YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

Please pay for the refua sheleima of our son,

Noam Avraham ben Atara Shlomit.

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**Dedicated in memory of Israel Koschitzky z"l,**

**whose yahrzeit falls on the 19th of Kislev.**

**May the world-wide dissemination of Torah through the VBM**

**be a fitting tribute to a man whose lifetime achievements**

**exemplified the love of Eretz Yisrael and Torat Yisrael.**

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**Shiur #07: Isho Mishum Momono**

Unlike most of the standard *mazikim*, such as animals who damage, *eish* or fire, is intangible. A *bor,* or a pit in the ground, is a particular location a particular set of coordinates which can be guarded, and possibly, can be owned by someone. Fire is merely a process of combustion which can never be legally owned. Why should a person be responsible for damages caused by his fire?

The *Amoraim* debated this question. Reish Lakish claimed "*isho* *mishum momono*" which literally means that a person is liable for his fire just like he is liable for damages caused by his legally owned possessions, such as animals. This shiur will analyze Reish Lakish's opinion.

Though Reish Lakish associated fire with typical *mamon* it isn’t clear that he considers fire actual *mamon*. He employs a vague term of *“mishum*” to compare fire to *mamon*. The term *mishum* can imply that fire is *identical* to property or it can mean that you are *chayav* for fire damages **just like** you would be *chayav* for damages caused by your legally owned *mamon*.

Tosafot (22a *s.v isho mishum momono*) asserts that fire isn’t actually owned, and that Reish Lakish never intended to justify liability for fire based upon monetary ownership of the fire. Though Tosafot explicitly reject the concept of any classic ownership over fire, they do not clarify what Reish Lakish really intended with the equation between fire and *mamon* and why a person is liable for fire damages.

**Negligence**

The Pnei Yeshoshua does explain the non-monetary liability for fire damages according to Reish Lakish. If a person allows his fire to spread and cause damage he is *chayav* for his *peshiya,* or negligence. The analogy between fire and *mamon* highlights negligence as the common source of the liability. Just as I am liable for negligence regarding my animal, for instance, which causes damage, I am similarly liable for negligence regarding my fire which causes damage.

The Pnei Yehoshua's version of Reish Lakish evokes a famous question which sits at the heart of *Bava Kamma*- Is a person liable for the damages his property causes because he owns it or is a person liable because he must watch it? Namely, what is the basis of the obligation – monetary ownership or negligence? The first Mishna of *Bava Kamma* summarized liability for *nizkei* *mammon* with the term *'u’shemiratan alekha'* which implies that the liability for *nizkei mamon* stems from my obligation to watch which I did not adhere to. The Rif, however,, added the word "*mamonkha*" to his version of the Mishna signaling that the *chiyuv* stems from monetary ownership of the animal. By contrast, Tosafot (3b *s.v u'mamoncha*) didn’t agree with the Rif's version, in part because they couldn’t imagine actual ownership upon a *bor*. This is one of the fundamental questions of *nizkei mamon* and, according to the Pnei Yeshoshua's may have been at the core of the dispute between Reish Lakish and Rav Yochanan. Rav Yochanan believed that *nizkei mammon* is based on legal ownership. As a person cannot legally own fire, he could not compare fire to *mammon* and chose instead to designate it as *chitzav* (something akin to *adam ha-mazik*). By contrast, Reish Lakish believed that general *nizkei* *mammon* is based upon negligence and not legal ownership and had little problem designating fire as mammon. Just as someone must watch a tangible item, he must guard fire. Failure to guard a tangible item renders me a *poshei'a* and failure to guard against fire damages also defines me as a *poshei'a*, making me liable to pay.

**Fire Relocated by Animals**

Though this is a plausible read of "*isho mishum mamono*" it clashes with the gemara's ensuing line of questioning. Interrogating Reish Lakish, the gemara cites two cases where a person's animal transports a fire to a new location which is then damaged by the fire. In one case, a dog transports fire attached to food (*kelev shenatal charara*, based upon the Mishna in *Bava* *Kamma* 21b) and relocates the fire to a field which is then burnt. In the second case a person's camel which is loaded with straw catches fire, after which the animal transports the fire thereby damaging other homes (*gamal ta'un pishtan*, based upon Mishna in *Bava Kamma* 62b). In each instance, the owner of the animal is liable for the fire damages.

In both instances the gemara questions the owner's liability according to Reish Lakish: after all the owner of the animal doesn’t **own the fire**(*lav momono shel ba'al hakelev* or *lav mommono shel ba'al hagamal*). This questioning of Reish Lakish clashes with the Pnei Yehoshua's belief that Reish Lakish based liability for fire damages upon negligence. Assuming negligence is the cause for liability why shouldn’t an animal owner be considered negligent and liable for fires which his animal transported? Why does the gemara imply that, according to Reish Lakish the animal owner should be exempt because they don’t actually own the fire. Ownership isn’t a prerequisite for liability for fire!?

Tosafot (22a) already sensed this inconsistency and offered a completely different explanation for the gemara's questioning of Reish Lakish. Indeed, ownership isn’t a prerequisite for *eish* liability*.* Perhaps in offering a completely different read of the gemara's question, Tosafot agreed with the Pnei Yehoshua that *eish* liability stems from negligence.

**Ba’al Hatakala**

The simple reading of the gemara, however, implies that the liability for fire does stem in part from something **akin** to ownership and not just negligence. Animals transporting fires lit by other people do not cause liability for their owners, even though the owners were negligent, because the animal owner doesn’t **own**the fire.

A different approach toward understanding *isho mishum momono* emerges from Rabbeinu Peretz. Though legal ownership of fire is impossible, the person who lit the fire did create a public hazard which ultimately caused damage. As the creator of the *mazik* he is considered the *ba'al* *hatakala*. He doesn’t possess legal ownership but is liable for damages caused by a *mazik* he created. This concept of *ba'al hatakala* is familiar to us from the *chiyuv* of *bor*, which we spoke about in previous shiurim. A person who dug a pit is liable for the damages of the pit even though they may not legally own a hole in the ground in a public area, or *reshut ha-rabim*. Instead the digger of the *bor* is *chayav* because they created a *mazik* and must cover the damages caused by that *mazik*. Namely, the *bor* digger doesn’t own anything but is considered *ba'al hatakala* (a term which initially appears in the context of *bor* in *Bava Kamma* 50a). Similarly, though a person who lit the fire doesn’t **own**the fire they are considered *ba'al hatakala* or the person who created the *mazik,* or hazard and are responsible for its damages. *Mishum momono* doesn’t mean that a person **owns** the fire and is liable. Instead, it means he becomes the “**author”** of the *mazik* and is held accountable for its damages.

Presumably, this approach would justify the gemara's question to Reish Lakish. If a person is liable for fire because they are considered its author, how can one be liable for fire lit by another person which their animal merely relocated? If one’s animal relocates someone else's fire, they are not considered the *ba'al* *hatakala*. Why is the owner of the dog or the owner of the camel held accountable for fires they didn’t light. The gemara's question to Reish Lakish makes more sense if the basis of liability for *eish* is the status of *baal hatakala*.

**Exceptions**

This understanding of Reish Lakish may help explain exceptions - situations in which the animal’s owner did not light the fire but isnevertheless considered the author of the fire hazard.

In theory, one of two radical positions can be adopted. Theoretically I may never be considered the author of the *mazik* for a fire lit by another. This is the simple reading of the gemara, which could not justify liability for someone else's fire relocated by my animal. Alternatively, one can claim that when my animal relocates another person's fire I am considered the new author of the *mazik*. It appears that Rabbeinu Peretz read the gemara this way and was forced, like Tosafot, to offer a completely different explanation for the gemara's question according to Reish Lakish.

However, it is also possible that only under certain specific conditions, can I be considered the new author of an *eish*-type *mazik,* even if I didn't initially light the fire. For example, Rabbeinu Chananel in his comments to *Bava Kamma* (22a), distinguishes between a situation in which my animal **drags** a fire to a different location – in which case I am not liable, and a scenario in which the animal **lifts** fire off the ground and relocates it- in which case I am liable. This difference doesn’t reflect the logic of the Pnei Yehoshua. My negligence regarding the fire doesn’t increase based on whether **my** animal lifted or dragged the fire. Why should I be liable for lifted and relocated fire and exempt for dragged and relocated fire?

Perhaps Rabbeinu Chananel agreed that the liability for fire, according to Reish Lakish, is based on my being considered the author of a *mazik*. Of course in the classic scenario, I am considered the *ba'al hatakala* if I ignited the fire. Additionally, I am also considered the author of the *mazik* if my animal lifts someone else's fire and replaces it on the ground. By lifting the fire rather than merely dragging it, my animal effectively eliminates the fire hazard and creates a new one. Even though I didn’t light the fire, once my animal lifts the fire, suspends its capacity for damage and replaces it on the ground, I am considered the new author of the *mazik*. The best way to explain Rabbeinu Chanael's distinction between dragging (in which the owner of animal is exempt) and lifting (in which the owner of animal is liable) is to base the *chiyuv* for fire upon the status of *ba'al hatakala*.

**Providing Fuel for the Fire**

Perhaps the Rambam also agreed that Reish Lakish bases the liability for fire damages upon my status as *ba'al hatakalah*. Although the gemara asserts that I can't be *chayav* for the fire my camel relocated, according to the Rambam I am obligated to pay if my camel loaded with flammables catches fire and spreads it to other items. Even though I didn’t light the initial fire, since I provided the fuel for the fire's spread I can be considered the author of the fire-type hazard. Again if the Pnei Yehoshua were correct and Reish Lakish designates negligence as the source of my liability, it is difficult to distinguish between a dog spreading fire and a camel spreading fire. However, if the *chiyuv* is based upon being considered the creator of the *mazik*, perhaps the provision of fuel for the fire renders me the author of a fire, even though I didn’t light it.