

28 Iyar 5776  
June 5, 2016



Bava Kamma Daf 5

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**Rabbi Oshaya and Rabbi Chiya**

[The Gemora had asked: Why didn't Rabbi Oshaya list Rabbi Chiya's cases? The Gemora answered: He was reckoning compensation payments only; he was not discussing fines.]

The Gemora asks: But the payment of *zomemim* witnesses<sup>1</sup> should be regarded as compensation, so why didn't Rabbi Oshaya mention it?

The Gemora answers: Rabbi Oshaya follows Rabbi Akiva, who holds that the *zomemim* do not pay if they admit (that they were convicted of being *zomemim* in a different *Beis Din*; this proves that the payment is a penalty, and not compensation, for the *halachah* is regarding penalties that one is exempt from paying if he admits that he is liable).

The Gemora asks: If he holds like Rabbi Akiva, he should reckon two types of "ox"! He should mention the case of an ox damaging property and an ox damaging a person, for we learned in a *Mishna*: Rabbi Akiva says: If a *tam* damages a person, the owner is required to pay full damages. [It emerges that the payment for a *tam*'s damages is different when it damages another animal

<sup>1</sup> when witnesses offer testimony and other witnesses refute them claiming that the first set of witnesses could not possibly testify regarding the alleged crime since they were together with them at a different location at the precise time that they claimed to witness the crime somewhere else; the Torah teaches us that we

or a person; accordingly, they both should be reckoned!?!]

The Gemora answers: Rabbi Akiva has anyways limited the strength of this ruling, since it was taught in a *braisa*: Rabbi Akiva said: You might think that in the case of a *tam* injuring a man, payment should be made from choice property (and not the body of the damaging ox); it is therefore stated: *This judgment shall be done to it*. This teaches us that the payment should be made only out of the body of the *tam* and not from choice property. [It emerges that the owner will not always pay full damages, for if the damaging animal is worth less than the amount damaged, he will pay only the amount equivalent to that of the damaging animal. Since in these cases, it is similar to the case where an ox gores another ox, Rabbi Oshaya did not feel that it was necessary to reckon it by itself.]

The Gemora continues to ask on Rabbi Oshaya: Why didn't he reckon the cases of the rapist, the seducer (in certain cases, he must pay fifty shekalim) and the defamer (a husband who falsely claims that his wife was not a virgin and that she committed adultery; he is required to pay one hundred shekalim to her father),

believe the second pair in this instance; the first witnesses are called "*eidim zomemim*" -- "*scheming witnesses*," and they receive the exact punishment that they endeavored to have meted out to the one they accused



since their payments should be regarded as compensation?

The *Gemora* answers: Whichever payment you are referring to, it has already been dealt with. If you are discussing the actual damages incurred by the girl, this has already been dealt with under “damages”; if you are referring to her suffering, this has already been dealt with under “pain”; if you are referring to her humiliation, this has already been dealt with under “embarrassment”; if you are referring to her depreciation, this has already been covered by “damages”! What else then can you suggest? The payment as a fine!? Rabbi Oshaya does not reckon fine payments.

The *Gemora* asks: Why didn't he reckon the cases of one who is *metamei* someone else's produce (e.g., he touches a dead *sheretz* on someone's *terumah*), one who mixes *terumah* into someone's *chullin* (thus restricting this mixture to be eaten only by *Kohanim*) and one who makes someone's wine into *nesech* (by pouring the wine as a libation to idolatry, which renders all the wine in the barrel forbidden for any use whatsoever), since their payments should be regarded as compensation?

The *Gemora* answers: However this payment should be considered, it has already been dealt with. If you maintain that an unrecognizable damage (i.e. just causing a change in status) is considered an actual damage, this has already been dealt with under “damages”; and if you hold that it is not regarded as damage, then the reason to pay in such circumstances would only be because of a penalty, Rabbi Oshaya does not reckon fine payments.

The *Gemora* notes: By the fact that Rabbi Chiya does reckon these cases, can it not be proven that he holds that an unrecognizable damage is not considered an actual damage, for if it would be regarded as a damage, why would he mention “damages” twice?

The *Gemora* answers that this cannot be proven, for we can say that Rabbi Chiya wished to reckon two types of damages – recognizable damage and unrecognizable damage.

The *Gemora* asks: It is understandable that our *Tanna* found it necessary to give the total number (*four*) of main categories of damages in order to exclude those of Rabbi Oshaya. And it is also understandable that Rabbi Oshaya gave the total number (*thirteen*) in order to exclude those of Rabbi Chiya. But what could be excluded by the total number (*twenty-four*) specified by Rabbi Chiya?

The *Gemora* answers: It is intended to exclude the cases of an informer (*a moiser - a Jew who tells the gentile authorities about another Jew's property, causing it to be confiscated*) and one who is *mefagel* (*he makes it piggul - a korban whose avodah was done with the intention that it would be eaten after its designated time*) the *korban* of another.

The *Gemora* asks: Why doesn't Rabbi Chiya mention those cases?

The *Gemora* answers: He doesn't mention the case of *piggul*, for he is not discussing *kodoshim* cases. He doesn't reckon the informer case, for that is a damage caused by mere words, and he is not discussing damages caused by speech.



The *Gemora* asks: But he does reckon the case of the defamer, which is a damage caused by mere speech?

The *Gemora* answers: It is a speech that has in it an action (for the laws of the defamer do not apply unless he had relations with his wife first).

The *Gemora* asks: But he does reckon the case of the *zomemim* witnesses, which is a damage caused by mere speech?

The *Gemora* answers: The Torah refers to it as an action, as it is written: *And you shall do to him as he plotted to do to his brother.*

The *Gemora* asks: What are the sub-categories of Rabbi Oshaya and Rabbi Chiya's cases?

The *Gemora* answers: [There are no sub-categories.] They are called main categories, for the *halachah* is that the owner would pay from the best land, as is the *halachah* by the other main categories.

The *Gemora* explains the *gezeirah shavah* that is used to derive this *halachah*. [For by all of them, it either states: *tachas*, *nesinah* (in some form), *yeshalem*, *keseif*.] (5a)

### **Learning One from the Others**

The *Mishna* had stated: They are both unlike fire in that they are alive, while fire is not.

Rav Mesharshiya in the name of Rava explains the meaning of the *Mishna*: Let the Torah write only two of the damagers (*shor* and *maveh*) and we would be able to derive the third (*fire*) from them by using a *tzad hashavah* (the common characteristic of two or more

*halachos*). [According to Shmuel, who holds that *maveh* is *shein*, the derivation would work as follows: If you will ask that you cannot derive fire from *keren*, for by *keren*, the animal intended to do damage, you can answer that *shein* will prove otherwise – for even though it did not intend to cause damage, the owner is still liable. If you will ask that you cannot derive fire from *shein*, for by *shein*, the animal derived pleasure from its damage, you can answer that *keren* will prove otherwise – for even though it did not derive pleasure from its damage, the owner is still liable. It emerges that its unique characteristic is not what causes the owner to be liable; rather, it is the common characteristics of the two. They both normally inflict damage and a person must watch them to ensure that they do not damage. So too regarding fire – it normally does damage and a person must guard it – therefore, the owner will be liable. According to Rav, who holds that *maveh* is *man*, the derivation would work as follows: If you will ask that you cannot derive fire from *keren*, for by *keren*, the animal intended to do damage, you can answer that *man* will prove otherwise – for even though he does not intend to cause damage, he is still liable. If you will ask that you cannot derive fire from *man*, for by damages caused by *man*, he is obligated to pay an additional four things, you can answer that *keren* will prove otherwise – for even though the owner is not obligated to pay an additional four things, the owner is still liable. It emerges that its unique characteristic is not what causes the owner to be liable; rather, it is the common characteristics of the two. They both normally inflict damage and a person must watch them to ensure that they do not damage. So too regarding fire – it normally does damage and a person must guard it – therefore, the owner will be liable.]



The *Mishna* rejects this derivation: We cannot derive one from two (*for they are both unlike fire in that they are alive, while fire is not*).

Rava said: If the Torah would have written only one of the main categories together with the damage of pit, we would have been able to derive all of the other damages from them using a *tzad hashavah*. This would work for all the damages except for *keren*, for we can ask that the other damages are different than *keren*, for they are *mu'ad* from the beginning (*and keren is not*). And according to the one who maintains that *keren* is stricter (*and even more liable*) because the animal intend to do damage, even *keren* can be derived from there.

So, the *Gemora* asks: Why did the Torah write all of these damages (*if they can be derived from the others*)?

The *Gemora* answers: It is to teach the individual *halachos* that apply to each one of the damages (*and they do not apply to the others*). *Keren* was written to teach us the distinction between *tam* and *mu'ad*. *Shein* and *regel* were written to teach us that the owner will be exempt from paying if the damage occurred in a public domain. *Bor* was written to teach us that one would be exempt from paying if utensils were damaged in it. And according to Rabbi Yehudah, who holds that one would be liable to pay for utensils, *bor* was written to teach us that one would be exempt from paying if a person was killed in it. A person damaging was written to teach us that he is liable to pay for the additional four things. The damage of fire was written to teach us that one would be exempt from paying for hidden things that were burned in the fire. And according to Rabbi Yehudah, who holds that one would be liable to pay for hidden things, it was written to teach us that

one is liable to pay if the fire licked a plowed field or singed his stones. (5a – 6a)

## INSIGHTS TO THE DAF

### *Shein and Regel in a Public Domain*

**By Reb Avi Lebovitz**

The Rif says that *shein* and *regel* are exempt for damages in a public domain because “it is normal,” meaning that this type of damage is not out of the ordinary.

The Rosh is bothered with why the Rif feels compelled to offer a rationale for the exemption in public domain; it is simply a Scriptural exposition that the *Gemora* learns (21b) that *shein* and *regel* are only liable in a private domain!?

The Rosh explains that the Rif is coming to explain the Torah’s exemption. Since it is normal for them to walk in the public domain and damage by just normal activities, it is impossible for the owner to guard them and prevent these types of damage. Therefore, if there is a beam - halfway in the public domain and halfway in the private domain, and the animal steps on the beam in the public domain which causes damage to utensils in the private domain, the owner is exempt. Had it just been for a verse, the owner would be liable since the damage occurred in a private domain, but since the rationale for exempting in a public domain is because the animal has a right to walk there freely, the owner is even exempt from liability for damages that are caused in a private domain from the animal that is in the public domain.

The Yam Shel Shlomo offers a simpler understanding of the Rif. The Rif is not coming to teach a novel *halachah*; rather, he is just trying to help us categorize the different forms of damage. Anything which is normal qualifies as *shein* and *regel*, which are exempt in a public domain. This idea is supported by the Nemukey Yosef (15b). The *Gemora* says that if a dog eats large sheep that are not normal for a dog that size to eat, it qualifies as *keren*, but if they are small sheep, then, it qualifies as *shein*, since it is normal. The Nimukei Yosef explains that anything which is abnormal is considered *keren* even if the animal is doing it for the pleasure of eating, and therefore the damage qualifies as a “penalty,” which we don’t have the power to collect outside of Israel. The Rif is also explaining that the primary characteristic of *shein* and *regel* is that they are normal, to the exclusion of anything which is abnormal automatically qualifies as *keren* rather than *shein* or *regel*.

### A Negligent Cook

The Amoraim on our *daf* disagree whether or not causing *hezek she’eino nikar* [indiscernible damage] requires compensation. The Meiri (*Gittin* 40b, s.v. *ule’inyan mishnaseinu*) explains that this concept refers to cases where the object itself is not physically damaged, but rather for halachic reasons it can no longer be used. For instance, when a person renders *terumah* belonging to someone else *tamei*, the fruit is not affected physically, but nevertheless it can no longer be used. The halacha (*C.M.* 385:1) states that although in principle, someone who causes *hezek she’eino nikar* is exempt from paying, if done with intent the Sages fined him, requiring him to pay the entire cost of the damages.

On the other hand, one who causes physical damage must always pay the owner. Therefore, if someone makes a tiny hole in someone else’s *esrog*, he must pay for the damage since the *esrog* is no longer fit for a mitzvah and an actual change took place. The implications of this halacha can be learned from a subtle distinction made by the *Pri Megadim*.

A cook once placed *treif* meat into two pots unintentionally. One pot contained vegetables and the other kosher meat. We can infer from the *Pri Megadim* (*O.C., Hanhagas Orach Chaim, Seder 2*) that the cook would have to pay for the vegetables that could no longer be eaten, but not for the kosher meat that became forbidden. No actual change was rendered to the kosher meat mixed with the *treif* meat, since its taste remained the same. Therefore this was a case of *hezek she’eino nikar* and the cook was not obligated to pay since he added the *treif* meat unintentionally.

On the other hand the taste of the vegetables that became *treif* was altered and they had acquired a meaty flavor. The damage was clearly discernible, and even though the meat was added accidentally, since a man is considered *mu’ed le’olom* [always liable for his acts] the cook was required to pay the owner of the vegetables for his loss (see Responsa *Minchas Shlomo* I §88).

DAILY MASHAL

Informer

In Shadik, Poland there was a moser {informer} who terrorized the Jewish community. While he was being richly rewarded, tremendous suffering was befalling the town as a result of his slanderous reports. He furthermore had the audacity to demand the most

dignified seat in the synagogue and to be called to the Torah for the most honorable aliyah {different people are honored to be called to the Torah during the reading}.

When the community Rav had passed away, the position was filled by one of the Torah leaders. He had wanted the position in this smaller community as it would afford him a chance to devote himself to his studies in a relatively uninterrupted way. He had a small Beis Medrash {study hall} adjacent to his house wherein he immersed himself in prayer and study. When the new Rav heard of the damage being caused by this moser and his insolent demands for honor, he decided that this disgrace could not continue.

On one Shabbos, the Rav appeared in the main synagogue. When the moser was called for the aliyah, the Rav pounded on the lectern and shouted: "What do you have to do with the Torah!? You endanger the lives and possessions of your brothers! How dare you come forward to pronounce a blessing on the holy Torah? Leave at once!"

The humiliated man hurriedly backed out of the synagogue. As he was leaving, though, he turned to the congregation with a wicked smile and sneered: "I'll teach you... You'll all pay for this dearly..."

The next few months passed uneventfully with the community nervously awaiting the explosion of the time-bomb. One day, the Rav was summoned to a nearby village to perform a bris {circumcision}. As he was traveling with two disciples, they saw in the distance the moser approaching on a horse. They became quite nervous while the Rav maintained his calm composure. Suddenly, as the horse was almost upon them, the moser jumped off the horse and ran

toward the Rav. To the shock of the students, he bowed before the Rav and began to beg him for forgiveness. He then mounted his steed and rode off.

The Rav turned toward his bewildered students and explained. "When I saw him approaching, I sought counsel from a passuk {verse}. I thought of the verse in Mishlei [27:19]: As the face of the water reflects the face that it's shown, so too the heart of a man to a man. I started to search for some merit on his behalf. How sad, to think of the state of callousness that this man has sunken to. Perhaps, with the right education and home, this would never have happened to him. I kept thinking along these lines until I was overcome with compassion for him and bore him no animosity or ill will whatsoever. Once I was viewing him in that way, his heart responded in kind to that warmth and caring. He started to think: 'Perhaps the Rav is right. His intentions are not for personal honor or simply to fight with me. His intentions are truly for the sake of Hashem's honor.' With such reciprocal thoughts, he approached me to beg forgiveness for what he had done."