



Volume 4. Issue 2

## Tam – Not So Simple

In the *masechet* we learnt the difference between a *tam* and a *mu'ad* in the class of damage *keren* (unusual damage caused by one animal or property, eg, goring). In the first few instances of such damage, the animal is defined as a *tam* and the owner is liable to pay half the damage caused. If the animal has been established as an animal that regularly causes such damage then the owner is liable to pay full compensation (see 2:4).

One *Mishnah* (3:8) learnt this week discussed how compensation is determined if two animals each inflict such damage on each other. At first glance this *Mishnah* appear to be a simple exercise in mathematics. Indeed *Tosfot* (*Bava Kama* 33a s.v. *shnei*) question the need for this *Mishnah* at all. One line however in the *Mishnah* is debated by the *Rishonim* (as noted by *Kehati*):

If damage caused by the *mu'ad* is in excess of the damage caused by the *tam*, the owner of the *mu'ad* will pay full compensation of the excess. If damage caused by the *tam* is in excess of the damage caused by the *mu'ad*, the owner of the *tam* will pay half compensation of the excess.

How do we understand the above *Mishnah*? According to the *Rambam* (*Nizkei Mamon* 9:14) the first step is to determine the liability of each of the parties. Half the damage caused by the *tam* is compared to the damage caused by the *mu'ad*. The excess is then paid by the owner. Using the *Rosh's* example if the *tam* caused \$40 damage and the *mu'ad* caused \$50 damage, the owner of the *mu'ad* would be liable \$30 (the damage his animal caused minus half the damage caused by the *tam*). This is consistent the liabilities placed on the owner of a *tam* and the owner of a *mu'ad*. What is being compared here is the liabilities of each of the parties. This would also be how *Tosfot* understands the *Mishnah* as such a presentation contains no novel ideas.

*Rashi* (see *Rosh* 3:13) however demonstrates the new point in the *Mishnah*. He understands that in the above case, the full damage caused by each of the animals is first compared. Therefore using the above example, the owner of the *mu'ad* would be liable \$10. Halving the liability placed on the owner of the *tam* is only brought into effect when considering the excess damage caused by the *tam*. Even though this understanding fits the simple wording of the *Mishnah*, it appears to contradict the liability placed on

the owner of a *tam*. Why are we considering more than half the damage caused by the *tam*?

The *Rosh* understands that *Rashi* believes that since the animals attacked each other simultaneously, the only damage that we view with an eye for compensation is that damage done by one in the excess of the other. It appears that *Rashi* understands that in such a “sparring contest” we take wound for wound and right it off. But why is that?

Perhaps we can explain these two understanding by returning to the first *Mishnah*. The closing statement in the is that the common factor amongst the four primary classes of damage is that “they have the potential to cause damage and the owner is responsible for guarding them [from damaging]”. The *Rif* also inserts an extra parameter - “they are your property”. *Rashi* agrees with this insertion (see *Rashba* 2a) while the *Tosfot* is against it (3b s.v. *u'mamoncha*, 4a s.v. *adam*).

What does it matter whether “they are your property” is added to the *Mishnah*. Rav Moshe Taragin explains, assuming that the owner’s negligence makes him liable for damage caused, the debate is whether some form of legal ownership is required for that obligation. Offering a slightly different understanding, one way to look at it is that as soon as the animal is no longer guarded the owner is being negligent and therefore the owner is liable for anything the animal does. The obligation begins before damage is even caused. Alternatively a oxen running wild does not create the obligation; neglect alone is not necessarily enough. It is only after the damage is done that we trace it back to the financial owner of this wild animal to collect compensation.

Returning to our original case, we may suggest that those (*Rambam*, *Tosfot*) that first half the damage caused and then work out the difference may understand that neglect alone is enough (*Tosfot*) and the owner is obligated from the outset for anything the animal did. In contrast those that compare the damage in full and only determine compensation (or half compensation) based on the difference in actual damage (*Rashi*, *Rosh*) may understand that compensation is only determine once the damage is caused and traced back to the owner (*Rashi*). In this case the “damage” is the difference in actual damage caused.

David Bankier

### Revision Questions

בבא קמא ג' א' - ד' ג'

- If Reuven leaves a bottle in the middle of the street and Shimon drives over it, is Shimon liable for the damage cause? (ג':א)
- What if the bottle caused damage to Shimon's car, is Reuven liable for the damage? (ג':א)
- If Reuven dropped his bottle of juice and it smashed, and then Shimon slipped on the juice, is Reuven liable? (Explain both opinions) (ג':א)
- If Reuven poured his waste water into the street and Shimon slipped on it, is Reuven liable? (ג':ב)
- What is the *takana* instituted regarding those that leave their compost bins in the street? Who broadens this *takana* to apply to anything that can potentially cause damage? (ג':א)
- What is the law regarding two potters, Reuven and Shimon, both carrying their wares, with Reuven walking in front of Shimon, and Reuven drops on of his pots and Shimon subsequently trips on it causing damage? (ג':ד)
- Regarding a case where Reuven is carrying a beam and Shimon is carrying a pot, in which three cases do we say that Reuven is liable if his beam breaks the pot, and in which two cases do we say that he is liable? (ג':ח)
- If two people run into each other who is liable? (ג':ו)
- Is one liable if they were chopping wood in their property and a chip flew out into the street and caused damage? (ג':א)
- How is compensation calculated if two oxen cause damage to one another if: (ג':ח)
  - Both are *tamim*?
  - Both are *mu'adim*?
  - One is a *tam* and the other is a *mu'ad*?
- According to *R' Akiva* when does a *tam* pay full compensation? (ג':ח)
- How is compensation calculated if: (ג':ט)
  - A *tam* ox worth \$100 killed an ox worth \$200 dollars, leaving a carcass of no value?
  - A *tam* ox worth \$200 killed an ox worth \$200 dollars, leaving a carcass of no value?
- In which two cases would a person be liable but be exempt if his animal cause the same damage, and in which two cases would a person be exempt, but if his animal cause the same damage he would be liable? (ג':י)
- What is the law regarding a case where Shimon claims that Reuven's ox injured his ox, while Reuven claims that Shimon's ox's injury was caused when it tripped? (ג':יא)
- What is the law regarding a case where Reuven claimed the Levi's ox injured Shimon's while Levi claimed it was Reuven's ox that damaged Shimon's ox? What if Reuven's ox was a *mu'ad* while Levi's was a *tam*? (ג':יא)
- Explain both opinions regarding how compensation is calculated in a case where a *tam* ox caused damage to four different oxen? (ג':א)
- Can an animal be partially *mu'ad*? (ג':ב)
- Is one liable if his ox injured an ox belonging to *hekdes*? (ג':ד)
- Explain the debate regarding whether a *mu'ad* ox belonging to a *katan* changes its status when the *katan* becomes a *gadol*? (ג':ד)
- What is the special law regarding a *shor ha'itzadin*? (ג':ד)

### Local Shiurim

**Sunday -Thursday**  
Between mincha & ma'ariv  
Mizrachi Shul

**Friday & Shabbat**  
10 minutes before mincha  
Mizrachi Shul

**Audio Shiurim on-line!**

- [613.org/mishnah.html](http://613.org/mishnah.html)
- [www.shemayisrael.com/mishna/](http://www.shemayisrael.com/mishna/)

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### Next Week's Mishnayot...

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	שבת קודש
3 <sup>rd</sup> June י"ג סיון	4 <sup>th</sup> June י"ד סיון	5 <sup>th</sup> June ט"ו סיון	6 <sup>th</sup> June ט"ז סיון	7 <sup>th</sup> June ט"ח סיון	8 <sup>th</sup> June ט"ט סיון	9 <sup>th</sup> June כ"ג סיון
Bava Kama 4:4-5	Bava Kama 4:6-7	Bava Kama 4:8-9	Bava Kama 5:1-2	Bava Kama 5:3-4	Bava Kama 5:5-6	Bava Kama 5:7-6:1

