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Dedicated in loving memory of HaRav Yosef Grossman *zt"l*

OCEAN WAIVES: DID THE TITAN'S PASSENGERS RELINQUISH THEIR RIGHTS?

Adapted from the writings of Dayan Yitzhak Grossman

In the wake of the recent Titan submersible disaster, there has been speculation about lawsuits to be filed against the submersible's operator, OceanGate. But legal experts are skeptical about the chances of success:

> But even as new details continue to emerge about the company that operates the missing Titan sub, including the CEO's history of flippant remarks about safety and past allegations of negligence at the oceanic exploration company, legal experts say OceanGate will almost certainly be protected from any future lawsuits stemming from the current disaster.
>
> "The chance of family members of the passengers having a successful lawsuit against the company is close to zero," attorney Sherif Edmond El Dabe, a partner with El Dabe Ritter Trial Lawyers, said in comments shared with *Insider*. "The passengers knowingly participated in an extremely hazardous activity and they knowingly assumed great risk."
>
> Passengers aboard the vessel, who each paid $250,000 to take the journey to the famous shipwreck, also signed a waiver before embarking on the trip.
>
> "Everyone on board knew this wasn't a vacation or a sightseeing trip, and the disclaimer appears to have made the risk of death very clear multiple times," lawyer Miguel Custodio, co-founder of Custodio and Dubey LLP, said in comments to *Insider*...
>
> With this type of private expedition, everyone involved is "intentionally assuming tons of risk" and is ostensibly informed of the numerous dangers, making it difficult for anyone to sue OceanGate in the aftermath of tragedy, El Dabe said.
>
> "It would be preposterous for their families

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The Bais Hava'ad on the Parsha
Bring the Parsha to Life!

PARSHAS MATOS-MAS'EI

GETTING YOU NOWHERE

Excerpted and adapted from a shiur *by* Dayan Yehoshua Grunwald

You shall not bring guilt (lo sachanifu) *upon the land in which you are, for the blood will bring guilt upon the land; the land will not have atonement for the blood that was spilled in it, except through the blood of the one who spilled it.*

Bemidbar 35:33

The Sifri, quoted by the Ramban, says we derive from this *pasuk* a prohibition on *chanufah* (flattery). The Yerei'im writes that *chanufah* is an *issur de'Oreisa*[1] and says one violates it if he sees someone commit an *aveirah* and either praises him for it or does not protest. (The latter, he says, is liable only if his silence is due to wickedness or fear of conflict, not if it's attributable to fear of either injury or financial loss.)

The Chafetz Chaim offers two examples of *chanufah de'Oreisa* according to these *Rishonim* in the realm of *lashon hara*: a) Speaking *lashon hara* about someone you know your interlocutor despises, in order to gain his favor. b) Hearing *lashon hara* and nodding in assent or otherwise validating the report.[2]

Rabeinu Yonah in Sha'arei Teshuvah cites additional cases of *chanufah*,[3] including praising a *rasha,* even for the mitzvos he performs. (R'

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1 It seems that the other *Rishonim*, who do not count *chanufah* as an *issur de'Oreisa*, hold that it is *asur mideRabanan* and understand the Sifri to be an *asmachta*.

2 The Chafetz Chaim does not specify whether one violates the *issur* if he doesn't respond.

3 Rabeinu Yonah offers nine examples of *chanufah* but does not cite this *pasuk*; it would

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A Fruitless Blessing

Q When reciting a *bracha acharonah* on cookies and grapes, I forgot to insert *al ha'eitz* for the grapes. Must I make another *bracha*?

A When reciting the *bracha mei'ein shalosh*, all applicable phrases must be inserted: "*al hamichyah*" for certain grain foods, "*al hagefen*" for wine or grape juice, and "*al ha'eitz*" for *shivas haminim* fruits (O.C. 208:12). They are inserted in three places: in the *psichah* (opening), the *chasimah* (closing), and *samuch lachasimah* (just before the closing).

If one of the phrases was omitted, a new *bracha* must be recited, including only the forgotten phrase(s). You must therefore now make an *al ha'eitz*.

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> to turn around and sue the company that they hired to dive to the wreck of the Titanic," he added.
>
> That legal protection, however, only extends as far as OceanGate informed its passengers of the various risks they faced in boarding the submersible, according to Custodio…

Custodio concedes, however, that

> The waiver could be challenged if it can be found that OceanGate was negligent in the way it was being designed or operated, and that caused the submersible to be lost."[1]

Media outlets published excerpts of an OceanGate waiver from an earlier expedition:

> I hereby assume full responsibility for the risk of bodily injury, disability, death, and property damage due to the negligence of [OceanGate] while involved in the operation…
>
> A portion of the operation will be conducted inside an experimental submersible vessel. The experimental submersible vessel has not been approved or certified by any regulatory body and may be constructed of materials that have not been widely used in human-occupied submersibles…
>
> When diving below the ocean surface, this vessel will be subject to extreme pressure, and any failure of the vessel while I am aboard could cause severe injury or death…
>
> I understand the inherent risks in the activities that will be undertaken during the operation, and I hereby assume full responsibility for all risks of property damage, injury, disability, and death…I hereby agree to defend, indemnify, save, and hold harmless OceanGate Expeditions, Ltd.…from any loss, liability, damage, or costs they may incur due to any claim brought in violation of this Release.[2]

Are liability waivers halachically effective?

The Mishnah states:

> An unpaid custodian may stipulate to be exempt from an oath. And a borrower may stipulate to be exempt from paying. A paid custodian and a renter may stipulate to be exempt from an oath or from paying.[3]

The Mishnah is not explicit about whether a stipulation to be exempt even from negligence is valid; some *Rishonim* infer from the fact that the Mishnah does not declare such a stipulation to be effective that it is ineffective,[4] while others apparently take for granted that it *is* effective, and they explain that the Mishnah does not discuss such a stipulation only because "such foolishness does not occur to people, to stipulate that he will be exempt from negligence."[5] Some *Acharonim* side with the latter view,[6] while others consider the matter inconclusive.[7]

With regard to liability for the sale of defective merchandise (*ona'ah*/*mekach ta'us*), an entirely different paradigm obtains. The Gemara says:

> If the seller says to his fellow, "This sale is on the condition that you have no claim of price fraud against me," Rav says the buyer nevertheless has a right to claim price fraud, but Shmuel says he does not have a right to claim price fraud.[8]

The Gemara provides the rationale for Rav's position that such a stipulation is ineffective, despite the fact that people may generally stipulate against Torah law in monetary matters:

> …Did the buyer know that he was being defrauded so that he might waive his claim?

The Gemara subsequently qualifies that even according to Rav, the stipulation is effective if the amount of the exploitation is explicitly specified:

> In what cases was this law said, that the wronged party may claim fraud? Where the overcharge was unspecified. But where the seller specifies—for example, where the seller said to the buyer, "This item that I am selling to you for 200, I am aware that it is really worth only 100; nevertheless, I am selling it on the condition that you have no claim of price fraud against me," then he has no claim of price fraud against him. And likewise, a buyer who said to a seller, "This item that I am buying from you for 100, I am aware that it is really worth 200; nevertheless, I am buying it on the condition that you have no claim of price fraud against me," then he has no claim of price fraud against him.

(It is unclear why the requirement to explicitly specify the amount that is being waived does not apply in the case of the custodian who stipulates that he will be exempt from negligence.)

The Gemara concludes that the halacha follows the view of Rav.[9]

> Applying these principles to our case, if OceanGate was negligent while *operating* the submersible, then assuming the company had custodial liability for the victims,[10] the effectiveness of the waiver would be the subject of a major dispute among the *Rishonim* and *Acharonim*. But if it was negligent in the *design* or *construction* of the submersible, then the applicable paradigm might seem to be that of a stipulation to waive fraud claims, which would definitely be effective if the nature of what is being waived is precisely specified. But upon more careful consideration, it would seem that since we are not dealing with a claim for the return of the price paid, but rather for damage caused by OceanGate's alleged malfeasance,[11] the position that negligence waivers are ineffective would apply here as well.

1 Erin Snodgrass. The company that operates the missing Titan sub is likely protected from future lawsuits thanks to the 'tons of risk' that passengers incurred, legal experts say. Insider. https://www.insider.com/oceangate-likely-protected-from-titanic-sub-lawsuits-legal-expert-2023-6.

2 OceanGate Protects Itself from Lawsuits in Submersible Deaths Even if Negligent. TMZ. https://www.tmz.com/2023/06/23/titanic-submersible-expedition-liability-agreement-death-oceangate-sub-titan/.

3 Bava Metzia 94a.

4 R' Baruch b. Yitzchok of Regensburg, cited in Or Zarua ibid. *siman* 297 (cited in Hagahos Ashri ibid. *perek* 7 *siman* 17). Cf. Machanei Efraim, Hilchos *She'eilah siman* 1 s.v. *Ule'inyan mah shehiksheisi le'eil*; Ein Haro'im, *erech Masneh Al Ma Shekasuv* BaTorah, *osios* 1-2.

5 Shitah Mekubetzes ibid., citing R' Yehonasan; Shu"t Maharam b. Baruch (*defus* Prague) *siman* 229 (cited by Mordechai ibid. *siman* 361 and Teshuvos Maimoniyos, Mishpatim *siman* 11, and codified in Shulchan Aruch C.M. 72:7). (See Lechem Rav (*siman* 222), Tumim, Shemen Rokeiach, and Erech HaHashulchan cited below, as well as Mishneh Lamelech Hilchos *Sechirus* 2:9.)

6 Tiferes Shmuel to Hagahos Ashri ibid.; Shu"t Zichron Yosef C.M. *siman* 1 *osios* 6-7. (These sources are cited in Pis'chei Teshuvah C.M. *siman* 296 *s.k.* 5.) Shu"t Mabit *cheilek* 2 *Shniyas* end of *siman* 70 also takes for granted that such a stipulation is effective, and cf. ibid. *siman* 187. The Knessess Hagedolah (C.M. *siman* 291 Hagahos Tur *os* 113) attributes this position to the Radvaz (in Shu"t Mishpetei Shmuel *siman* 67) as well, although this understanding of his position there may be debatable, because the stipulation in his case was not a blanket exemption from negligence, only an agreement that the custodian would keep the money entrusted to his care together with his own money, wherever he kept it, and such a stipulation seems to be universally accepted as effective (see Shulchan Aruch C.M. 291:17, citing the Tur). In Shu"t Radvaz *cheilek* 3 1002 (573), however, Radvaz rules explicitly that a stipulation of exemption from negligence is effective. The Knessess Hagedolah, however, cites yet another *teshuvah* of Radvaz in which he cites the position that it is ineffective, but I have been unable to locate that *teshuvah*.

7 Shu"t Mahari ibn Lev (Amsterdam 5486) *cheilek* 1 *Chidushei Dinim* p. 68b; Shu"t Lechem Rav *simanim* 184 and 222. (*Siman* 184 discusses the same case as the Mabit, whom he cites, which was apparently the subject of a major dispute among various *poskim* of Tzfas and Salonika); Shu"t Shemen Rokeiach (*cheilek* 2 C.M.) *siman* 73.
Shu"t Maharit *cheilek* 2 C.M. *siman* 116 discusses this question as well; his student, the Knessess Hagedolah (C.M. *siman* 291 Hagahos Tur *os* 113), understands him to incline toward the view that the stipulation is ineffective.
Cf. Urim Vetumim, *siman* 72 Tumim *s.k.* 23; Erech Hashulchan C.M. *siman* 291 *os* 2; Pis'chei Choshen, Hilchos *Pikadon Ushe'eilah*, *perek* 4 *se'if* 15 and n. 34; Mordechai Berkowitz, *Masneh Al Ma Shekasuv* baTorah *Beshomrim*, Machnashta Debei Dari 5769, *os* 3;

8 Bava Metzia 51a-b.

9 Shulchan Aruch C.M. 227:21.

10 We have previously discussed the applicability of custodial responsibility to human beings in Part II—Under Fire: Must Someone Be Saved from a Danger of His Own Making? Bais HaVaad Halacha Journal. Apr. 20, 2023. The question of whether halacha has a concept of vicarious liability, according to which a business can be held liable for the actions of its employees, is beyond the scope of this article; see Erech Shai C.M. 291:26 s.v. *Hagah*; Shu"t Chemdas Moshe *siman* 132; Shu"t Tarshish Shoham, *Milu'im Lesefer* Chemdas Moshe *os* 31; Shu"t Even Shoham (C.M.) *siman* 106.

11 The question of whether a provider of goods is liable for damage caused to the recipient by defective (or improperly described) goods is a complex one, which we have previously discussed in Erring on the Side: Is Pfizer Liable for Harmful Side Effects of its Products? Bais HaVaad Halacha Journal. Dec. 22, 2022.

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RAV ARYEH FINKEL

What if "*al ha'eitz*" was inserted in only one or two of the three places? The Piskei Teshuvos (ibid.) rules that if it was said even once, the *bracha* is valid *bedieved* (see footnote 155 for his source).

But this ruling only applies to errors of omission. In the case of an incorrect insertion, like saying "*al hamichyah*" after eating only grapes, the Shulchan Aruch says the *bracha* is only valid if both the *psichah* and the *chasimah* were said correctly; otherwise, the *bracha* needs to be repeated. The Gra (cited by Biur Halacha ibid.) argues, saying a correct *chasimah* suffices. One should follow the Gra's view, because *safek brachos lehakeil* (Sheivet Halevi 3:18).

If your omission was in the *psichah*, if you realize it prior to "*Baruch atah*" of the *chasimah*, go back to where the insertion was omitted in the *psichah* (but not all the way to "*Baruch atah*" of the *psichah*) and continue from there (Piskei Teshuvos ibid.).

If you finished the *bracha* but recognized the mistake *toch kedei dibur* (within 2-3 seconds), correct the *chasimah*.

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Moshe Feinstein says this means praising him more than he deserves, and that even excessive praise may only be a bad *midah* rather than a true *issur*, so in case of great need, one may, for example, have a *rasha* perform *psichah* in shul.) R' Chaim Kanievsky also permits praising a nonobservant Jew more than he deserves in order to encourage him to perform more mitzvos.

seem he holds they are *asur mideRabanan*.