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Bava Kamma Daf 36

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***They Both are Liable***

The *Mishna* had stated: If both of them (*two animals chasing after one*) belonged to one person, both are liable.

Rava from Parzika said to Rav Ashi: May we conclude from our *Mishna* that if one of two *tam* oxen did damage, the damaged party may collect from either one of the animals (*and if one of them was lost, he may collect from the other*)? [Why should this be? Shouldn't he be required to bring a proof that this animal damaged before he collects from it?]

The *Gemora* answers: The *Mishna* is dealing with a case where both animals are *mu'ad*.

The *Gemora* asks: If so, let us consider the latter case of the *Mishna*: If one were big and one were small, and the injured party says, "The big one caused the damage," and the damager says, "Not so; but the small one was the one that caused the damage," the *halachah* is that whoever is attempting to take money from his fellow, he is the one who must bring the proof. If the *Mishna* is discussing a case of *mu'ad*, what difference does it make? The damager will anyway be required to pay for the complete value of the ox!?

Rav Ashi replied: The latter ruling is referring to animals that are *tam*, and the former case is dealing with animals that are *mu'ad*.

Rav Acha the Elder asked Rav Ashi: If we are discussing *mu'ad* animals, why does the *Mishna* say that "they" are liable (*referring to the oxen*)? The *Mishna* should have stated that the owner is liable! And also, why does the *Mishna* say that they are "both" liable?

Rather, the *Gemora* answers: The *Mishna* is dealing with *tam* animals and the *Mishna* is following Rabbi Akiva, who holds that the damager and damagee are partners in the damaging ox. Accordingly, the damager, in this case, is required to pay only if both animals were present, where the damager cannot push the damagee away; however, if they were not both here (*one of them was lost*), the damager can say, "Go and bring me a proof that this ox is the one that did the damage and then I will pay you." (36a)

WE SHALL RETURN TO YOU, HAMANIACH

***Mishna***

If an ox gored four or five oxen (*and it is still a tam, whose owner pays from its body*) one after the other, he pays to the owner of the last one of them (*he is the first one to get paid*). If there is some excess in it (*more than what the damaging animal is worth*), it is returned to the one before him (*the next to last injured party; and the one's before him will lose out*); and if there is still excess in it, it is returned to the one before this one. The last one damaged is the one who profits (*for he is the first to be paid*); these are the words of Rabbi Meir.

Rabbi Shimon says (*he holds that the damager and the damagee become partners in the damaging ox, and they will both be liable if it damages again*): If an ox worth two hundred zuz gored an ox worth two hundred zuz, and the carcass is not worth anything, this one takes a *maneh* and this one takes a *maneh*. If it again gored another ox worth two hundred zuz, the last one takes a *maneh* (*half damages*) and those before him (*the damager and the damagee*) - this one takes fifty zuz and this one takes fifty zuz. If it again gored another ox worth two hundred zuz, the last one takes a *maneh*, and the one before him takes fifty zuz, and the first two each take a golden *dinar* (*twenty-five zuz*). (36a)

### ***If it Gores a Number of Oxen***

The *Gemora* asks: It would seem that Rabbi Meir is not in accordance with both Rabbi Yishmael and Rabbi Akiva!? For according to Rabbi Yishmael, who maintains that the damagee is but a creditor, and that he has only a claim of money against him, why does the *Mishna* rule that the last one damaged is the one who profits? The *Mishna* should have ruled that the first one damaged is the one who profits (*for debts to creditors are normally settled in the order that they occurred*)!? And according to Rabbi Akiva, who holds that they are both partners in the damaging ox, why does the *Mishna* rule that if there is some excess in it (*more than what the damaging animal is worth*), it is returned to the one before him? The *Mishna* should have ruled that it is returned to all of them (*for they are all equal partners*)!?

Rava answers: The *Mishna* is in accordance with Rabbi Yishmael, and the reason why the last one damaged is the one who profits is because the *Mishna* is dealing with a case where each one of the damagees seized the damaging ox (*as security*) in order to collect the damages from it, and they become like a paid custodian over it with respect to all future acts of damage (*and therefore, if they are negligent in their guarding of the animal, they are*

*liable to pay for the damages; it is for this reason that the last one damaged is the one who benefits*).

The *Gemora* asks: If so, why does the *Mishna* rule that if there is some excess in it (*more than what the damaging animal is worth*), it is returned to the one before him (*the next to last injured party; and the one's before him will lose out*)? The *Mishna* should have ruled that it is returned to the initial owner (*since he should never have lost his original one hundred zuz, for when the animal gored the first time and the damagee seized it, he became responsible on half of it, for that is what is rightfully his; he forfeits this portion when the animal gores again, but this should not affect the initial hundred*)!?

Ravina explains the *Mishna's* ruling as follows: If the damages (*the payment due to the second to last victim*) are more (*than the payment due to the last victim*), the excess is returned to the one before him (*the second to last victim*). [*If the second to last one was worth one hundred zuz and last one was worth fifty zuz; the last one will collect twenty-five for his half damage and the one preceding him will collect fifty zuz; if there is still leftover money, it will belong to the one preceding him.*]

Ravin in the name of Rabbi Yochanan explained the *Mishna* in the same manner as well, for he said that the rulings of the *Mishna* are based on the negligence of the custodian (*meaning that each victim seized the animal in order to collect from; they are responsible because they become custodians on the animal*).

The *Gemora* asks on Rava: You explained the *Mishna* in accordance with Rabbi Yishmael, but let us consider the latter part of the *Mishna*: Rabbi Shimon says: If an ox worth two hundred zuz gored an ox worth two hundred zuz, and the carcass is not worth anything, this one takes a *maneh* and this one takes a *maneh*. If it again gored another ox worth two hundred zuz, the last one takes a *maneh* (*half damages*) and those before him (*the*



*damager and the damagee*) - this one takes fifty zuz and this one takes fifty zuz. If it again gored another ox worth two hundred zuz, the last one takes a *maneh*, and the one before him takes fifty zuz, and the first two each take a golden *dinar* (twenty-five zuz). This ruling is in accordance with Rabbi Akiva, who holds that the damager and the damagee become partners in the damaging ox, and they will both be liable if it damages again!

It emerges that the first ruling in the *Mishna* would be following Rabbi Yishmael and the second ruling is in accordance with Rabbi Akiva!?

The *Gemora* answers: Yes, for Shmuel said to Rav Yehudah: Sharp one! Let the *Mishna* be (*do not try to explain it according to one Tanna*) and come after me. The first ruling of the *Mishna* is in accordance with Rabbi Yishmael and the last ruling is in accordance with Rabbi Akiva. (36a – 36b)

### **Hitting in the Ear**

We learned in a *Mishna*: Someone who (*shouts into or*) hits his friend's ear must pay a *sela* (*for the humiliation*). Rabbi Yehudah said in the name of Rabbi Yosi HaGelili: He is required to pay him a *maneh*. [*A sela equals four dinar, which is one zuz, whereas a maneh equals one hundred dinar.*]

The *Gemora* cites an incident: A certain man hit another man's ear. Rav Tuvyah bar Masnah sent him to Rav Yosef, and he inquired of him as to whether the *Mishna* meant a Tyrian *sela* (*pure silver, which equals four zuz*) or merely a provincial *sela* (*one from this country, which was only worth half a zuz since it was minted from seven parts copper and one part silver*). Rav Yosef sent back a reply: We have learned it from our *Mishna*: And the first two each take a golden *dinar* (twenty-five zuz). Now, should you assume that the *Tanna* is calculating by the provincial *sela*, we may ask, why does he not continue the division

by introducing a further case (*when the ox gored another time*) where the amount left for each of the first two will be twelve zuz] and one provincial *sela*?

Rav Tuvyah replied: Is it necessary for the *Tanna* to mention many cases like a peddler (*counting out coins*)?

The *Gemora* asks: What was the solution to this issue?

The *Gemora* answers: The solution was gathered from the statement made by Rav Yehudah in the name of Rav: Any "money" stated in the Torah refers to Tyrian currency, while Rabbinic money refers to provincial currency.

The plaintiff upon hearing that (*the fellow only owes him a provincial sela*) said to the judge, "Since it will only amount to half a zuz, I do not want it; let him give it to the poor." Later, however, he retracted and said, "Let him give it to me, as I will go and obtain a cure for myself with it." But Rav Yosef said to him, "The poor have already acquired it, for although they were not present here, we act as the agents of the poor (*and we acquired it on their behalf*), as Rav Yehudah said in the name of Shmuel: Orphans do not require a *pruzbul*. Rami bar Chama learned like this as well: Orphans do not require a *pruzbul*, because Rabban Gamliel and his *Beis Din* are the parents of orphans.

The *Gemora* related another incident: Chanan the Evil once hit his fellow in the ear. Rav Huna said: Give him half a zuz. Chanan had a worn out zuz which he wished to pay him his half a zuz with. He was not able to exchange it, so he went and hit the fellow again in the ear and gave him that (*worn out*) zuz. (36b – 37a)

### **INSIGHTS TO THE DAF**

#### ***Tam Goring Four or Five Times***



The Rishonim ask: How can an animal that gores four or five times remain a *tam*? It should be a *mu'ad* after three times!?

Rashi answers: The *Mishna* is referring to a case where the animal gored once and then saw other animals but did not gore them. It then gored again and once again saw other animals but did not gore them. This process repeated itself several times. It emerges that the animal can gore many times without becoming a *mu'ad*.

The Rashba answers that the animal gored many times consecutively, but they never testified against it in *Beis Din*. An animal cannot become a *mu'ad* except in *Beis Din*.

The Meiri writes that it did not become a *mu'ad* because it gored all the animals in one day.

The Pnei Yehoshua has trouble with this explanation, for the *Tanna* of our *Mishna* is Rabbi Meir, and he holds that an animal can become a *mu'ad* by goring three times in one day.

### Can a Vow to Give Tzedakah be Annulled?

According to Torah law, a debt that remains outstanding at the end of the *Shmitta* year is null and void and the creditor cannot demand repayment. Even if the borrower wants to repay his loan, the lender is commanded to say, "I hereby waive the loan." However, the *Shulchan Aruch* (C.M. 67:28) rules that *Shmitta* does not affect money owed to a *tzedakah* fund. The source for this halacha comes from our *daf*, which says that *beis din* is considered the representative of orphans and the poor (see Rashba). Since the loan is owed to the *beis din*, the halachos of *Shmitta* do not apply—much like a *pruzbol*, which transfers the right to claim the debt to the *beis din*. The borrower must then pay the debt after *Shmitta*.

A debtor who sought to avoid his creditor lost his case due to this halacha. The debtor admitted that he owed the creditor money, but was unwilling to deal with him. To solve the problem an arrangement was made to transfer the money to the *beis din*, which would then hand it over to the creditor. Meanwhile the *Shmitta* year passed and the debtor, who had not yet paid the loan, claimed that it had been nullified by *Shmitta*. However, the *beis din* decided that since it was acting as the creditor's agent, the debt was still due (*Piskei Din, Yerushalayim, Dinei Mamonos U'Birurei Yahadus III, Psak Din*, p. 19).

According to the Rashba (Responsa I §656), when someone makes a *neder* to donate money to a *tzedakah* fund he can later nullify his vow through a *chacham*. However, if he transfers the money to a third party, he can no longer nullify his *neder*, although the money has not yet been passed on to the *gabbaim* [see *Aruch Hashulchan, Y.D. 258:22*].

The *Noda B'Yehuda* (*Mahadura Tannina, Y.D. §154, s.v. ad kan*) provides an insightful explanation for the reasoning behind the Rashba's ruling: When someone approaches a *chacham* and asks him to void a *neder*, he must declare that had he known the consequences he would have never made the vow. Although the person trying to nullify the vow might actually be lying, since people are trusted regarding *issurim*, the *chacham* must accept his word and annul the *neder*.

In our case, however, if the *chacham* accepts his declaration, he would be depriving the poor of money that would otherwise reach them. Therefore he is not allowed to believe the donor, and the money must remain with the third party. The *neder* remains intact and the donor must instruct the third party to give the money to *tzedakah*.