



Volume 10. Issue 12

Certainty against Uncertainty

This week we learnt about the different levels of responsibility and liability for the different types of guardians. One example is difference between someone who borrows an animal and someone who rents an animal if the animal dies a natural death through no fault of the guardian. The former would be liable to pay the owner, while the latter would be exempt after swearing he was not negligent.

The *Mishnah* (8:2) discusses a case where the terms change. For example the person borrowed the animal in the morning and rented it in the afternoon. The first case is where the animal died sometime during that period. The owner claimed that the animal died while it was being borrowed thereby obligating the borrower to compensation. The person entrusted with the animal (the *shomer*) however admits that he does not know when it died. The *Mishnah* rules that the *shomer* is obligated to compensate the owner.

Based on this ruling the *Gemara* (97b) seeks to conclude another debate. The case is where one person, *Reuven*, claims that another, *Shimon*, owes him money but *Shimon* is unsure. *Rav Huna* and *Rav Yehuda* argue that *Shimon* must pay. *Rashi* explains that this is because *Reuven's* claim is certain when *Shimon's* is in doubt, therefore *Reuven's* position is preferred – “*bari ve'shema bari adif*”. *Rav Nachman* and *R' Yochanan* however argue that *Shimon* is exempt. The money stays in the hands of the current owner and cannot be extracted based on a doubt without evidence. Since in our *Mishnah* the owner's claim is certain and the *shomer* is unsure and the *shomer* is liable to pay, it appears to support the position of *Rav Hunah* and *Rav Yehuda* and not like *Rav Nachman*.

The *Gemara* dismisses this proof explaining that the case in our *Mishnah* is different. For example the *shomer* was responsible for two animals under the above arrangement and both died. He admits that he is liable to pay for the first but is unsure about the second. Since he partially admits to the liability he is obligated to take an oath in order to exempt him from the rest. In this case however, since he is unsure about the second animal, he cannot take an oath. The ruling of the *Mishnah* that he therefore liable is consistent with the opinion of *Rava* how holds that if one is required to take an oath but cannot, he is liable to pay.

The *Pnei Yehoshua* raises a difficulty with *Rashi* comment on our *Mishnah*. Having detailed the *Gemara's* analysis and conclusion, it is odd that *Rashi* on the *Mishnah* comments that the *shomer* is liable because “*bari ve'shema bari adif*”. Even though *Rashi* may have preferred this explanation for its simplicity (it does not involving multiple animals) since the *Gemara* immediately dismisses that explanation *Rashi* should have characteristically commented “the *Gemara* will explain”.

The *Pnei Yehoshua* therefore explains that even though the *Gemara* answers that the *Mishnah* is like *Rava* that would still not work according to *Rav Nachman* (as noted by *Tosfot*). The reasons is that in a case that demands a *shevuah* and both parties are unable to make one due to their suspect nature, *Rav Nachman* argues that they must divide the cost between them. (According to *Rava's* derivation the obligation to pay would fall back on the defendant.) *Rashi* therefore understands that while *Rav Nachman* would ordinarily not agree with *Rava*, in this case of *bari v'shema* he would agree. In other words it is the combination of both elements that on their own would not be enough.¹

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¹ The *Pnei Yehoshua* cites the *Gemara* in *Ketubot* (12b) as proof. The *Mishnah* records a debate between *R' Yehosha* and *R' Gamliel* regarding a husband who claims his wife is not a *betula* and it is therefore a *mekach ta'ut*. The wife however claims that she was an *anusa* after *eirusin* and it is his loss. *R' Gamliel* maintains that she is believed. The *Gemara* there argues that since her position is *bari* and her husband's is *shema* and she is believed to extract her full *ketubah* payment it appears to be against the opinion of *Rav Nachman*.

The *Gemara* however provides two answers for why *Rav Nachman* could align with *Rabban Gamliel* in this case. The first is that she had a better

claim which she did not employ (*migo*). She could have said she was a *mukat etz*. The claim she is an *anusa* invalidates her from marrying a *kohen* in the future. The second answer is that she has a *chazaka* (from birth) that she is a *betula*.

The *Pnei Yehoshau* comments that we find that even though ordinarily *Rav Nachman* does not hold much weight to *bar v'shema* we see that when combined with a *migo* or *chazah* (albeit weak ones) it can extract money. So too in our case it is the combination of being obligated to make a *shevuah* and not being able to do so with the *bar v'shema* that obligates the *shomer*.

Revision Questions

בבא מציעא ז' ד' ח' ו'

- Regarding the previous questions, can the employee be selective with the food he takes? (ז' ד')
- What limitation did the *Chachamim* place on this right for the benefit of the employer? (ז' ד')
- Explain the debate regarding whether the employee can consume food of a value that is greater than his salary. (ז' ח')
- Can an employee forgo the “right of food consumption” for money? (ז' ו')
- How is this right affected in a field of *neta revai*? (ז' ו')
- What is different about a guard’s “right of food consumption”? (ז' ח')
- What are the four types of guardians and explain the differences between them? (ז' ח')
- What are the two opinions about what constitutes *ones* for an attack by wolves? An attack by dogs? (ז' ט')
- If an animal in the hands of a *shomer* dies, when is it considered *ones*? (ז' ו')
- If an animal, in the hands of a *shomer*, falls off a cliff when is it not considered *ones*? (ז' ו')
- Can a *shomer* stipulate with the owner to change the level of responsibility? (ז' ו')
- What are the three cases of an invalid condition, and what is the law if one makes these conditions? (ז' י"א)
- What is the exceptional case where a *sho'el* is exempt if the borrowed animal dies and what is the source of this law? (ז' א')
- What is the law if a person borrowed an animal from someone and also rented this animal (for a different time) and the animal died and: (ז' ב')

 - Neither know when the animal died?
 - The lender claims it died during the time it was borrowed, and the renter claims it died during the time it was rented?

- Regarding the previous question, in what cases do we say the renter is *chayav* and when do we say he is *patur*? (ז' ב')
- If an animal was sent to the borrower by means of a *shaliach*, and it dies in transit, when is the borrower *chayav* and when is he *patur*? (ז' ג')
- What complication is raised in a case where a *kinyan chalipin* is performed exchanging a cow for a donkey and what is the law? (ז' ח')
- What is the law regarding a dispute between a buyer and a seller regarding which field was sold? (ז' ד')
- What is the law if *Reuven* sold *Shimon* his olive trees for him to cut down and use as wood, yet *Shimon* delayed and the trees grew olives and now each party wishes to claim ownership? (ז' ח')
- What other case is similar to the one in the previous question? (ז' ח')
- What is the law regarding when a tenant can remove an occupant if they did not initially fix a rental period if: (ז' ו')

 - The property is in the city?
 - The property is in a village?

- Regarding the previous question, is it different if it was a commercial property? (ז' ו')

Local Shiurim

Melbourne, Australia

Sunday -Thursday

10 minutes before *Mincha*
Mizrachi Shul
Melbourne, Australia

Friday & Shabbat

10 minutes before *Mincha*
Beit Ha'Roeh
Melbourne, Australia

Efrat, Israel

Shiur in English

Sunday -Thursday

Rabbi Mordechai Scharf
9:00am
Kollel Magen Avraham
Reemon Neighbourhood

ONLINE SHIURIM

Rabbi Chaim Brown
www.shemayisrael.com/mishna/

Rav Meir Pogrow
613.org/mishnah.html

Rabbi E. Kornfeld
Rabbi C. Brown
<http://www.dafyomi.co.il/calendars/myomi/myomi-thisweek.htm>

SHIUR ON KOL HALOSHON

Rabbi Moshe Meir Weiss
In US dial: 718 906 6400
Then select: 1 – 2 – 4

Next Week's Mishnayot...

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	שבת קודש
5 th May כ"ה אייר	6 th May כ"ו אייר	7 th May כ"ז אייר	8 th May כ"ח אייר	9 th May כ"ט אייר	10 th May א' סיון	11 th May ב' סיון
Bava Metzia 8:7-8	Bava Metzia 8:9-9:1	Bava Metzia 9:2-3	Bava Metzia 9:4-5	Bava Metzia 9:6-7	Bava Metzia 9:8-9	Bava Metzia 9:10-11

