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Contents

Articles are arranged in the order they appear
in מסכת בבא קמא.

Greetings

The first משנה in מסכת בבא קמא commences with a list of four general categories of damages: ארבעה אבות נזיקין: השור, והבור, והמבעה, וההבער. "There are four categories of damages, namely; the ox, the pit, the *mave*, and the fire." The תלמוד spends much time attempting to define the exact meaning of and laws related to each of the categories. Another question to address, however, is the very order of their appearance in the משנה.

רש"י makes the following observation:
השור והבור כו' - כסדר שהן כתובין בפרשה סדרן במשנה דפרשה ראשונה נאמרה בשור שניזה בבור
"In the order they are written in the תורה so the משנה orders them: the first (case of damages) is 'the ox' with 'the pit' second (and so forth)."

רש"י's explanation, however, is perplexing. The case of "the pit" appears in *שמות* כ"א:ל"ג before the case of "the ox" in כ"א:ל"ה! It is possible רש"י intends another case of ox - that being an ox that kills a human being, not merely one causing monetary damages. That case of ox indeed appears prior to the case of "the pit," in *שמות* כ"א:כ"ח.

Rabbi Yaakov Nagen further points out that the תורה, when discussing an ox goring a person and causing death uses the language כי יגח, while when relating to an ox causing monetary damages to another animal uses כי יגף. The משנה, on the other hand, uses the language of כי יגח exclusively for both cases. The Rabbis seem to be intentionally blurring the lines between the two types of animals.

Based on this insight I would like to suggest that the Rabbis intend to send us a message about the severity of the responsibility involved in a person guarding his animals from causing damage. By utilizing language that equates an animal causing damage to an animal that kills, the ox owner is left to conclude that, on some level, the offense is of similar weight. Of course the law expects and exacts more from an owner whose animal kills a person than from one whose animal only causes damages. Nonetheless, the order of the damages cases in the משנה and the interchangeable language regarding the offending animal sends the message that the responsibility of the owner to guard against damages should be taken as seriously as the need to guard one's ox from killing another human being. If this interpretation is valid, it is one more example of how our halachic texts transmit not only normative law but Jewish values as well.

The essays contributed by our students in our Masoret Akiva Torah Journal take the unobvious and, in addressing a particular question, provide us with understanding and resolution. Issues are drawn from the beginning of the first chapter of מסכת בבא קמא, the end of the second chapter, or the beginning of the third chapter. כל הכבוד to all our contributing students and to their teachers, Rabbi Stein and Rabbi Nemes. We also acknowledge the wonderful work of Rabbi Nemes in producing this 4th Volume of Masoret Akiva.

חזק ואמץ!

With Torah Blessings,

Rabbi Scot A. Berman
Head of School

Introduction

When evaluating a situation of נזיקין, two questions typically need to be addressed: did the person commit a sin when causing damage, and is the person liable for the damage. In other words, is the obligation to pay for damage separate from the fact that damaging is אסור, which leads to the possibility that even though a person may not be responsible to pay for damage, the person still committed an עבירה by damaging. Many commentators, including Rav Chaim Soloveitchik and Rav Yaakov Kanievsky, the Steipler, assume that causing damage is an איסור independent of one's responsibility to pay restitution. גרמא בנזיקין, indirectly causing damage, may be פטור, but that does not mean it is מותר.

What emerges from this analysis is fundamental to how we approach תלמוד תורה. The תורה is not merely a collection of laws which state if a person must pay or not; it is an all-encompassing guide to life. Even when a person is not required to pay, it does not mean they are permitted to harm someone else. By having this perspective, a person is always looking for the moral and ethical principles that can emerge from legal aspects of the תורה. While learning מסכת בבא קמא this year, we emphasized this point many times and looked for personal lessons we can extrapolate from the תורה's tort system.

This work, the fourth volume of מסורת עקיבא, is a compilation of articles written by students in our Beit Midrash Program on סוגיות in מסכת בבא קמא. Through diligently learning, reviewing, and writing חידושי תורה, our students have analyzed various topics relating to a person's responsibility toward another person's property. Our ברכה to our dear תלמידים and תלמידות is as they continue to progress and grow intellectually in לימוד התורה, they should always look at the

personal lessons that emerge from the תורה and internalize them as they grow as בני ובנות תורה.

Rabbi Asher Nemes

Rabbi Noam Stein

יסוד חיוב נזקי ממון

Responsibility for Damage Caused by Property (דף ב.)

Sima Stein ('21)

In the first משנה in בבא קמא it talks about how there are four main categories of damages, שור, בור, מבעה, והבער. A person is חייב when they cause any of these; they are חייב when they light a fire and it damages, or when they dig a pit and it damages someone or something, or when their שור (or other animal) damages. It would seem very obvious that one should be חייב for damage that they cause directly, but what does not seem so obvious is that one should be חייב when one's animal does damage; because one's animal doing damage is not the same as one directly doing damage.

The משנה says הצד השוה שבהן שדרכן להזיק ושמירתן עליך. The common denominator between the ארבעה אבות נזקין is they naturally cause damage and the owner has to watch them. Meaning, one is חייב when one's שור causes damage because one was responsible to properly guard their animal. The fact that the animal caused damage is a result of the owner's failure to properly guard.

The הלכה is that if one carefully guards their animal, and it causes damage anyway, then they are פטור. Assuming the reason why one, in general, is חייב for their animals' damage is because they were negligent in watching, then when one is not negligent and they did watch their animal but it still caused damage, one is simply automatically פטור because there is no מחייב to begin with.

The רמב״ם in the opening of הלכות נזקי ממון seems to understand why someone would be חייב for damages that their animal causes in a different way than the משנה. He says, כָּל נֶפֶשׁ חַיָּה שֶׁהִיא בִּרְשׁוּתוֹ שֶׁל אָדָם שְׁהֶזִּיקָה הַבְּעָלִים חַיָּבִין לְשַׁלֵּם שֶׁדֶּרֶי מְמוֹנָם הִזִּיק meaning one is חייב, when any animal one owns causes damage because it is that person's ממון.

רמב"ם, unlike the משנה, does not focus specifically on שור. He says כל נפש חיה. Clearly, the obligation to watch an animal varies by animal. However, רמב"ם is not focused on the obligation to watch the animal and the negligence involved in failing to do so. רמב"ם understands the obligation much more broadly. One whose animal causes damage is simply responsible, because that animal is their property, and a person is responsible, no matter what, for what their property does.

The difficulty with this position is if one is חייב simply because the animal belongs to them, then they should be חייב even if they watched the animal appropriately. Presumably, however, one is פטור nonetheless because if they have done everything reasonable to guard the animal, it is considered an אונס for which the תורה exempts the owner.

The opinion of רמב״ם and the view expressed in the משנה seem to be similar to two different legal theories. One theory of damages is negligence, which corresponds to what the משנה says, meaning one should have taken certain precautions because there were foreseeable consequences which makes one liable. And the other is strict liability, which seems to correspond with the רמב״ם, meaning one is liable for all damage even when there was no intention or negligence. One is חייב simply because they are connected to their animal. These theories can help one further understand the differing opinions of the משנה and the רמב״ם.

We can see in various places throughout the סוגיות of נזק, even in cases not involving damage caused by an animal, that the הלכה seems to be based on a strict negligence approach in which a person is חייב regardless of negligence or intent. משנה בבא קמא כ"ו says אָדָם מוּעָד לְעוֹלָם meaning a person is always considered forewarned, which means that they are חייב regardless if it was their fault that they caused damage. This statement seems to correspond with the approach of רמב״ם, because one is not חייב regardless of negligence.

Similarly, in a בריתא cited as a source for the משנה, חזקיה says that an אדם is חייב for damages even when it was completely באונס. It would make more sense that this is true if we have a strict liability view of נזק. This corresponds with approach of רמב״ם because it is saying that one is חייב even if it was complete אונס, and the whole idea that an אדם is חייב even when completely באונס seems to make more sense if we have a strict liability view of נזק.

In contrast, רבי יצחק quoted in בבא קמא ירושלמי commenting on this משנה seems to limit the absolute responsibility of the מזיק based on whether the מזיק was negligent. He says that only in a case in which the מזיק came to sleep next to an already sleeping person or went to sleep simultaneously with the other person, is the מזיק חייב, because the מזיק is considered מועד. This statement seems to correspond with the משנה approach because the מזיק is חייב only because it was their responsibility to watch, and because they did not properly watch they are חייב.

Overall, it appears that both of these approaches play a role in creating the חיוב of נזק and, in learning the סוגיות, one needs to pay careful attention to which source of חיוב the סוגיא is dealing with.

אבות ותולדות

Subcategories of Damages (דף ב.)
Ethan Adler ('19)

The first משנה in מסכת בבא קמא starts off with talking about the four categories of damage: "ארבעה אבות נזיקין השור,והבור, והמבעה, וההבער" The list is שור (Ox), בור (Pit), מבעה (Teeth, Person), הבער (Fire). All of these things are considered אבות, head categories. The גמרא says that since there are אבות there must be תולדות, subcategories. An example of a תולדה and אב can be found in the category of שור. One of the ways an ox can damage is קרן, or goring. This would be an אב. A תולדה of קרן would be kicking. Both of them are intentional acts of damage and therefore one is the תולדה of the other. In some topics of הלכה, אבות and תולדות are identical in their laws, but are the תולדות of נזיקין similar to their אבות? The גמרא asks this question, and we will explain what it means to be "similar."

The גמרא brings the concept of אבות and תולדות in מסכת שבת and proves that the תולדות are similar to their אבות. There are 39 אבות מלאכה in שבת, categories of forbidden actions, such as planting, each with תולדות, such as watering. The תולדות have the same prohibition and punishment as the אבות. Then the גמרא brings the concept of אבות and תולדות in הלכות טומאה and it proves that the תולדות are different than their אבות. There are 3 אבות הטומאה, and each of the אבות can make something else טמא, but its תולדות which acquire טומאה from the אבות, have a lower level of טומאה regarding what they can pass טומאה to. The גמרא asks "here what" regarding the תולדות of נזיקין: are they similar to their אבות or not? רב פפא responds some are similar to their אבות and some are not similar to their אבות. שן is one of the אבות of שור (ox). שן literally means tooth and is the category of an animal eating for its benefit. What is a תולדה of שן? Two examples are an animal rubbing against a wall for benefit until the wall falls or rolling around on fruits for benefit, ruining the fruits. Since they are

both examples of the animal acting for benefit, they are תולדות of בור שן. is another אב. בור is placing a pit in public property. What is a תולדה of בור? An example is a rock, knife, or package that are put in the public domain and cause damage. Since they are also hazards placed in public property, they are תולדות of בור. In both of these cases, the תולדות are legally similar to their אב. So in what case would the תולדה not be similar to the אב? צרורות is the case of נזיקין where the תולדה is not like the אב, because an owner is only obligated to pay חצי נזק, half damages for damage caused by צרורות. צרורות is where an ox kicks pebbles, causing damage to an object. The אב of צרורות is רגל. רגל is an אב within שור where an ox accidentally steps on something during its normal course of moving. Since the act of kicking the pebbles is also a result of the animal's normal course of motion, it is a subcategory of that category. That being the case, while one pays for full reimbursement in רגל, one is only required to pay for half the damage by צרורות. Why is it a תולדה of רגל if its reimbursement is not similar? In both the damager pays מן העליה, from his own assets, even in excess of the value of the animal that caused the damage. So it essentially is a form of רגל in both the form of damage as well as level of obligation with this one exception of how much to pay.

There are a few ways to understand the גמרא's question of "are the תולדות similar to the אבות?" Under the אב of שור there are two categories, תם and מועד. תם refers to an ox whose owner was not warned before it damaged since the animal does not have a history of damaging, while מועד refers to an ox which has gored 3 times in the past and whose owner was warned about his animal's dangerous behavior. There is a difference between the liability of the owner in these two cases. A תם only pays for half of the damage caused, while the מועד is responsible to pay for all of it. Using this distinction, the רי"ף in the beginning of בבא קמא understands the גמרא's question as asking since we see that there is a distinction between תם and מועד regarding how much you pay, is this distinction going to play out in the תולדות or not, meaning: if they are similar, for a תולדה of תם you

would pay like the אב of תם and for מועד, you would pay like the אב of מועד. The ראש clarifies how the ריף understands the question. If there was no distinction between תם and מועד regarding חצי נזק ונזק שלם, the גמרא would not have had a question if תולדות are similar to אבות. Since there is such a distinction, the גמרא asks if there are more distinctions between the תולדות and their אבות.

Rabbi Yitzchak Zev Soloveitchik, also known as the גריז, explains the גמרא's assumption when it asks are the תולדות similar to their אבות. He quotes רשי on "הכא מאי" דף ב: ד"ה who explains, "if they are similar then you would have to pay and if not similar then not." רשי seems to imply that if they aren't similar you wouldn't have to pay. The גריז is perplexed at this implication of רשי because he says if you didn't have to pay then why are they called תולדות? He quotes the ראש in פרק א' סימן א who brings a case where אבנו סכינו ומשאו (one's stone, knife, or package) blew off the roof, landed on the ground, and then someone tripped on it. The ראש has a disagreement with other גדולים regarding this form of נזק as to which אב it will be a תולדה of. The גדולים say that it's derived from בור and אש, since it includes a moving damager, the defining characteristic of אש, and a stationary damager, a defining characteristic of בור. The ראש says that it's defined as a תולדה of בור since ultimately, the damage was caused by someone tripping over the stationary object, which is the essence of a בור. Ascertaining which אב the תולדה falls under can have ramifications in regards to its law. Each אב has certain exemptions which take away liability from the damager. The exemption of בור is כלים, which means one is not liable for utensils damaged by a pit, and the exemption of אש is טמון which means one is not liable for a fire that causes damage to objects which are hidden from view. According to the גדולים, you apply פטור for both אש and בור and would be exempt for both כלים and טמון. According to the ראש, you are only פטור for the פטורים of בור, meaning כלים but for hidden objects you would be חייב since according to the ראש this

case is not derived as a תולדה of אש. Using this, the גרי"ז explains how a תולדה would not be similar to its אב yet would maintain some level of liability to be called a תולדה. The question of the גמרא is if the תולדה is similar to its אב, it shares the exemptions that its אב has, so a תולדה of אש would be exempt from cases of טמון just like the אב of אש. On the other hand, if the תולדה is not similar to its אב, it simply uses the אב as a source for its liability but not for the exemptions the אב carries, so the תולדה of אש would be חייב for טמון until the אב which is פטור from טמון. Since the גמרא's conclusion is that most תולדות are similar to their אבות, most have the same exemptions that apply to their אבות.

<u>איסור נזק</u>

Damages: Compensation or Prohibition (דף ב':)

Shira Schon ('21)

In order to learn סדר נזיקין one must understand a fundamental question. Is damaging another person's property אסור or does one simply have to compensate for any damage they cause? In the תורה there are many discussions of נזק and the responsibility to pay for damages is clearly delineated. However, the תורה never expressly forbids damaging another person's property. Moreover, an איסור is never explicitly discussed in the משנה or גמרא. Those who maintain that it is in fact אסור need to explain what the source of the prohibition is. And the different possible sources could lead to implications for the parameters of הלכות נזק.

רבנו יונה in his commentary on פרקי אבות א':א' explains what exactly it was that משה received from סיני and passed down through the generations. רבנו יונה states that when משה received the תורה he was given the written and the oral תורה along with explanations and elaborations upon them. An example of this is the prohibition of לא תגזול, do not steal. The elaboration that משה received was that included within the איסור גזל is the איסור נזק as well.

יד רמ"ה offers two possible sources for the איסור נזק. His first possibility is לפני עור לא תתן מכשול. This is certainly different than our traditional understanding of this פסוק. Normally this פסוק is understood to mean that one cannot exploit or trick a fellow, specifically that one cannot cause another Jew to violate an איסור or to make a harmful decision. יד רמ"ה proposes another, more literal explanation of לפני עור לא תתן מכשול. This explanation is simply that literally putting a stumbling block in front of someone would cause harm or damage to the person or their property and that is why it tells you not to do it, because causing damage is אסור.

יד רמ"ה proposes another possible source for איסור נזק. He claims that causing נזק would violate ואהבת לרעך כמוך. You are obligated to love others as you would love yourself and it is assumed that people do not wish to damage themselves, so you are then obligated to treat others as you would yourself which would entail not damaging them in any way. This answer has a major difference than the other answers we have seen so far. The איסור נזק would be a violation of a מצות עשה and not an איסור לא תעשה.

ברכת שמואל introduces an idea that isn't seen in any other sources. He is מחדש that damaging is not a violation a broader איסור (like לא תגזול or לפני עור) but that נזק on its own is אסור מן התורה. ברכת שמואל quotes רב חיים in identifying the source in the תורה for the איסור נזיקין. רב חיים claims that when the תורה says ושמרנו ולא it is saying it is אסור to damage and even by not watching not only is one violating an איסור but one is in fact a מזיק.

He brings proof for this in the idea of כופר. If a שור מועד kills someone the owner of the שור must pay a כופר, a ransom one pays in the place of the theoretical death penalty they deserve. ברכת שמואל points out that the only thing done wrong in this case is that the owner was not watching his שור. This shows that ושמרנו ולא is an איסור because if it was not, there would not be a theoretical death penalty.

The fact that איסור נזיקין is its own איסור has an important implication for the הלכה. In general, when we have a ספק about ממון, we do not employ the principle ספק דאורייתא לחומרא. However, there are several instances in which it seems that there is a ספק about נזיקין in which we do go לחומרא. On the other hand, there are other cases related to נזיקין in which we do not go לחומרא.

ברכת שמואל explains there are two types of ספקות about נזיקין. In one type of case the ספק is we are not sure whether there has been a

violation of נזק at all, for example if a שור does an unusual act of נזק that may or may not qualify as קרן. In a case like this, we have a ספק about איסורין – is this act אסור or not. If our ספק is a ספק איסור then we do in fact go לחומרא.

There is another kind of ספק, however, if we know that נזק was done, but, it is unclear if this is a case in which the מזיק is חייב because of a technicality. An example of this would be if an animal ate someone else's fruit, but it is unclear if the area in which the animal ate it was a רשות הרבים. In a case like this, the ספק is a ספק ממון, even though נזק is אסור, the particular ספק we are addressing is only a ספק about whether money is owed. In a case like this, we would not go לחומרא.

ברכת שמואל is only able to make this distinction, because according to his view that נזק is its own איסור, the question of whether נזק occurred or not is identical to the question of whether an איסור was violated. Therefore, the ספק נזק is a ספק איסור not a ספק ממון. According to any of the other views, even if something is not נזק it still could be a different variant of the larger איסור (such as ואהבת לרעך) that one is violating.

מהות נזקי קרן

Aggression or Out of the Ordinary (דף ג':)
Chana Fischer ('19)

Intuitively, it is easy to understand that a person who damages another person should be responsible to pay for the damage they caused. A little harder to understand is the idea that a person is responsible to pay for the damage that their animal or other property causes. Yet, that is the foundation of הלכות נזיקין, a person is חייב for all four of the אבות נזיקין: שור, בור, מבעה, והבער. The justification for this is that a person should expect their animal, in certain circumstances, can be a danger to others and, therefore, is responsible for watching the animal. This explanation, however, seems not to apply to one particular variety of damage caused by a person's animal. When an animal damages in a manner deemed to be קרן (literally damage done with its horn, but, as we will see, not limited to cases in which the horn was actually used to inflict the damage), that animal is in many instances considered תם meaning that it is unexpected it would act in this way. We will explore the legal definition of the category קרן and attempt to understand when, and why, one is חייב for that damage.

Under the category of שור there are three subcategories: רגל, שן, and קרן. The first one, שן, is anything that the animal gets benefit from like eating and the second one, רגל, is anything that happens naturally without the animal noticing. Since with both שן and רגל damage is foreseeable, the owner is required to watch the animal closely to make sure nothing happens. If damage does happen, then the owner is held responsible and has to pay the full amount. However, if the damage is done in any place that it is normal for animals to be, like a public space or the owner's own property, then they are exempt from having to pay since the injured person should have known there would be animals there and taken precautions.

The third subcategory is קרן, which is damage that a bull does with its horns. The משנה extends this category to other aggressive acts like biting and kicking. Unlike רגל and שן, these acts are not common for a bull. To help us determine what the owner is required to pay we split animals into two categories. The first one, תם, is an animal that rarely damages, so it is less likely for it to damage by קרן and the other is מועד, in which the animal has damaged often and is more likely to do so again in this way.

However, we still need a definition of what kind of act is קרן. Looking at the sources we see that there are two different characteristics that could define קרן, it could be intent or if the act is unusual for the animal.

In בבא קמא ג:, the גמרא discusses how we could learn from the תורה that the owner of an animal should be required to pay for קרן. It says that since, in the case of שן, when the animal is not כוונתו להזיק, it doesn't have intent to cause damage, the owner is required to pay, shouldn't the owner have to pay in a case of קרן when the animal does have intent to cause damage. This shows that the גמרא is defining קרן as an intentional act of aggression by the animal.

Another example is on י"ט: which compares a case of an ox swinging its tail and breaking something versus an ox swinging a different body part and breaking something. The גמרא discusses whether either of these cases would be considered קרן based on whether this type of action is usual behavior for the ox. In the end there's no answer to this question, but this shows that whether the damage was usual or unusual for the animal is important in deciding if something is קרן. Additionally, we see in בבא קמא ט"ו: that a dog that eats a lamb or a cat that eats a chicken is considered קרן because it is unusual behavior for them even though they are getting benefit which would normally mean this was שן. This shows us that unusual behavior is the defining characteristic of קרן.

These two possibilities can have an important implication להלכה. The משנה tells us that while a שור is תם with regards to goring and other aggressive acts until it proves itself otherwise by repeated acts of damage, other animals are מועדים מתחילתן. A snake, for instance, is considered a מועד automatically and the owner of the snake has to pay נזק שלם the first time the snake damages.

However, the question remains, when a snake damages by an aggressive act like biting, is it נזק שלם חייב because it is really like שן since this is the norm for the snake? Or, is it חייב נזק שלם because it is like קרן but, unlike a שור תם, in the case of a snake the owner should have expected it from the beginning?

According to תוספות, the snake is considered like שן. Since this is a normal act for the snake, it cannot be considered קרן, and therefore, if the snake damages in רשות הרבים the owner is פטור since it is normal behavior, and others in the רשות הרבים should be wary of such things. Apparently for תוספות, the main definition of קרן is something unusual. Biting for a snake does not qualify.

מגיד משנה, however, understands רמב"ם to be saying that if the snake damages in רשות ברבים the owner is חייב. On the one hand, this is an aggressive act and for the snake it is normal, so the owner should have watched it better. Therefore, it is מועד from the beginning and the owner pays נזק שלם. On the other hand, since it is an aggressive act, which apparently for רמב"ם is the main definition of קרן, the other people in רשות הרבים would not naturally be as aware of the danger as they would be with שן. Therefore, since this is קרן, the owner is חייב even in רשות הרבים.

פטור נזקי עבדו ואמתו

An Owner's Responsibility for Damage Caused by a Slave
(דף ד.)
Dena Stein ('19)

בבא קמא ד. discusses why the תורה needs to tell us a person is חייב for both קרן and שן and you cannot learn one from the other. The גמרא explains that you cannot learn one from the other through a קל וחומר, because קרן is not necessarily more likely to be חייב due to the damage being done בכוונה. A slave also can damage with כוונה, but one is פטור when their slave does damage. רב אשי explains that the reason a slave owner is פטור is so the slave does not go burn down a field in order to get back at his owner by putting them in a position where they are forced pay for damages.

רב אשי's explanation of why a slave owner is פטור seems to be based on a משנה ידים. However, the משנה seems to have a somewhat different focus than רב אשי. The משנה ידים says the reason why a slave owner is פטור even though a שור owner is חייב is because unlike a שור that does not have דעת, a slave does, so the owner cannot be חייב for what the slave does. Fundamentally, it seems the owner should be פטור because they are their own person. If a slave has דעת and can make their own decisions, how could we really attribute the acts of the slave to the owner? This being true, we need to understand why according to רב אשי it seems that the owner is fundamentally חייב and was only made פטור out of concern for how the slave could abuse the situation.

רבינו יונה says in the שיטה מקובצת that the owner is fundamentally פטור, as would appear to be the case from the משנה, but the תורה was מחדש in a case where the slave did damage on purpose that the owner should be חייב to try to get the owner to be inclined to prevent the slave from doing the damage. It is in that case specifically where the

rabbis stepped in and said the slave would try to get back at the owner and do damage to make him pay, so then the owner is פטור from their slave's damage.

The גרנ"ט says that fundamentally the owner should be חייב, as would appear to be the view of רב אשי, even though the slave has their independent דעת. The slave is the owner's property, so the owner should be responsible for the damage the slave does even if the owner has limited control over the slave's decisions. The גרנ"ט demonstrates that the owner's responsibility is clearly not based on the owner's control over the slave, because if the owner gave the slave the responsibility to watch himself then the owner should be פטור because he fulfilled his job of doing *שמירה* for the slave. So, if that were the source of חיוב, the owner would always be פטור. Instead, the owner's חיוב must be based on the fact that an aspect of ownership is the responsibility for what the slave does.

When citing the owner's פטור, the רמב"ם says that the owner is פטור from both נזק and גזל done by their slave because of the concern that the slave could abuse the situation. This seems problematic, because it suggests that fundamentally the owner should be חייב for the theft committed by the slave. Regardless of our understanding of why the owner could be fundamentally חייב for the damage done by their slave, why would an owner be חייב for a slave's theft?

רב חיים believes that this רמב"ם proves that stealing is a form of נזק because it causes a loss in a person's property. Even though one would not be חייב if their slave steals because it is the slave's own sin, the owner could be חייב to compensate the victim for the damage done to them by the theft since stealing is a type of damage. That is why רמב"ם needs to clarify that you are פטור because of the תקנה to avoid a slave abusing the situation.

אדם מועד לעולם

A Person Is Always Responsible for Damages (דף כ"ו.)

Adam Siegel ('19)

The גמרא stresses that each person should be on notice at all times regarding damages. This concept is known as אדם מועד לעולם. This means that a person is always warned regarding damages. In מסכת בבא קמא, there are many cases that deal with oxen that damage. An ox can be labeled either תם (innocent) or מועד (warned). The ox earns the title of מועד when the ox gores 3 times before and receives the title of being warned. So why is a person always warned regardless of whether they have damaged before or not when an ox has to receive the title of being warned? The simple answer is as humans, we have more knowledge and are more aware than animals. We as people are obligated to always be on edge for something possibly happening.

The משנה in מסכת בבא קמא on דף כ"ו. states:
אדם מועד לעולם בין שוגג בין מזיד בין ער בין ישן סימא את עין חבירו ושיבר את הכלים משלם נזק שלם.
This means that a person is always warned and therefore liable for damage, whether intentional or unintentional, whether awake or asleep. The משנה brings two examples: if you blind a fellow person's eye or break vessels, you pay for the damage. A person who damages is always held responsible to pay no matter what the circumstances.

An example of אדם מועד לעולם is a case on דף כ"ז. where a person is on a roof and an uncommon wind (a very powerful wind) comes and blows the person off the roof and the person causes damage. The גמרא rules that this person is liable to pay for what he damaged. Even though one's first thought would have been that he didn't expect this

uncommon wind, the person is still liable to pay because of אדם מועד לעולם.

Even though we state that a person is liable for their actions, does this always truly apply? Are there any circumstances where something happens which is completely out of their control and they are not held accountable? There are some opinions that say yes. This is known as אונס גמור, which means a complete accident. When something happens and it is completely beyond the person's ability to prevent it, it is ruled as אונס גמור.

We see a case where it is out of the reach of a person's ability in the תלמוד ירושלמי in בבא קמא ב:ח'. If a person is sleeping, and someone comes to lie down next to him and the two injure each other, the second person becomes מועד and the first person is not. תוספות on דף ד. quotes this ירושלמי and extends it to damaging an item that was placed next to a sleeping person. תוספות says the person is פטור because the person who placed the item next to the bed caused him to break it.

תוספות on דף כ"ז: uses the ירושלמי to develop the idea that in a case of אונס גמור, in which one damages but could not have known otherwise, one is פטור. תוספות brings five cases where אונס גמור is applied and uses this concept to explain why the מזיק is פטור:

1. A person is walking with a barrel and behind him a person is walking with a beam. Suddenly, the person in front stops and the person with the beam walks into the barrel and breaks it. The person with the beam is exempt because he couldn't have expected the person in the front to stop suddenly.
2. A father borrowed a cow from someone and died, leaving his children with the cow. The children think that this cow belonged to their father, so they slaughter the cow. The children are exempt from damage they cause because they thought the cow belonged to their father and it was out of their control to clarify that it didn't belong to their father.

3. The case of the ירושלמי: Person A is sleeping, Person B lies down next to him and goes to sleep and the two damage each other. Person A is exempt because he could not have known someone or something would be next to him after he went to sleep. Person B is obligated for damage he causes because he was negligent since there was someone already there.
4. A person is walking at night and trips over a barrel, breaking it. He is exempt because the person would not have expected there to be a barrel out in the middle of the street where he was walking.
5. An unpaid watchman was watching a barrel, moves it and breaks it. He is exempt because an unpaid watchman is exempt from having to pay if there are accidents similar to theft. In both cases, he has no control over what happens.

What we see in these cases is תוספות applies the concept that אדם מועד לעולם will not apply in a case of אונס גמור, since the circumstance was beyond the person's ability to know.

The רמב"ן in בבא מציעא דף פ"ב: takes a different look at this issue. He says that a person is not exempt in cases of אונס גמור, but looks at the whole situation to determine who is the negligent party to hold responsible. Looking at the ירושלמי, רמב"ן sees the second person was negligent in putting something or lying down next to a person sleeping, unlike תוספות who ruled the first person is exempt because from his perspective, it was an אונס גמור. For each of the cases that תוספות explained as אונס גמור, the רמב"ן understands the reason to be פטור differently. For example, in the case of the children slaughtering the borrowed cow, תוספות ruled this as a case of אונס גמור, but רמב"ן understands the children as פטור since it is not possible for the children to know that the cow did not belong to their father. In the case of one person walking with beam and another walking with barrel, while תוספות views the beam-carrier as being אנוס, the רמב"ן views the barrel-carrier to be negligent because he shouldn't have stopped suddenly.

What emerges from learning תוספות and the רמב"ן is the two have two different views on the responsibility of damage. תוספות sees in a case of אונס גמור the damage being out of the person's control and therefore פטור. רמב"ן on the other hand looks at both parties and the whole situation. The damager won't necessarily be פטור because of אונס, but if the other party was negligent, he would be פטור because the damage is their fault.

מקור דין חייב אפילו בשוגג

Source for Obligation to Compensate for Unintentional Damage
(דף כ"ו:)

Cara Lopatin ('21)

אדם מועד לעולם בין שוגג בין מזיד בין ער בין ישן says, משנה בבא קמא כ"ו. a person will always be responsible, whether they damage by accident or on purpose, while they are awake or asleep. According to this משנה, it seems that no matter what the circumstances are, a person is always responsible to pay the full payment of damages. The Rabbis feel so strongly about this that they say that even a person who damages in their sleep is responsible to pay. This is not common in most areas of הלכה, because usually a חיוב does not apply equally in a case where a person acts by accident. So why is the category of damages so unique and different from all other categories of הלכה? Why would a person be responsible if they damage by accident?

רש"י thinks the גמרא כ"ו: asks this exact question when it asks, מנא הני מילי, what is the source of these words? רש"י interprets this question to mean, what is the source for the words אדם מועד לעולם בין שוגג בין מזיד? Therefore, according to רש"י's understanding of the question, the answer can simply be understood from חזקיה's answer to the מנא הני מילי. He says that the source is the פסוק, "פצע תחת פצע", or "a wound for a wound," from שמות כ"א:כ"ה. רש"י explains that this פסוק is a good source for the ruling of חייב אדם אפילו בשוגג because it is an extra passage. There are other places in the תורה, even in the same פרק and פסוק, where the ruling of "a wound for a wound" is mentioned. Therefore, because there are not supposed to be extra or repetitive words in the תורה, רש"י says that this פסוק can be learned as a source for חייב אדם אפילו בשוגג.

רבנו חננאל disagrees with רש"י. He thinks when the Rabbis in the גמרא ask the question מנא הני מילי, they are not asking for the source of the

ruling חייב אדם אפילו בשוגג, but rather they are asking for the source of the ruling פטור אדם מד' דברים בשוגג which the גמרא derived from the משנה immediately before this question. רבנו חננאל thinks the מגא הני מילי is based on this ruling, and therefore interprets the question as asking, what is the source for the ruling of being exempt from the other four payments (other than damages) when one damages by accident? Therefore, according to רבנו חננאל's interpretation, the question of why a person is responsible to pay for damages בשוגג is left in the air, and we still don't know the answer!

The פני יהושע, who agrees with רבנו חננאל's interpretation, answers this question. He says the source for the ruling of חייב נזק אפילו בשוגג is obvious. If a person is responsible for the damage that their animal causes even when they do not have any way of stopping their animal from doing it, then קל וחומר a person should be responsible for the damage that they themselves cause even accidentally. However, although this is a good start, it is not a complete answer to the question, because it is unclear why the פני יהושע makes this קל חומר. There are two ways to understand his reasoning, each of which is based on one of the two ways of understanding the overarching issue of why, in general, a person is חייב for the damage they cause.

One way to understand why a person is, in general, חייב for the damage they cause is a person has a responsibility for themself and their property. They are required to watch what they do and what their property does. If they, or their property, cause damage because they did not properly fulfill this obligation to watch, then they are considered negligent. The חיוב for נזק is a consequence of that negligence.

Another way to understand why a person is חייב seems to be championed by רמב"ם. He thinks that the reason a person is responsible to pay for the damage that their property causes is because their property is connected to them. Therefore, a person's

property's actions are connected to that person, so they are responsible for anything their property does.

We can now understand the קל וחומר in two different ways.

According to the first approach we would explain the קל וחומר as follows: we know that a person is חייב for damage their property does, because they were responsible to watch out for what their property did. If a person is responsible to watch out for what their property does, then קל וחומר, a person is responsible to watch what they themselves do. Their obligation to watch themselves is clearly greater than their obligation to watch their property. Therefore, if a person is חייב for damage done by their property because of the obligation to watch, even though at the time of the damage, they did not do it on purpose and they had no ability to stop it, so too they must be responsible for damage they do accidentally due to not having properly watched themselves.

However, there is a flaw in this interpretation. It isn't always so clear that a person is more responsible to watch their own actions than the actions of their property. In fact, the opposite could be accepted in a case where a person is sleeping. A person taking a nap is not such a dangerous beast. How much care in watching oneself must one really take? On the other hand, when a person owns a goring ox, it is obvious that they should watch their animal.

According to the second approach, we can understand the קל וחומר differently. If a person is חייב for נזק when their property damages, simply because that property is connected to them and they are responsible for whatever it does, then obviously a person would be חייב for נזק when they themselves damage, even if by accident. The obligation one has for oneself is obviously greater, because the connection and association one has with every action they do is much stronger.

In light of these two approaches to understand why a person is חייב אפילו בשוגג, the גמרא בתובות ל"ה can be clearly understood in an enhanced way. The גמרא בתובות quotes a ברייתא of חזקיה that is very similar to the ברייתא in our גמרא. In ויקרא כ"ד:כ"א the פסוק says מכה אדם ומכה בהמה, comparing hitting a person and hitting an animal. חזקיה comments on this פסוק: just like when a person hits an animal it doesn't matter whether they hit it by accident or on purpose, they intended to hit it or not, or they hit it with an upward motion or downward motion, they will always be חייב to pay money. So too when a person hits another person it doesn't matter whether they hit by accident or on purpose, they intended to hit or not, or they hit with an upward motion or downward motion, because they will always be פטור from paying money.

חזקיה here takes for granted that when it comes to hitting an animal, one is חייב whether בשוגג or מזיד. How does he know this? According to רש"י, the ברייתא in כתובות is based on what we learn in the ברייתא in בבא קמא. פצע תחת פצע teaches us that a person who does damage is חייב אפילו בשוגג and then based on that, חזקיה compares a person doing damage to a person killing another person.

According to פני יהושע, חזקיה is able to make this comparison based on the assumption that damaging an animal is חייב in both שוגג and מזיד, because this is an obvious fact that can be derived via קל וחומר from the fact that one is חייב for the damage their animal caused.

מתעסק בהיתר ובאיסור

Doing One Action While Trying to Do Another (דף כ"ו:)

Zoe Korelitz ('19)

The גמרא דף כ"ו עמוד ב' brings the case of נתכוין לזרוק שתים וזרק ארבע which is a case in which a person intended to throw a rock a distance of 2 אמות, but ended up throwing it 4 אמות. This is problematic because on שבת it is אסור to move an object 4 אמות or more in a public domain. However, the גמרא tells us that in this case a person is in fact פטור from the charges they would normally receive for doing such an action on שבת. This is surprising since the action of throwing an object 4 אמות is an act of מלאכה and the thrower intended to move the object. The only aspect missing from making this a perfect case of מלאכה is that the thrower did not intend to move it as far as they ended up moving it.

The reasoning given for the thrower being פטור is מלאכת מחשבת בעינן - in order to be חייב a מלאכה on שבת- one needs to have done the action with intention. There are several categories of less-than-full intention that do not qualify as מלאכת מחשבת. The one which is relevant here is מתעסק, when in the course of intending to do one action one ends up doing a different action which is אסור. Even within this more limited exception to מלאכת מחשבת, however, the parameters are unclear. In order to fully understand why the rock-thrower is פטור, the parameters of מתעסק need to be understood.

The גמרא in שבת discusses this case in the context of other similar but not identical cases. The first case is נתכוון להגביה את התלוש וחתך את המחובר which is a case of intending to lift up a plant which is no longer attached to the ground but actually cutting the plant. This case is פטור according to everyone. There is a מחלוקת about the second case, נתכוון לחתוך את התלוש וחתך את המחובר—intending to cut a plant which is no longer attached to the ground (which is מותר on שבת) but

accidentally cutting a plant which is still attached to the ground (which is אסור on שבת.) According to רבא the actor is פטור because they did not intend to do the action they did. In contrast, אביי says they are חייב because the person did the action they intended to do (they did intend to cut a plant, albeit in a different way.) The rock-thrower case is presented as identical to this case of נתכוון לחתוך את התלוש וחתך את המחובר, meaning they should have the same laws.

However, while the cases of נתכוון להגביה את התלוש וחתך את המחובר and נתכוון לחתוך את התלוש וחתך את המחובר may seem clear, there is actually a מחלוקת between רש"י and תוספות over what the facts of these cases really are. They are arguing practically about two cases.

One case is when a person intends to cut plant A, which actually is attached to the ground, but they miss and accidentally cut plant B, which is not attached to the ground. We will call this case "missing." רש"י says the "missing" case is the case of the מחלוקת אביי ורבא and תוספות say this is the case in which all agree that the person is פטור.

The second case is when a person intends to cut plant A, which they think is *not* attached to the ground. They do cut plant A, but realize afterward that it actually was attached to the ground. We will call this case "mistaking." In the "mistaking" case, רש"י says the person is חייב and תוספות say that this is case of the מחלוקת אביי ורבא.

In order to understand why רש"י and תוספות have this מחלוקת, the source for the exemption from punishment for מתעסק needs to be learned. The source for this exemption is in מסכת כריתות דף י"ט עמוד ב'. In כריתות there are two sources for this principle. The first is the פסוק "אשר חטא בה" which teaches us that one is חייב פרט למתעסק - liable except when it is מתעסק. A second source brought by שמואל is that המתעסק בחלבים ובעריות – חייב, שכן נהנה; מתעסק בשבת פטור מלאכת מחשבת אסורה תורה. This source says that in other איסורים one is חייב for מתעסק because they get הנאה, or benefit, from the action;

however, in שבת one cannot be חייב because in order to be חייב on שבת one needs to have full intention to do the action.

רש"י says רבא and אביי (and as such the גמרא in שבת) argue with שמואל and do not accept both sources, rather they only accept the first source. As such, רש"י says that one is only פטור when they intend to do an act which is מותר. This is true for both שבת and other איסורים. This type of exemption is known as מתעסק בהיתר. The reason for this view is that if we accept only one source, we would assume that מתעסק is referring to its obvious meaning, when one intends to do something מותר.

In contrast, תוספות say that that רבא and אביי (and as such the גמרא in שבת) agree with שמואל and do accept both sources. This means that even when one intends to do something אסור (but end up doing a *different* action which is also אסור) they're פטור for מתעסק in שבת (this type of exemption is known as מתעסק באיסור), and that when one intends to do something מותר they are פטור in שבת and in other איסורים. The reason for this view is that if we accept two sources, the second source must be teaching us another principle—that מתעסק applies even when one intends to do something אסור.

We end up with two ways of understanding the scope of מתעסק. It could be that one is פטור if they did an אסור action instead of doing the מותר action they intended to do-they are doing a completely separate act, such as in the case of "missing." On the other hand, one could be פטור for doing the action they intended to do on a different אסור object than the one they intended to do the action on, regardless of the fact that they *did* intend to do an אסור action and that they completed the act which they intended to do (but just did it on a different object), such as the case of "mistaking."

We can now better understand the מחלוקת רש"י ותוספות in the גמרא שבת. In that גמרא there is one case that all agree is פטור and another

case that is a מחלוקת אביי ורבא. Both רש"י and תוספות are trying to understand the exact parameters of this case. What they assume is that the גמרא here must be based on the conclusion in כריתות which talks about the source of the פטור. As such, when the גמרא in שבת presents a case in which everyone agrees one is פטור, both רש"י and תוספות believe that this matches the case in which one is פטור in כריתות; however, they disagree as to what that case exactly is. The case in שבת in which there is a מחלוקת (the case of נתכוון לחתוך) is different in that it is a new kind of case not covered in כריתות.

According to רש"י the case we know from כריתות is פטור is the case of מתעסק בהיתר when a person thinks they are doing a מותר type of action and accidentally instead does an entirely different type of action which is אסור. In the גמרא שבת that case נתכוון להגביה is when one plans to simply lift up a plant that is not attached to the ground, but misses, and does a *totally different type of action* - plucking - on an attached plant. According to רש"י the new case אביי ורבא argue about is when one plans to cut (not simply lift up) an already detached plant, but misses and cuts an attached one which is the case of "missing." This is closer to fulfilling one's intention than a typical מתעסק בהיתר, because one is doing the same exact type of action they intended to do (cutting) just to a different object than planned. Whether this is in fact מתעסק and in fact פטור is exactly what אביי ורבא argue about.

תוספות has a different version of the case which is פטור. The case from כריתות that they say is פטור is the case of מתעסק באיסור, when a person thinks they are doing an אסור type of action and accidentally does the action on a different אסור object. If this is true then if one intended to do an action on a מותר object but ended up doing the action on a different object which is אסור, one is also obviously פטור. According to תוספות the new case אביי and רבא argue about is when one plans to cut a detached plant, cuts it, and then realizes it was still attached when it was cut, the case of "mistaking." This is greater intention than a normal case of מתעסק since they did the action they

intended to do. Whether this is in fact מתעסק and in fact פטור is exactly what אביי ורבא argue about.

תוספות is suggesting that "mistaking" is a case in which רבא says that one is פטור, despite the fact that this is a very unusual case which on face value no one should assume to be פטור. This case does not seem to fit the definition of מתעסק at all. מתעסק is defined as intending to do one action but ending up doing a different action which is אסור. In this case one intends to do an action, does that action, and finds out the action was אסור. This type of case is fundamentally different, since the action being done is physically the same as the action the actor was intending to do. Usually, the פטור of מלאכת מחשבת comes from not having full intention to do the act. תוספות's case proposes that this type of מתעסק is not a פטור from lack of intention to do the act, but rather from not intending to violate the איסור. However, not intending to do an איסור but accidently doing it is, in fact, the very definition of *שוגג* on *שבת* for which one is *חייב* a קרבן חטאת. The classic cases of *שוגג* are not realizing what you are doing is מלאכה, or not realizing that it is *שבת*, or not knowing that there is such a concept of מלאכה on *שבת*. These cases, for which one is obviously חייב, seem very similar to the case that תוספות claims may be מתעסק! In all of these cases one had full intention to do the action they did, but simply did not have intention to violate an איסור with that action. How then can תוספות propose that what seems like a classic case of *שוגג* is actually מתעסק? It seems as if there should be no logical way to think such a thing.

A potential reason that this case qualifies as מתעסק and one is therefore פטור (according to רבא) is the type of lack of intention to violate is different in a case of *שוגג* and in our case. In a *שוגג* case the reason one thinks what one is doing is מותר is external to the action being done. It is about it not being *שבת*, or if the action is allowed or not, and so on. The action is accomplished and so is the actor's intention, it is just that the actor was unaware of certain facts that make them חייב.

However, in our case, the reason you think what you are doing is מותר is you do not understand the action you are doing, the mistake is intrinsic to the action itself.

This distinction is suggested by the *שיטה מקובצת* in the case of a מוהל who thinks he is cutting a baby whose eighth day is *שבת* but actually cuts a baby whose eighth day already passed. The מוהל is חייב even though he did not intend what he did. *שיטה מקובצת* explains the מוהל's intention absolutely was to cut in an אסור manner, because the mistake was about a peripheral issue of what day it was, but the intention was for an אסור type act: הוי כמו נתכוון לאיסור שהרי הוא מתכוון לעשות מלאכה גמורה, דהי דסבור שהוא של שבת, מכל מקום לחבלה מתכוון. In our case, however, the mistake is intrinsic. The cutter thinks they are cutting a different type of plant, which really means the cutter thinks they are doing a different type of action. This kind of mistake about whether one is violating can make one פטור as a type of מתעסק.

נתכוין לזרוק ח' וזרק ד'

A Person Intended to Throw 8 אמות, but Threw 4 אמות
(דף כ"ו:)
Shayna Lopatin ('19)

In some cases in the גמרא, intention does not matter; what matters is the action that you did, no matter what your intention was. However, in the גמרא in שבת, which discusses in detail נתכוון לזרוק ח וזרק ד, intention means everything. There are a few cases that are talked about and disputed in this גמרא, but the main case that I will talk about in this article is נתכוון לזרוק שמנה וזרק ארבע, a case where your intention was to throw an object 8 אמות and you end up throwing it 4 אמות. The גמרא initially gives a ruling of חייב, but by the end, it is not clear whether one would be פטור or חייב in the נתכוון לזרוק ח וזרק ד case. As a result of this lack of clarity, רש"י and רמב"ם argue about whether you are in fact פטור or חייב in this case.

The הלכה in the inverse case is clear. If one intends to throw something ד אמות and it instead travels ח אמות they are פטור. This is because it is not considered a מלאכת מחשבת. On שבת in order to be חייב in a מלאכה, one needs to do the action with complete intention. If intention is lacking, they are פטור. If one intended to throw something ד אמות, they had no intention whatsoever for it to travel ח אמות and therefore, they are פטור. The question is, should the case of intending ח אמות be different, since when one intended to throw something ח אמות they did have within their intention that the object would travel ד אמות on the way to traveling ח אמות. So, while the person certainly did not fulfill their entire intention, what they did do (throwing it ד אמות) was within their intention.

רש"י's approach to this case, can be compared to a "target approach." רש״י states, שתנוח לסוף ד' לא מזדרק ליה תמניא בתמיה הלכך כי נח לסוף ד' לא נתקיימה מחשבתו. The target approach he is talking about is the idea

that someone has direct intention to throw an object somewhere and only to that place. For example, I want to throw an apple 8 אמות. Not to pass over 8 אמות, but I want my apple to land 8 אמות away. Therefore, if my apple lands 4 אמות away, it is *not* fulfilling my intention, because even though I knew my apple would pass by 4 אמות, I never intended it to land there. רש"י puts a big emphasis on the landing of the object. If it did not land in the place you wanted it to, you are not חייב. The intention to throw something 8 אמות was not fulfilled, despite the object going part of the way. There is no fulfillment of any of the action/intention. The person's intention did not come to fruition and the notion of it landing 4 אמות away was not at all within their intention.

רמב"ם does not agree with רש"י's "target" approach. רמב"ם believes that one would be חייב because when one threw it 8 אמות, they must have known that it would have to travel across 4 אמות: שֶׁהַדָּבָר יָדוּעַ שֶׁאֵין זֶה הַחֵפֶץ מַגִּיעַ לְסוֹף שְׁמוֹנָה עַד שֶׁיַּעֲבֹר עַל כָּל מָקוֹם וּמָקוֹם מִכָּל הַשְּׁמוֹנָה. He believes that instead of looking at the intent as a "target" approach like רש"י, we should look at the intent like a path. רמב"ם puts a focus on the travelling of the object while רש"י puts an emphasis on the landing of the object. Because רמב"ם puts an emphasis on the object's travel, it is obvious why he would think that you would be חייב: in order for an object to travel to 8 אמות, it first has to pass 4 אמות. Every אמה that the object passes counts as a part of the fulfillment of the person's intention. The traveling past 4 אמות certainly was within their intention even if they did also intend to do more.

ברכת שמעון asks, why would the רמב״ם discount landing as an important feature to whether you are חייב? The מלאכה that one is violating in our case is הוצאה. For any violation of הוצאה, in order to be חייב a person needs to remove something from its place – עקירה – and needs to place it back in a new place – הנחה. So, how can רמב"ם say that having had the intention for something to pass by 4 אמות

without having the intention for it to land in that place – with no intention for הנחה – is considered enough intention for one to be חייב?

ברכת שמעון brings a very interesting answer to its question When it comes to הוצאה מרשות לרשות, עקירה and הנחה seem to be essential components of the מלאכה. They are not simply technical requirements in order to be חייב. Without them, one simply has not done the מלאכה. Therefore, in order to be חייב, the הנחה would also have to be intended. רמב"ם seems to say that when it comes to מעביר ד אמות ברשות הרבים, however, עקירה and הנחה are not components of the מלאכה. Technically, in order to be חייב, one needs to be עוקר and מניח, but the definition of the מלאכה is causing something to travel the distance. Therefore, as long as the travel was within one's intention, even without intention for the חנחה at that spot, they can be חייב.

מצא תביא תבר

Breaking Something Which Will Break (דף כ"ו:)

Yehudah Wrotslavsky ('19)

I've always wanted to smash someone's iPhone with my baseball bat, so I did it.

One summer day, I took my friend Bob's iPhone X and brought it to the ballpark. I was so excited to finally break a phone with a bat. I threw Bob's phone up in the air, wound my bat back, and as I was about to take the biggest swing of my life, another friend, Jim, came and crushed the phone with his bat all the way to left. I yelled at Jim because I wanted to break Bob's phone, but at least now I assumed I didn't have to pay for it. Jim, however, said he wouldn't pay for it because when I threw the phone up in the air, even if I swung and missed, the phone would still have fallen and broken. It was inevitably going to break.

Who pays for Bob's iPhone? The גמרא in the second פרק of בבא קמא analyzes different types of cases that help us answer this question.

In the second פרק of בבא קמא on דף כ"ו:, רמה brings a case similar to the baseball one. If person A (me) throws a vessel off a roof and before it hits the ground, person B (Jim) breaks it with a stick, person B (Jim) is פטור. The reason is because when Jim broke it, he broke a vessel that was going to break anyway, "מצא תביא תבר". Something that will break on its own is considered having no value, so he is not חייב.

רבא states a comparable case on דף י"ז:. If a chicken steps on a כלי and doesn't break it, but it rolls to another place and then breaks, what's the דין? Do we view this case as רגל in which he would be חייב נזק שלם or do we view it as צרורות (pebbles), in which he would

be חייב חצי נזק? The reason why צרורות is only חייב חצי נזק is because it was an indirect damage. The animal kicked the pebbles, then the pebbles damaged an object. The גמרא brings רבה's case from דף כ"ו: to resolve this case, where he concludes that he is פטור, presumably because בתר מעיקרא אזלינן, we follow rule based on the beginning of when the damage occurred. The גמרא wants to prove from רבה's case that in the case of the chicken, we should also go בתר מעיקרא and the chicken's owner should be חייב to pay נזק שלם.

Everyone agrees that the hitter is פטור because רבה explicitly says so; however the גמרא does not seem to address if the thrower is חייב or פטור. The ראשונים have three possible explanations to clarify if the thrower is חייב or not.

רש"י on דף י"ז: states that since we judge based on the beginning of what happens to this object, the thrower is חייב and the hitter is פטור. Since it was already going to break, it's as if the thrower broke it. Going back to our גמרא on דף כ"ו:, there is no mention if the thrower is חייב or not. רש"י says that in רבה's case, the owner threw it off the roof, which is why the גמרא makes no mention of him being חייב or not, since he was the owner of the כלי. This case implies that if someone else threw, that thrower would be חייב, reinforcing that the גמרא's conclusion is בתר מעיקרא אזלינן.

The רמב"ן in מלחמות ה' on דף ט"ז. brings a different approach. He says the thrower is certainly פטור, because we evaluate who is liable based on the time it broke, "בתר תבר מנא אזלינן", and the hitter is also פטור since the כלי he hit was going to break and therefore had no value. Why does the רמב"ן disagree with רש"י? He explains that if it were true that we judge based on the beginning, why doesn't the גמרא say that the first person is חייב? That's a bigger חידוש and it would teach us to judge based on beginning. Clearly, the hitter is פטור because the כלי had no value. Since the גמרא does not state בתר מעיקרא אזלינן addressing the thrower as חייב or not, the רמב"ן says the

conclusion is בתר תבר מנא אזלינן, and his throwing it did not break it, so he is פטור.

A third approach in this case regarding if the thrower is חייב or פטור is presented by the רשב"א. The רשב"א of דף כ"ו:, who quotes the ראב"ד, learns רמה's case as proving we judge based on beginning, similar to רש"י's understanding, but that doesn't mean the first person is חייב. It only means we obligate based on the beginning of this object's journey. The reason why both are פטור, according to the רשב"א, is because when we focus on the thrower, perhaps the vessel would not have broken, so we cannot label him as causing a financial loss. Regarding the breaker, since it was inevitable that the vessel was going to break, it is considered as if he did not cause a financial loss. We evaluate each person's action individually, based on what it leads to.

If we look at the רשב"א in comparison to רמב"ן and רש"י, his approach is similar to the רמב"ן that they both say the first person is פטור, but different in that we judge based on the beginning according to the רשב"א, unlike the רמב"ן who goes based on תבר מנא, when it actually breaks. Compared to רש"י, it's similar in that we judge based on beginning, but goes against רש"י because the רשב"א says first person is still פטור.

The גמרא brings a comparable case of murder. If a person throws a baby off a roof and someone comes and stabs it, there is a מחלוקת תנאים if the stabber is חייב or not (because in murder, you must be the one who "murdered" the person and if you take the last part of the person's life, are you considered as having taken the person's whole life or not), but everyone agrees the thrower is פטור. In חידושי רב שמעון שקופ, רב שמעון שקופ provides an answer as to why by murder we don't judge based on the beginning but in damages, we do. רב שמעון שקופ explains that when we said "because it's going to break," that doesn't mean the object is broken now; it means "when it breaks," we view it as if it was broken in the beginning so right now, it has

no value. By murder, however, you have to fully murder the person to be labeled as a murderer and חייב. Until he is actually dead, he's alive, so you're not חייב. A human's life is not evaluated by a sum of money. As long as he is alive, you can't be חייב for murder. But in terms of damage, if you throw a כלי, you made it worthless, and therefore you are חייב.

גרמא בנזיקין ודיא דגרמי

Direct and Indirect Damage (דף כ"ו:)
Jaden Jubas ('21)

Cases of damage can be categorized based on a person's direct involvement in the damage caused. If you or your property damage you are חייב. When it is a case of גרמא, indirectly causing damage, we rule you are פטור. What about cases between these direct and indirect cases? This middle category is called גרמי and is the subject of discussion within הלכה regarding whether the person is חייב or פטור.

In the גמרא on דף כ"ו:, it says "ואמר רבה זרק כלי מראש הגג והיו תחתיו כרים וסלקן או קדם וסלקן פטור מאי טעמא בשעתא דשדיה פסוקי מפסקי גירה." This literally translates to "if a person drops an item off a roof, but there are pillows and blankets on the ground underneath and another person or even you yourself come and remove the pillows and blankets while the item is falling you are פטור. What is the reason? At the time you dropped it, your arrows stopped."

While analyzing this גמרא it may seem unclear and vague why you are פטור in this case and what it means "your arrows stopped." רש"י on דף כ"ו: ד"ה "כלי מראש הגג והיו תחתיו כרים וכסותות כו' פטור" says at the time it was thrown it wasn't going to break until the pillows and blankets are removed. Even if the thrower himself removed them he is פטור because גרמא in נזיקין is פטור. רש"י holds this is a case of גרמא since you are only indirectly breaking the object. When it says your arrows stopped it means when you dropped it you are not liable because the item won't break unless someone removes the pillows and blankets, just like an arrow shot at a shield won't cause any damage until the person moves the shield.

A case is brought in the גמרא on דף צ"ח: where רמה states if you burn a document or contract of your friend, you are פטור. The גמרא quotes a מחלוקת between תנאים if דנין דיעא דגרמי, we judge (and therefore obligate to pay) cases of גרמי or לא דנין דיעא דגרמי, we do not judge cases of גרמי. אמימר comes and explains that this is a case of גרמי and the person who judges cases of גרמי would make him pay for the value that could be collected based on the *שטר*. According to the one who doesn't judge cases of גרמי, the damager only damaged the paper and would only be חייב to pay for the value of the paper but not of the value that could be collected based on the document.

תוספות on דף כ"ו: quotes the רי"ף as saying that when רמה presented our case in the גמרא, רמה doesn't obligate cases of גרמי, so that is why he says פטור. Since we hold of גרמי, we would hold that he is חייב. תוספות themselves disagree with the רי"ף and say that it is a case of גרמא so the הלכה would be like רמה and he is פטור. רמה himself is the one who said on דף צ"ח a person who burns a *שטר* is פטור, but we in fact rule against רמה on the case and say you are חייב. From this we can infer that we hold the case of burning a contract is גרמי and that is why רמה says it's פטור but we hold חייב.

רבינו יהונתן says if the מזיק throws a vessel off the roof and it wouldn't have broken because there were pillows, but someone comes and removes it they are both פטור. The first person is פטור because the item wouldn't break and the second person is פטור because it's גרמא. It seems like רבינו יהונתן is holding it is a case of גרמא like רש"י and the simpler understanding of רמה, unlike the רי"ף. A case of גרמי would be burning a contract, in which the value it could obligate is lost, or ruining a pillar that could have been used to carve nice designs on. In both cases, you would have to pay since he judges cases of גרמי.

Based on several cases we will bring shortly and the rulings in each of them, תוספות in "זאת אומרת" בבא בתרא דף כ"ב: ד"ה developed simple principles to identify a case as גרמא or as גרמי. For גרמא, his first rule

is that you set up the scenario and someone or something else does the damage. The second rule for גרמא is that your action causes damage later on and not at the exact time of your action. All other types of indirect damage cases, according to תוספות, would be categorized as גרמי. The first rule for גרמי is that you are the one doing the damage. The second rule of גרמי is that the damage happens at the same time as your action.

One example of גרמא would be our case of pulling pillows out from underneath a falling object. Since you are causing the damage to happen but it happens later on not at that exact moment you cause it, it will be גרמא. Stoking a fire with the wind by blowing along with the wind to make the fire bigger is damage not only done by you and it happens at a later time so it too is considered גרמא. Placing poison in front of an animal who dies from eating it is considered גרמא because you are just putting it there and the animal eats it later on its own.

In contrast, תוספות brings cases of גרמי, such as burning your friend's contract which is considered גרמי because you are not directly causing your friend a loss; you are indirectly causing a financial loss but it happens as a direct result of your burning his contract and at the exact time when you burned it. A second case is a case of כלאים, growing grapes and grains together. It is forbidden to grow both in the same field and the produce grown becomes prohibited, but if a fence separates the two, the two are considered separate fields and permitted. When the fence between the two fields falls down and the owner refuses to fix it, the damage to his friend's field since he is not able to sell the product is a direct result of the fence falling so we label this as a case of גרמי. A final case תוספות brings under the category of גרמי is when Bob (person 1) sells a contract to Jimmy (person 2) to collect a debt owed to Bob by Tom (person 3). Bob then forgives the loan that Tom is required to pay him, causing Jimmy to lose the money because Tom no longer has to repay the debt. In this case, Bob's action directly and immediately caused

Jimmy a financial loss. All of these cases fit under תוספות's rules of how to know when it is a case of גרמי.

כופר

Atonement Payment for Death (דף כ"ז.)
Ezra Klausner ('20)

In שמות פרק כ"א פסוק כ"ט, the תורה presents a case referred to as כופר. The case involves an ox that has gored three times, making it מועד, and the owner is warned to guard it, but fails or neglects to, and the ox kills a person. The תורה says that the ox should be stoned and its owner shall be put to death. The פסוק afterwards, לְ פסוק, says "אם כפר יושת עליו ונתן פדיון נפשו ככל אשר יושת עליו." The literal definition of the פסוק is that if an atonement payment is place upon him, he must pay to redeem his soul. The תורה שבעל פה understands this to mean that the owner isn't actually put to death, but is required to pay an atonement penalty instead, and the word אם here doesn't mean the classic "if." How do we evaluate what the owner pays?

In מכות דף ב:, the גמרא, based on the words "ונתן פדיון נפשו" brings two opinions on how we evaluate what the owner pays. This is based on how to understand the word נפשו in the פסוק: whose soul is the תורה referring to? רבנן say that we assess the amount to be paid as an atonement according to דמי ניזק, the victim's value. רבי ישמעאל בנו של רבי יוחנן בן ברוקה says that we assess the amount to be paid as an atonement according to דמי מזיק, the owner's value.

This מחלוקת on כופר plays a major role in defining a case in our גמרא in בבא קמא on דף כ"ז. The case is when a baby is thrown off a roof and an ox catches it with its horns, killing the baby. How do we evaluate what the owner of the ox pays? The גמרא quotes the מחלוקת from מסכת מכות. רש"י says that according to רבי ישמעאל, who holds דמי מזיק, the owner would pay his own value. However, according to רבנן, who holds דמי ניזק, the owner wouldn't pay anything because when the victim, the baby, was thrown from the roof, it had no value because it was going to die with or without the

ox. When the ox's horns killed the baby, the baby was already considered dead and lacking value.

רבינו חננאל takes a different approach than רש"י about when the owner is חייב and when he is פטור. He states that according to רבנן, who hold דמי ניזק, the owner would pay because his ox killed someone. However, according to רבי ישמעאל, who holds דמי מזיק, the owner should be put to death because since he didn't watch his ox it is like he was the one who killed the baby. However, ה' has mercy on him and allows him to pay כופר since he didn't kill anyone with his own hands. In our case, even if the owner caught the baby himself instead of the ox, he would be פטור. He would be פטור because the rule is if more than one person is involved in murder, all of them are פטור. Since one person threw the baby and someone else caught the baby, both are פטור. Therefore, if the owner would be פטור then all the more so the ox should be פטור. This rule is brought up in the previous section of גמרא on דף כ"ו:. The case is the same as our case but instead of an ox catching the baby with its horns, a person a catches the baby with a spear. The גמרא brings a ברייתא, a Tannaic source, that says if ten people hit one person with sticks, everyone is פטור. We see from here if two or more people kill someone all those involved are פטור.

Rav Soloveitchik offers one approach to understand the underlying points in the מחלוקת between רש"י and רבינו חננאל. He says that רש"י understands the מחלוקת between רבנן and רבי ישמעאל to be on how much you have to pay (i.e. is it the value of the damager or the person damaged). He explains that רבינו חננאל understands the מחלוקת between רבנן and רבי ישמעאל to be a fundamental difference in why you're חייב כופר. According to דמי מזיק, you're חייב כופר because your ox killed and that makes you, the owner, a רוצח and חייב מיתה בידי שמים. כופר is an atonement that exonerates you from any death obligations. According to דמי ניזק, the ox is the one who is labeled a רוצח, not the owner. You're חייב כופר because someone was killed by

your property, so the obligation to pay is no different than any other damage your property causes.

Looking back at our case, we can see the נפקא מינה between רבנן and רבי ישמעאל according to רבינו חננאל's understanding of their opinions. According to דמי מזיק, the reason the owner is generally חייב כופר is because he is labeled a רוצח. However, in our case, the owner would be פטור as a murderer because of the rule that when two people murder someone they are פטור since neither individual can be solely classified as a רוצח. Based on דמי ניזק, the reason the owner is generally חייב כופר is not because he is classified as a רוצח but because his property, the ox, killed a person. In our case, the above mentioned rule regarding two murderers doesn't apply since a human and an ox killed, not two humans, so the owner would be חייב כופר.

One final issue that Rav Soloveitchik says we still need to clarify is how רבינו חננאל can say that רבנן, who hold you evaluate based on דמי ניזק, obligate you in this case. While the baby is falling it should have no value since it is going to die, so when the ox kills it, דמי ניזק should be valued as zero. The Rav explains that we don't evaluate the individual at that specific moment in that circumstance, rather we evaluate the value of the person in an abstract setting. Therefore, in our case, when the ox catches the baby, we don't evaluate the baby in this specific situation of falling, but as an individual without any external factors.

בושת

Payment for Embarrassment (דף כ"ז.)
Ari Ershler ('19)

In Jewish Law, when a man causes damage to the body of his fellow man, he is חייב for more than just the reimbursement of the decrease in monetary value that occurred. This reimbursement is known as נזק and is evaluated by looking at the damaged man's value prior to the damage and what he is now worth after the damage. He is also חייב for what is known as "ד' דברים", "the four things". The ד' דברים that a man is חייב beyond the damage are: צער, the pain he caused, ריפוי, his medical bills, שבת, his unemployment, and finally בושת, the shame the damaged party experienced. It is this final "extra" payment that we will focus on. During an act of damage, the victim can experience a certain amount of shame. This shame is hardly a pleasant experience and has a certain monetary value attached to it, i.e. the amount of money one would pay to avoid experiencing such a shame. This damage is subjective as the משנה on פ"ג: tells us that the monetary value is relative to who is the one who embarrassed and who is being embarrassed. This amount is what is required for the damager to pay the victim to cover his embarrassment.

What is the source in the תורה for בושת? In דברים כ"ה:י"א, the תורה states "כי ינצו אנשים יחדו איש ואחיו, וקרבה אשת האחד להציל את אישה מיד מכהו ושלחה ידה והחזיקה במבשיו." It talks about two men fighting. The wife of one of the men comes over and grabs the man who is fighting with her husband, thus embarrassing him. From this verse we also see that a certain level of intent in the act is necessary as the wording implies she intentionally grabbed the man.

The גמרא on דף כ"ז. brings a case of בושת. It states: אמר רבה נפל מראש הגג ונתקע באשה חייב בד' דברים וביבמתו לא קנה. חייב בנזק בצער בריפוי בשבת אבל בשת לא דתנן אינו חייב על הבשת עד שיהא מתכוין. A man falls from a

roof, and ends up in relations with a woman. He is required to pay for נזק, צער, ריפוי, and שבת, but not בושת. If this woman is a יבמה, his deceased brother's wife, he does not acquire her as a wife. The second half of רמה's statement says that he is not חייב to pay for בושת because he has no intent to embarrass her.

A big question on this topic is why a person is only חייב for embarrassment if he has intention unlike all the other payments which he is חייב for if he was negligent but committed without intention? The answer to this question, according to the ים של שלמה, is because true embarrassment is only if the person did the action with intent, while all other damages can exist even without intent. If a person embarrassed someone else without intention, everyone knows it wasn't done to disgrace them. The other payments of the ד' דברים are all different results of the damage the person caused, such as pain he caused, his medical bills, or his unemployment.

What would happen if you have intention for the action you are doing, but not for the embarrassing aspect of it? Would you be חייב to pay for בושת in such a situation? For example, if a man tries to stop himself from falling by grabbing onto another man, causing the second man to fall into mud, what is the law? He did not intend on embarrassing him, but he did intend on grabbing onto him. Is that considered enough intent?

The גמרא on דף כ"ז. brings several cases where a man again falls off a roof:
"אמר רמה נפל מראש הגג ברוח שאינה מצויה והזיק ובייש חייב על הנזק ופטור בד' דברים". A man falls from a roof due to a רוח שאינה מצויה, an atypical wind and he caused damage and embarrassed the person. He is חייב for נזק and פטור from the ד' דברים because it was not due to negligence.

"ברוח מצויה והזיק ובייש חייב בד' דברים ופטור על הבשת" If he falls in a רוח מצויה, a common wind, he is חייב to pay for ד' דברים, since he was

somewhat negligent if he fell due to a common wind, but פטור from בושת.

"ואם נתהפך חייב אף על הבשת" If he turned over while he was falling, he would be חייב for all 5 payments, including בושת.

To explain why he is חייב for בושת even though he did not intend to embarrass, the גמרא quotes the פסוק we discussed earlier which says that the woman "sent her hand and grabbed him." The extra verbiage of sending her hand and grabbing teaches us that as long as there is intent to damage, even if it is not specific intent to embarrass, it is enough to hold the person liable for בושת.

What exactly is this case of the man who turned himself in order land on his friend? What was his intent? There is an argument between רש"י and מאירי on one side against the ים של שלמה, Rabbi Shlomo Luria. The מאירי states that when the falling person turns, he is doing so to save himself, but he knows that he is going to embarrass the person under him, therefore, it is considered as if he intended to embarrass. There is a similar concept in the laws of מלאכה בשבת called פסיק רישא. If a person wants to perform a permitted action, but it will definitely lead to a forbidden act of מלאכה, the permitted action is forbidden based on the principle of פסיק רישא. In such a case, the normally permitted action becomes forbidden because since it will certainly lead to the forbidden act, it is as if you are intending to do the מלאכה. Similarly, רש"י says that to be חייב for בושת it is sufficient to have intention to benefit from the damage, meaning to cushion your blow from the fall. Furthermore, רש"י says, you're חייב בושת in the case of turning even though you didn't have intention to embarrass. We see from this that רש"י and the מאירי are on the same side.

The ים של שלמה, against רש"י's position, says you can't just have כוונה to save yourself to be חייב. You need כוונה to actually hurt in order to be חייב. To support his position, he quotes the גמרא which

cites the source of בושת, in which the גמרא says the woman may not have intended to embarrass the man, but she did intend the hurt the man by grabbing him.

האומר קרע כסותי

Permitting Someone to Damage Your Property (דף כ"ז.)

Daniel Shamayev ('19)

The משנה on דף צ"ב. talks about how if someone asks someone to break their object, the person who breaks it will be obligated to repay the owner for the damage caused. Why? Why should someone be obligated to repay for an object that they were asked to break? Obviously, if the owner of the object told the individual to break it, it clearly means they have no value for it, so why should they get anything for its loss? Does it matter in which form they gave the object?

However, the גמרא on דף צ"ג. quotes a בריתא which seems to contradict the משנה. The גמרא seems to say that you will be exempt from damages if you were asked by the owner to destroy it. How do we explain the contraction with the משנה?

The גמרא explains there is difference between the case in the בריתא and in the משנה. The distinction is based upon what the owner initially asked of the person to whom he gave the object.

The case in the משנה is based upon the concept of the owner giving the object to the second party בתורת שמירה, with the responsibility of watching an object that is given to you to care of. In the גמרא, the owner of the object asks someone to break their object for them and the person is liable for payment, only because the object was initially given to them בתורת שמירה, for the purpose of watching. The initial responsibility given to the *שומר* was to watch it. Only later did the owner tell the *שומר* to break it. The responsibility of *שמירה* is so important that even though the owner told the *שומר* at a later point that he can break it, it is still considered פשיעה and he has to pay for the damage he caused.

In the בריתא, the person is פטור from damages because he was given the object initially בתורת קריעה, meaning when he was first given the the object he was immediately told to break it.

Let's now bring in an additional concept. The משנה on דף צ"ב. introduces us to the idea of על מנת לפטור, "on the condition that you will be exempt." The משנה says that in general, saying קרע כסותי does not exempt the damager from responsibility of being a שומר. However, if the owner says על מנת לפטור when he says קרע כסותי, then he is exempt from payment.

So far, we learned some fundamental ideas, but there is another case. The גמרא on דף כ"ז. talks about a scenario where someone puts a lump of burning coal on another man's heart and the man dies. רבה rules in this case that he will be exempt from death. Why would that be so? The reason given by רש"י is that the person should have removed the coal and not let it burn them.

However, there is similar case in which the person putting the coal on something is, in fact, held responsible for damages. The case is that instead of putting the coal on someone's heart, they put it on someone's garment which is on the ground. In this case, the owner doesn't remove the coal, and yet, the person who puts the coal on the garment is liable to repay for damages to the garment. Why should the person putting coal on a garment be treated differently than a person who puts a burning coal on someone's heart?

The difference is in what you expect the damaged person to do. In the case of the person who has coal on his heart you would expect him to immediately take it off. After all, if he doesn't he is going to die. To a certain extent, he himself is responsible for the damage he incurred. However, as רש"י explains, the person whose shirt is burning may specifically not act because he knows that he can go to

the בית דין to claim his loss so there is no need for him to do anything now.

However, the idea that the person who allows his garment to burn is entitled to damages bothers the רשב"א on דף צ"ג. To the רשב"א , the case of someone burning someone else's garment should be no different than the person who gives someone a garment בתורת קריעה and immediately tells them to rip it. It seems that in both situations, the person is relinquishing control over his property. Can't one make the assumption that a person who puts his garment on the floor or allows it to burn no longer values it? In addition, if in both cases the responsibility for damages stems from demonstrating that you no longer value your property, then it would seem that the person who is told to break after being told to watch should also be exempt from damages. The רשב"א resolves this question by stating if the person who placed a coal on someone's garment would be פטור by arguing the owner should have removed it, even if the owner did not direct him to burn it, how much more so we should exempt someone who is instructed קרע כסותי after they were given it בתורת שמירה, which we have stated is חייב unless the owner said על מנת לפטור.

אין הולכין בממון אחר הרוב

We Don't Follow the Majority in Monetary Cases (דף כ"ז.)

Raffi Klausner ('19)

In פרשת משפטים פרק כ"ג פסוק ב' it says אחרי רבים להטות, which is the source of the concept that we follow the רוב, the majority. The פסוק is talking about דיני נפשות, which are capital cases, but not דיני ממונות, which are monetary cases. The גמרא in בבא קמא דף כ"ז. discusses the separate topic of whether we follow the רוב in דיני ממונות. The גמרא brings multiple cases where the terms כד (a jug) and חבית (a barrel) are used interchangeably. רב פפא states that these two words technically have the same meaning. He then asks that if כד and חבית are the same, why are there two different words? His answer is that there is a נפקא מינה in cases of sale in places where most people call a כד a כד and a חבית a חבית, unlike a minority of the people, who use the two inversely. In such a place, if someone who keeps the terms straight asks for a חבית (meaning a חבית) and receives a כד, he cannot argue that it was an invalid sale because he got what the seller would call a חבית, and the seller can claim to be part of the minority. The גמרא uses this to conclude "אין הולכין בממון אחר הרוב" which means that we don't follow the majority in monetary cases.

On this, תוספות asks why we do not follow the majority here, since we do follow the majority in דיני נפשות where we are generally stricter. Therefore, we should use a קל וחומר to apply the concept of רוב to monetary cases where we are usually more lenient. To answer this, תוספות distinguishes between two kinds of majorities: a רובא דאיתא קמן, which means a majority that is in front of us, and a רובא דליתא קמן, which is a statistical majority. An example of רובא דאיתא קמן is if there are 3 pieces of meat mixed together, 2 kosher and 1 not kosher, but we cannot identify which piece is from which. An example of רובא דליתא קמן is stating that most people buy oxen to plow and a minority buy them to slaughter. The issue of not

following the majority in דיני ממונות only to applies to a רובא דליתא קמן since we do follow the majority in רובא דאיתא קמן. In this instance of meat, we follow the רוב to determine the meat is permissible to eat. So too, if there was a monetary case in a בית דין in which two judges vote in favor of one party while one judge votes in favor of the other, the ruling follows the majority of judges. This case is considered a רובא דאיתא קמן since it is based on a fact that is directly observable (two vote one way and one votes the other way) and not based on statistics.

תוספות on דף כ"ז: explains the reason why we only follow a רובא דאיתא קמן in דיני ממונות is because we disregard the minority and treat it as if it is incorporated into the majority. In the case of the judges that would mean that although one judge dissents, we view it as if all three judges are giving a unanimous decision. Normally we follow the assumption that when there is a lack of evidence we leave the money with whomever is in possession of it. Here, however, the בית דין has the ability to determine monetary ownership, based on the principle of הפקר בית דין הפקר, what is declared ownerless (and by extension, transferring ownership) by the בית דין is ownerless (or belonging to the new owner). In this kind of situation where there is neither a minority nor an assumption of ownership, we do follow the majority. However, in a situation of a רובא דליתא קמן, there is a minority which cannot be ignored and assumption that whoever is in possession of the money has the rights to it, which combined go against the majority. Therefore we don't follow these kinds of majorities in דיני ממונות. Therefore, in the case of the barrels, the buyer will only get a כד, and in the case of buying an ox, he will have to keep his ox even though he may have intended to buy one for plowing as opposed to slaughtering.

עביד איניש דיא לנפשיה

Taking the Law into Your Own Hands (דף כ"ז:)
Yona Burstyn ('19)

The question at hand is whether you are allowed to take the law into your own hands. An example of this would be if you know someone stole an item from you, would you be allowed to take the item back yourself rather than take them to court to restore your property.

The גמרא on דף כ"ז: starts by bringing a case of עביד איניש דיא לנפשיה. The case is there are two farmers with fields who share an irrigation pit from which they draw water for their fields. Each day only one farmer can draw water, with the farmers each day alternating whose turn it is to draw water. One day, Farmer A sees Farmer B drawing water, despite the fact that it is Farmer A's day to draw water. Seeing this, Farmer A tells Farmer B to stop drawing water because it is not his day, but Farmer B ignores him. To prevent him from taking the water which is rightfully his, Farmer A whacks Farmer B with his shovel. Farmer B didn't like this, so he sued for damages, but רב נחמן rules that farmer A was allowed to hit him with the shovel, and in fact could have hit him as many times as was necessary to stop him from drawing water.

In this case we can see that the farmer was allowed to take the law into his own hands. In this case though, the גמרא clarifies that there is an element of immediate loss. רש"י explains that if he went to בית דין, the other farmer would continue to draw water, and Farmer A would be unable to verify how much water he took, or Farmer B would take all the water which would not be able to be returned. Even רב יהודה, states the גמרא, who is of the opinion that you cannot take the law into your own hands, agrees that if there will be a financial loss if you wait to go to court, you can take the law into

your own hands. We see that the only scenarios in which they disagree is when there is no immediate loss.

The גמרא brings several cases trying to support one side or the other. One proof that is brought is as follows. Someone notices that someone else's ox has climbed on top of their ox with the intent to kill it. To save their ox, they may pull out their ox from under the other one, causing the other ox to fall, killing it. The ruling here is that the one who pulled out their ox on the bottom, killing the top ox, does not have to pay for the dead ox. This challenges רב יהודה, because it shows that the one whose ox was in danger was allowed to take the law into his own hands. When asking the question, the גמרא is assuming that the attacking ox in this case was actually a שור מועד, an ox which has gored at least 3 times in the past. This would further support רב נחמן because if the attacking ox is a שור מועד, the owner of the ox which was attacked can receive full restitution if his ox is killed, since the rule is a שור מועד must pay נזק שלם, full damages. This shows that even in a case where there is no monetary loss, one can still take the law into their own hands. This proof is then rebutted by the גמרא saying that in this case the attacking ox is actually a שור תם, a tame ox, which would mean that the owner would have a monetary loss if his ox is killed, since the owner of the attacking ox would only have to pay in court half the value of the dead ox. An important note emphasized by the רמב"ם is that while pulling out your ox is allowed, pushing the top ox off your ox and killing it is forbidden. This is because when you pull out your ox, you are actively saving your own property, even though this happens to cause the attacking ox to die. However, when you push off the attacking ox, you are actively killing another person's ox in order to save your ox. Since pushing off the other ox is doing an action and was not needed to be done to save your ox, you would not be permitted to do so. However, in a case where you are unable to pull out your own ox, pushing off the attacking ox is justified, because it was the least force needed to save your ox, and thus is allowed in that specific case.

Another proof brought is the following situation. One walks outside of their house to discover that someone has put some jugs of wine and oil in their yard without permission, such that the owner of the yard is blocked from entering or exiting his yard. The ruling in this case is that the owner of the yard may break his way through the jugs to get in or out of his yard. This is because the one who put the jugs there had no right to do so. Note that in this case there is no monetary loss to the owner of the yard, yet he may still take the law into his own hands by destroying the barrels to get through his yard, and is not obligated to pay for them. This proof is rejected by רב נחמן בר יצחק, who explains that when the גמרא says that the owner may break the barrels and exit it means he may break the barrels to exit in order to go to court, and when it says the owner can break them to enter his house, it only means he may break the barrels in order to enter his house to obtain documents which prove the courtyard belongs to him. This is significant because he is only allowed to do what prevents him from sustaining a loss, which means that we cannot prove from here whether רב נחמן opinion is correct or not. תוספות explains that although it is possible for the owner of the courtyard to move all the jugs aside so he can exit his yard, we will not burden him by forcing him to do so since the owner of the jugs had no right to put them in the yard, blocking the path through his yard. This is contrasted with the case of one animal attacking a second animal, where we burden the owner to save his animal by pulling his out.

The רא"ש clarifies what רב נחמן means when he says עביד איניש דינא לנפשיה. When רב נחמן allows it, he means you can only take the law into your own hands if you have the evidence to back up your claim in court. However, if you could not prove your case in court, even רב נחמן would not allow you to act on your own.

When looking at the concept of עביד איניש דינא לנפשיה, there are two possible ways of understanding it. One way is to view it as vigilantism; if someone wrongs you, you have permission to defend

yourself and respond. The other way is to view yourself acting as a שליח בית דין, a messenger and extension of the court, and thus operating within the framework of the judicial process. The רא"ש seems to support this second approach by stating that עביד אינש דינא לנפשיה only works if you have the evidence to prove your case in court. If you could win your case in בית דין, the בית דין doesn't obligate you to come before them and try the case; they allow you to confiscate the money on their behalf. If you could not prove your case before them, they do not allow you to take the law into your own hands, since they themselves could not rule in your favor. Additionally, the name of the concept, עביד אינש דינא לנפשיה, supports the idea that what you are doing is a form of דין, something within the judicial system.