

## הוחמה בהר פטור – It became overheated in the mountain; he is exempt

### Overview

The משנה ruled that if one rented a donkey for travel in a valley, but he travelled instead on a mountain, and the donkey became overheated and died; the renter is פטור. Our תוספות resolves this ruling with other seemingly contradictory rulings.

תוספות asks:

ואם תאמר למאן דאמר לעיל (דף מב,א) תחילתו בפשיעה וסופו באונס חייב<sup>1</sup> -

And if you will say; according to the one who previously maintained that if at the beginning (before the actual damage) he was negligent, but at the end (when the damage occurred), it was accidental, the rule is that he is liable; according to this מ"ד -

אמאי פטור הא תחילתו בפשיעה היה לענין הוחלקה -

Why is he פטור in our case, for initially (when he led her up the mountain) he was negligent regarding slipping (for the חמור is more likely to slip on the mountain than in the valley), so even though the actual death was an אונס (for it would have surely died in the valley on account of the heat), nevertheless he should be חייב since this is a case of תחילתו בפשיעה וסופו באונס, why does our משנה rule that he is פטור?!

תוספות answers:

ויש לומר דלא מחייב אלא באונס שיש לתלות שאם לא היה משנה אפשר שלא היה בה<sup>2</sup> האונס -

And one can say that תחילתו בפשיעה וסופו באונס is not always חייב (even according to that מ"ד), unless it was an אונס that one can assume that if initially he would not have changed what was expected (the תחילתו בפשיעה), it is possible that the אונס would have never occurred -

כי ההיא דצריפא דאורבני<sup>3</sup> דאונס בא מחמת הפשיעה<sup>4</sup> -

Like that case of צריפא דאורבני, where the אונס came about because of the פשיעה - שאם היה מצניעם תחת הקרקע כדשמואל<sup>5</sup> לא היו נגנבים -

Where if he would have hidden the money underground, as שמואל ruled, they would not have been stolen; the פשיעה contributed to the אונס -

<sup>1</sup> See footnote # 3 & 4, for an explanation.

<sup>2</sup> Others amend this to read בא (instead of בה).

<sup>3</sup> The case of צריפא דאורבני (a hut made of willow branches) is where someone entrusted his friend with money, and the custodian placed it in a צריפא דאורבני (where he felt certain that it would not be stolen from there, since people do not usually put money in a צריפא דאורבני). The money however was stolen.

<sup>4</sup> He was פושע by putting the money in the צריפא דאורבני, for it can easily catch on fire (and the money will be burnt).

<sup>5</sup> שמואל maintains (there) that the only proper protection for money is by placing it underground.

**אבל הכא כי הוחמה בהר כל שכן דאם לא שינה והיה הולך בבקעה דהוה הוחמה -**  
**However here; where she became overheated in the mountain, so if he would not have changed, and he would lead her in the valley, she certainly would have become overheated.** The פשיעה did not contribute at all to the אונס, in such a case all agree that he is פטור.

תוספות offers support for his answer:

**והכי אמר רבא בהמפקיד (לעיל דף לו,ב) גבי פשע בה ויצאתה לאגם -**  
**And this is also what רבא stated in פרק המפקיד; regarding the case where the שומר was negligent with the cow (he did not watch it properly<sup>6</sup>), and the cow went to a meadow and it died there (this is באונס), so רבא ruled -**

**אפילו למאן דאמר חייב הכא פטור דמלאך המות מה לי הכא מה לי התם -**  
**Even according to the one who maintains באונס וסופו בפשיעה וסופו באונס, nevertheless here he is פטור, because there is no difference to the מלאך המות whether she is here (in her corral) or there (in the אגם); her dying had nothing to do with where she was; she would have died anywhere. We see from רבא that תחילתו בפשיעה וסופו פטור, only where the פשיעה contributes to the damage באונס; otherwise he is פטור.**

תוספות asks:

**ואם תאמר שילהי הפועלים (לקמן דף צג,ב ושם דיבור המתחיל אי) גבי הניח עדירו ובא לעיר -**  
**And if you will say; in the end of הפרק השוכר את הפועלים, ברייתא states regarding a case where the shepherd left his flock and came into the city -**

**ובא ארי ודרס פטור ומוקי לה רבה דעל בעידנא דלא עיילי אינשי<sup>7</sup> -**  
**And a lion came and killed the sheep, the shepherd is exempt from paying, and רבא established the ברייתא [even] in a case where the רועה entered the city in a time where shepherds usually do not enter the city, and nevertheless he is פטור -**

**ופריך אביי תחילתו בפשיעה לענין גנבי<sup>8</sup> וסופו באונס הוא לענין ארי -**  
**So רבא challenged אביי, this is a case where תחילתו בפשיעה regarding thieves, and תחילתו בפשיעה וסופו אונס (according to the מ"ד that פטור) so why is he פטור regarding the lion so why is he פטור? This concludes the citation from the גמרא there. תוספות continues with his question -**

**והתם אפילו לא פשע הוא ולא בא לעיר היה נארע האונס ומאי פריך<sup>9</sup> -**  
**But there, even if he was not negligent and did not come into the city, the אונס**

<sup>6</sup> This is תחילתו בפשיעה for it could have been stolen.

<sup>7</sup> [See the גמרא there why רבא found it necessary to establish the ברייתא in this manner.]

<sup>8</sup> He left his flock alone where he should have been with them; they could have been stolen!

<sup>9</sup> תוספות maintains that תחילתו בפשיעה וסופו באונס חייב only if the פשיעה contributed in some measure to the אונס, but here the אונס of the lion would happen even if the שומר remained with his flock. He cannot fend off a lion!

from the lion would occur regardless, **so what is the challenge** from אביי?!

תוספות responds:

**ויש לומר דשמא אם היה שם היה מוליכן למרעה אחר קודם ביאת ארי -**

**And one can say; that perhaps if he was there with his flock, he may have led them to a different pasture before the lion came -**

**כי כן דרך הרועים לרעות חצי היום בשדה זו וחצי היום בשדה אחר -**

**For this is the manner of shepherds, to graze half a day in this field and half a day in another field, therefore his leaving was contributory negligence -**

**או שמא אם היה שם הארי היה ירא לבא שם -**

**Or perhaps if he was there, the lion would be afraid to come there** (since sometimes lions do not wish to confront humans) -

**או היה מקיים ביה גם את הארי ואת הדוב הכה עבדך<sup>10</sup> -**

**Or perhaps the verse of 'your servant smote even the lion and the bear' would have been fulfilled by him.** תוספות is suggesting that by leaving, the שומר contributed to the אונס.

תוספות offers support for his answers:

**ובלאו הכי<sup>11</sup> צריך לפרש הפשט התם כך דקאמר אין אומרים אילו היה שם היה מציל -**

**And even without this, it is necessary to explain the meaning of the ברייתא there in this manner** (that the shepherd, by remaining, could have saved the sheep), **for the ברייתא states** regarding this רועה. **'we do not say, 'if he was there he would have saved the flock'** (meaning that we should automatically assume that, and therefore the - (חייב is רועה)

**אלא אומרים<sup>12</sup> אם היה יכול להציל חייב ואם לאו פטור ואי אפשר לפרש בענין אחר<sup>13</sup> -**

**But rather we evaluate the situation; if the shepherd was able to save the flock, he is liable, and if not he is פטור.** This concludes the ברייתא, and תוספות continues,

<sup>10</sup> תוספות is citing a פסוק in (זל, יז) (שמואל א' יז, לו) regarding דוד המלך who smote a lion and a bear. תוספות is suggesting that perhaps this shepherd would show the same courage and strength to kill or drive away the lion, had he remained.

<sup>11</sup> We have to maintain that there is a possibility that the lion would not have killed the sheep if the רועה would have remained, even without the question that we asked on תוספות assertion that באונס is תחילתו בפשיעה וסופו באונס only if there is contributory negligence to the אונס. This explanation is necessary in order to understand the ברייתא itself.

<sup>12</sup> The אמרם אב"ה amends this to read, אלא אומרים אם (instead of אב"ה).

<sup>13</sup> תוספות, in the question assumed that it is impossible to save the flock. In his answer תוספות assumes that it is possible to save the flock. If we assume the latter (that the רועה could have saved the flock), the ברייתא is understood; we do not say, 'he is always חייב, for if he would have been there, the flock would be saved', but rather we evaluate the situation. However according to the ה"א (that he could not save the flock), how can the ברייתא state (even as a ה"א) that we do not say, 'if he was there he would have saved the flock and he should be חייב'; how can there even be such a ה"א if we assume that it is impossible to save the flock. Therefore we are forced to learn that there is some possibility to save the flock, but nevertheless he is not always חייב, unless we estimate that in this situation he could have saved the flock.

**and it is impossible to explain the ברייתא in another manner** except to say that the רועה had the possibility of saving the flock.

<sup>14</sup> presents an alternate answer to his previous question:

**ורב אלפס פירש התם דאביי לטעמיה דאמר בפרק המפקיד<sup>15</sup> (לעיל דף לו,ב ושם) -**

**And the רי"ף explained there that אביי follows his own opinion, which he stated in פרק המפקיד -**

**לא מיבעיא כולי אלא אפילו למאן דאמר פטור הכא חייב דהבלא דאגמא קטלה<sup>16</sup> -**

**‘There is no question, etc. that according to the חייב באונס וסופו בפשיעה וסופו באונס חייב** (since it is תבפוסב"א"א here (by יצאה לאגם) he is surely חייב (יצאה לאגם) **but even according to the ד"ז that תבפוסב"א"א is פטור, nevertheless here (by יצאה לאגם) he is חייב, for the air of the meadow killed her’;** it is not סופו באונס, but rather סופו בפשיעה. This concludes the citation of the previous גמרא -

**משמע דלמאן דאמר חייב אתי שפיר בלאו האי טעמא -**

**It seems (to the רי"ף) that according to the חייב תבפוסב"א"א, it is properly understood why he is חייב even without this reason of קטלה דאגמא -**

**אף על פי שהאונס היה נאדע בכל ענין<sup>17</sup> -**

**Even though the אונס would have occurred in any event.**

negates this view:

**ויש לדחות ראייתו דלמאן דאמר חייב נמי סמך אהאי טעמא -**

**And it is possible to reject his proof; for even according to the תבפוסב"א"א מ"ד, in order to be חייב here, he too, depends on this reason -**

**דקאמר בסוף דהבלא דאגמא קטלה<sup>18</sup> -**

**Of קטלה דאגמא which הבלא mentioned at the end of his statement, but otherwise he would not be חייב even though he maintains חייב תבפוסב"א"א -**

**דאם לא כן תקשי ליה ממתניתין דהכא דקאמר הוחמה בהר פטור -**

**For if this is not so (but rather תבפוסב"א"א is always חייב), there will be a difficulty**

<sup>14</sup> What is s' question on רבא, since there is no contributory negligence.

<sup>15</sup> This is in regard to the case of ויפעה בה ויצאה לאגם ומתה where רבא maintain that he חייב, but אביי maintains that he is פטור.

<sup>16</sup> It was because he was negligent, so she went to the אגם and the (foul) air there killed her.

<sup>17</sup> The רי"ף assumes according to אביי that the reason of קטלה דאגמא is necessary for him to be חייב only if we maintain תבפוסב"א"א is פטור, however according to the חייב תבפוסב"א"א, there is no need for this reason, for even if we do not maintain קטלה דאגמא, he is still חייב since it was תחילתו בפשיעה. This explains why אביי said לא מיבעיא. We can therefore conclude that according to אביי there is no need for contributory negligence according to the מ"ד. We now understand why אביי asked the question on רבא (השוכר את הפועלים), since (according to אביי) if it is תבפוסב"א"א he is always חייב, regardless whether there was contributory negligence or not.

<sup>18</sup> See ‘Thinking it over’.

from our משנה here, which states if it became overheated in the mountain he is פטור, however according to אביי that תבפוסב"א is always חייב, why should he be פטור in the case of הוהמה בהר.

תוספות concludes:

ומיהו למה שנפרש לבסוף<sup>19</sup> דהכא לא חשיב תחילתה בפשיעה אתי שפיר:

However according to what we will eventually explain that here (by הוהמה בהר) it is not considered תחילתה בפשיעה, everything will be properly understood (there will no question on the רי"ף)<sup>20</sup>.

### Summary

אונס contributed somewhat to the פשיעה (according to that מ"ד), only if the פשיעה contributed somewhat to the אונס.

### Thinking it over

תוספות writes that even according to the חייב תבפוסב"א מ"ד, we still need to assume (even according to אביי) that he is חייב only because קטלה דאגמא<sup>21</sup>. How then can we explain the expression of לא מיבעיא<sup>22</sup>, why is he more חייב if we maintain תבפוסב"א חייב, than if we maintains פטור תבפוסב"א, since the only reason he is חייב is because of the דאגמא?!<sup>23</sup>

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<sup>19</sup> See תוס' ד"ה רבי יוסי at the very end (on the עמוד ב').

<sup>20</sup> Alternately, תוספות initial question (in the beginning of תוס') has no place, since here it is not תחילתו בפשיעה.

<sup>21</sup> See footnote # 16.

<sup>22</sup> See footnote # 15.

<sup>23</sup> See # 74. אוצר מפרשי התלמוד.