

20.5.01

46a (משנה א') → 47a (והלכתא חולקין)

7. ואל הזקנים אמר שבו לנו בזה עד אשר נשוב אליכם והנה אהרן וחור עמכם מי בעל דברים יגש אליהם: שמות כד, יד

- I (סומכוס) נזק (סומכוס) משנה א'
- a *if*: an ox (תם) gored a cow and its (dead) young was found at its side
- i *and*: it was unclear whether it had given birth before the goring (and died from other causes) or after the goring
- ii *ruling*: owner pays ½ damages for the cow and ¼ for the calf
- 1 *note* (דבא): we estimate loss based on the loss of a pregnant cow m- **not** a cow and a calf independently
- (a) *similarly*; loss of a limb (limb isn't estimated independently) or damage to a field (crops not estimated ind.)
- (b) *reason*: else, we are ignoring the position of the מזיק
- (i) *explanation*: his claim is "(if) my ox killed a pregnant cow, I will pay for a pregnant cow"
- 2 *note*: appreciation due to fat of cow (as pregnant) goes to cow's owner – calf doesn't contribute to it
- 3 *question*: increased size – to whom is that paid?
- (a) פפא ד' owner of cow
- (b) הלכה ד' אחא בריה דרב איקא split
- iii *note*: this משנה follows סומכוס (ממון המוטל בספק חולקין) ברייתא, as per בריתא
- iv *however*: רבנן's position is המע"ה – and this is a "great rule" –
- 1 *Reason for "great rule"*:
- (a) *Possibly*: even if the claimant is sure and the defendant is unsure (ניזק ברי ומזיק שמא)
- (b) *Or*: case where A sold B an ox which turned out to be violent:
- (i) דב: fraudulent sale (which reverts)
- (ii) שמואל: A may claim that he sold B the ox for meat
- (iii) *note*: case must be where B buys for both meat and work and the prices are the same (else we could identify the intent of the sale from these circumstances)
- (iv) *question*: if so, even רב should allow sale, as the buyer can simply extract the money from the שור
1. *answer*: case is where it is possible to get A to pay back
- (v) *reasons*:
1. דב: follow majority – most sales of oxen are for work
2. שמואל: we don't follow majority in ממונות – rather, המע"ה
- v *source for "great rule" of המע"ה* v.1
- 1 *challenge* (ר' אשי) it is סברא – "the one who is in pain (plaintiff) goes to the doctor"
- 2 *answer*: indeed; v. 1 supports rule that he who brings case is addressed first, then defendant (if he counter-claims)
- b *parallel*: if a cow (תמה) gores an ox and her calf is found at her side (same ambiguity)
- i *ruling*: pays ½ damage from the body of the cow and ¼ (if needed) from the calf\
- ii *question*: why is there discussion of anything more than ½ damage?
- 1 case is where cow is owned by A and calf by B
- (a) *and*: ניזק sued B first, demonstrating to A that he believes that there was a "partnership"
- (i) *explanation*: if he sued A first, he could tell A to prove that B was a "נזק-partner", else A pays all (1/2)
- (b) *or*: even if he sued A first, A could "push him off" and demand that he prove that B **isn't** a "partner"
- (c) *ergo*: ½ (of the ½ = ¼) paid by owner of cow; ¼ (of the ½ = 1/8) paid by owner of calf
- (d) *rejection* (דבא): משנה doesn't state ¼ and 1/8
- 2 דבא: case is where both are owned by one person; means:
- (a) *if*: the cow is around, ½ payment comes from it; if not, ¼ is paid from calf
- (i) *implication*: if we knew that the calf was born afterward, he could seize the ½ from either
- (ii) *consistency*: רבא rules that damages done by a cow may be paid from it or its young;
1. *however*: damages done by fowl may only be paid from the fowl, not from its eggs
2. *reason*: young are part of the body (mammals); eggs are separate from the body (fowl)