And the owner of the coal should be liable - וליחייב בעל הגחלת

Overview

The משנה stated that if a dog took a smoldering biscuit and set fire to a granary, the owner of the dog is liable to pay a חצי נזק for the granary. The גמרא asks that (seemingly) the owner of the coal (biscuit) should be liable [for burning the granary]. תוספות points out that the wording of the question is inaccurate.

האי לישנא לאו דוקא דהא מיתוקמא[1] דאכלה בגדיש דבעל החררה[2] -

This expression (of וליחייב בעל הגחלת) **is not precise, for** the גמרא **establishes** the משנה in a case **where** the dog **ate** the חררה **in the granary of the בעל החררה;** so how can we say that the בעל הגחלת should be liable for the גדיש, since it is his גדיש!

אלא כלומר שיפטר בעל הכלב מחלקו של בעל הגחלת ולא ישלם כי אם הרביע[3] -

But rather the question of ולחייב בעל הגדיש **means that the dog's owner should be exempt from the portion of the coal's owner, and** the בעל הכלב **should only pay a fourth** of the damages.

תוספות asks:

ואם תאמר ואמאי לא פריך וליפטר בעל הכלב מן החררה[4] -

And if you will say; why does not the גמרא **ask, 'and let the בעל הכלב be פטור** from paying **for the חררה' –**

תוספות responds:

ונראה מכאן לדקדק דיותר יש לאדם ליזהר עצמו שלא יזיק אחרים משלא יוזק[5] -

---

[1] See the bottom of this עמוד.

[2] This is in contrast to פרש"י ד"ה וליחייב who writes, וקס"ד דגחלת וחררה דחד וגדיש דחד. See אמ"ה # 52.

[3] See the previous תוס' ד"ה וליחייב that the question is that the בעל הכלב and the בעל הגחלת are both equally responsible for the burning of the גדיש. The total liability for the גדיש is (as the משנה states) a ח"נ. If it would be a גדיש of a third party the בעל הכלב ובעל הגחלת would each pay a fourth of the damage (together a ח"נ). Now that we are discussing the גדיש of the בעל הגחלת (even though the בעל הגחלת obviously does not pay, nevertheless), the בעל הכלב should only pay his half (which is a רביע נזק) to the בעל הגדיש and the בעל הגדיש would have to suffer the loss of the other רבעי נזק (besides the entire other ח"נ) since he too was a partner in this crime. See 'Thinking it over' # 1.

[4] The משנה stated that the בעל הכלב has to pay a ש"נ for the חררה and a ח"נ for the גדיש. The גמרא asks why the בעל הכלב should pay for the גדיש since the בעל הגחלת is also responsible. Seemingly the גמרא could have (also) asked why the בעל הכלב should pay for (entire) חררה since the בעל הגחלת is also responsible. See 'Thinking it over' # 2. See פנ"י that the question is that the בעל הכלב should be פטור completely, for since the בעל החררה did not watch his חררה, it is considered as if he left it in an open space and there can be no חיוב of שן for eating something in an exposed area. See נח"מ for an alternate explanation (of the פנ"י).

[5] A person must be extremely careful that he or his possessions should not harm others. Therefore if he did not guard the גחלת properly and it damaged he is (partially) negligent and liable. However, he need not be that concerned that

And it appears that we can infer from here that a person has to be more careful that he should not damage others, than he should be concerned that **he should not be damaged,** so therefore the rule is -

שמחויב לשמור גחלתו מן הכלב אף על פי שאין לו רשות ליכנס לביתו כדי שלא יזיק אחרים -

That the בעל הגחלת **is obligated to guard his גחלת from the dog** (that the dog should not take it) **even though** the dog **has no right to enter his house** and take the גחלת, nevertheless the בעל הגחלת has this responsibility **in order that he should not damage others** with the גחלת; this שמירה is an obligation; however -

ואפשר[6] לשמור עצמו כדי שלא יכנוס כלב כדי ליטול חררתו[7] -

It is [not necessary] to watch himself, so the dog should not enter in order to take his biscuit –

תוספות offers a proof to this contention that the obligation to prevent damage is greater than the one to prevent being damaged:

וכן משמע בהמניח (לקמן דף לא,א) בשמעתין דקדרין[8] דפריך אי נתקל פושע שני נמי ליחייב -

And it seems so in המניח פרק **regarding the discussion of the 'potters', where** the גמרא **asks, 'if tripping is considered negligence the second one should also be חייב';** this concludes the citation from that גמרא -

אלמא חשיב שני פושע לחייבו בנזק שלישי ואינו פושע[9] לענין שיפטר[10] ראשון בנזקיו:

It is evident that even if **the second is considered a פושע** in his tripping **to be held liable for the damage to the third, nevertheless he is not** considered **a פושע that the first should not be liable for damaging** the second. This proves that in the same act one may be considered a פושע regarding damaging others but not a פושע regarding protecting oneself.

---

his items should not be damaged. Therefore even though he did not guard the חררה properly that it should not be taken by the dog, nevertheless (since it was in his רשות) he is not considered as a negligent partner in this crime (because he left his חררה open for all to take), but rather the (owner of the) dog is deemed to be the entire responsible party for taking away the חררה and is therefore entirely liable.

[6] See the marginal note which amends this to read ואין לו or (רש"ש) ואין צריך instead of ואפשר.

[7] Therefore the בעל החררה was not a פושע and the בעל הכלב is liable for the entire חררה.

[8] The גמרא there cites a ברייתא which states if three potters were walking one behind the other and the first one tripped, and the second tripped on the first and the third tripped on the second. The rule (according to רבא) is that the first is liable for damages he caused to the second whether they were caused by the body of the first or the utensils of the first; However the second is only liable for the damages his body caused to the third but not for the damages caused by his utensils, עיי"ש. The גמרא asks if tripping is considered negligence, the second should be liable for the third as much as the first is liable for the second.

[9] Seemingly if the second is a פושע in his tripping to the extent that he is liable for נזקי שלישי, why should the first pay the second since the second was at fault (פושע) for tripping and damaging himself.

[10] Similarly here the בעל הגחלת is a פושע for not preventing damage to others, but is not considered a פושע for not preventing damage to himself.

Summary

The question of וליחייב בעל הגחלת means that the בעל הכלב should be exempt from paying the half that the בעל הגחלת would have paid to a third party. There is no question that the בעל הכלב should be exempt for eating the חררה, for regarding the protection of his property the בעל החררה was not negligent.

Thinking it over

1. תוספות explains the question of ולחייב בעל הגחלת that the בעל הכלב should only pay half of a ח"נ (for the בעל הגחלת is liable for the other half).[11] Previously the גמרא stated that ר"ל interprets the משנה that the dog threw the גחלת on the גדיש and therefore he pays only a ח"נ on the מקום הגחלת (because of צרורות). Why cannot we say that the כלב placed it on the גדיש (so it is not צרורות) and he pays only a ח"נ because the בעל הגחלת is liable for the other חצי נזק, since he did not guard the coal?![12]

2. תוספות asks why the גמרא does not (also) ask that the בעל הכלב should be פטור on the חררה.[13] Why does תוספות assume that this is not included in the question of ולחייב בעל הגחלת?[14]

[11] See footnote # 3.
[12] See מהרש"א הארוך.
[13] See footnote # 4
[14] See אוצר מפרשי התלמוד # 58.