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Survey of Recent Halakhic Periodical Literature

SUBSTITUTION OF LOTTERY TICKETS

The 19 Kislev 5722 issue of *Hamachne Hachareidi*, a Hebrew-English publication of the Belz Community, in a regular department captioned "*Oneg Shabbos*: A Special Story for *Shabbos*," presented a remarkable anecdote concerning a matter adjudicated by R. Meir Simchah ha-Kohen of Dvinsk, renowned as the author of *Or Sameah* and *Meshekh Hokhmah*.

The story, apocryphal at best, recounts that an impecunious, but highly righteous, scholarly and dearly beloved inhabitant of a village in the vicinity of Dvinsk found himself in dire financial straits. Under the best of circumstances he was barely able to keep body and soul together but always relied upon God to provide for him. Suddenly, he was confronted with an immediate need for an extraordinary sum of money to cover unexpected expenses, including outlays associated with the wedding of his eldest daughter who had become affianced to a budding young scholar and defraying the living expenses of the new couple. As always, he placed his trust in God. Recognizing that God is far more likely to bestow His blessing upon human endeavor than to perform an overt miracle, he invested a paltry sum in the purchase of a lottery ticket and prayed that luck would be with him. His fellow villagers wished him good fortune and prayed on his behalf.

In the same village there lived a man who was known to be a swindler, thief and conniver. This person, however, regularly invested his ill-gotten gains in speculative enterprises that were never successful. Finding himself deeply in debt and in serious trouble because of his shady dealings he, too, determined to purchase a lottery ticket. However, in light of his many previous unsuccessful experiences he was convinced that he lacked *mazal*, that luck would never favor him. On the other hand, although both the aspirations and income of the earlier described righteous man were modest, he always found funds to satisfy his basic needs. He seemed to be lucky, to enjoy *mazal.*

Our unsavory protagonist convinced himself that the pious man's *mazal* would not desert him while his own *mazal* was non-existent.

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He therefore resolved to steal the other person's lottery ticket but, in order to avoid detection, he would replace it with his own. He convinced himself that the other person's *mazal* would assure that the ticket the latter had purchased would be awarded the prize and, accordingly, he stole it for himself.

To the thief's great consternation, when the lottery was drawn, the winning ticket turned out to be the one he himself had originally purchased but exchanged for the ticket he had misappropriated from his fellow purchaser. He then had the temerity to inform the holder of the ticket of what he had done and to demand that the holder of the ticket turn over to him the winnings which he claimed were rightfully his as the purchaser of the winning ticket.

The pious holder of the winning ticket was in no position either to deny or to confirm the veracity of the facts as alleged by his challenger nor was he aware of his duties or rights if the facts were indeed as alleged. As a God-fearing Jew, his response was to place the entire matter before R. Meir Simchah for adjudication. The issue seems to hinge upon ownership of the ticket in question: If title remains vested in the original purchaser, the purchaser should be entitled to the proceeds. If, on the other hand, title to the ticket passed to the victim of the theft, it would seem that the victim, i.e., the current holder, is entitled to the winnings represented by the ticket.

As the story is related, R. Meir Simchah awarded the proceeds to the innocent holder of the ticket. R. Meir Simchah reportedly berated the thief for being a fool in believing that a lottery ticket can somehow be endowed with *mazal* or luck. *Mazal*, he declared, attaches to the person, not to a lottery ticket. In an "Appointment in Samarra"-like comment, he asserted that it was destined that the pious man win the lottery, not that a particular combination of numbers win the prize; perforce, any ticket the pious man would have acquired would have been the winning ticket. Since it is the person who was destined to win, rather than the ticket, he concluded, there is no reason for him to surrender his winnings.

This observation with regard to *mazal*, i.e., the workings of divine providence, is incisive and undoubtedly correct. Nevertheless, human perceptions regarding presumed operation of providence are not dispositive with regard to the outcome of lawsuits. Providence is ordered on the basis of how a dispute will be lawfully resolved rather than *vice versa*. Providence might have decreed a chain of events that, when set in motion, would cause the thief publicly to confess his crime and suffer the consequent shame and humiliation. If genuinely contrite and repentant, the professed thief might even have deserved to be rewarded with the winnings.

In a personal conversation, the author of the *Oneg Shabbos* column, a talented individual writing under a *nom de plume*, freely acknowledged that the anecdote lacks substantiation in any recorded source. The narrative was passed from person to person and related by a relative who had no connection whatsoever to R. Meir Simchah or to either of the litigants. There is no reason to doubt that the *mussar haskel*, or moral lesson, to be learned is accurately attributed to R. Meir Simchah but there is serious reason to doubt that such was the halakhic basis for his decision. Anecdotes of this nature frequently omit salient details, particularly when they are technical and do not strike a resonant popular chord.

The crucial halakhic question in this scenario is who has title to the ticket substituted for the one that was stolen. Ownership of the stolen ticket is irrelevant and, since it was a losing ticket, is a moot issue. There is no question that title to the winning ticket originally vested in the purchaser. The sole question is whether ownership was transferred by the purchaser to the later holder of the ticket by means of the act of substitution. The thief certainly intended to convey to his victim title to what the thief genuinely believed to be a worthless piece of paper. He can only claim that, had he appreciated the actual value of the ticket, i.e., that it would prove to be the winning ticket, he would not have bestowed it upon his victim. The thief's claim, then, is that transfer of title failed because it was a transfer undertaken in error, i.e., a *kinyan be-ta'ut*.

The Gemara, *Bava Kamma* 110b, makes a quite similar point with regard to the consecration of certain sacrificial animals. An animal designated either as a *hatat* or an *asham* whose owner has died cannot be offered as a sacrifice posthumously. The owner, had he been aware of his impending death, would certainly not have consecrated the animal as a sacrifice since there would be no purpose to consecration of an animal that cannot actually be offered on the altar. Hence, queries the Gemara, why is the consecration not regarded as having been a nullity and hence void *ab initio*? The Gemara responds by declaring that, despite the attendant error in consecration, the continued sanctity of such animals is posited by a law received by Moses at Sinai. The Gemara then raises the same question with regard to a woman confronted by an untenable levirate obligation: A husband has died without issue but his brother-in-law is afflicted with a dermatological condition that makes sexual intimacy repugnant. Why should the original marriage not be rendered void on the grounds that, had the woman realized that she would one day find herself in such a position, she would not have consented to the marriage? The Gemara's response is the adage "Better to live as a couple than to live alone." As Rashi explains, a woman would not necessarily spurn a perfectly

acceptable marriage partner because of possible distasteful eventualities. The Gemara accepts the underlying principle to the effect that failure to be aware of a material future event may constitute present error but responds with the psychological contention that a woman desires marriage despite distasteful future eventualities and hence no error can be assigned.

There is no similar principle with regard to commercial transactions. It is certainly the case that in many such instances, had the purchaser been aware of the future loss of the acquired property, he would not have entered into the transaction. Accordingly, *Tosafot* question why the sale of an object that becomes ruined should not be rescinded on grounds of error and the purchase price refunded.

Tosafot respond by observing that a sale of property is always bilateral: the buyer agrees to acquire the property in exchange for the purchase price and the seller agrees to relinquish title. The purchaser might very well wish to condition his acquisition, and accompanying financial payment, upon the absence of subsequently acquired defects or a later accident. The seller, however, would not agree to any such stipulation; the seller would insist that the purchaser assume the risk of loss normally associated with ownership of property. Hence, the sale is consummated pursuant to constructive negotiations leading to an agreement that, as part of the bargain, such risks are to be borne by the purchaser. Assumption of risk of loss is integral to the bargain. In contradistinction, sanctification of a sacrificial animal is not the product of a bilateral agreement; it is a unilateral act dependent entirely upon the person offering the sacrifice. Since there is no question of a need for a meeting of minds, there are no negotiations, either actual or constructive. Acting unilaterally, the person consecrating the animal may stipulate any condition he may desire. Accordingly, any conditions a prudent person would make are considered to be inherent in the act of consecration.

Tosafot assert that, by virtue of the technical nature of marriage, a bride's consent to marriage is also comparable to consecration of a sacrificial offering in that it is unilateral on the part of the bride. Marriage is categorized by *Tosafot* not as a bilaterally executed *kinyan* subject to a meeting of minds but as the result of an act entirely controlled by the bride. The bride either permits the act to take place or refuses to do so; the groom, if he wishes the marriage to occur, must accede to the terms set by the bride. Since he must accept the bride on her terms, were the bride unwilling to accept the eventuality of a levirate relationship with a repugnant brother-in-law, the marriage would fail retroactively.

Conferral of a gift, in contrast to a sale, is a unilateral conveyance in that it depends upon the intent of the benefactor, with the result that the

conveyance is a unilateral act on the part of the grantor while the recipient is entirely passive. Since the active consent or participation of the recipient is not required, he is in no position to bargain. The recipient has no occasion, or reason, to negotiate a condition that would invalidate the gift retroactively in the event of subsequent development of a defect in the gifted object. In any event, since, by definition, a gift is a gratuitous transfer, nullification of the transfer would result in no advantage to the recipient.

In order to explain the context in which the Gemara's discussion takes place, *Tosafot*, *ad locum*, find it necessary to conclude with the comment that restitution on the part of the thief is also a unilateral act performed by the thief. Restitution is similar to a gift in that it is a unilateral act on the part of the thief involving no need for a meeting of minds between the thief and his victim. Were the transfer subsequently to fail, the victim would be in no worse a position than prior to the attempted transfer. Hence, the victim has no opportunity, or reason, to stipulate the conditions of transfer or to refuse conditions set by the thief. Thus the victim certainly has no power to stipulate that he accepts restitution in the form of chattel provided that such chattel does not develop a defect rendering it valueless. The thief, on the other hand, might well stipulate that, if the object presented to the victim as restitution (rather than return of the property actually stolen to which the thief never acquired title) suddenly acquires enhanced value, the transfer is to be retroactively nullified and the object returned. Such a condition may also be constructively construed.

In the case under discussion, the thief, motivated by a desire to conceal his theft, unilaterally determined to convey a lottery ticket to his victim. He presumed the ticket to be worthless. Had the thief known that his ticket was imprinted with the numbers destined to be drawn in the lottery, he would not have transferred the ticket to his victim. Since such transfer of title is not the product of a negotiated bargain but is accomplished unilaterally by the thief, it is within his power to attach such a condition. Moreover, such a condition may be constructively construed. It then follows that the thief is entitled to recover the ticket and hence pocket the winnings.

Nevertheless, in the context of other factors presumably present, R. Meir Simchah's confirmation of title vested in the victim was probably correct. The question ultimately hinges upon considerations of evidence. A thief intent upon concealing his act of theft is hardly likely to deliver his own ticket to the victim in the presence of witnesses. The thief's version of the events, and hence his claim to ownership of the lottery ticket, is

based entirely upon his "confession." No plaintiff has credibility to prove his own claim. Hence the thief must be non-suited.

R. Meir Simchah's observation that *mazal* attaches to a person rather than to an object is entirely correct and accurately portrays the situation described. Underlying substantive legal principles may well support the thief's claim, but the facts must be established by admissible evidence. *Mazal*, or providence, conspired to withhold requisite evidence. From the human vantage point, justice was indeed served!

PRODUCTS LIABILITY

Virtually all suits for products liability brought in U.S. courts before 1960 involved manufacturing defects. When plaintiffs prevailed, it was usually by relying upon a claim that the seller had breached an implied warranty of fitness or of merchantability.[1] Those cases alleged breach of contract rather than commission of a tort and hence did not require a finding of negligence. An implied warranty claim alleges simply that, in marketing a product, the seller implicitly guarantees that the product is safe for ordinary use. The seller then becomes liable for any consequential damage resulting from breach of that implied contractual undertaking without regard to fault or negligence. Liability of that nature is known as strict liability.

The primary limitation of contract law, if narrowly applied, would restrict recovery to the buyer who is a party to the contract, to the exclusion of a bystander who is injured by a defective product. Moreover, an express disclaimer of a guarantee of safety would, arguably, serve as a barrier to a claim in contract.

Modern products liability doctrine was born in 1963 with the decision of the California Supreme Court in *Greenman* vs. *Yula Products, Inc.*, 377 P.2d 897 (Cal. 1963). The case involved a serious injury resulting from a piece of wood that flew out of a home wood-working machine. In *Greenman* the Court found that, even absent a warranty of safety, the manufacturer of a product is liable for damages so long as the product is used in a manner in which it was intended to be used. The Court held that it was not necessary to establish negligence or carelessness on the part of the manufacturer. In 1965, what has come to be known as strict products

[1] The three most significant and widely cited cases are *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916); *Escola* v. *Coca Cola Bottling Co.* 150 P.2d 436 (Cal. 1944); and *Henningson* v. *Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

liability for defect-based harms was incorporated in Section 402A of the *Second Restatement of Torts.* There is considerable case law as well as legislation in various jurisdictions that serves to define notions such as "defective condition" and "unreasonably dangerous" and also expounding the notion of uses intended by the seller to include reasonably foreseeable uses.

Strict products liability is not limited to responsibility for the results of carelessness on the part of the manufacturer and is divorced from any notion of fault. Even a manufacturer who acts prudently in adopting reasonable quality control standards remains liable if a defective product enters the stream of commerce and causes injury in the course of customary use. In most jurisdictions, a retailer is similarly liable for the sale of defective products causing damage despite the retailer's lack of involvement or ability to intervene in the manufacturing process, although the retailer generally has recourse to the manufacturer for indemnification. Such rules allow for speedy and reliable compensation. However, many jurisdictions protect innocent sellers from liability for the sale of defective products.

Liability for simple forms of design defect draws upon the dual concepts of warranty and negligence. The consumer can justifiably claim that he had not anticipated acquisition of defectively designed merchandise and, moreover, that failure to recognize defects of design is negligence *per se*. Nevertheless, by definition, it is not possible to anticipate an unrecognized and unforeseeable risk, e.g., unanticipated side effects of a pharmaceutical product that become manifest only after years of use. Courts and legal theorists continue to struggle with developing a coherent theory of products liability to be applied in such instances.

Another form of products liability is not associated with a defect in the product but lies in failure to warn against possible danger or to provide instruction with regard to the proper, and hence safe, use of the product. The warning must be adequate in the sense of prominence and detail and is considered inadequate if the disclosure warns only of a less serious risk as result of misuse whereas, in actuality, there is risk of a more serious result. Some courts have assigned liability even for failure to warn of risks that were unknown and unknowable at the time of sale but which were identified after the sale had taken place. In effect, such liability is based upon establishment of a post-sale duty to take reasonable steps to warn customers of newly discovered dangers.

In Jewish law, liability is generally limited to harms caused by a person by means of direct physical action or to harms proximately caused by his property. Thus, there would seem to be no room at all for products

liability on the basis of failure to warn. It would further appear to be the case that breach of an implied warranty of fitness or of merchantability would also fail to give rise to a claim for damages. Damages resulting from breach of contract are generally in the form of *gerama*, i.e., lacking in what Halakhah regards as proximate cause, and hence are not actionable before a *bet din*. Breach of even an explicit warranty of fitness would result only in rescission of the sale and recovery limited to refund of the purchase price. Accordingly, it would seem that the possibility of products liability might be considered only if the defect is of a nature that would retroactively nullify the sale and thereby restore title to the offending product to the seller. Even then it might seem that liability rests with the merchant only when the defective product is the proximate cause of the resultant harm, e.g., a defective firecracker that explodes spontaneously.

The earliest Jewish law discussion of what may well be categorized as products liability involves an instance of error that was, in effect, a breach of a warranty of fitness. R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, V, no. 11, addresses the claim of a woman who was sold a quantity of white powder represented by the merchant to be baking powder. The baking powder was to be used as a leavening agent in the preparation of baked goods to be served at a wedding banquet. In the course of mixing the powder into a quantity of dough the woman discovered that the powder was actually a cream of tartar. Although the substitution was inadvertent, the customer was certainly entitled to claim that the sale was consummated in error and to demand return of the purchase price. However, since the sale was void, the cream of tartar remained the property of the seller. The woman sought to recover the value of the flour, honey and other ingredients ruined in preparation of the dough on the grounds that the harm was committed by the seller's property. That claim would seem to be frustrated by virtue of the fact that the cream of tartar itself did not cause damage; it was the woman who caused the damage by mixing the cream of tartar with other ingredients.

Nevertheless, Maharsham's interlocutor regarded the case as analogous to kindling a fire and entrusting the fire to a minor or to a mentally incompetent person, a situation in which there is liability for having generated the fire. "Fire" is a unique form of tort liability by virtue of the fact that fire causes harm because it is spread by wind. The wind is, in effect, a supervening cause. The tortfeasor who kindles the fire is liable despite the presence of "a separate power mingled with it" (*koah aher me'urav bo*). The interlocutor argued that, since the purchaser had no knowledge of the true nature of the product, the purchaser should be regarded as "mentally incompetent" insofar as

the care that should be exercised with regard to use of the purchased powder is concerned. If so, the seller should be held liable for delivering a "fire," i.e., an inherently dangerous or harmful substance, to a purchaser who could not be presumed to be knowledgeable enough to safeguard it. Spread of a "fire" by a mentally incompetent and hence, arguably, by a mindless person as well, is tantamount to allowing the wind to spread a fire.

Maharsham peremptorily rejects that contention. Unlike a minor or a mentally incompetent person, the unsuspecting customer would have been perfectly capable of preventing harm from occurring had the nature of the substance been known to her. Although the customer was entirely ignorant of the true nature of the purchased substance, unlike a minor transporting a flame, she would have appreciated its potential harmfulness had she undertaken to investigate its nature. Hence, as is the case with regard to a person who entrusts a flame to a competent adult, the merchant's delivery of the cream of tartar cannot be deemed the proximate cause of the resultant harm and therefore the merchant escapes liability.

Maharsham acknowledges that in cases of *garmi*, i.e., when damage is certain to follow, there may be liability for damage caused by one's property even in the absence of proximate cause. Nevertheless, Maharsham takes note of the many authorities who maintain that there is no liability for inadvertent damage even in the form of *garmi* if the harm was unintentional on the part of the tortfeasor. Thus, in the case of a person who unknowingly sells sterile seeds for planting, *Shulhan Arukh*, *Hoshen Mishpat* 232:20, limits recovery to the purchase price of the seeds but does not allow for recovery of the inevitably associated expenses in plowing a field and planting the seeds. Similarly, *Shulhan Arukh*, *Hoshen Mishpat* 232:21, rules that, even if the purchaser of an animal later found to be defective informs the owner that it is his intention to transport the animal to another locale, he can recover only the purchase price. However, *Shulhan Arukh* rules that, if the seller was aware of the defect as well as of the purchaser's intent to incur expenses in removing the animal to a distant place and knowingly sold the animal without disclosure, he is liable for the resultant loss since such loss is certain to occur and hence is in the category of *garmi*.

Maharsham's interlocutor assumed that in the case of substitution of a harmful substance for a baking ingredient the seller acted inadvertently and hence should not be liable for harm as a result of *garmi*. Maharsham counters that the harm caused by the seller must be categorized as "close to intentional" (*karov le-mezid*) because it was the seller's duty to verify the nature of the substance sold. In an entirely

different context, the Gemara, *Yevamot* 89a, categorizes failure to examine vegetables for spoilage in a like manner.[2] It is indeed true that the housewife was equally capable of tasting the product to verify its nature before using it and hence might be regarded as equally at fault. R. Jonathan Eybeschutz, *Urim ve-Tumim*, *Tumim* 129:3, indeed rules that there is no liability for *garmi* in instances in which the victim was not vigilant. Nevertheless, *Tosafot*, *Bava Kamma* 23a, s.v. *u-lihayeiv*, and 27b, s.v. *am'ai*, declare that the duty of a potential tortfeasor to avoid a tort is greater than that of the victim to avoid harm. Similarly, contends Maharsham, the seller of a defective animal is liable to consequential damages in the nature of *garmi* only if he is *karov le-mezid*, i.e., he could have discovered the defect without "great travail" (*tirha gedolah*) had he troubled himself to examine the animal prior to the sale.

Maharsham further notes that there may be no liability for *garmi* for yet another reason. *Shitah Mekubbezet*, *Ketubot* 87b, cites Ra'avad and Ramban who maintain that only acts that are performed wantonly result in liability for *garmi*; unintended harm arising from an act designed merely for self-benefit does not give rise to liability for *garmi*. Those authorities maintain that liability for *garmi* is in the nature of a penalty rather than of restitution designed to make the victim whole and consequently maintain that such liability is incurred only in the case of an intended harm or a wanton act.[3] Hence, concludes Maharsham, although there are conflicting authorities with regard to this point, in cases of *garmi* rather than of proximate cause, the seller who acted for self-interest[4] may plead

[2] Regarding the liability of a person who sells meat and discovers that the animal was a *terefah* only after the purchaser has consumed the meat see *Shulhan Arukh Hoshen Mishpat* 234:2 and *Netivot ha-Mishpat* 234:2. Regarding the sale of foodstuffs proscribed by rabbinic decree see *Shulhan Arukh, Hoshen Mishpat* 234:3 and *Netivot ha-Mishpat* 234:3.

[3] Maharsham asserts that even the authorities who ascribe biblical liability to acts of *garmi* concede that, when the act is performed for self-interest, liability is only rabbinic in nature and hence does not extend to situations in which the seller was unaware of the defect.

[4] Maharsham advances yet another, but puzzling, argument based upon the notion of self-interest to absolve the merchant from liability. The Gemara, *Bava Kamma* 26a, establishes a rule of strict liability in instances of *adam ha-mazik*, i.e., torts committed by the physical act of a human being. Accordingly, a person is liable in tort for all damages, including those caused unintentionally or inadvertently. *Kezot ha-Hoshen* 25:1 argues that the rule is limited to torts but that there is no similar liability for inadvertent theft. Cf., however, R. David Shlomoh Eybeschutz, *Teshuvot Ne'ot Desha*, no. 57. Mahasham argues that the merchant "whose intention was for his own interest is comparable to a thief or robber rather than a tortfeasor." That argument is puzzling because the unintentional thief absolved from liability for loss or damage by *Kezot ha-Hoshen* did not commit a tort; he simply misappropriated an object in erroneously transferring it to a third party. However, in the case under discussion, the merchant set in motion, albeit inadvertently, a series of events that resulted in damage to the property of others.

reliance on the opinion of Ra'avad and Rambam and refuse to honor the claim.[5]

In a note appended to that responsum, the editor of *Teshuvot Maharsham* advances a rather novel theory that, if correct, would serve to establish some form of products liability. *Shulhan Arukh*, *Hoshen Mishpat* 306:3, codifies the rule with regard to a contracting artisan who fails to perform as directed. *Shulhan Arukh* rules that a dyer who uses black dye instead of red or a carpenter who fashions a stool in place of a chair can recover expenses (including his own wages had he been a day laborer) only to the extent that his labor has enhanced the value of the finished product beyond the value of the materials furnished to him. Rema adds that the profit that might have been realized from the sale of a chair or of red material had the artisan obeyed instructions may be recovered by the person commissioning the work before the artisan is entitled to claim reimbursement for expenses.[6] *Shakh*, *Hoshen Mishpat* 306:5, rules that the artisan's claim for expenses, including wages as a day laborer, must be satisfied before the owner of the raw materials can claim loss of unrealized profit.

Netivot ha-Mishpat 306:6 explains that liability for anticipated but unrealized profits is not a tort liability but arises from a contractual undertaking. The Gemara, *Bava Mezi'a* 73b, declares that a person who accepts money for the purpose of purchasing wine on behalf of the person advancing the funds but fails to execute his undertaking is liable for foregone profit. Rav Ashi is cited by the Gemara as absolving the agent from liability but only because there is no certainty that the winemakers would have agreed to sell him wine on reasonable terms. *Shitah Mekubbezet*, *ad locum*, questions the grounds for liability since preventing a person from engaging in a profitable enterprise is not ordinarily actionable. *Shitah Mekubbezet* responds with the comment that acceptance of funds for a mercantile purpose coupled with the other party's reliance upon faithful performance generates liability. The recipient, in effect, binds himself to deliver the anticipated profit. He agrees to act as surety for the anticipated profit in return for the pleasure and satisfaction he derives from the other person's reliance upon him. Receipt of that pleasure constitutes a *kinyan* in the form of *halipin* serving to generate an obligation in exchange. Obligations of a worker to his employer and *vice versa* for losses incurred

[5] See also *Teshuvot Panim Me'irot*, I, no. 82 and *Teshuvot Shevut Ya'akov*, II, no. 158. Cf., however, *Shakh*, *Hoshen Mishpat* 66:117.

[6] *Sema*, *Hoshen Mishpat* 306:9, argues that *Shulhan Arukh*'s ruling is in conformity with the position of *Tur* and Rosh but that, according to Rashi and Rambam, the artisan is entitled to recover expenses even if the owner of the raw material will not realize any portion of his potential profit.

as a result of breach of an employment contract are similarly predicated upon an obligation arising from the pleasure derived from the reliance and trust placed in the party entering into the relationship. Ra'avad and Rashba, *ad locum*, compare the case to that of a sharecropper who is liable for unrealized profit if he allows the land to remain fallow. The underlying theory is that an actionable *shibud,* or lien *in personam*, is generated with regard to anticipated profit known with certainty to be within the recipient's power to realize. *Netivot ha-Mishpat* maintains that the artisan, in accepting the commission to dye material a certain color, in effect warrants that the task will be performed in a workman-like manner designed to result in enhanced value of the finished product and assumes a contractual obligation to deliver that enhanced value.[7]

The editor of *Teshuvot Maharsham* argues that, in accepting payment for his wares, the merchant binds himself to compensate the purchaser for loss sustained as a result of a defect in his merchandise. As do modern tort liability theorists, he infers a warranty of safe use for a specific purpose giving rise to an action for breach of contract rather than for tort and, since Halakhah does not allow recovery for consequential damages for breach of contract, he couples that warranty with assumption of a *shibud* to indemnify for such damages.

However, the editor's application of *Netivot ha-Mishpat*'s thesis is inappropriate. As spelled out in *Netivot ha-Mishpat*'s comment, liability in the nature of a *shibud* arises in situations in which the extent of loss as a result of failure to perform is known in advance and the obligee has both the knowledge and ability to prevent loss from occurring whereas the extent of the damage resulting from a hidden or unperceived defect is impossible to predict. A warranty for reimbursement for such loss is actually a form of insurance provided by the seller. As such, it may suffer from the same halakhic defect as insurance against accidents, *viz.*, according to some authorities, it may constitute an *asmakhta*.[8] An *asmakhta* is a contractual undertaking lacking enforceability because of absence of an absolute determination to be bound. A gambler, for example, regards loss as a mere contingency and hence arrives at no final determination to satisfy a gambling debt. Similarly, assumption of an obligation that becomes due only upon development of a situation presumed to be remote is not accompanied by mental determination with regard to actual satisfaction of the obligation. Since neither the merchant nor the manufacturer assumes that

[7] See also *Netivot ha-Mishpat* 176:31 and 183:1.
[8] See Menachem Slae, *Insurance in the Halachah* (Tel Aviv, 1982), pp. 108-113.

a harm will actually occur, there is no firm assumption of liability.[9] Although there may be ways to draft a contract to avoid the problem of *asmakhta* in Jewish law, there is no implied contractual liability for unpredictable harm.

A similar case involving a woman to whom a merchant delivered salt instead of sugar was addressed by R. Shlomoh Zalman Auerbach, *Minhat Shlomoh*, *Bava Kamma* 6a.[10] *Minhat Shlomoh* asserted that such a situation does not constitute *garmi* because it is not at all a certainty that there will be resultant damage. The purchaser might well decide to taste the substance before using it for baking purposes and discover the error. If so, the sale represents a simple *gerama* for which, as a matter of strict application of law, there is no recourse. The seller would nevertheless remain liable "at the hands of Heaven."

The incident brought to the attention of *Minhat Shlomoh* was substantially the same as the matter earlier addressed by Maharsham. *Minhat Shlomoh*, however, found other grounds to assign liability to the merchant. *Minhat Shlomoh* reached a similar conclusion in the case of a person who placed a bag containing glass bottles in a garbage dumpster. In the process of loading the garbage onto the garbage truck, the bag was displaced and fell to the ground. Passing automobiles ran over the bag of bottles, shattering the glass and spreading the shards to a place where they caused harm to both automobiles and pedestrians.

Minhat Shlomoh's ruling was based upon the consideration that a stone or rock left in a public thoroughfare is regarded as a *bor* or "pit" and the person who created that nuisance is liable for resultant damages. *Tosafot, Bava Kamma* 6a, s.v. *le-atuyei*, asserts that, if such a stone is rolled or kicked by an animal traversing a public thoroughfare, the person who deposited the stone in such a place is liable for damages caused by the moving stone. *Tosafot* assert that a stone moved by an animal is tantamount to a fire that spreads by means of wind. The salt, argues *Minhat Shlomoh*, does harm because it is transported by the women who purchase it. The damage is caused by the intrinsic nature of salt, which has the power to "burn," as does fire. *Minhat Shlomoh* also found the person who disposed of glass bottles by placing them in a dumpster liable for having created a "rolling pit."

[9] For a fuller discussion of *asmakhta* see *Encyclopedia Talmudit*, II, 108-115 (English ed., 522-538). English-language discussions of *asmakhta* may be found also in George Horowitz, *The Spirit of Jewish Law* (New York, 1953), pp. 466-469 and *Encyclopedia Judaica* (Jerusalem, 1972), III, 751-754 and V, 932-933.

[10] The discussions of both *Teshuvot Maharsham* and *Minhat Shlomoh* are summarized in *Ve-Ha'arev Na*, I, *Parashat Hukkat*.

Minhat Shlomoh presents an objection based upon a counterexample found in the Gemara, *Bava Kamma* 47b, in the case of a person who places poison in front of an animal. Such an act is regarded as an act of *gerama* rather than a direct act of *esh*, i.e., creation of a fire. *Tosafot* explain that, unlike a spreading fire, the poison causes harm only because of a voluntary act on the part of an animal. Similarly, the customer is free to choose to use the purchased substance in baking or to refrain from doing so. *Minhat Shlomoh*'s rejoinder was that, had the damage occurred because someone ate salt rather than sugar, the cases would be comparable and there would be no liability. The animal has the option of not consuming the poison and the person has the option of not eating the salt. "However, [in this case] the women unintentionally damaged [their] husbands' property." This writer is at a loss to understand the distinction: The animal had the option of not eating the poison; hence the animal's master has no claim for damages. The woman had the option of not using the salt in baking; hence her husband should similarly have no claim. The fact that the dough belongs to the husband rather than to the purchaser does not seem to be of material significance.

A further objection to the position of *Minhat Shlomoh* was raised on the basis of a controversy recorded in the Palestinian Talmud, *Bava Kamma* 1:5, concerning a person who made a fire in a pit into which an animal later stumbled. According to one opinion presented in the Palestinian Talmud, there is no resultant liability because "fire," by definition, involves an act that causes destruction by spreading or moving of a harmful entity beyond its original locus. In falling into a pit, it is the animal that approaches the source of harm while the fire remains stationary and hence there is no liability. Similarly, it was argued, the salt did not necessarily cause harm by "spreading" to the ruined ingredients; rather, the ingredients may well have been ruined as a result of having been brought to the salt. *Minhat Shlomoh* countered that objection by asserting that delivery of the salt to the customer for removal from the merchant's premises is tantamount to setting the salt, a harmful substance, into motion and hence constitutes the kindling of a "fire."

Moreover, it seems to this writer that *Minhat Shlomoh*'s basic thesis is subject to rebuttal in a manner similar to Maharsham's dismissal of the contention that the harmful substance should be treated as a "fire." There is no liability for kindling a "fire" and delivering it to a mentally competent person. Similarly, *Tosafot*'s statement with regard to treating a stone as a "fire" is made in the context of a stone rolled by a brute animal. *Tosafot* do not claim that the person placing a stone in a public place is liable if the stone is moved by another competent human being. If so, the merchant would not be liable for damage caused by the act of a purchaser.