

What does he swear

מאי¹ משתבע –

OVERVIEW

The גמרא cited a ברייתא regarding one who transported a barrel for his friend and it broke. ר"מ maintains that whether the transporter was a ש"ח or a ש"ש he swears and is פטור. The גמרא then cited a ברייתא which seems to contradict the view of ר"מ here.² Initially the גמרא brought the interpretation of ר' אלעזר (the אמורא) to explain this contradiction.³ Later the גמרא brought the explanation of ר' חייא בר אבא א"ר.⁴ After the גמרא brought the latter explanation, the גמרא asked; 'what does he swear'. תוספות will explain why this question was only on the latter explanation, but not on the former.

מעיקרא⁵ הוה אתי ליה שפיר שנשבע שלא שינה מן המנהג -

Initially the גמרא properly understood that he swears that he did not change from the customary way of transporting -

אבל השתא⁶ דתרצת דכי נמי לא שינה דהוי פושע⁷ ואפילו הכי פטור משום תקנת חכמים⁸ -

However, now that you answered that even if he did not change (he carried the barrel in the normal manner) he still is a פושע and nevertheless he is פטור from paying because of the תק"ח -

אם כן אפילו שינה ממנהגו נמי פטור מכח אותה תקנה⁹ -

So therefore even if he changed from the customary manner he will still be פטור from paying because of that same תק"ח –

¹⁰ תוספות responds to the anticipated difficulty:

¹ The marginal note indicates that this תוספות is referencing the גמרא on פגא. (It would therefore seem that the גירסא should be מאי משתבע [instead of משתבע היכי].) See (however) מפרשי התלמוד # 36-7.

² From our גמרא it seems that ר"מ maintains הוא פושע הוא (therefore they can swear), however in the other ברייתא it is apparent that ר"מ maintains הוא פושע הוא.

³ ר"מ maintains that these are two contradictory views of ר"מ (which were reported by different students).

⁴ On פגא they say that even though ר"מ maintains הוא פושע הוא, nevertheless here he is פטור with a שבועה because of a תקנת חכמים; for otherwise no one would be willing to transport items for his friend, lest they be liable.

⁵ This refers to the explanation of ר"א (footnote # 3) that ר"מ in our ברייתא maintains הוא פושע הוא. Therefore he swears that his tripping was not caused by him doing something out of the ordinary.

⁶ This refers to the explanation of ר"ח ב"ר אמר ר"י (footnote # 4) that ר"מ in our ברייתא also maintains הוא פושע הוא, but nevertheless he does not pay, but rather swears on account of the תק"ח.

⁷ ר"מ maintains הוא פושע הוא (footnote # 4 & 6).

⁸ See end of footnote # 4.

⁹ There is therefore no point in him swearing that לא שינה, for even if שינה he is still פטור from paying.

¹⁰ Perhaps the תק"ח was only if לא שינה (that even though הוא פושע הוא, nevertheless since he was לא שינה he is פטור); however if שינה, so there was extreme gross negligence, the תק"ח would not apply and he would be liable. Therefore

דמה לי פשיעה רבה ומה לי פשיעה זוטא¹¹ -

For what difference is there **to me** whether it was a **major פשיעה** or a **minor פשיעה**. Once there is a ת"ק that even though he is a פושע, nevertheless he is פטור; this ת"ק will apply to all types of פשיעה.¹²

ומשני שבועה שלא בכוונה¹³ שברתיה:

And the גמרא answers; he takes an oath that I did not break it intentionally.

SUMMARY

Once the חכמים make a תקנה that a פושע is פטור from paying, there is no difference between a פשיעה רבה and a פשיעה זוטא.

THINKING IT OVER

Why do we not distinguish between פשיעה רבה and פשיעה זוטא,¹⁴ but we do distinguish between פשיעה רבה (where he is פטור)¹⁵ and פשיעה רבה שברתיה (where he is חייב)?

הדרך עלך השוכר את האומנין

We will return to you פרק השוכר את האומנין

he should swear that לא שינה and he will be פטור (because of the ת"ק). Tosfos rejects this argument.

¹¹ Tosfos may feel forced to take this position (that דמה לי פשיעה רבה מה לי פשיעה זוטא), for if indeed there is a difference, why did not the גמרא answer that he swears שלא שינה. This proves that the only time he is not exempt from paying is if he broke it intentionally; however if it was (merely) שינה, he would still be פטור on account of the ת"ק. See 'Thinking it over'.

¹² The question therefore remains what can he swear?!

¹³ The ת"ק does not apply to intentionally breaking the barrel; only if it is broken due to negligence.

¹⁴ See footnote # 11.

¹⁵ Should we not consider a פשיעה רבה to be (practically) an אדם המזיק?!