וחייב באחריותו – And he is liable for its responsibility

Overview

The משנה in מסכת גיטין[1] states: If one is מטמא another's טהרות (for instance תרומה) thus rendering it worthless (for it needs to be burnt), the rule is that if he did it בשוגג he is פטור, however במזיד he is חייב. This is different than regular damages, where one is liable whether it was בשוגג or במזיד. The גמרא there explains that legally (מן התורה) he is פטור in all cases since this is a היזק שאינו ניכר – an unrecognizable damage. There is no physical change to the טהרות. It does not appear to us as if the טהרות have been damaged. A היזק שאינו ניכר is not considered a היזק. If it was done במזיד, however, the חכמים punished the perpetrator in order to prevent people from wantonly damaging other people's טהרות. Our case of כלאים seems to be a היזק שאינו ניכר. Why is he חייב?! תוספות will discuss this issue.

תוספות asks:

ואף על גב דהיזק שאינו ניכר לא שמיה היזק (גיטין נג,א) – and even though that an unrecognizable damage is not considered a damage. The damage incurred to the grain is not apparent. The כלאים grain looks like regular grain. The damage to the grain is a halachic damage; it is אסור בהנאה. This damage is not apparent. Why is the בעל הכרם liable for this damage?

תוספות answers:

ונראה לרבינו יצחק דהאי חשיב היזק ניכר – The ר"י is of the opinion that this case of כלאים **is considered a recognizable damage**

שהרי ניכר הוא שהוא כלאים – for it is obvious that it is כלאים -

כשרואה הגפנים בשדה – when one **sees the grapevines in the** grain **field.** It is known that grape vines and grain growing together are כלאים and אסור בהנאה. Therefore when one sees the כלאים he observes (in his mind's eye) damaged and worthless produce. The damage is obvious and recognizable[2].

תוספות anticipates a question:

ומטמא – and concerning one **who defiles** the purified products (טהרות) of another, that is considered היזק שאינו ניכר in all instances -

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[1] דף נב,ב.

[2] תוספות is seemingly introducing a new concept. היזק ניכר does not mean that there is an obvious physical damage present; that there has been physical destruction thereby limiting or eliminating its usefulness. It is sufficient if it is recognizable that the object suffered halachic damage. It is now unlawful to use this item in its customary manner. If it is obvious that legally it may not be used, that is considered a היזק ניכר.

אף על פי שרואין השרץ על הטהרות – even when the dead [3]**שרץ is seen on the טהרות,** nevertheless it is considered a היזק שאינו ניכר. Seemingly there too it is obvious to all, that these טהרות are טמא since there is a שרץ on them. What is the difference between כלאים which is considered a היזק ניכר and מטמא which is considered a היזק שאינו ניכר?

תוספות responds that by טהרות –

לא חשיב היזק ניכר – it is not considered a היזק ניכר, even if one sees the שרץ on the טהרות. The reason is –

דמי יודע אם הוכשרו – for who knows whether the טהרות **are fit** to become טמא. Foodstuffs cannot become טמא unless they came (willingly) in contact with water, before the טומאה touched them[4]. Seeing the שרץ on the טהרות is not evidence that the טהרות are טמא. It is possible that the טהרות never came in contact with water, and therefore are not מוכשר to be מקבל טומאה. That is why it is considered a היזק שאינו ניכר (even if it is טמא). However by כלאים there are no such mitigating circumstances[5]. In all cases it is כלאים. Therefore it is considered a היזק ניכר.

תוספות anticipates an alternate solution to his question, and negates it:

אבל אין לומר – however one cannot say the following to resolve the original question; why is he חייב? It is a היזק שאינו ניכר! Seemingly we may answer -

דהכי נמי הוי היזק שאינו ניכר – that indeed כלאים **is also a היזק שאינו ניכר**, and nevertheless he is חייב –

וקנסוהו – because the חכמים **punished him**

כמו במטמא (שם) – just as the חכמים punished one who is **מטמא** the טהרות of another. The reason for the punishment of מטמא is –

שלא יהא כל אחד הולך ומטמא טהרותיו של חבירו – in order that no one should go and be מטמא his friend's טהרות. If the דין would be that היזק שאינו ניכר is always פטור, then there is the likelihood that if one were angered by his friend, he would avenge himself, by being מטמא his friend's טהרות. He would be secure in the knowledge that he will not be liable for the damage since it is a היזק שאינו ניכר. This may cause rampant destruction. Therefore the חכמים instituted that even by a היזק שאינו ניכר such as מטמא, the perpetrator will be punished and required to make compensation for the damage he caused. We may think that the same holds true in our case of כלאים. That really it is a היזק שאינו ניכר, nevertheless the חכמים punished him for his negligence and require him to compensate for the damage[6].

תוספות negates this option:

דהכא ליכא למיחש להכי – for here by מחיצת הכרם **there can be no such concern**, that he will willfully cause the other's crop to become כלאים.

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[3] A שרץ is a creeping, crawling type of animal. There are eight שרצים enumerated in the תורה (שמיני יא, כט-ל) that are מטמא when dead. A dead שרץ is considered an אב הטומאה. It can be מטמא people as well as food.

[4] This is derived from a פסוק (שמיני יא, לד) which states מכל האוכל וגו' אשר יבוא עליו מים יטמא; indicating that it can become טמא only after it came in contact with water.

[5] See: 'Thinking it over' # 1.

[6] The concern is that people may purposely inflict the damage of כלאים on others.

שבעל הכרם נמי מפסיד – for the vineyard owner loses as well. His vines are also כלאים and אסור בהנאה. We are not concerned that a person will be so spiteful to damage someone else, when he himself is being damaged through this action. Therefore in our case of כלאים the חכמים would not have punished the בעל הכרם, for there is no concern of widespread vandalism; as opposed to טומאה[7]. By טומאה the חכמים were concerned, for the perpetrator suffers no loss.

תוספות offers another reason why the solution of קנס is inappropriate:
ועוד אי קנס הוא – and furthermore if the liability of the בעל הכרם **is a punishment** but it is not a real היזק
במזיד דוקא היה לו להתחייב – he should be liable only if it **was premeditated.**
A קנס is appropriate if the perpetrator acts in a premeditating and purposeful manner to harm the other. In our case of מחיצת הכרם, the איסור כלאים came accidentally[8]; the wall fell in. The בעל הכרם did not want to make כלאים for the בעל השדה. There is no rationale to punish someone for an accident. For these two reasons we can therefore not accept this solution that it is a קנס. Rather the reason the בעל הכרם is חייב is because it is a היזק ניכר.

<u>Summary</u>
כלאים is a היזק ניכר since it is obvious that the produce in this field (a mixture of grapes and grain) is אסור בהנאה. However מטמא טהרותיו is considered a היזק שאינו ניכר since it is possible that the food was never מוכשר לקבל טומאה; the presence of the שרץ notwithstanding.
We cannot say that כלאים is a היזק שאינו ניכר and he is חייב משום קנסא because:
a) There is no need for a קנס when the alleged perpetrator himself is being damaged as is the case by כלאים, and
b) A קנס is applicable only by מזיד; by מחיצת הכרם he was not a מזיד.

<u>Thinking it over</u>
1. Why does תוספות distinguish between כלאים and מטמא, that by כלאים it is always obvious? It would seem that by כלאים it is also not obvious because could be it is not ניחא ליה?![9]

2. What would be the דין if someone plants wheat in a neighbor's vineyard; is he חייב or not?

[7] The point of a קנס is to prevent similar occurrences. If it is an isolated instance there is no need for קנס.
[8] It will be necessary to distinguish between the falling of the wall, which was not במזיד, but rather באונס, as opposed to his negligence in rebuilding the wall which may be considered במזיד. However the מזיד of not rebuilding a wall would not seem sufficient to warrant a קנס, if ע"פ דין there is no חיוב.
[9] See footnote # 5. See סוכ"ד (אות פ"ג), נח"מ, בל"י (אות כ').