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IF ONE SPENT OTHER PEOPLE'S MONEY TO SAVE LIVES, MUST ONE PAY THEM BACK?

By Rabbi Aryeh Klapper

[1]A sugya on Bava Kamma 177b assumes that a person who saves their own life at the cost of someone else's property without permission is liable to pay that cost. Let us assume, with essentially all of Jewish tradition outside of Rabbi Yaakov Ettlinger (Shu"T Binyan Tziyon), that the action is permitted so long as one accepts the obligation to repay. Does the obligation to repay apply when the property is used to save third parties?

One can imagine at least four outcomes. There might be no liability; or the rescuer might be liable; or the rescued might be liable; or the rescuer might be liable to the owner, but able in turn to sue the rescued. Which would you adopt?

Rabbah (alt: Rava) apparently answers this question at the end of a three-part legal statement.

> Someone pursuing another with intent to kill who broke utensils, whether belonging to the pursued or to third parties - is exempt,
> since he is liable to death (for the same action);
> Someone pursued with intent to kill who broke utensils belonging to the pursuer - is exempt,
> so that his money not be more valuable than his life;
> who broke utensils belonging to third parties - is liable,
> because it is forbidden to save oneself at the cost of someone else's property;
> Someone pursuing a pursuer with intent to save the pursued who broke utensils, whether belonging to the pursued or to third parties – is exempt,
> but this ruling is not derived from *din*, rather because if you ruled otherwise, no one would save a pursued from a pursuer.

That "this ruling is not derived from din" indicates that the purpose of saving a third party is not intrinsically a stronger ground for exemption than saving oneself; indeed, Rashi says that if one is liable for saving oneself, "all the more so one who saves B at the expense of C (is liable)". His basis for saying "all the more so" is not clear.

Rav Mosheh Feinstein (*Dibrot Mosheh* to Sanhedrin 74a) wonders why Rabbah's outcome is not the clear *din*. He argues that the obligation to save the pursued includes an obligation to spend one's money as necessary; therefore, the obligation to save rests on property as well as on bodies; therefore, the owners of any property necessary for rescue are obligated to contribute it; therefore, why should the actor be required to compensate them for participating in a shared obligation? If you suggest that the exemption extends even to cases where the rescuer could have avoided the damage by using more care, isn't the rescuer obligated to act in the way most likely to save, rather than in the most careful way?

Rav Mosheh leaves these question unanswered. I suggest tentatively that the most likely answer is that the obligation rests on property only if the owner is present at or at least aware of the threat to life.

Within that framework, we must ask: What is the scope of Rabbah's exemption from liability? In Igrot Mosheh CM2:63, Rav Mosheh writes:

> The *takanah* stated by Rabbah on Bavan Kama 117b and Sanhedrin 74a . . . "because if you ruled otherwise, no one would save a pursued from a pursuer" is only to exempt from the *din* of a damager, and only for (damaged property) that were obstructing his path, but they were not *metaken* to exempt from obligations related to robbery or loans.

Rav Mosheh does not state why the *takanah* is limited in this way.

Many subsequent scholars have argued that Rav Mosheh conflicts with Netivot HaMishpat Biurim 72:17 (see also 140:6).

> Nonetheless, it seems regarding one who borrowed an object so as to rescue from a fire, which is (clearly) like lifesaving because we violate Shabbat to do it, and similarly any other case where someone borrows a utensil for the sake of lifesaving – that they are exempt (from liability if it is damaged), as explained on Sanhedrin 74a, that one who broke utensils while pursuing a pursuer is exempt.

However, I am not convinced. Rav Mosheh addresses how the loss occurred, not how the rescuer gained access to the third party's property. If an object on loan to the rescuer was damaged, the legal outcome would be no different than if the object came to hand serendipitously. So Rav Mosheh might well

[1] (This article was stimulated by R. Yonah Lavery-Yisraeli's recent article in *Lehrhaus*, "Who Shoulders the Cost of Saving Lives? Reappraising a Teshuvah of Rav Mosheh Feinstein", and by a subsequent conversation with the remarkably patient and forbearing author, for which I am very grateful.)

agree with Netivot's outcome. (See however Meshovev Netivot, who rejects Netivot on the ground that "to borrow his utensils is literally saving with someone else's money, and we have not found them being *metaken* regarding that.)

The scenario Rav Mosheh dealt with, by contrast, was a loan taken with the explicit purpose of selling the object and using its cash value for lifesaving. There was no unanticipated damage, and the liability stemmed directly from the loan.

The question remains, however, whether Rav Mosheh's limitation is compelling. Answering that question requires a methodological excursus.

Rabbah's statement in its original context relates only to damages caused in the context of hot pursuit for the purpose of rescue. However, he also states a rationale which might apply more broadly. How broadly it applies might depend on how broadly it is interpreted.

Consider for example Rav Mosheh's case. Rabbah's logic is that otherwise people will not intervene to rescue A from B. This can be understood as saying broadly that we don't want any concerns about money to prevent efforts at lifesaving.

However, that broad understanding introduces a whole set of complications. Exemption for damages incurred while in hot pursuit have a natural limitation. Once one leaves the context of hot pursuit, the scope of the risk to other people's property will increase dramatically. Moreover, once I have time to plan, what if I plan to use your property rather than risking my own?

These complications increase massively when we extend past the realm of damages to loans of money. Money is fungible: there is no halakhic way to tell that the money used was the money borrowed rather than your own funds. What if you borrowed or stole my jewels and pawned them, when you could have obtained the same amount for rescue by taking out a second mortgage on your house?

Some of these issues can be mitigated if we posit that Rabbah's exemption applies only if you succeed in saving the pursued. But Rabbah's language and logic do not support such an exclusion; and it would be only a partial mitigation anyway.

So we can understand Rabbah much more narrowly, as saying only that in the specific context of damages in the course of hot pursuit, a *takanah* was made to override the underlying *din* of liability, because in that case the purpose overrode the potential costs. They were not *metaken* the rationale as a general principle overriding all forms of *din*-liability in all cases.

It is worth noting that the rule against not redeeming captives above their market value is relevant here, for two reasons.

First, private parties should not be allowed to disproportionately allocate communal resources (even those the community has not taken possession of). Private parties may for example wish to steal vast sums to rescue one relative or teacher, while the community needs to allocate its resources more equitably. Or there may be profound disagreement about whether or not to prioritize the rescue of Torah scholars.

Second, Rabbah addresses a circumstance in which value was destroyed, By contrast, Rav Mosheh addressed a case in which value was transferred to a third party (as a bribe), with at least the possibility that it would end up in the hands of the (Nazi) pursuers.

The above IMHO constitute very strong grounds for limiting Rabbah's exemption. However, it is important to recognize that the impact of Rabbah's rationale can also be dramatically extended, albeit on a different axis.

Rav Mosheh describes Rabbah's ruling as a *takanah*. Many of us instinctively distinguish legislative and judicial functions, and identify *takanah* as a legislative function, granting that in *halakhah* the legislative and judicial functions can inhere in the same person or people. Legislation has a clear scope.

But now consider Shu"t Mahari Weill #148-149. Mahari Weill addressed a case in which one party expended money to save an orphan Jewish girl from long-term imprisonment or worse, and seeks compensation from the orphan's inherited estate. The executors of the estate argue inter alia that the law prohibits such compensation until the orphan comes of age. Mahari Weill argues that if this argument is sustained, no one would ever put out their money to save orphans, and cites the case of Rabbah as support.

Here we are not talking about exemption, but rather compensation, and so there is no meaningful way to claim that Rabbah's *takanah* covered the case. However, Rabbah can also be understood to be acting judicially rather than legislatively, that is to say: as establishing a precedent that judges are permitted to overrule formal law as necessary in specific cases on the basis of this sort of prudential/policy consideration.

Consider also Professor Eliav Schochetman's argument (Techumin 22 p. 97) that one should not instruct solders that they require atonement for accidental killings in the course of military actions. "This perspective, according to which the communal interest in having people behave with absolute focus on saving lives without worrying that they will thereby violate other prohibitions, finds confirmation from the halakhah regarding pursuit, regarding which it says: "one who is pursuing a pursuer…".[2]

On this understanding of Rabbah, the question in each case is not what the law is, but whether there is a good enough argument for what the law should be to overrule what the law is. Full disclosure – I am not prepared to assent to Professor Schochetman's conclusion.

Shabbat shalom!

[2] Shu"T Maharam MiRotenberg (Prague) #495 is similar but distinguishable. In that case, as I understand it, Maharam reports that the practice in his community is that if a Jew stands as guarantor for another Jew's loan from a nonJew, the borrower must repay the guarantor for any losses suffered as a result, even if the damages were suffered on the basis of an unjust claim by the nonJew. Maharam suggests that this practice may be rooted in a *takkanah of the communities* which had the same sort of rationale as Rabbah's *takkanah*, namely that otherwise no one would agree to stand as guarantor.