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Fire Liability – Exclusions

The *Gemora* quotes a *Baraisa* detailing the opinions of Rabbi Yehudah and *Chachamim* in the liabilities for the lighter of a fire. The *Baraisa* begins with the case of one who burns someone else's pile of grain, in which were embedded utensils. Rabbi Yehudah says that the one who lit the fire is liable for the damage of the utensils that were hidden inside (*in addition to the grain*). The *Chachamim* say that (he is not liable for the embedded utensils) he pays only for a pile of wheat or a pile of barley, and he pays the owner of the grain as if the space occupied by the utensils was uniformly grain. [This is the dispute already mentioned in the *Mishnah* as to whether one who lights a fire is responsible for "*Tamun*" (embedded) items.]

In what case were these words stated? In a case where he lit the fire in his own property and it went and consumed in his fellow's property. If, however, he sets the fire in the property of the owner of the grain, then everyone agrees that he is liable for everything inside of it (even the embedded items). Additionally, Rabbi Yehudah agrees with the Sages where a man granted his fellow the loan of a particular place [in his field] for the purpose of piling up a stack of grain, if [the borrower of the place] piled up stacks and hid [some utensils there] no payment would have to be made except for the value of the stack alone. [This is because he only accepted responsibility to watch grain, and not embedded items.]

[Continuing on this theme of the second case, the *Baraisa* abstracts a rule for any case where the burner of the fire gave someone permission to pile something in his field. In such a case, the liability of the owner of the field is a function of his permission, and is limited both by what he permitted and what he saw brought in. Anything beyond his permission or not visible was not included in his acceptance of liability. The *Baraisa* lists four cases where this rule applies (*note that barley is worth less than wheat*):]

1. Permission was given for piling wheat, and he piled barley instead.
2. Permission was given for barley, but he piled wheat instead.
3. Wheat (for which he was given permission) was piled, but its outer layer was covered with barley (*making it look like a barley pile*).
4. Permission was given (only) for barley, and barley was brought in, with its outer layer covered with wheat.

In all of these cases, the owner of the field is only liable for the value of a pile of barley. [In the first and third cases, the owner of the field only saw barley, while in the second and fourth cases, he only accepted responsibility to guard barley.] (61b4 – 62a1)

Acceptance of Responsibility

Rava said: If a man gave a woman a block of gold to guard, and told her, "Be careful, it's silver!", if she damaged it she would have to pay for a gold dinar because he could [rightly] claim against her, "What business had you to damage it?" If, however, she was merely negligent in her guarding, she only has to pay for a silver block, as she could [rightly] plead against him, "It was only silver that I accepted responsibility for, but I never undertook to take care of gold."

Rav Mordechai told Rav Ashi: You taught this in the name of Rava; we derive it quite definitely from the Baraisa (above) [which states]: [If a man piled up] wheat [for which the

permission was granted], but covered it with barley, or again [if he piled up] barley but covered it up with wheat, no payment would be made except for the value of the barley alone. Now, does this not prove that he is entitled to plead against the plaintiff, "It was only barley that I accepted responsibility for?" Here too she is surely entitled to plead against the depositor, "I never accepted responsibility to watch gold." (62a1 – 62a2)

The rule for the robbery victim

Rav said: I learned a special law according to Rabbi Yehudah, but I do not remember what it was. Shmuel said: Does Abba not know what he had heard? According to Rabbi Yehudah who holds a burner of a fire liable for embedded objects, the Sages applied the rule for a robbery victim to embedded items burned. [The *Mishnah* in Shevuos states that if someone was robbed, but it's unknown how much was taken, the victim can swear the amount, and collect that from the robber. Similarly, when something was embedded in grain and burned, the Sages let him swear how much it was, to recover that money from the burner.]

Ameimar inquired whether the Sages applied this rule to the case of someone whose money was unlawfully handed over to non-Jews by a *moseir* (*informer*). According to the view that we should not give judgment [against the defendant] in cases of *garmi* (*where the damage was [not actually done but] merely caused [by him]*), there could be no question that also against informers we should not give judgment. But the question could still be raised according to the view that we should give judgment [against the defendant even] in cases of *garmi*. Would the judges make the ordinance enacted for the benefit of a robbed person extend also to the case of an informer so that the plaintiff would by taking an oath [as to the exact amount of his loss] be paid accordingly, or should this perhaps not be so? — The *Gemora* leaves this question unresolved. (62a2 – 62a3)

The *Gemora* tells the story of a person who kicked someone's money box and pushed it into the river. The owner of the box went to court, and claimed a certain value that he had stored in the box, which should be paid by the kicker. Rav Ashi sat and was deliberating this case, "In a case like this, what is the law?" Ravina told Rav Acha the son of Rava, or Rav Acha the son of Rava told Rav Ashi: Shouldn't the judgment be obvious from our *Mishnah*. Our *Mishnah* states that the *Chachamim* agree with Rabbi Yehudah that embedded objects are included in damages of a fire when the lighter of the fire burned a tower, since people normally store and embed all types of objects in a tower. [Similarly, people generally store objects of value in a money box, so the kicker should be liable.] Rav Acha, or Rav Ashi said to him: If he would have pleaded that he had money there, it would indeed have been the same. But we are dealing with a case where the owner of the box claimed that he had a jewel inside of the box. What is the law? Is it usual for people to store pearls in such a box or not? [If it is unusual, the kicker had no reason to consider that possibility, and therefore would not be liable.] This case is left unresolved.

Rav Yaimar asked Rav Ashi about the extent of the rule of a robbery victim when a fire burns a tower. Do we believe the tower owner if he claims that the tower contained a silver cup, which is very costly? Rav Ashi answered that we investigate the matter: If the owner of the tower is of the means to own such a cup – or if he is so trustworthy that someone may have asked him to guard such a cup – then his claim is plausible, and once he swears that such a cup was there, he can collect its value from the lighter of the fire. Otherwise, his claim has no merit. (62a3)

Robbing vs. Grabbing

Rav Adda the son of Rav Avya said to Rav Ashi – what is the difference between a robber (*gazlan*) and one who grabs (*chamsan*) (both of whom are invalid witnesses)? Rav Ashi answers that a *chamsan* gives money (for the item he is taking), whereas a *gazlan* does not give money. The other rejoined: If he is prepared to make payment, how can you call him *chamsan*? Didn't Rav Huna say that [even] where the vendor was [threatened to be] hanged [unless he would agree] to sell, the sale would be a valid sale? — This, however, is no contradiction, as in that case, the vendor did

[finally] say, "I agree," whereas here [in the case of *chamsan*] he never said, "I agree." [Even though one who takes an item from someone in duress has acquired it, that is true only once the owner says that he agrees to the "sale." When the owner does not express agreement, the one taking the item is labeled a "*chamsan*."] (62a4)

Mishnah

If a spark flies out from under a smith's hammer and damages, the smith is liable. The *Mishnah* discusses the case of a camel carrying (*combustible*) straw on a street. If the camel's straw stuck into the store, catching fire from the store owner's candle, and then burned down a tower, the owner of the camel is liable (because he should not have put so much straw that it entered the store). If, however, the store owner's candle was outside the store, and the straw caught fire and burned down a tower, the store owner is liable (since he should have kept his candle inside). Rabbi Yehudah states that if the candle outside was a candle for Chanukah, the store owner is not liable (as he had religious permission to place his candle outside). (62b1)

Location of Chanukah Candle

[The *Gemora* discusses whether Rabbi Yehudah's statement indicates a specific location for the Chanukah candle.] Ravina said in the name of Rava: Rabbi Yehudah's opinion indicates that the Chanukah candle should be placed within ten *tefachim* off the ground, for if it would enter your mind that one may place it above ten *tefachim*, why would Rabbi Yehudah say that by a candle for Chanukah, the store owner is not liable? Let the damaged party say to the store owner, "You should have put the candle higher than the camel and its rider!" Evidently it is a proof that the Chanukah candle should be placed within ten *tefachim* off the ground.

However, the *Gemora* deflects this proof: In fact I can tell you that it might be placed even above the height of ten *tefachim*, and as for your argument, "You ought to have placed it above the reach of the camel and its rider," [it might be answered that] since a person is involved in a *mitzvah*, the Sages did not trouble him so much. [Therefore, he is exempt, even if he could have avoided damage with more effort.]

Rav Kahana said: Rav Nassan bar Manyumi expounded in the name of Rabbi Tanchum: A Chanukah candle above twenty *amos* is invalid, just as is a *sukkah* or *movai* (*stick allowing carrying in an alleyway*) that are above twenty *amos*. [In all these cases, a person's eye is not drawn to something so high. In the case of Chanukah, the goal of *Persumei nissah* – publicizing the miracle – will therefore not be attained.] (62b1 – 62b2)

WE SHALL RETURN TO YOU, HAKONEIS

Mishnah

[The seventh chapter shifts the focus of *Bava Kamma* to *nizkei adam* – damages done directly by a person, with no intermediary. The first area discussed is stealing (*geneiva*), and its extensions. When someone steals, he must return the stolen object, but also pay a fine of *kefel* (*doubling*) money worth the value of the stolen object. When someone steals an ox or sheep, and then slaughters or sells it, he must pay a further fine. For an ox, he must pay five times, and in the case of a sheep, four times. This fine is called *arba'ah v'chamishah* (*four or five*) or *daled v'hei*.] The *Mishnah* says that the fine of *kefel* is more extensive than the rule of fourfold or fivefold payment, since the payment of *kefel* applies equally to all stolen items, alive or inanimate, while the rule of fourfold or fivefold payment applies exclusively to ox and sheep, as it is said: If a man steals an ox or a sheep and slaughters it or sells it, he shall pay five oxen for an ox and four sheep for a sheep. One who steals [articles already stolen] in the hands of a thief need not make double payment, as also he who slaughters or sells [the animal] while in the possession of [another] thief does not make fourfold or fivefold payment. (62b3)

Theft vs. claiming theft

That the measure of double payment applies both in the case of a thief and in the case of [an unpaid custodian falsely] alleging a theft, whereas the measure of fourfold or fivefold

payments has no application except in the case of a thief alone — [this, be it noted], is not taught here. This [omission] supports the view of Rabbi Chiya bar Abba, for Rabbi Chiya bar Abba said in the name of Rabbi Yochanan: [When one is guarding an item (*without compensation*), he is liable only for negligence, but he is not liable if the item is stolen or lost.] If the guardian falsely claims that the item was stolen (and it was found that he himself stole it), he must pay *kefel*, similar to a thief. If he slaughtered or sold it, he pays fourfold or fivefold. [Our *Mishnah*, which lists a difference between *kefel* and *the rule of fourfold or fivefold payment*, but does *not* list the case of *toen ganav*, seems to prove this statement.]

Some read as follows: Shall we say that this [omission] supports the view of Rabbi Chiya bar Abba who said in the name of Rabbi Yochanan: If the guardian falsely claims that the item was stolen (and it was found that he himself stole it), he must pay *kefel*, similar to a thief. If he slaughtered or sold it, he pays fourfold or fivefold. — But does your text say: There is no difference between [this and that except . . .]? What it says is: The rule is more inclusive. — While some points were stated in the text, others were omitted. (62b3 – 62b4)

Textual source for kefel items

The *Gemora* asks how we know that *kefel* applies to all objects, and brings a *Baraisa* that explains the source. The *Baraisa* analyzes the verse (*found in the topic of an unpaid guardian*) describing what items are subject to *kefel*. [*The Gemora will later discuss which case of kefel this is – that of a thief, or of a false claim of theft by the guardian*].

The verse states that *kefel* is applicable in the case of:
Al kol dvar pesha – on any criminal item:
al shor – on an ox
al chamor – on a donkey
al seh – on a sheep
al salmah – on clothing
al kol aveidah – on any lost item

The *Baraisa* breaks this verse into three main sections: a *klal* (*general introductory clause*), a *prat* (*specific instance*), and a *klal* (*general summarizing clause*). In this verse, the sections are:

Introductory *Klal* (*general*)	*Prat* (*instance*)	Summarizing *Klal* (*general*)
Al kol dvar pesha (any criminal item)	*Al shor (ox)* *al chamor (donkey)* *al seh (sheep)* *al salmah (clothing)*	*Al kol aveidah (any lost item)*

[*Even though the prat is compound, the Baraisa treats them as one instance*.]

The construct of a *klal*, *prat*, and *klal* (*one of the thirteen constructs listed by Rabbi Yishmael*) tells us that we can abstract from the instance to anything that is *me'ein* the *prat* – similar to the instance in its essential characteristics. In this case, the *Baraisa* states the essential characteristics of the specific instance: they are movable and intrinsically valuable. The first characteristic excludes land (*and, by extension, slaves, which are equated with land in halachah*), and the second excludes contracts, which enable their holder to collect money, but are not intrinsically worth anything.

Finally, the *Baraisa* states that the end of the verse – *yeshalem shnayim l'rayayhu – he should pay double to his peer*, excludes *hekdesh*, which is not his peer.

The *Gemora* proceeds to challenge the characteristics stated by the *Baraisa*. The common denominator of the instance items is something whose carcass causes impurity to someone who touches or carries it, so this should be the abstract category. This property is true of all *neveilos* – dead animals – but not of birds. Therefore, although clothing will include any inanimate objects that are movable and intrinsically valuable, the first three instances should limit

any animate objects to those who cause the same impurity as a dead animal.

The *Gemora* points out that we have three specific animate instances, and from each one we can extend to more animate objects. Specifically, if the verse had only listed an ox, we would have only included animals which – like an ox - can be brought as a sacrifice. If the verse had only listed a donkey, we would have included only animals which – like a donkey – may not be kosher, but whose first born males have holiness [*a first born male donkey is given to the kohen*]. These two instances would exclude *chayos* – undomesticated species - which are not brought as sacrifices, nor have the holiness of a first born male. When the verse lists both ox and donkey, ox is extra and per force must include *chayos*. However, birds would still be excluded. When the verse lists sheep, which is also extra, that will per force include birds - but only kosher species of birds, which cause impurity when one ingests its carcass. However, non-kosher species of birds, which never cause any impurity, still would not be included. At this point, the *Gemora* has reached a logical stage where the *Baraisa* still has not given a sufficient source for the inclusive category it laid out. The *Gemora* resolves this by stating that the construct being used is not a *klal*, *prat*, and *klal*, but rather a *mi'ut* and *ribui* – a full inclusion, followed by individual exclusions. Since the first *prat* contains the word "*kol*" - all – this is a full inclusion, and each instance excludes a specific category, leading to the final rule of movable and intrinsically valuable. (62b4 – 63a2)

INSIGHTS TO THE DAF

Burning Hidden Things - Halachah

The Shulchan Aruch (H"M, 418:13) rules like the *Chachamim*, that one who burns a fire is not liable for embedded items (*tamun*). As the *Baraisa* details, this is only true if the fire was lit in one's own property, and then spread to someone else's. A fire lit in someone else's property obligates the burner in the damages for embedded objects. This is due to the fact that the verse which excludes *tamun* is in the basic case of a fire described in the Torah – when a fire exited one's property, and then damaged. However, liability for *tamun* in the case of a fire lit elsewhere is only for items normally embedded – and for which the burner should have considered may be burned. Therefore, in a field, he is only liable for farm implements, whereas in a house, he is liable for all items.

Which Cases?

The *Gemora* earlier in B"K (22-23), in the topic of whether a fire causes liability as the burner's arrows or property, discussed the case of *tamun*. The *Gemora* stated that according to Rabbi Yochanan (*whose opinion is the halachah*), who holds that a fire is like the burner's arrows, there seems to be no reason to exclude *tamun*: if a person shot an arrow, he's liable for any damages, even on embedded items. Therefore, the *Gemora* states that Rabbi Yochanan only excludes liability for *tamun* when *kalu lo chitzav* – the direct effect of the fire has stopped (*e.g., by being blunted by a wall, which then collapsed*). In that case, the liability is only for the property aspect of the fire, since he should have put up a firewall to stop it from spreading. Even though Rabbi Yochanan holds that a fire causes liability as an arrow of the burner, Rabbi Yochanan agrees that a fire can *also* cause liability as the burner's property, and would be considered so if the burner could have stopped the fire and didn't. Therefore, the Shulchan Aruch rules that the exclusion of *tamun* only applies to a fire which was blunted by a wall.

The Gr"a (418:33), however, claims that this understanding of the *Gemora* on 23 is incorrect, and is not the way the Rambam and the Rif read it. Instead, the Gr"a says that when the *Gemora* clarified that Rabbi Yochanan agrees to a property aspect of a fire, the *Gemora* was reversing the limitation of *tamun* to *kalu lo chitzav*. The *Gemora*'s original question was how a person could be exempt for paying for *tamun* damages. The *Gemora* here states that a burner is liable for *tamun* when he lights the fire in the grain owner's property. However, just as when someone fires an arrow, wherever it goes is considered his action, when someone

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lights a fire *anywhere*, wherever it goes should be considered his lighting, and therefore, all cases of *tamun* should be liable. The *Gemora* on 23 first answered that when the wall blunted the fire, it's not an arrow anymore. However, the *Gemora* then reverses this, and states that a fire is different than an arrow, because a fire can be interrupted in mid flight. Therefore, the verse's exclusion of *tamun* is only when the fault of the burner was simply not stopping the fire. The Gr"a therefore disputes the exception that the Shulchan Aruch places on the limitation of *tamun*, and instead holds that the burner of a fire is always not liable for *tamun*, as long as he lit the fire in his own property, and it spread elsewhere. [*See Gra on B"K 23, note 1 for a different reading of the Gemora there*.]

Grain coating

The Shitah quotes Rabbi Yehonosan who points out that we must explain that the case of a barley pile coated in wheat is a case where the field owner only allowed barley. If this would not be the case, there would be no reason to exempt him from paying for the wheat covering, which he allowed and saw. If so, the need for this case – even though we already learned the case of bringing a full wheat pile when only allowed to bring in barley – is to teach us that if the owner only allowed barley, he is not even obligated in the small difference that a wheat covering adds.

Takanas Nigzal

The *Gemora* lists a number of diverse cases where the Sages applied the rule for the robbery victim, without clarifying in exactly what circumstances the rule was applied, nor why. There is discussion in the Rishonim about what the parameters for these cases are. Rabbeinu Tam (Tosfos 62a asu) states that the debate in the case of an informer is only when the informer claims with certainty that he did not cause as large a loss as the victim claims. However, when the informer is uncertain, then there's no question that the victim can use the rule of the robbery victim, and collect with an oath. The Ri, on the other hand, states that the *Gemora* is currently following the discussion of applying the robbery victim rule to fire damages of embedded items. In that case, the damager obviously has no knowledge how much he damaged, so similarly the discussion by an informer must be also in the case of the informer not knowing how much damage he caused. According to the Ri, the application of *takanas nigzal* is only due to the fact that the damager doesn't know how much the damage is. If the damager claims with certainty a lesser amount, the usual procedure must be followed, and the victim must bring proofs. The *Gemora* is only using the case of *nigzal* as a borrowed term, to apply in a case where the damager cannot counter claim with certainty. However, Rabbeinu Tam applies the *takanas nigzal* even to cases where the damager claims a lesser amount with certainty. The application must be a more direct analogy to the robbery case. In the robbery case, the robber is not able to swear, since we punish his status as a robber by invalidating his oath. Therefore, the Sages placed that oath on the victim, to allow him to collect. Similarly, Rabbeinu Tam holds that one who lights a fire – a gross negligence, and a very direct form of damage – and an informer – a very severe and dangerous form of damage – are punished for their crime by allowing the victim to collect with an oath. Rabbeinu Tam would therefore equally apply the *takanas nigzal* to any fire damages, even in the simple non *tamun* case that the *Chachamim* discuss. [*See the Rosh paragraph 16, who mentions both reasons by the case of fire*.]

The Pnei Yehoshua points out that the *Gemora* flow seems to indicate Rabbeinu Tam's approach is correct. The *Gemora* concludes the discussion of *takanas nigzal* with a seeming non sequitur – the distinction between a *chamsan* and *gazlan*. The Pnei Yehoshua explains that the *Gemora* was discussing different types of criminals, and the sanctions put on them by *takanas nigzal*, and therefore concluded with a statement about two types of criminals who cause another person monetary loss.

Taiku in Monetary Halachah

Our *Gemora* contains two instances of Taiku – an unresolved question. Taiku's are very common throughout Shas, and are generally considered a full-fledged doubt when deciding

halachah. However, when there is a taiku in issues of monetary *halachah*, the Rishonim are of various opinions how to rule. Rav Hai is quoted by the Rosh (paragraph 16) and Tosfos (62a, Asu), as saying that in any monetary case that is left as a taiku, the two parties split the money in question. In our case, that would mean that the alleged damager would pay half the claimed amount, after the victim swore. The Rosh, Rif, and Ri, however, hold that no money can be extracted in a taiku case, since money can only be taken from someone with a proof. The Rambam (Chovel uMazik 8:7) holds that money cannot be extracted, but if the victim seizes the money, we do not take it away from him. The Shulchan Aruch (388:1) rules like the Rambam.

Placement of the Chanukah Candle

The Shulchan Aruch (H"M 418:12) and the Rambam (Nizkei Mamon 14:13) rule against Rabbi Yehudah, and hold the store owner liable for his Chanukah candle. The reasoning given is that although the store owner had license to put the candle outside, to fulfill the *mitzvah* of Chanukah, he still is responsible to ensure no damage comes from it.

The *Gemora* discusses whether Rabbi Yehudah's exclusion of liability in the case of a Chanukah candle indicates that it should be below ten *tefachim*. The *Gemora* concludes with a limit of twenty *amos*. There is discussion in the poskim about reconciling the two measures. The Shulchan Aruch (O"H 671:6), following the Rosh, rules that the optimum placement (*l'chatchila*) is below ten *tefachim*, but the absolute limit (*b'dieved*) is twenty *amos*. The Gr"a explains that even though the *Gemora* deflected the proof from the *Mishnah*, we follow the straightforward implication of the *Mishnah*. The Rambam (Chanuka 4:7) only mentions the measure of twenty *amos*. The Rambam understood that the two measures are a dispute, and ruled like the opinion of twenty *amos*. The Rambam therefore could have held the store owner liable simply because he should have placed the candle higher, but nonetheless made the more fundamental statement that performing a *mitzvah* does not exempt a person from damages. This statement is a more general one, and has implications in other cases, as the Gr"a points out (H"M 418:28). The Shaarei Teshuva (O"H 761:8) points out that the *Chachamim* and Rabbi Yehudah's dispute, as detailed in other sources, does not relate to different opinions on the location of the Chanukah candle, but rather on this fundamental question of exemption due to religious activity.

DAILY MASHAL

Paying for the Golden Calf

The Mishnahh on our daf says that if one steals an ox or a sheep, he must give the owners four or five times the value of the stolen item in the form of a fine (if he slaughters it).

In the Medrash (*Shemos Rabba*, Vilna, *Parasha* 30) we find another type of payment altogether. Says the Medrash, "Israel told Hashem, since we stole an ox and made a golden calf of it, we paid five heads of cattle for it when our fathers died instead of it in the desert."

In his *sefer* on the Torah (p. 110), the Maharil Diskin *zt'l* elucidates this remarkable Medrash. When *Bnei Yisrael* wandered in the Sinai Desert they paid *machtzis hashekel* [a mandatory half-shekel contribution] on two occasions. One was for building the *Mishkan* and the other for *korbanos tzibbur* (see *Rashi, Shemos* 30:15). Therefore, *Bnei Yisrael,* who numbered 600,000 adults, gave 600,000 *shekalim* altogether. Three thousand people worshipped the Golden Calf (*Shemos* 32:28). For using Hashem's money to commit such a grave sin, *Bnei Yisrael* had to pay five times their value. The value of a person between the ages of 20 and 60 is 50 *shekalim*, as it says in *Parashas Erechin* (*Vayikra* 27:3). Thus the value of 3,000 men is 150,000 *shekalim*. If so, they needed to raise a sum of 750,000 *shekalim*—five times their value, yet *Bnei Yisrael* paid only 600,000 *shekalim*—four times their value. The Medrash tells us that the 3,000 people who died after the sin of the Golden Calf was for that payment.

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