

TALMUDIC METHODOLOGY
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**SHIUR #16: IS THE *MU'AD* PROCESS PURELY EMPIRICAL?
(PART I)**

One of the anomalous aspects of *nezek* of the *keren* type is the discount offered the first three times the damages occur. Since these damages are caused by uncommon and unpredictable aggression of the animal, the owner is exempt from full restitution, but instead pays *chatzi nezek* – half damages. After the animal has committed this damage three times, its status changes from that of “*tam*” to that of “*mu’ad*” and full payments are obligated. Presumably, the fact that the animal has caused damage in this manner three times indicates that this animal, unlike regular ones, harbors aggressive tendencies and must be watched more carefully. Failure to do so constitutes gross negligence, and full payment is therefore demanded. A slightly different formulation might suggest that the three repeated damages do not INDICATE tendency, but rather GENERATE that tendency. Domestic animals are born naturally docile, but after three damages become “aggressive.”

Either way – whether the three damages are indicative or causative – the process seems to mirror other situations in which repeated events indicate or generate tendencies that affect the halakha.

There are indications that the *mua’d* process is different, however. The first hint of this distinction stems from the unanimous choice of specifically three damages as necessary for the animal to become a *mu’ad*. Halakha recognizes that repeated events are able to indicate or generate a new halakhic status. This process is known as “*chazaka*” and has broad application. Rabbi and R. Shimon ben Gamliel dispute whether two or three events are necessary to establish a *chazaka*, and we typically rule like R. Shimon ben Gamliel that three events are necessary. Regarding the establishment of *mu’ad* status, however, the *mishna* (*Bava Kama* 23b) requires three acts of damage, without citing the dissenting

opinion of Rebbi that two damages would suffice. Some *Rishonim* (for example, the Ramban, *Yevamot* 31) do, in fact, maintain that Rebbi would be consistent and establish *mu'ad* after two damages, but the simple reading of *Bava Kama* suggests that Rebbi would CONCEDE that *mu'ad* laws are different for some reason. Evidently *mu'ad* doesn't follow the standard guidelines of *chazaka*; though Rebbi normally suffices with two events, for *mu'ad* he requires three.

An additional indication that the *mu'ad* process may not be simply indicative/causative stems from an interesting *machloket* between R. Yehuda and R. Meir. The Torah discusses the *mu'ad* process by describing three goings that occur over three days. Would *mu'ad* status ensue if the three goings took place in one day over the course of a few hours? R. Me'ir argues that it would, and he presents convincing logic: If three goings spread over three different days indicates/generates an aggressive tendency, certainly three damages performed in a shorter time frame would suggest as much! Yet R. Yehuda disagrees and only assigns *mu'ad* status if the goings occurred on separate days. Why did R. Yehuda disagree with R. Meir's compelling logic?

Some *Rishonim* explain that R. Yehuda disagreed with R. Meir's assessment of animal nature. While R. Meir assumed that condensed damages are more reflective of aggression than damages over time, R. Yehuda may have argued that condensed damages can be easily attributed to a "bad day" or an illness; they may not reflect the INHERENT nature of the animal. This interpretation of the *machloket* limits the extent of the dispute. Both R. Yehuda and R. Meir view the *mu'ad* process as "*chazaka*-based," establishing the empirical fact that this animal is now aggressive and requires more vigilance. They disagree only regarding how to assess this reality and whether concentrated damages would serve as an accurate litmus test.

There is another possible interpretation of this *machloket*, however. R. Yehuda may have argued that the *mu'ad* process does not simply establish FACTS; rather, converting an animal to a *mu'ad* is a FORMAL process of changing the animal's legal status. Had the Torah not actually described this process, we could not have independently graduated a *tam*, who pays partial damage, to a *mu'ad*, who pays full restitution. Furthermore, if the *mu'ad* process is merely a transformation of the animal's nature, why did the Torah describe the

transition in such detailed fashion? We could have simply applied the universal rules of *chazaka* to establish these facts. By carefully delineating the process of *mu'ad*, the Torah may have been signaling that this transition is a formal designation of the animal with a *mu'ad* status. Only by designating the animal as a “hazard” can the payment reach full restitution. Since this is a formal process as established by the Torah, the rules must accord to the exact description in the Torah – a three day process in which no “shortcuts” are allowed.

The view that becoming a *mu'ad* entails more than just ESTABLISHING facts but rather creates a new status may account for the discrepancy in Rabbi's position. While he claimed that conventional *chazaka* occurs after two occurrences, *mu'ad* is not a typical *chazaka*, but rather a transformation of the legal status of the animal, and three occurrences are therefore required.

In fact, this view of *mu'ad* may be implicit in the continuation of the discussion surrounding this debate between Rabbi Meir and Rabbi Yehuda. After R. Meir asserts his position that concentrated events of damage would establish *mu'ad*, the Rabbis (not necessarily R. Yehuda) challenge him with the precedent of a *zava*, who only acquires *tum'a* if she saw an emission on THREE days, and not three emissions on ONE day. If *zava* requires a three day period, shouldn't *mu'ad* as well? Without question, a *zava* is not merely a situation in which a TENDENCY is established; rather, the woman becomes formally designated with a STATUS that renders *tum'a*. Since a status is being rendered, the formal time constraints of the Torah cannot be overlooked. Clearly these “dissenters” who seem to side with Rabbi Yehuda's logic (cited in *Bava Kama* 24) viewed *MU'AD* as similar to *ZAVA*, and therefore argued that just as *zava* requires three days, *mu'ad* should as well. It is unclear whether R. Yehuda argued similar logic, but he may well have.

Of course, R. Meir could very easily respond by distinguishing between *zava* – which is a formal designation and requires three separate days – and *mu'ad*, which is empirical and therefore can be achieved in concentrated fashion. In fact, Tosafot (*Bava Kama* 24a) suggest this line of defense for R. Meir.

Yet another indication that *mu'ad* is not merely empirical but legal and formal stems from an unnatural association between *mu'ad* and a seemingly

unrelated *halakha*. The third *perek* of *Bava Batra* discusses the manner of proving ownership over land in the absence of a contract. The *gemara* claims (28a) that if a disputant resided on and benefitted from the land during three consecutive unprotested years, the land is awarded to him. The *gemara* searches for a source for this *halakha* and suggests a parallel to *mu'ad*: just as *mu'ad* is achieved after three damages, ownership is similarly awarded to a disputant after three years of residence. This assertion is odd if *mu'ad* indicates a tendency. What parallel tendency is indicated by the three-year residence? In the situation in *Bava Batra*, *beit din* is attempting to solve a legal dispute about the status of the land, and comparison to *mu'ad* does not seem feasible!

Perhaps the *gemara* assumed that *mu'ad* is not empirical or indicative, but rather a transformation of the animal's legal status after three goings. If an animal's status is altered after three events, perhaps the legal status of land SIMILARLY should change after three events – three years of residence and benefit. Of course, the two legal transformations may be different, and ultimately the *gemara* rejects this comparison to *mu'ad*, but the very attempt to compare land ownership to *mu'ad* can best be explained by viewing *mu'ad* as legal and not empirical.