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Bava Kamma Daf 46

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### Maintaining a safe environment

In the Mishna, R’ Eliezer had stated: There is no level of guarding that would be sufficient for a *muad*, short of killing it.

Rabbah said: What is R’ Eliezer’s source for this? The verse in Shemos 21:36 which says “And he did not guard it” which R’ Eliezer interprets as “and he shall not guard it”, implying that no level of guarding would be sufficient.

Abaye asks: In the context of someone who digs or opens a pit in the public domain, the verse says in Shemos 21:33 “And he will not cover it”. According to R’ Eliezer, we should interpret this to mean that there is no way for someone who creates a pit to satisfactorily provide a safeguard to prevent anyone from falling in. Yet we know this is not true from the Mishna on 52a that tells us that if someone creates a pit and covers it properly, and then an ox falls into it and dies, he is exempt?

Abaye answers that the source of R’ Eliezer is rather as R’ Nosson teaches in a Baraiasa: How do we know that it is forbidden to maintain a vicious dog or a rickety ladder in his house? From the verse in Devarim 22:8 “You shall not place blood in your house”, and R’ Eliezer extends that prohibition of maintaining a hazard in your house to an ox that has damaged 3 times and been rendered a *muad*.

**WE SHALL RETURN TO YOU, SHOR SHENAGACH DALED  
V’HEI**

### 5<sup>th</sup> Perek – Mishna

If an ox gored and killed a pregnant cow, and the dead calf is found alongside it, and we don’t know if the cow gave birth before the goring, and the attacker is not liable for the calf, or if the goring caused the cow to miscarry, the owner of the ox must pay half of the damages for the cow, and a quarter of the damages for the calf.

Similarly, if a pregnant cow gored an ox and the calf was found alongside the cow, and we don’t know if the cow gave birth before the goring so the calf was not involved in the goring, or if the cow gave birth after the goring, the victim collects the damages based on half the value of the cow and also a quarter of the value of the calf.

### Burden of proof

Rav Yehuda says in the name of Shmuel: This Mishna represents the opinion of Sumchos who holds that any case where there is a monetary dispute, we divide it. However the Rabbis say that this is a major principle of law that the one who is looking to extract money must bear the burden of bringing proof to support his claim.

Why did Shmuel preface the Rabbis opinion by saying that it is a major principle of law? To teach us that they would apply this ruling even in a case where the plaintiff presents a definite claim and the defendant is not certain of his counter-argument.



Alternatively, to include a case that is the subject of dispute. If someone sells an ox and then the purchaser discovers that it has a history of goring, Rav says the sale is invalidated, but Shmuel says the seller can claim that he was selling it for the purpose of slaughtering and eating it, and it would be incumbent on the purchaser to prove that both parties had intended the purchase to be for the sake of plowing.

The Gemara asks: Why not investigate the purchaser to see what his normal business practices are; if he purchases oxen for plowing or for eating?

The Gemara answers: He has a history of buying oxen for both reasons.

The Gemara asks: Let us use the purchase price to determine the intentions, as an ox being sold for plowing is more expensive than an ox being sold for its meat?

The Gemara answers: The price of meat increased so the purchase price is not indicative of their intentions.

The Gemara asks: If the seller has no liquid assets, what is the point of this dispute, the purchaser would just keep the ox in lieu of a refund. As the popular adage goes: "If someone owes you money, collect even bran from him as payment"?

The Gemara answers: We are referring to a case where the owner has liquid assets available, and the purchaser is claiming a refund. Rav holds that we follow the majority, and the majority of oxen sold are sold for the purpose of plowing, and therefore the sale is invalidated. Shmuel holds that we only use the majority as a determination in cases of ritual law, but in cases of monetary disputes we would say that the plaintiff bears the burden of proof.

A Baraisa corroborates Shmuel's statement: If an ox gores a cow and the calf is found dead at its side, and we don't know if the cow gave birth before the goring, or if the goring caused it to miscarry, the owner of the ox is liable to pay half the value of the cow, and a quarter of the value of the calf. This is the opinion of Sumchos, but the Rabbis say; the one looking to extract money bears the burden of proof.

R' Shmuel bar Nachmani says: What is the source for this rule? The verse in Shemos 24:14 that says: "He who is the plaintiff shall approach them (the judges)", and we interpret that to mean that the plaintiff shall approach the judges with a proof.

#### **One at a time**

Rav Ashi disagrees and says that we don't need a Scriptural source for this rule as it is simple logic, just as someone who has pain would go search for a doctor. Rather the verse is needed to teach us a rule stated by Rav Nachman in the name of Rabbah bar Avuha that if the defendant has a counter claim against the plaintiff, the judges should first address the plaintiff's claim, settle that dispute and then separately address the counter claim.

The Rabbis in Nehardea note that there is an exception to this rule; in a case where a delay would cause an irretrievable loss to the defendant.

The Mishna had said that if there is doubt whether the cow gave birth before or after it gored the ox, the victim claims half the damages from the cow and a quarter of the damages from the calf.

The Gemara asks: why is the victim allowed to take three quarters of the damage, he should only be eligible for half the damages?



Abaye answers that the Mishna is declaring the damages in the context of half the total damages, so when the Mishna says half the damages are paid from the value of the cow, it means a quarter, and when it says a quarter of the damages are paid from the value of the calf, it means an eighth. If the cow and calf belong to the same person, the victim can still claim a full half of the total damages because regardless of whether the goring took place before or after the cow gave birth, the owner of the cow would be liable. However, our Mishna is referring to a case where the cow and calf have different owners. Furthermore, if the victim first presents his claim to the owner of the cow, he can still claim a full half of the damages because he can say that he knows the cow definitely caused damage, and if the owner of the cow wants to claim that he has a partner in the damages, i.e. the owner of the calf, it is incumbent on the owner of the cow to litigate to retrieve half the damages from the owner of the calf. The scenario discussed in our Mishna is where the victim first approaches the owner of the calf. In this case the cow's owner has the ability to claim that the ox's owner has demonstrated his acceptance that there are two partners to the damages, and he is therefore only responsible for half of the half-damage liability, i.e. a quarter of the damage.

There is an alternate opinion that even if the ox's owner approaches the cow's owner first, the cow's owner can still claim that he knows he is only one of the two partners responsible for the damage and is therefore only liable for a quarter of the damages.

Rava disagrees with Abaye because the Mishna does not say they payments made are a quarter and an eighth, the Mishna says the payments are a half and a quarter. Rather he explains that the Mishna is referring to two different scenarios. If the cow is still extant, the victim can claim half the damages from the cow. If the cow is not extant, the victim can claim a quarter of the damages from the calf.

## INSIGHTS TO THE DAF

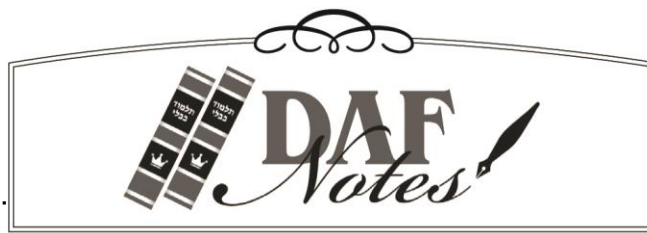
### Selling Treif Dishes

About a hundred years ago, the Ben Ish Chai was asked to settle a stiff argument between two Baghdad merchants. A wholesaler imported glazed earthenware dishes and sold them to a retailer. After the purchase was complete, the retailer discovered that the merchandise had been used at a lavish wedding held a few days earlier by a wealthy non-Jew from Baghdad. After the wedding the dishes had been washed and then packaged "just like they are wrapped when they come from Europe."

After uncovering the facts, the retailer demanded a full refund. He argued that the dishes were rendered *treif* at the non-Jewish wedding and now he could only sell them to non-Jews. The wholesaler, however, flatly refused to return the money, countering, "Although Jews won't buy the merchandise from you, since you can sell them to non-Jews you haven't suffered any loss, so you have no reason to complain."

HaRav Yosef Chaim (*Rav Pe'alim* II C.M. §12) compared this case to the difference of opinion between Rav and Shmuel on our *daf*: After purchasing an ox the buyer discovered that it was prone to gore. The halacha states that such an ox must be slaughtered immediately to prevent it from causing damage (*Sma* 232, S.K. 57). According to Rav, if most people buy oxen for plowing, the buyer can argue that he is among that majority for whom a goring ox is useless, and therefore the transaction is null and void. Shmuel disagrees, based on the principle, "the burden of proof falls on the one who demands payment."

The halacha is according to Shmuel (Rambam *Hilchos Mechirah* 16:5): clear-cut proof must be offered to force the other party to pay, and it is insufficient to rely on the majority. Thus if the buyer has already paid for the ox he



cannot cancel the transaction and force the seller to refund his money unless he can prove beyond a doubt that he only wanted to buy an ox for plowing. On the other hand, if the buyer has not yet paid for the ox, even though he had already made a *kinyan* (an act to finalize the transaction), he cannot be forced to pay. The buyer can declare the purchase null and void as long as the seller cannot demonstrate conclusively that his prospective customer wanted to purchase an ox to be slaughtered.

In the dispute between the earthenware merchants, it remained uncertain whether the retailer would have bought the dishes had he been aware of the problem. Even if he had known they could only be sold to non-Jews, perhaps this would not have bothered him, for he did business with non-Jewish customers as well. Since the retailer had already paid for the utensils and was demanding a refund, the burden of proof falls on him. Consequently the retailer could not cancel the transaction.

The difference between a goring ox and a *treif* dish: According to the *Kol Eliyahu* (C.M. §21), however, the case on our *daf* differs from the dispute between the two merchants. When a person needs an ox for plowing, an ox that gores is totally worthless. On the other hand, the earthenware retailer did not receive defective merchandise. His whole argument was that the number of potential customers was less than he had originally thought. This argument does not call the quality of the merchandise into question, for it can still be used for its designated purpose.

#### DAILY MASHAL

The Sages say: The one seeking to exact payment from his fellow bears the burden of proof.

The Olas Chodesh writes: There is a hint in this principle relevant to those who rebuke others, and that is: How can

they recognize if their words are truthful and are they for the sake of Heaven? The answer is: “One seeking to exact from his fellow” – if the one giving the rebuke causes with his words that the listeners accept his words, “the burden of proof is upon him” – he then knows that he indeed fears God and is worried about fulfilling the words of Hashem, and that is why his words which emanated from his heart entered into the hearts of the listeners.