



Shavuot Night Study Guide

WHO IS LIABLE FOR GIVING ACCESS TO HACKERS AND FRAUDSTERS?

Computer viruses, malware, ransomware and other malicious programs have the potential to wreak havoc on a computer or network. These programs are typically spread by unwitting participants who receive the program from a friend and then send it to another friend. In theory, the person or persons who wrote the program and spread it should be held responsible for all of the damage, but typically, they are not known and there is no recourse against them. The question then becomes: to what extent is one person responsible for causing damage to someone else's device and how much is he responsible to pay? Does the same apply to an email scam which leads to identity theft or wire fraud?

Let's Look at the Following Cases:

Case 1: Chaim owns a business which relies heavily on a computer system for its inventory and sales. Despite receiving annual training on cybersecurity, one of his employees was acting negligently and downloaded a virus that crippled the system. In addition to having to pay a technician to restore the system, the business was not able to function properly for an entire day which was very costly. **Chaim's lawyer advised him that he is legally entitled to dock the employee's pay to cover the costs. Should he do so?**

Case 2 (Based on a true story): and Rachel are about to purchase a new home. As the closing approaches, they are included in an email thread involving many different people

(the seller, the lawyers, the bank, the mortgage broker, the real estate broker, the title agent etc.) with all the details about the closing. Days before the closing, they receive an email from the title agent giving them updated information as to where to wire the money for the purchase of the home. They consult with their lawyer, Mr. Rosen to make sure this is what they are supposed to do and Mr. Rosen assures them that they should follow those instructions. They follow the updated instructions only to receive an email a few days later asking why the money was never sent. Shimon insists that the money was sent and forwards the email he received about the updated wiring instructions. After a little investigation, they discover that a hacker had gained access to one of the email accounts in the thread (it cannot be determined whose account was hacked). Armed with all of the

information about the closing, the hackers were able to send a spoof email that looked like it legitimately came from the title agent. The money that they saved for a home was now wired into a hacker's account! Shimon and Rachel quickly found an attorney who specializes in wire fraud and with the assistance of several federal agencies, they were able to recover most of the money. However, some of the money was already withdrawn and there were legal fees paid to recoup the money. **Should Mr. Rosen, who assured them that the spoof email was legitimate, pay for their losses?**

These two cases need to be analyzed on two levels, the *din* — the legal obligations in each case, and the *lifnim mishuras hadin*, what the proper moral course of action is in each case.

Background Information

There are a number of ways to categorize damage caused by an individual. Let's summarize them and the applicable laws:

- 1) **Adam HaMazik:** If a person causes direct damage to an item, he is liable, even if the damage was caused due to circumstances beyond his control (Mishna, *Bava Kama* 26a). There is a dispute regarding damage that wasn't simply beyond his control, but there was no way he could have prevented it (*onnes gamur* — See Tosafos, *Bava Kama* 26a, and Ramban, *Bava Metzia* 82b).
- 2) **Garmi:** Sometimes a person's direct actions indirectly lead to someone else's loss. For example, if Reuven has a loan document stating that Shimon owes him money and then Levi burns the document, Levi's actions were direct. However, Reuven's loss is not a direct result of the burnt document but rather his inability to collect the loan (See *Bava Kama* 98b). This is called *garmi*. There is a dispute as to whether one is liable for *garmi* and the halacha is that one is liable, but with certain limitations (see *Shulchan Aruch*, *Choshen Mishpat* 386:1).
- 3) **Gerama:** Indirect damage. For example, if Yossi placed poison before an animal and the animal ate it and died, Yossi indirectly killed the animal. The halacha is that legally, he is not liable, but he has a moral obligation to pay the animal owner for his loss (*chayav b'dinei shamayim*, *Bava Kama* 56a) if the damage was caused intentionally (*Meiri*, *Bava Kama* 55b).
- 4) **Sho'el:** If someone borrows an item and the item is damaged or lost, the borrower must pay for the damage. Even if the damage or loss occurred due to circumstances beyond the borrower's control, he is nevertheless responsible. However, if damage occurred through normal use (*meisa machmas melacha*), one is exempt (*Bava Metzia* 96b).
- 5) **Socher & Shomer Sachar:** If someone rents an item or someone is being paid to watch an item, he is liable for theft or loss, but not for damage that occurs beyond his control (Mishna, *Bava Metzia* 93a)
- 6) **Shomer Chinam:** If someone is voluntarily watching an item, he is only responsible for damage that results from his own negligence (*ibid*).

For Discussion:

Based on these categories and their respective laws, how would you apply them to the following situations?

- 1) An IT company was paid to maintain the computers at a local school, including updating its anti-virus software. They failed to do so and as a result, someone in the school downloaded a virus that costs hundreds of dollars to remove.
- 2) Yehuda sent a file to Moshe not realizing that the file contained a virus. As a result, Moshe lost many important files.
- 3) In the course of fixing someone's printer, Dani downloaded corrupt firmware that rendered the printer unusable.

Case 1: Damage Caused by Employees

The employee damaged the network by downloading a virus. **What is the employee's responsibility?**

Source#1a: Mishna, Bava Metzia 80b

כל האומנין שומרי שכר הן.

All craftsman are considered paid watchmen.

Source #1b: Perisha, Choshen Mishpat 306:1

דדוקא קבלן הוא שומר שכר ולא שכיר
יום כיון דהשכר שנותנים להם לא בשביל
השמירה נותנין להן כי אם בשביל טירחא
היום נתנוהו להן ומחר יתנוהו לאחר ...

Only a contractor is considered a paid watchman, not a daily (or hourly) worker because their wages are not for the item they are handling but for their labor. Today they handle this item and tomorrow, someone else might handle it.

Source #1c: Shach, Choshen Mishpat 306:1

לא ידעתי מנ"ל הא וגם לא מצאתי לשון
פוסק שחילק בכך.

I do not know what [Perisha's] source is for making such a distinction and we have not found that other authorities distinguish between a contractor and a daily worker.

Questions for Discussion:

- 1) *Perisha* exempts a salaried employee because his employment isn't directly tied to the item that he is handling. Do you think *Perisha* would exempt an employee who damaged a company computer that is designated specifically for this employee? Does it matter if the

employee also uses the computer for personal use? Why or why not?

- 2) Does it make a difference if the damage to the network is a result of a flaw on the particular machine that the employee was using or a different machine (e.g. a server) that the employee accessed when using his own computer? Why or why not?
- 3) If, according to *Perisha*, the employee doesn't attain the status of a paid watchman, would he still be liable as *adam hamazik*? In what situations?
- 4) How you apply the three situations from the discussion on the previous page to these sources?

Case 2: Damage Caused Through Bad Advice

In Case 2, Shimon and Rachel received bad advice from their attorney. *Rashba (Teshuvos HaRashba 1:99)* writes that in a general sense, if someone gives bad advice and this leads to loss by the recipient of the advice, the advisor is not liable because it is considered *gerama*. Yet, as we shall see from a Talmudic discussion about money changers, there may be situations where someone can be held liable for giving bad advice.

Source #2a: Bava Kama 99b

איתמר המראה דינר לשולחני ונמצא רע תני
חדא אומן פטור הדיוס חייב ותניא אידך בין
אומן בין הדיוס חייב אמר רב פפא כי תניא
אומן פטור כגון דנכו ואיסור דלא צריכי
למיגמר כלל.

It was stated: If a dinar was shown to a

money changer [and he recommended it as valid] but it was subsequently found to be invalid, in one beraisa it was taught that if he was an expert he is exempt but if he is an amateur he is liable.

In another beraisa it was taught that whether he is an expert or an amateur he is liable. R. Papa stated: The ruling that in the case of an expert he is exempt refers to money changers like Danko and Issur who needed no [further] training at all.

Adapted from Soncino Translation

Source #2b: Rambam, Hilchos Sechirus 10:5

המוליך חטין לטחון ולא לתתן ועשאן סובין או מורסן ... בהמה לטבח ונבלה חייבין לשלם דמיהן מפני שהן נושאי שכר לפיכך אם היה טבח מומחה ושחט בחנם פטור מלשלם ואינו מומחה אף על פי שהוא בחנם חייב לשלם וכן המראה דינר לשולחני ואמר לו יפה הוא ונמצא רע אם בשכר ראהו חייב לשלם אע"פ שהוא בקי ואינו צריך להתלמד ואם בחנם ראהו פטור והוא שיהיה בקי שאינו צריך להתלמד ואם אינו בקי חייב לשלם אף על פי שהוא בחנם והוא שיאמר לשולחני עליך אני סומך או שהיו הדברים מראין שהוא סומך על ראייתו ולא יראה לאחרים.

If one brings wheat to craftsman for milling and the craftsman didn't bleach the flour and it became coarse or he brought an animal to a slaughterer who rendered the animal a neveilah (non-kosher slaughter), they have to pay for the damage because they are paid watchmen. Therefore, if the slaughterer was an expert who slaughtered for free, he is exempt from payment. If he was not an expert, he must pay even if it was done for free. The same is true for someone who shows a dinar to a money changer and the money changer says that it is valid and it turns out to be invalid, if the money changer charged for his evaluation, he must pay for the damage, even if he is an expert who needs no

further training. If he did this voluntarily, he is exempt as long as he is an expert who requires no further training. If he is not an expert, he must pay even though he evaluated the coin on a voluntary basis, as long as the client said to the money changer, "I am relying on you" or it was clear that he was relying on his evaluation and wasn't going to show the coin to others.

Source #2c: Rabbeinu Asher, Bava Kama 9:13

והיכא דהוא בעצמו עושה היזק לממון חבירו וברי היזקא הוא הנקרא דינא דגרמי. שורף שטר או מוחל הוא בעצמו מזיק לממון חבירו. וכך מראה דינר לשולחני דבמה שאומר לו שהוא טוב הוא מזיקו.

Whenever one personally causes damage to a friend's property in a manner that the loss will certainly come about, this is considered garmi. One who burns a loan document or forgives a loan [that was sold to someone else] is liable for the damage. The same applies when one shows a dinar to a money changer who assesses that the coin is valid [and it is not] — it is a form of damage.

Unpacking These Sources:

- 1) There seems to be a fundamental dispute between Rambam and Rabbeinu Asher as to why the money changer is liable. Rambam is of the opinion that he is liable because he is a watchman — he was asked to protect the client's interest in the coin. As such, if he is getting paid, he is liable for all damages except those that are totally beyond his control. If he is not getting paid, then he is only liable for negligence. Evaluating a coin when one is not an expert coin evaluator is an act of negligence when it is clear that the client is relying on

this information. The money changer should have declined to evaluate the coin and explain to the client that this is not his area of expertise. Rabbeinu Asher, on the other hand, sees this as a form of *garmi*. By telling the client that the coin is valid when it really isn't, one is directly performing an action that will lead to a loss. The only reason why the expert is exempted is because it was a situation beyond his control.

- 2) Within the approach that the damage is because of *garmi* there seems to be a dispute as to whether an expert who is getting paid is liable or not (see Tosafos, *Bava Kama* 99b, s.v. *V'tanya* and Rabbeinu Asher, *Bava Kama* 9:16).
- 3) There may be a factor that is unique to the case of the money changer. Mordechai, *Bava Kama* no. 116, suggests that in the case of the money changer, the client already received the coin as part of a transaction. If the money changer says that the coin is valid, the client is bound by this evaluation and has no recourse to return it to the person who gave it to him in exchange for a valid coin. *Shiltei HaGiborim*, *Bava Kama* 35b (Rif pages) no. 2, disagrees and maintains that the money changer is liable even if the client has the option to ignore the advice of the money changer and find someone else who will invalidate the coin (See *Shach*, *Choshen Mishpat* 306:12).

Questions for Discussion

- 1) How would you apply the dispute between Rambam and Rabbeinu

Asher to Case 2? Can the lawyer be held liable as a paid watchman by validating an email? Is it the same as evaluating a coin? If the liability is based on *garmi* is there a difference between validating a coin and validating an email?

- 2) Does it make a difference if the lawyer is getting paid for his services or was simply helping out a friend? Does it make a difference if the lawyer specializes in real estate?
- 3) How does the dispute between Mordechai and *Shiltei HaGiborim* relate to Case 2?

Lifnim MiShuras HaDin

Now that we have established some parameters for when someone is liable for damages in Case 1 and Case 2, let us look at another dimension from stories in the Talmud that relate directly to these two cases:

Source # 3a: Bava Metzia 83a

רבה בר בר חנן תברו ליה הנהו שקולאי חביתא דחמרא שקל לגלימיהו אתו אמרו לרב אמר ליה הב להו גלימיהו אמר ליה דינא הכי אמר ליה אין (משלי ב, כ) למען תלך בדרך טובים יהיב להו גלימיהו אמרו ליה עניי אנן וטרחינן כולה יומא וכפינן ולית לן מידי אמר ליה זיל הב אגרייהו א"ל דינא הכי אמר ליה אין (משלי ב, כ) וארחות צדיקים תשמור: *The Gemara relates an incident involving Rabba bar bar Chanan: Certain porters broke his barrel of wine after he had hired them to transport the barrels. He took their cloaks as payment for the lost wine. They came and told Rav. Rav said to Rabba bar bar Chanan: Give them their cloaks. Rabba bar bar Chanan said to him: Is this the halakha? Rav said to him: Yes, as it is written: "That you may walk in the way of good men" (Proverbs*

2:20). *Rabba bar bar Chanan gave them their cloaks. The porters said to Rav: We are poor people and we toiled all day and we are hungry and we have nothing. Rav said to Rabba bar bar Chanan: Go and give them their wages. Rabba bar bar Chanan said to him: Is this the halakha? Rav said to him: Yes, as it is written: "And keep the paths of the righteous" (Proverbs 2:20).*

Translation adapted from The William Davidson digital edition of the Koren Noé Talmud

Source #3b: Bava Kama 99b

ההיא איתתא דאחזיא דינרא לרבי חייא אמר לה מעליא הוא למחר אתאי לקמיה ואמרה ליה אחזיתיה ואמרו לי בישא הוא ולא קא נפיק לי אמר ליה לרב זיל חלפיה ניהלה וכתוב אפנקסי דין עסק ביש ומאי שנא דנכו ואיסור דפטירי משום דלא צריכי למיגמר רבי חייא נמי לאו למיגמר קא בעי רבי חייא לפנים משורת הדין הוא דעבד.

There was a certain woman who presented a dinar to Rabbi Chiyya to assess its authenticity. He said to her: It is a proper coin. The next day she came before him and said to him: I presented it to others, and they told me that it is a bad dinar, and I am not able to spend it. Rabbi Chiyya said to Rav (his nephew, who handled Rabbi Chiyya's finances): Go exchange it for her, and write on my ledger: This was a bad transaction. The Gemara asks: But what is different about Dankhu and Issur, who are exempt due to the fact that they do not need to learn about assessing currency? Rabbi Chiyya too did not need to learn, as he was also an expert. The Gemara responds: Rabbi Chiyya was not actually required to return a dinar to this woman, but when he did so he acted beyond the letter of the law (lifnim mishuras hadin).

Translation adapted from The William Davidson digital edition of the Koren Noé Talmud

Additional Points to Consider:

1) Tosafos, *Bava Kama* 100a, note that in general, *lifnim mishuras hadin* doesn't require one to lose a significant amount of money. In Rav Chiyya's case, the reason why he observed *lifnim mishuras hadin* was because his exemption was due to his being an expert. If he wasn't an expert, he would have been obligated to pay. When one is exempt based on personal status, one should go above and beyond and treat oneself like everyone else. In Rabba bar bar Chanan's case, Rav employed a verse from Mishlei rather than a verse from the Torah because this is a higher level of *lifnim mishuras*

hadin. The Vilna Gaon, Mishlei 2:20, adds that this type of *lifnim mishuras hadin* is subjective, depending on one's level of righteousness. Rav was telling Rabba bar bar Chanan that he was on that level.

2) There is a dispute between Rabbeinu Asher (*Bava Metzia* 2:7) and Mordechai (*Bava Metzia* no. 257) about whether a *beis din* (rabbinical court) can compel someone to observe *lifnim mishuras hadin*. Rav Avraham Yitzchak HaKohen Kook, *Be'er Elyahu* 12:9, suggests that this dispute only applies to situations similar to Rav Chiyya's case. Everyone agrees that a *beis din* cannot compel someone to

observe the higher level of *lifnim mishuras hadin* that was applied in the case of Rabba bar bar Chanan.

3) Rav Moshe Feinstein, *Igros Moshe, Choshen Mishpat* 1:60, notes that Rav told Rabba bar bar Chanan that he is required to pay his workers because his workers were poor and when someone is uniquely positioned to help a poor person, the obligation of tzedakah falls on him first.

Questions for Discussion

- 1) What aspects of *lifnim mishuras hadin* are relevant to Case 1?
- 2) What aspects of *lifnim mishuras hadin* are relevant to Case 2?

Summary

In Case 1, there are a number of reasons why Chaim's employees might be liable. First, depending on the program he downloaded, he may have directly damaged the system while using it (*adam hamazik*). Second, he may be liable as a paid watchman. This seems to be a dispute between *Perisha* and *Shach*, though we did see that it might depend on other factors. From a *lifnim mishuras hadin* perspective, according to R. Kook, exempting employees from damage is a higher level form of *lifnim mishuras hadin*. According to R. Feinstein, if the employee is struggling financially, exempting the employer would be a form of tzedakah.

In Case 2, we saw a dispute between Rambam and Rabbeinu Asher regarding the liability of an advisor. Rambam treats the advisor like a watchman, whose level of liability depends on whether he is getting paid. Rabbeinu Asher treats bad advice as a form of *garmi*. According to Rambam, liability may be limited to cases where one is evaluating an actual object, not giving advice about email. According to Rabbeinu Asher, there is a possibility to be liable because of *garmi*. Within Rabbeinu Asher's opinion, one must still determine whether Mr. Rosen is exempt because he is an expert (dispute between Tosafos and Rabbeinu Asher) or because his clients had the option to ask someone else for a second opinion (dispute between Mordechai and *Shiltei HaGiborim*). If Mr. Rosen is exempt specifically because he is an expert, Tosafos note that *lifnim mishuras hadin* should be employed and Mr. Rosen should help defray the legal costs that his clients incurred.