

20.3.10

35a (משנה יא) → 36a (סיום הפרק)

- I (המע"ה) המוציא מחבירו עליו הראיה – general rule: source of damage – general rule: **מזיק וניזק** in re: **משנה יא**
- a If an ox was chasing another and the latter was found hurt:
- ניזק claims**: hurt by ox
 - מזיק claims**: hurt because it slipped on a rock – exempt (המע"ה)
- b If 2 oxen were chasing another and the latter was found hurt (by an ox):
- Each owner claims that the other's ox did the damage – both exempt
- c If: they were both owned by same person, "both liable" ("both" discussed below)
- If: one was bigger; **ניזק** claimed the larger one attacked and **מזיק** claimed smaller one attacked – המע"ה
 - If: one was **תם** and the other **מועד**; **ניזק** claims **מועד** attacked and **מזיק** claims **תם** attacked – המע"ה
 - If: 2 were attacked, 1 large, the other small
 - And: 2 attacked, 1 large and the other small:
 - ניזק claims**: large attacked large, small attacked small
 - מזיק claims**: large attacked small, small attacked large – המע"ה
 - Or: 2 attacked, 1 **תם** and the other **מועד**
 - ניזק claims**: **מועד** attacked large, **תם** attacked small
 - מזיק claims**: **מועד** attacked small, **תם** attacked large – המע"ה
- d **Observation**: **משנה** seems to counter **סומכוס**'s position that **ממון המוטל בספק** is split 50/50, even in counter-claims of **ברי וברי**
- Question**: is our **משנה** a case of **ברי וברי**?
 - Answer**: yes – from first disagreement (ox vs. rock)
 - Challenge**: if so, entire **משנה** should be **ברי וברי**; last case stipulates that **ניזק** will only get larger share if he can prove his case (המע"ה) → if he can't he gets as per the claim of the **מזיק**
 - Explanation**: this counters **בר נתן**'s rule that a claim of **חטים** countered by an admission of **שעורים** leads to a full exemption
 - Application**: if **ניזק** is claiming (e.g.) **ח"נ שלם** and **מזיק** claims **ח"נ**, should be no payment (not even **ח"נ**)
 - Rather**: **משנה** is **ברי ושמא** (or **ברי וברי** – which are parallel) and even here **סומכוס** rules **חולקין** (and **רבנן** disagree)
 - Revisiting נתן בר נתן**'s rule: how can the payment be as per **מזיק**, it should be nothing as it is **בשעורין**
 - Answer**: liability is theoretical
 - Challenge**: **ברייתא** stipulates payment from body of **קטן** etc.
 - Answer**: in case the **ניזק** seized property, that is how it paid out
- II Analysis of "both liable" where both possible **מזיקין** were owned by one person
- a **Inference**: if 2 **שוורים** that are **תם** did damage, he can seize payment from whichever he chooses
- Challenge**: our case could be referring to **מועדין**
 - Block1**: later cases in **משנה** involve circumstance where **ניזק** stands to lose if **מזיק** was smaller → must be **תם**
 - Provisional answer**: later cases are **תם**, earlier **מועד**
 - Block2**: shouldn't say **חייבין**, rather **חייב**; shouldn't say "both", as it is one owner
 - Rather**: they are **תם** and it follows **ר"ע** who maintains that **ניזק וניזק** co-own **מזיק**
 - And**: they are only both "liable" since they're both around → if only 1 is available, **מזיק** can claim the other was the **מזיק** and the **ניזק** has no recourse