

TALMUDIC METHODOLOGY
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SHIUR #04: THE 50% PAYMENT OF A TAM ANIMAL

R. Huna classifies the payment for the *keren* damage caused by a seemingly harmless animal (*tam*) as a *kenas*; as a fine rather than classic compensation, only half the damage is delivered. In an earlier [shiur](#), we elaborated on the primary approach to R. Huna's startling statement: Fundamentally, he claims, no compensation is required, since most domesticated animals are presumed to be harmless, and they require little to no guarding. This damage was unexpected, and the owners therefore cannot be held accountable. A fine of half-payment is levied to deter future incidents and incentivize some degree of guardianship over seemingly harmless animals who may still "act out" of character. *Chatzi nezek is a kenas!*

Although this logic seems sufficient, we are left wondering how and why R. Pappa contested this issue and referred to half-payments of *keren tam* as classic compensation (*mamona*). Did he disagree with the "statistics" and the likelihood of a non-violent domesticated animal performing damage? If R. Huna defined *tam* - damage as a *kenas* because it is statistically unpredictable, how could this be a subject for debate? Evidently, the classification of *tam*-damages as *kenas* and the absence of standard compensatory payments is based on a categorical logic, and not simply low statistical probability of damage and lack of consequent.

R. Soloveitchik developed the idea that since a domesticated *tam* animal is not expected to damage, it is not considered a *mazik*, and the owner is therefore not responsible for its damages. The lack of standard compensatory responsibility is not based on lack of **predictability**. Instead, R. Huna maintained that an owner is only obligated to compensate for damages performed by items that are "menaces." Since an average domesticated animal typically does not cause damages, it cannot be viewed as a *mazik*, and the owner is thus acquitted from compensation and is only levied a *kenas* - fine of half payment.

By assigning this logic to R. Huna's classification of *tam* payments as merely *kenas*, a more elegant option emerges to explain R. Pappa's dissenting opinion. He may entirely dispute the need for an object to be defined as a *mazik*; an owner must offer compensatory payment for any damage caused by **any** of his owned items, even those not defined as *mazik*. Hence the *machloket* as to whether *chatzi nezek* is *kenas* or *mammon* does not concern the statistical probability of damage, but rather the level of obligation when innocuous items perform damage.

This issue of whether a person must compensate damages caused by items not considered a *mazik* emerges from a different discussion about delivering potential hazards to an irresponsible watchman. According to Reish Lakish (*Bava Kama* 9b), a person who transfers a bound animal to a minor is responsible for damages ultimately caused by that animal. Since an animal can potentially unleash itself, he delivered a potential *mazik* to the unqualified guardianship of a minor, and this **negligence** obligates compensation. However, if the owner delivered coal to an unqualified minor, and the minor stoked a fire, the original owner is not responsible – **despite his negligence** in conveying the item to an irresponsible watchman. Since a coal will inevitably extinguish (unlike an animal, which may unleash itself), it **is not considered a *mazik*** or a weapon. The owner is not culpable, even in the case of negligence, if the item itself is not considered a **menace**. This same logic could inform R. Huna's position that no classic compensatory damages are required for *keren tam* damages; only a fine of half-payment if levied.

This concept of R. Soloveitchik may explain an interesting phenomenon – the capping of payments at *chatzi nezek* (50%) even if the animal currently presents a statistical likelihood of damaging. For example, if the animal caused damage on three different occasions, but the respective witnesses offered testimony on the same day, according to one position in the *gemara* (*Bava Kama* 24a), the animal remains frozen in a *tam* status and the owner's payments do not exceed 50%. Tosafot (24a) question this point: If R. Huna based the 50% payment cap on the unlikeliness of the domesticated animals damaging, this scenario should obligate full payment, since the animal has already displayed violent tendencies and requires classic preventative measures. Why should the timing and formal admittance of the testimony in *beit din* impact the payment scales? However, if R. Soloveitchik is correct, R. Huna capped payments for a standard domesticated animal at

50% because it typically does not possess the status of a *mazik*. To **transition** to *mu'ad* status and full payment obligations, the animal must undergo a **formal** process of re-designation, which must unfold over three full days of testimony. (For elaboration on other formal aspects of the *mu'ad* process please see here: <http://etzion.org.il/en/muad-process-purely-empirical-part-1> and <http://etzion.org.il/en/muad-process-purely-empirical-part-ii-0>.)

In other words, if R. Huna associated half-payments with statistical unlikelihood, the payment should spike to 100% once the statistics have changed. Any formal requirement for the *mu'ad* transition is questionable. By contrast, if the 50% payment cap is based on the non-*mazik* status of a *tam*, the *mu'ad* process must redefine the animals as *mazik*, and only **that** process can carry formal requirements.

A second interesting halakha reflecting by R. Soloveitchik's concept is asserted by Tosafot (15) surrounding the prospect of 50% *kofer* payments for *tam*-animals which kill a human. Classically, a *mu'ad* animal that murders a human obligates the owner in *kofer* payment. One opinion (R. Yossi HaGalili) maintains that a murderous *tam* animal obligates its owner in 50% *kofer*. However, Tosafot claim that even Rabbi Yossi Haglili who generously considers 50% *kofer* payments would not apply them if *tam*-payments are *kenas*. R. Huna, who views 50% *tam* payments as a *kenas*, would deny any possibility of even 50% *kofer*. R. Soloveitchik explained that since a *tam* is not considered a *mazik*, its goring cannot be considered murder, and no *kofer* payments can be considered. Had R. Huna's *kenas* designation stemmed from improbability, perhaps 50% *kofer* payments would have applied to *tam* murders.

Additionally, this redefinition of R. Huna may clarify a strange irony about a *tam* damage. R. Huna viewed the 50% cap on *keren tam* payments as indicative of it being **less** severe a situation as compared to classic animal-based damages. As such, we would expect that the required levels of guardianship over a *tam* animal should not exceed levels expected for **frequent** animal damages, such as *shein* (damages driven by pleasure) and *regel* (damages occurring through typical animal routines). Yet surprisingly, R. Yehuda (*Bava Kama* 45b) claims that an owner must apply extraordinary preventative measures (*shemira me'ula*) to be acquitted from half-payments. This is true despite the fact that he can exempt himself from payments for classic damages even with moderate forms of guardianship. This is

counterintuitive. If *tam* is less severe – as expressed by discounted payments – it should also demand equal or lesser levels of prevention to enable acquittal.

Perhaps R. Soloveitchik's logic can resolve this irony. A case of *tam* is not merely less severe than typical damage because it is less probable. That would assume basic parity between *tam* and classic damages: they merely exhibit quantitative discrepancy – lesser likelihood. According to R. Soloveitchik a *tam'* isn't a *mazik*, and is thus **qualitatively** different from classic damages. The owner does not bear lesser responsibility; he bears **no** responsibility. The *kenas* is merely superimposed as a social deterrent for **other** owners to better guard even their domesticated *tam* animals. Since the payment is unrelated to negligence of classic *mazik*-based payments, the owner cannot exonerate himself **unless** he took every possible measure and can be legitimately considered an *ones*, who is exempt under halakha from any payment – even a fine. The notion that *tam* is categorically different from typical *mazik* dramatically alters the nature of the *kenas* payment and perhaps – ironically - creates a greater range of culpability. More scenarios will lead to this payment, even though the payment will be capped at 50%