

חושן משפט סימן כה

Rav yosef aino mumcheh sma Rav Sheshes

Sugya of Dayan Shetaah, Kam Dinah vs. Hadar Dinah, Sanhedrin 33A:

Lining up the psak halacha of the Mechaber, Rama & Shach, with the shitos Amoraim & Rishonim in the sugya.

Contradiction: The Mishna in Meseches Sanhedrin, 32A says that “Dinei Memonus *Machzirin*”, that if a Dayan makes a mistake in Dinei Mamonus, that we are Hadar Dinah, and that we redo the psak. The Gemara on 33A brings down a contradiction from a Braysah (#1), that says “Dan en hadin....*ma sheasah asah*, veyishalem mibayso” that it is Kam Dinah, and the psak stays, and since the dayan created a psak that stays in force and does damage, that now he has to pay for it. The Gemara brings down 3 answers to this question.

Rav Yosef: The first answer is Rav Yosef that says “Kan bemumcheh, kan besheayno mumcheh”. That the Mishna says machzirin / Hadar Dinah only when you are a mumcheh. Only a mumcheh can be certain that now he knows the correct psak, and that his original psak was a mistake, and that therefore we should be Hadar Dinah the original wrong psak. A non-mumcheh/hedyot that thinks he is correct now and mistaken before, might really be mistaken now, and correct before, so we have no grounds for undoing the original psak. The Braysah that says Kam Dinah is by a non-mumcheh. The Gemara asks on this answer, that we see in a Braysah (#2), that “im hayah mumcheh lebaish din, patur milishalem” that even where you are a mumcheh, the psak stays in force. The implication of “patur milishalem” is that the damaging psak still stays in force, and the damage is in fact caused. Just you are still patur for paying for the damage that you caused. So we see, that even by a mumcheh, it is Kam Dinah, and not like Rav Yosef’s okimta in the Mishna that by a mumcheh, that it is Hadar Dinah.

Rav Nachman’s Clarification in Rav Yosef

Rav Nachman answers this question on Rav Yosef’s answer, by explaining that in Rav Yosef’s system that you really need 2 active ingredients to be hadar Dinah. “Kan beyesh gadol heymenu bechachma ubeminyan”, that really you need two ingredients to make it Hadar Dinah in the Mishna, Mumcheh + Gadol. That even a mumcheh might not be correct is assuming that he is right now and wrong before. Maybe he is wrong now and was really right before (which is the same problem we have with a non-mumcheh). And that only when you have a Gadol bechachma ubeminyan, that certifies that now you know the correct psak, and that before you were in fact mistaken, do we have a certified mistake, that we go ahead and are Hadar Dinah to undo the wrong psak from before. So the Mishna of machzirin/Hadar Dinah is by a Mumcheh + Gadol, so it is a certified mistake, so we say hadar dina, the Braysah

of “ma sheasah asah, veyishalem mibayso” is by a non-mumcheh, so we say kam dina, and the psak stays, and the dayan pays for his in force mistaken psak. And the second braysah of “im hayah *mumcheh* lebaus din, patur milishalem” that says Kam Dinah even by a mumcheh, is talking where you have the mumcheh, but without the necessary ingredient of Gadol. So we say kam Dinah and the psak stays, but since you are a mumcheh lebaus din, you are patur from paying.¹ The non-mumcheh, where we say “ma sheasah asah, veyishalem mibayso” does not have the special protection from payment that a mumcheh has.²

The severah in this answer, of not knowing if the original psak was wrong, and therefore needing a Mumcheh + a Gadol to verify that is wrong, only makes sense by a taah beshikul hadaas. By a taah bidvar mishna, we can open up the Mishna and see that you blew it and made a mistake, we do not need a mumcheh or a gadol to help us figure out rocket science that it was really a mistake. (see Tosfos 33A s.v. Caan)

This answer that the Shach paskins³ like, is learning the Mishna and both Braysahs to be in a case of taah beshikul hadaas⁴, by lechatchilah sif bais dayanim. One advantage in the Rav Yosef/Rav Nachman answer, is that the 3 cases of the Mishna & 2 Braysos, are dealing with very regular cases. Nobody is making a very glaring mistake that is against an explicit mishna. Nobody is acting out of bounds and is being a dayan that lechatchilah shouldn't be. Fully qualified, dayanim, and the critical chiluk between the Mishna of hadar dina and the 2 braysahs that hold kam dinah, is that in the Mishna's case, you have the formula of mumcheh + gadol = machzir es hadin / hadar Dinah, and the 2 braysahs lack the magic formula of

¹ We see an important factor in our sugya, that certain highly qualified dayanim do not have to pay, even if we say Kam Dinah, and therefore their damaging psak stays in force. The Mechaber, Rama & Shach all learn different severos for why this is true, and it comes out nafka minahs lehalacha depending on what the lomdos is for this petur. The Shach personally learns that a mumcheh that the baalei din were mekabel on themselves to be a dayan, is a lechatchilah kosher dayan, (and this mumcheh *lebaus din* implies that he is acting with the blessing of bais din, and also acting appropriately, and is therefore lechatchilah kosher to be a dayan) is patur if he makes a mistake oltz ones rachmana patrei. He is so knowledgeable, and is acting properly, so it is an excusable mistake that we don't hold against him.

² Note: that even though we are saying that this mumcheh lebaus din has a petur of ones rachmanah patrei, in the Shach, there are dayanim who are a mumcheh, but who act out of bounds, like a mumcheh who judges by himself, without the invitation of the baalei din, who we say acted inappropriately, so we do not give him a petur of ones.

³ Note that the Shach does add several factors that are not directly addressed in this answer of Rav Yosef + Rav Nachman. He qualifies that only certain mumches are eligible for a gadol machziro bailout. A mumcheh that does not have the explicit kabbalah of the baalei din, that paskins alone as a dayan yachid, is technically a mumcheh + gadol so we know that the psak is a certified mistake. But since this dayan acted inappropriately as it says in Pirkei Avos, “al tehi dan yechidi”, and he acted high handedly, so we do not bail him out of his mess that he caused, and we do not reverse his din, and he is stuck with a kam Dinah psak that he now has to pay for.

⁴ This is muchrach in the assembly line of the Shach, and See Tosfos 32A s.v. Caan that spell this out explicitly.

mumcheh + gadol, so you are left with the psak and therefore kam Dinah. One braisah is mumcheh without the gadol, and one braysah is without even a mumcheh.

The Baal Hamaor paskins like Rav Yosef + Rav Nachman's clarification. The Shach (with a few minor differences) follows the Baal Hamaor.

The Rama & Mechaber clearly do not paskin like this answer, that by taah beshikul hadaas, that we usually say kam Dinah, and only say hahar Dinah by a mumcheh + gadol, as it is a non-factor, that never applies according to them.

The Mechaber learns that by taeh beshikul hadaas by a mumcheh case of a sif bais lechatchilah dayan, (1 mumcheh + kabbalah) and a sif gammel bedieved dayan (1 mumcheh without kabbalah) that you try to redo the psak, hadar dinah, even without any gadol present.

To make matters even more glaring, the Mechaber learns that by the hedyot case of a lechatchila sif bais dayan, (3 hedyotos + kabbalah) and even the bedieved hedyot dayan of sif gammel, (1 hedyot + kabbalah) that we try to say hadar dinah and redo the psak, without even a mumcheh present.

The Rama lerans that by a taeh beshikul hadaas that it is always kam dinah, no matter what, and that even if you have a mumchah + gadol, we never reverse the psak to say hadar dinah.

In a case of taeh bidvar mishna, the Shach takes elements of svara from Rav Chisdah's answer, and he would make distinctions between an active and a passive psak.

Rav Sheshes: Rav Sheshes learns the Mishna's case of hadar dinah where there is a taeh bidvar mishna. This is a total mistake that lacks any severa or daas torah to it. Therefore it is not a valid psak and we are hadar dinah. The 2 braysos where we say kam Dinah, are talking where any dayan makes a taeh beshikul hadaas where, there is some element of daas torah severa to it, and therefore it is a horaah which is valid and stays in effect. The classic case of taeh bidvar mishna is where there is a machlokes Tannaim or Ammoraim where both are legitimate Daas Torah positions, just the flavor of the sugya indicates that the Gemara leans toward holding like one shitah more than the other. But both are valid Daas Torah positions and therefore a qualified and sanctioned horaas chacham.

The Rama paskins like this Rav Sheshes, and therefore learns that a taeh bidvar mishna is hadar dinah, and a taeh beshikul hadaas is always Kam Dinah. If you can't be hadar Dinah by a taeh bidvar mishna, and therefore the dayan made damage, and by any case of taeh beshikul

hadaas we say kam dinah and therefore there is, it comes down to an issue of payment and this depends on what kind of dayan you are and therefore what kind of dayan insurance you have. The Rama does not hold that Rav Yosef + Rav Nachman mumcheh or Gadol are factors at all. Likewise, he does not hold that Rav Chisdah's active/passive split is a factor at all.

Rav Chisdah:

Rav Chisdah answers "kan shenal unasan miyad", that when a dayan actively paskins by physically taking the money from one baal davar and giving it to the other baal davar, then we say that Kam Dinah (in the case of the two Braisos), and the psak stays and the dayan is chayav to pay for this psak that creates hezek. A passive psak of just saying the halacha, is hadard Dinah, and we redo the mistaken psak. The Mechaber paskins like Rav Chasdah, and is therefore mechalek between active and passive by a bidieved dayan in Sif Aleph (taeh bidvar mishna) & Sif Gimmel (taeh beshikul hadaas). The Shach explains in the Mechabar the svara of Rav Chisdah⁵, that even by a bidieved dayan, we prefer (if possible and where there is no loss to the baal davar) to bail out the dayan using the Rif's svara that we do not want dayanim to go on strike. If a dayan steps out of bounds and goes on a rampage, then he is a garmi mazik, and we would be more than happy for an irresponsible dayan like that to go on strike and take up plumbing instead. The Rama is never mechalek between Rav Chisdah's sevara of active and passive.

⁵ The Braissa #1, which says "ma sheaseh asah veyishalem mebayto" which means that kam Dinah, according to Rav Chisdah's answer, is a case of natal unasan biyad. One case in this braisah, is "zikeh es hachayav". The Gemara asks, how it is possible to actively pater someone, because by definition, to pater someone, you do not actively take money, you just passively say that they are patur. In the maskana pshat of Rav Chasdah, Ravina says that the case of actively pating someone, is where you actively take away a mashkon that the malveh has and give it back to the loveh, actively making it so that the malvah is not collecting here. However, the gemara dose have a different attempted pshat in Rav Chisdah, which it discards, ending off with two kashias on it, and leaving it in a state of "kashia". This hava minah pshat in Rav Chisdah says that the way how you get a case of natal unasan biyad, is by a case of passively pating someone, is that when you say a person is patur, since it is direct and automatic that the chiyuv goes off, and the psak is consummated on the spot, that it is similar to a case where you actively took money from the baal davar and finished off the psak on the spot. The Shach's explanation of the Mechaber in Rav Chisdah that has to do with the fact that when a dayan over steps his bonds, and goes on a rampage, and acts irresponsibly, that we do not protect this dayan so that he won't go on strike, because we are happy if lose a dayan like this, does not seem to fit into this hava mina pshat in Rav Chisdah. When a dayn just says the words "patur ata" and doesn't do anything else, it might complete the psak on the spot, but there is no sevara that he overstepped his bounds and is an undesirable dayan.