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YESHIVA UNIVERSITY
TORAH MITZION
BEIT MIDRASH

1. Devry Smith Frank LLP v. Chopra, 2018 ONSC 1303 (CanLII)

[21] During the two-year run-up to the trial, Mr. Chopra was adamant that he wished to have his day in court. Mr. Chopra testified that he was told that his claim was strong and that Easy Plastic Containers would pay a portion of his costs. However, I find as a fact that although DSF did tell Mr. Chopra that the unsuccessful party typically pays costs to the winner, they told him that there was a serious risk that he would be unsuccessful and that litigation is risky and outcomes cannot be predicted with any certainty. I find that DSF encouraged Mr. Chopra to settle his claim because of the risks of losing. I find that a mediator told Mr. Chopra much the same thing…

[37] Certainly by the time of the delivery of Easy Plastic Containers' Statement of Defence, it should have been clear that there was little for Mr. Chopra to gain and very much to lose in his having a day in court. Unless the costs of the litigation under Rule 76 (simplified procedure) could be limited to approximately $25,000 (between $20,000 and $30,000 all inclusive), nothing meaningful could be achieved. Had the costs exposure been contained, the family's upside was approximately $100,000 and its downside approximately $50,000.

[38] Even without the benefit of hindsight, and even in circumstances where the exposure to costs could be contained, the better advice from DSF would have been that Mr. Chopra should walk away and not expose his family in this way. If the law intended to enforce the deferred payment retainer, they ought to have warned Mr. Chopra in writing.

2. CPA of Ontario, *CPA Code of Professional Conduct* Section 202: Integrity and due care and Objectivity

202.1 Integrity and due care A member or firm shall perform professional services with integrity and due care.

202.2 Objectivity A member or firm shall not allow his or her professional or business judgment to be compromised by bias, conflict of interest or the undue influence of others.

Guidance 202 (5): Members and firms have duties to those to whom they provide professional services that arise from the nature of the relationships with the recipients of the services. Members and firms have a professional duty to act with integrity and due care and a contractual duty to provide services as defined by the terms of their engagement or employment. In certain cases, the relationship between a member or firm and those to whom they provide professional services could also be one that the courts describe as a fiduciary relationship that gives rise to fiduciary duties.

3. Cases
   - David and Ari are leaving synagogue together one Sunday morning, and David asks Ari, a professional tax accountant, for advice regarding a particular tax issue. Ari suggests a strategy, and David follows it. David ends up in trouble with the CRA. Is Ari liable?
   - Susan is a professional, certified investment advisor, and Sally retains her services. Susan advises Sally to purchase a particular stock, noting that all investments carry risk. Sally buys, and the stock's value plummets and never recovers. Is Susan liable?
   - Robin is a professional, certified investment advisor, and Sam retains Robin's services. Robin advises Sam to purchase gold, because Robin expects the commodity to recover strongly in two years. Sam was chasing immediate returns, though, as Sam needs that investment money to marry off a daughter in a year. Is Robin responsible for having given inappropriate advice?

Overview

4. Rabbi Dr. A. Yehuda Warburg, *The Investment Advisor: Liabilities and Halachic Identity*, J. of Halacha and Contemporary Society #58, footnote 30

Assuming that both parties are willing to sign an arbitration agreement or execute a *kinyan* (a symbolic act of undertaking an obligation) empowering *dayanim* (arbitrators) to resolve this matter based on *peshara krova ledin,* i.e. court-ordered settlement or *peshara*, i.e. compromise, then it is in the panel's discretion to award damages for acts of *grama*. (2) Another ground for mandating liability is if the arbitration agreement provides for a clause that states that the *dayanim* may use their own discretion in awarding acts of *grama…*

5. Mishnah, Bava Metzia 5:4 (68a)

אין מושיבין חנוני למחצית שכר, ולא יתן מעות ליקח בהן פירות למחצית שכר, אלא אם כן נותן לו שכרו כפועל.

One may not set up a vendor [with one's own merchandise] for 50% of the proceeds, and one may not give someone cash to purchase produce for 50% of the proceeds, unless one [also] pays him, like a worker.

6. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 176:10

המשתתף עם חבירו בסתם, לא ישנה ממנהג המדינה באותה סחורה, ולא ילך למקום אחר, ולא ישתתף בה עם אחרים, ולא יתעסק בסחורה אחרת... וכל שאינו משנה או פושע, יעשה בשל חבירו כמו בשלו (מרדכי סוף פרק אלמנה ניזונית)...,

One who joins with another without specification may not vary from local custom for such merchandise, may not travel elsewhere, may not partner with others in it, may not work with other merchandise… Anyone who does not vary and is not careless may handle others' merchandise like his own.

7. Talmud, Ketuvot 100b

רבינא הוה בידיה חמרא דרבינא זוטי יתמא בר אחתיה הוה לדידיה נמי חמרא. הוה קמסיק ליה לסיכרא אתא לקמיה דרב אשי א"ל מהו לאמטויי בהדן א"ל זיל לא עדיף מדידך

Raveina held the wine of Raveina Junior, an orphan, who was his nephew, and he also possessed wine. He brought the wine to Sichra [for sale]. He asked Rav Ashi: May I bring [Raveina Junior's] wine with mine? He replied: Go; that wine is no greater than yours.

8. Leviticus 19:14

לא תקלל חרש ולפני עור לא תתן מכשל ויראת מאלקיך אני ד'

Do not curse the deaf, and do not put a stumbling block before the blind; you shall revere Gd, I am Gd.

9. Midrash, Sifra, Kedoshim 2

היה נוטל ממך עצה, אל תתן לו עצה שאינה הוגנת לו, אל תאמר לו צא בהשכמה שיקפחוהו ליסטים, צא בצהרים בשביל שישתרב

If someone asks you for advice, do not advise him in a way that is inappropriate for him. Do not tell him, "Depart in the early morning," such that thieves will attack him, or "Depart at noon," so that he will be overcome by heat.

10. Rabbi Shlomo Ibn Aderet (13th century Spain), Rashba 1:99

ואם פתהו שמעון להתגייר וקבל ממנו ונתגייר אין שמעון חייב כלום לרבו. שהוא לא הזיקו בכלום והעבד הוא שנתגייר מרצונו... ולא מצינו בשום מקום משיא עצה ואפילו בנזקים שהוא חייב בדיני אדם

If Shimon persuaded [a servant] to convert, and the servant accepted and converted, Shimon owes nothing to the master, for he harmed nothing; the servant converted on his own… We never find that one who gives advice is liable in human courts, even for causing harm.

11. Talmud, Bava Kama 26b

ואמר רבה: זרק כלי מראש הגג והיו תחתיו כרים או כסתות, בא אחר וסלקן או קדם וסלקן - פטור, מאי טעמא? בעידנא דשדייה פסוקי מפסקי גיריה.

Rabbah said: If one throws an implement from a roof over cushions, and then someone – even the thrower – removes the cushions, the thrower is exempt from liability. When he threw the implement, his force was due to be halted.

12. R' Yosef Karo, R' Moshe Isserles (16th c. Israel, Poland), Code of Jewish Law, Choshen Mishpat 386:3

הזורק כלי שלו מראש הגג, והיו תחתיו כרים וכסתות שאם יפול עליהם לא ישבר, וקדם אחר וסלקם, ונחבט הכלי בארץ ונשבר, חייב המסלק; וכן כל כיוצא בזה. הגה: וי"א דזה מקרי גרמא בנזקין ופטור...

Rabbi Karo: If one throws his own implement from a roof, over cushions which would prevent it from breaking, and another removes them and it smashes on the ground, the remover is liable. The same is true in all similar cases.
Rabbi Isserles: Some say removal is called *grama* and one is exempt…

13. Talmud, Bava Kama 99b-100a

המראה דינר לשולחני ונמצא רע, תני חדא: אומן פטור, הדיוט חייב, ותניא אידך: בין אומן בין הדיוט חייב. אמר רב פפא: כי תניא אומן פטור - כגון דנכו ואיסור, דלא צריכי למיגמר כלל. אלא במאי טעו? טעו בסיכתא חדתא, דההיא שעתא דנפק מתותי סיכתא. 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...

ריש לקיש אחוי ליה דינרא לרבי אלעזר, אמר: מעליא הוא, אמר ליה: חזי דעלך קא סמכינא. א"ל: כי סמכת עלי מאי למימרא? דאי משתכח בישא בעינא לאיחלופי לך, והא את הוא דאמרת: רבי מאיר הוא דדאין דינא דגרמי, מאי לאו ר' מאיר ולא סבירא לן כוותיה! א"ל: לא, ר' מאיר וסבירא לן כוותיה.
If one shows a coin to a moneychanger [who approves it] and then it is rejected:

- One source teaches that an expert would be exempt, but a non-expert would be liable;
- Another source teaches that any moneychanger would be liable.

Rav Pappa said: The view that exempts an expert refers to someone like Danko and Issur, who lacked no knowledge, and erred only with a newly minted coin.
A woman showed a coin to Rabbi Chiya [who was expert, and was not paid], and he approved it. The next day she told him, "I showed it to others, who rejected it, and I couldn't spend it!" Rabbi Chiya told Rav, "Exchange it for her, and record it as a bad deal." But Rabbi Chiya was as expert as Danko and Issur! True; he did this to transcend his legal obligation…
Reish Lakish showed a coin to Rabbi Elazar [who was not expert], who approved it. Reish Lakish said, "See, I depend on you!" Rabbi Elazar replied, "What does that mean? If you wish to be able to exchange it in the event that it is found to be bad, haven't you said that liability would be the view of Rabbi Meir, who punishes for *garmi*, implying that we don't agree with Rabbi Meir?" Reish Lakish said, "No; it is Rabbi Meir, and we agree with Rabbi Meir."

14. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 386:1

קיימא לן כרבי מאיר דדאין דינא דגרמי

We follow Rabbi Meir, who punishes for *garmi*.

15. Rabbi Yaakov Yeshayah Blau (21st century Israel), Pitchei Choshen VI 4 footnote 57

יועץ לעניני השקעות שיעץ בהשקעה לא טובה, לכאורה היה נראה שיש מקום לחייבו מדין מראה דינר... ויועץ לעניני מס שהפסיד ללקוח ע"י עצתו נראה שיש לדון בו כדין מראה דינר לשולחני.
An investment advisor who advises to make a bad investment would appear to be liable under the law of one who shows a *dinar* [to a moneychanger]… And a tax advisor who causes a client a loss via his advice would appear to be judged under the law of one who shows a *dinar* to a moneychanger.

16. Rashbam (12th century France) to Bava Batra 94a **ונותן**

וכשבורר הצרור ומשליך חוץ היזק בידים הוא שאותן צרורות היו לו שוין כמו חטין
Sifting out the pebble and discarding it is direct harm; those pebbles were equal in value to wheat for him.

17. Rabbi Shabbtai haKohen (17th century Poland), Shach to Choshen Mishpat 386:1

חכמים קנסו בדבר שהי' נראה להם שהוא שכיח ורגיל וכי האי גוונא ואין לדמות גזרות חכמים זו לזו
The sages fined when they judged a circumstance to be common, like this, and one cannot compare decrees.

18. Rabbi Dr. A. Yehuda Warburg, *The Investment Advisor: Liabilities and Halachic Identity*, J. of Halacha and Contemporary Society #58 pg. 115

It should be noted that there is an authoritative opinion, albeit in variance with the accepted view, that there really is no distinguishing characteristic between *garmi* and *grama* actions. However, for punitive purposes, i.e. *kenas, Chazal* have classified usual and frequent injuries as *garmi* and unusual and infrequent injuries as *grama*. The underlying rationale for attaching tort liability is to deter individuals from harming their fellowmen. Should the aforementioned types of negligent misrepresentation be commonplace today in the brokerage industry, then there may be grounds for mandating liability based upon the actions being deemed *garmi*. The
number of cases filed with the New York Stock Exchange rises annually, and in 2002 alone $139 million in damages were awarded. Thus, there may be grounds for liability based upon *garmi*.

19. Rabbi Shabbtai haKohen (17th century Poland), Shach to Choshen Mishpat 386:24

דוק' מילת' דמצינן בש"ס דקנסו אמרי' משום שהיה נראה להם דשכיח קנסו... וכיון דדינא דגרמי אינו אלא קנסא דרבנן הבו דלא לוסיף עלה ואין לך אלא מה שאמרו הם כן נ"ל:
We say this only in cases where we find fines in the Talmud; they fined in those cases because those appeared common to them… And since *garmi* is only a rabbinic penalty, let us not add to it. We only have what they said, in my opinion.

20. Rabbi Shabbtai haKohen (17th century Poland), Shach to Choshen Mishpat 386:6

לפי מה שהעליתי לעיל ס"ק א' דכל דיני דגרמי אינו אלא קנסא דרבנן פשיטא דפטו' באונס... וכן אם היה שוגג נמי פטור...

According to what I raised in 386:1 that all *garmi* is only a rabbinic fine, it is obvious that one is exempt when compelled… And so one who does it accidentally is exempt…

21. Commerce Realty Ltd. v. Olenyk and Olenyk, 1957 CanLII 316 (BC SC)

The first duty of an agent is to comply explicitly with the orders of his principal. If the following of those instructions involves the abandonment by the principal of a statutory protection surely the principal cannot complain.

22. Rabbi Moshe Feinstein (20th century USA), Igrot Moshe Choshen Mishpat 2:16

אבל לבד זה יש לדון בכאן דהא המניות נקנו על שם שמעון השליח... שלכן הרי אי אפשר היה לראובן המשלח בעצמו למוכרם בלא שמעון, ונמצא שבהכרח קבל על עצמו השליחות למכור כשירצה ראובן המשלח... נמצא שנוטה הדין לע"ד שההפסד מיום שאמר לו למכור הוא של שמעון השליח...

Aside from this, there is room to discuss this, for the stocks were purchased in the name of Shimon, the agent… So that Reuven, the principal, could not sell them independently without Shimon, so that [Shimon] must have accepted agency to sell them when Reuven, the principal, wished… In my humble opinion, the law leans toward saying that any loss from the time [Reuven] told [Shimon] to sell belongs with Shimon, the agent…

23. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 183:5

נתן מעות לשלוחו לקנות לו חטים, בין לסחורה בין לאכילה, והלך וקנה לו שעורים, או בהפך, אם היה בהם הפסד הוא לשליח; ואם היה בהם ריוח, הוא למשלח...

If one gives money to his agent to buy wheat – as merchandise or food – and he buys barley, or the opposite, then any loss belongs with the agent, and any profit with the principal…

24. Rabbi Shabbtai haKohen (17th century Poland), Shach to Choshen Mishpat 183:9

דוקא פחת יוקרא וזול', אבל אם אירע לו אונס והאונס לא בא מחמת השינוי שנגנב ונאבד, ואין לו שום שכר להשליח מהמשלח, פטור השליח.

This only refers to appreciation and depreciation, but where there is unavoidable harm, which does not come from the diversion, for it was stolen or lost, and the agent was not paid by the principal, then the agent is exempt.

25. Rambam (12th century Egypt), Mishneh Torah, Laws of Employment 2:3

וכן הורו רבותי שהמוסר כרמו לשומר בין באריסות בין בשמירות חנם והתנה עמו שיחפור או יזמור או יאבק משלו ופשע ולא עשה חייב כמי שהפסיד בידים

And so my mentors ruled: If one gives his vineyard to a guardian, whether for sharecropping or unpaid guarding, with a condition that he dig or prune or dust it on his own, and [the guardian] was careless and did not do so, [the guardian] is liable as though he had actively damaged it.

26. R' Yosef Karo (16th century Israel), Code of Jewish Law, Orach Chaim 443:2

ישראל שהיה בידו חמצו של ישראל אחר בפקדון, יעכבנו עד שעה חמישית, ואם לא בא בעליו ימכרנו לא"י; ואם לא מכרו חייב לבערו בזמן איסורו, אפילו אם אינו חייב באחריותו.

If a Jew holds another Jew's chametz in his care [on the eve of Passover], he should keep it until the fifth hour. If the owner does not return, he should then sell it to a non-Jew. If he fails to sell it, he must destroy it when it becomes prohibited, even if he is not responsible for any harm that comes to it.

27. Rabbi Avraham Gombiner (17th century Poland), Magen Avraham 443:5

ונראה דהנפקד חייב לשלם דמי הפקדון למפקיד דהא ש"ח שהי' יכול להציל ברועים ובמקלות ולא הציל חייב ה"נ ה"ל למוכרו קודם זמן איסורא

Apparently, the holder must pay the owner for the value of the chametz, for an unpaid guardian who could have saved his charge via shepherds and sticks, and did not save it, is liable. So, too, he should have sold it before the prohibition began.

28. Rabbi Shneur Zalman of Liady (18th century Poland), Shulchan Aruch haRav Orach Chaim 443:8

ואינו חייב כלל למוכרו בערב פסח מחמת שקיבל עליו לשומרו אלא מחמת מצות השבת אבידה לבעלים... ולפיכך אינו חייב לשלם...

He is not at all obligated to sell it before Passover by dint of accepting guardianship, but because of the mitzvah of restoring lost property to its owner… Therefore, he need not pay…

29. Rabbi Moshe Sofer (18th century Pressburg), Responsa Chatam Sofer Orach Chaim 105

שפיר קאמר מג"א... דמה דאמרינן דמכירת חמץ הוה כמשיב אבידה היינו משום דאין אדם רשאי למכור את של חברו דרוצה אדם בקב שלו אי לאו משום דהוה כמשיב אבידה, עיי' ב"מ ל"ח ע"א ופסחים י"ג ע"א. והשתא דרשאי למוכרן מפני שהוא כמשיב אבידה ממילא שוב חייב למוכרן, ואי לא מוכרן הוי ליה פשיעה כיון שלא קדם ברועים ומקלות, ודברי מג"א נכונים מסברא.

The Magen Avraham is correct… When we say that selling chametz is like restoring lost property, this is because one [normally] may not sell other people's property, for people prefer their own *kav*, other than because he is like one who is restoring lost property (see Bava Metzia 38a and Pesachim 13a). Now that he can sell it because he is like one who is restoring lost property, then he is required to sell it, and failure to sell it is careless, for he did not come with shepherds and sticks. The Magen Avraham is logically correct.

30. Rabbi Meir Auerbach (19th century Poland, Russia) Imrei Binah, Loans 39

הרא"ש סבירא ליה כרשב"א ודיני דגרמי לאו בשותפין אתמר אלא בין אדם לחבירו אבל שותפים וש"ש חייבים אף בגרמא

Rabbeinu Asher agrees it with Rashba, and the distinctions of *garmi* do not apply to partnerships, but only to general interactions. Partners and paid guardians are liable even in cases of *grama*.

<u>Our Cases</u>

31. CPA of Ontario, *CPA Code of Professional Conduct* Section 202: Integrity and due care and Objectivity Guidance 202 (4):

Members are reminded that they may also be performing professional services when serving in the capacity of a volunteer and, accordingly, are subject to the requirement for objectivity when acting in that capacity.

32. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 306:6

המראה דינר לשולחני, ואמר לו: יפה הוא, ונמצא רע, אם בשכר ראהו, חייב לשלם אף על פי שהוא בקי ואינו צריך להתלמד. ואם בחנם ראהו, פטור...

If one shows a coin to a moneychanger, who approves it, and the coin is bad, then if the moneychanger was paid, he must pay, even if he is a full expert. If the moneychanger saw it for free, and is a full expert, he is exempt…

33. Rabbi Yechiel Michel Epstein (19th-20th century Lithuania), Aruch haShulchan Choshen Mishpat 306:13

ואם אינו בקי חייב לשלם, והוא שיאמר להשולחני "אני סומך עליך" או שהיו הדברים מראים שהוא סומך לגמרי רק על ראיתו, ובלא זה אין לנו לחייב את השולחני מפני שיכול לומר "לא ידעתי שתסמוך עלי לבדי, ותשאל עוד אצל אחרים, ולכן לא דקדקתי יפה יפה." וי"א דאפילו סתמא נמי חייב, דכל המראה לשולחני מסתמא סומך עליו לגמרי. וכתב רבינו הרמ"א דהסברא הראשונה נראה עיקר. ובשכר חייב אף על פי שלא אמר "עליך אני סומך" [נה"מ], דכיון דנוטל שכר וודאי דסמיך עליה לגמרי. וחיוב זה הוא מדיני דגרמי שיתבאר בסי' שפ"ו ובשכר הוי חיובו כשומר שכר:

If the moneychanger is not expert, then he is liable if the client told the moneychanger, "I depend on you", or if his words demonstrate that he depends entirely on his examination. Otherwise, we should not hold the moneychanger liable, since he can say, "I didn't know you would depend on me alone; I thought you would ask others, and so I was not very careful." And some say that the moneychanger is liable even if the person did not say, "I depend on you"; since he takes payment, the client certainly depends on him entirely. And this liability is from *garmi* – see Choshen Mishpat 386 – and when paid his liability is as a paid guardian.

34. Queen *v.* Cognos Inc., [1993] 1 S.C.R. 87 (emphasis added)

Per Sopinka and Iacobucci JJ.: The tort of negligent misrepresentation is an established principle of Canadian tort law. There are five general requirements for a successful claim: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

35. Rabbi Dr. A. Yehuda Warburg, *The Investment Advisor: Liabilities and Halachic Identity*, J. of Halacha and Contemporary Society #58 pg. 117

Just as a wrestler accepts that he may win or lose his bout, similarly an investment client accepts the possibility of profiting from or losing his investment. In each of these instances, there is an implicit waiver of filing a claim for damages against the other. However, should the professional broker offer negligent advice, the customer may sue for damages. Clearly, his assumption of risk was limited to receiving sound investment counsel.

36. Varcoe v. Sterling, 1992 CanLII 7478 (ON SC)

Brokers are required to comply with the regulations governing the conduct of their client's affairs. The cardinal rule of the brokerage business is the "know your client rule". A broker who opens an account for a client is required to obtain from the client an "account application form". It contains detailed information about the client including age, employment, income, net worth, trading experience and trading objectives, as well as personal and family responsibilities. The broker has an obligation to the client, to himself and to the industry to keep up to date on the client's circumstances and informed of any significant changes in those circumstances.

Because of the very high level of risk in trading in commodity futures, both the regulations under the Act and the by-laws of the Toronto Stock Exchange extend beyond the "know your client rule". Section 28 of the regulations under the Act and s. 24.13 of the by-laws of the Toronto Stock Exchange require the dealer to "assess" and to monitor the "suitability" of the client as a trader in commodity futures contracts. He is required to obtain the account application form from the client and a written acknowledgment on a "risk disclosure" form and an executed trading agreement…

37. IIROC [Investment Industry Regulatory Organization of Canada] Rules, 1300.1.q

Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such client based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level.

38. Talmud, Yevamot 44a

"ודברו אליו" מלמד שמשיאין לו עצה הוגנת לו שאם היה הוא ילד והיא זקנה הוא זקן והיא ילדה אומרין לו מה לך אצל ילדה מה לך אצל זקנה כלך אצל שכמותך ואל תשים קטטה בביתך

Devarim 25:8 says, "They shall speak to him" – This teaches that they give him advice that suits him. If he is young and she is old, or he is old and she is young, they say to him: Why would you be with a young girl? Why would you be with an older woman? Go with one who is like you, and do not create strife in your home.