

דאין לוקה ומשלם - That he is not both flogged and also made to pay

Overview¹

Our גמרא states that there is an established rule that אין לוקה ומשלם and therefore how is it possible that by בא על אחותו he pays קנס (in our משנה) and receives מלקות (מס' מכות). Our תוספות discusses whether the rule of אין לוקה ומשלם applies only to monetary payments (ממונא) or even also to fines (קנסא).

תוספות asks:

תימה דבפרק קמא דמכות (דף ד,ב ושם) משמע דבקנס² לוקה ומשלם³ -

It is astounding, for it seems from the first פרק of מסכת מכות that by a fine he is both flogged and is required to pay; the rule of אין לוקה ומשלם is only by ממון, not by קנס –

לוקה ומשלם the ruling is קנס that by משמע it is תוספות explains how it is

דקאמר אפלוגתא דרבי מאיר ורבנן⁴ דמעידין אנו באיש פלוני שחייב לחברו מאתים זוז -

Where the גמרא states regarding the dispute between ר"מ ורבנן in the case where stated, 'we are testifying regarding this person that he owes his friend two hundred זוז', and these עדים turned out to be זוממים; the גמרא there states -

בשלמא רבנן כי טעמייהו משום רשעה אחת⁵ כולי אלא רבי מאיר מאי טעמא -

The ruling of the רבנן is understood for they follow their reasoning of, 'you may punish him on account of one wickedness, etc.; however what is the reasoning of ר"מ, who maintains לוקין ומשלמין. The גמרא answers that ר"מ -

גמר ממוציא שם רע⁶ מה למוציא שם רע שכן קנס קסבר רבי מאיר עדים זוממין נמי קנסא -

¹ See 'Overview' to the previous תוס' ד"ה וקיימא.

² A payment is considered a קנס (a fine) if it is not the amount that he actually owes. For instance if an עבד kills an עבד he must pay the owner שלשים שקלים regardless the worth of the עבד. Similarly the payment of חמשים שקל for an נערה is also a קנס for it is the same amount in all cases regardless of the (social) status of the נערה.

³ Therefore there should be no question why by בא על אחותו he is לוקה ומשלם, since the payment of חמשים שקל is a קנס, where the rule of אין לוקה ומשלם does not apply.

⁴ This dispute between ר"מ ורבנן is in the משנה on א,ד. The רבנן maintain that the עדים זוממין are only required to pay to the alleged borrower two hundred זוז (as the תורה writes (in יט,יט) [שופטים] דברים) that לעשות לאחיו (דברים [שופטים] יט,יט) but they do not receive מלקות for violating the לאו of שקר עד שקר (in [יתרו] כ,יב). However ר"מ maintains that לוקין ומשלמין.

⁵ The תורה writes (in כה,ב) [תצא] דברים regarding meting out the punishment of lashes (מלקות) that והכהו לפניו כדי רשעתו. The word רשעתו (in the singular) means his one wickedness, meaning we can only punish a person for one רשעה, but not for more than one. Therefore we only punish him with זמם (see footnote # 4) which the תורה explicitly demands, but we do not punish him additionally with מלקות for transgressing the לאו of תענה.

⁶ A מוציא שם רע (generating a bad name) is one who claims that his wife was מזנה during the אירוסין period, bringing [false] witnesses to that effect. If these witnesses are discredited (through הזמה), the מוציא שם רע is required to pay a hundred שקלים to the father and he also receives מלקות, as the פסוק states in כב,יח-יט (תצא) דברים that ויסרו אותו (referring

Derives that לוקין ומשלמין from רע מוציא שם רע. The גמרא asks, you know why מוציא שם רע is because a לוקה ומשלם, however how can we apply this to עדים? ⁷ The גמרא answers that ר"מ maintains that ע"ז are also a קנס. ⁸ This concludes the citation from the גמרא in מס' מכות continues -

משמע⁹ דלרבנן לא ילפינן ממוציא שם רע משום דסברי דעדים זוממין ממונא -

It seems that according to the רבנן, who do not derive ע"ז from מוציא שם רע, because they maintain that ע"ז is a monetary payment, but not a קנס, so we cannot derive ממונא from קנסא -

אבל קנסא ילפינן שפיר ממוציא שם רע דלוקה ומשלם -

However we can properly derive a case of קנס (like אחותו על הבא) from מוציא שם רע that he will be both לוקה and משלם -

ועולא גופיה דדחיק הכא לשנויי כאן באחותו נערה הוא דמסיק התם¹⁰ הכי -

And it is the same עולא, who struggled here to answer, 'here (in our משנה) his sister was a נערה (therefore he pays קנס), this same עולא concluded there in מס' מכות in this manner that ר"מ derives ע"ז from מוציא שם רע. What therefore is the גמרא's question that לוקה ומשלם if by קנס we do say, אין לוקה ומשלם -

anticipates an answer to his question (and rejects it):

וליכא למימר דמבושת ופגם¹¹ שהן ממון פריך -

And we cannot answer that the גמרא asks from which are monetary payments. בוש ופגם responds that we cannot say that the question is regarding

דהא מדמשני כאן באחותו בוגרת משמע דלאו מבושת ופגם פריך¹² -

For since עולא answers; 'here in מס' מכות where he receives מלקות, it is in a case where his sister is a בוגרת, so there is no קנס therefore there is מלקות, this indicates

to (מלקות) and (מלקות) and is also required to pay; two punishments. We see that he receives מלקות and is also required to pay; two punishments.

⁷ The גמרא assumes (as it does in many places) that we cannot derive ממון from קנס.

⁸ One may consider ע"ז to be ממונא because the payment is not the same for all and it is commensurate with the amount they wanted to harm the accused. On the other hand it may be considered a קנס, since no loss occurred to the accused; the ע"ז merely attempted to cause him a loss.

⁹ is assuming that the reason the רבנן do not agree with ר"מ to derive from מוציא שם רע, is only because we do not derive מקנסא ממונא; otherwise where it is a case of קנס (like אחותו על הבא) we would derive it from מוציא שם רע that לוקה ומשלם (and the ruling of רשעה אחת will apply by מלקות and other cases).

¹⁰ (and that ר"מ) מוציא שם רע from ע"ז because he derives ע"ז from ר"מ is because he derives ע"ז from ר"מ (קנס). Why therefore was it necessary for עולא to answer here נערה כאן באחותו נערה, when he could have simply said that (even according to the רבנן) we derive קנס from מוציא שם רע that he is לוקה ומשלם.

¹¹ בוש is the shame the woman endures by being violated and פגם (defect) refers to the value of this woman for marriage, which is decreased, since as a בעולה she is considered defective. Both בוש ופגם are monetary payments, for they vary according to the social status of the woman. The גמרא's question would be that how can he both pay מלקות and receive מלקות, when the rule by ממון is that לוקה ומשלם.

¹² It is also evident from the גמרא that the original question was based on the קנס of כסף; it is only later (after עולא gave his answer) that the גמרא asked בוש ופגם.

that the **based** והא אין לוקה ומשלם **never asked** גמרא (that the בושת ופגם on the payment of - (משלם is the בושת ופגם

דאס כן לא הוה משני מידי -

For if indeed that was the question, עולא **did not answer anything**, for what difference does it make that אהותו בוגרת (קנס so there is no) however there is still a payment for בושת, so how can he receive מלקות since אין לוקה ומשלם. The question remains that according to the רבנן by קנס we say משלם לוקה for we derive it from מוצש"ר, therefore both משניות are correct; he pays the קנס and receives מלקות.

תוספות answers:

ויש לומר כיון דלרבנן דרבי מאיר עדים זוממין לאו קנסא הוא -

And one can say; since according to the רבנן who argue with ר"מ and maintain that the payment of ע"ז is not a קנס, but rather it is ממון -

ולכך לא ילפינו ממוציא שם רע¹³ אלא אין לוקין ומשלמין מכדי רשעתו¹⁴ -

And therefore we do not derive ע"ז from מוצש"ר that just as by מוצש"ר he is לוקה because we derive ע"ז by the same should be by ע"ז, **but rather ע"ז are not ומשלמין** because we derive **from כדי רשעתו** that משום רשעה אחת אתה מחייבו ולא משום ב' רשעות, and so therefore they just pay (because of זמם), but do not receive מלקות; once that we have come to this conclusion by ע"ז -

דהשתא אית לן למילף בכל דוכתין מעדים זוממין ולא ממוציא שם רע -

So now we can derive in all other places (where there is מלקות ותשלומין [even if it is a קנס payment]) **from עדים זוממין** that אין לוקין ומשלמין, **and** we do **not** derive **from מוצש"ר** that לוקין ומשלמין even by a קנס payment –

תוספות will now explain why we derive in all other places from ע"ז that אין לוקין ומשלמין (even if it is a קנס), but not from מוצש"ר:

דכל מלקיות ילפינן ממלקות דעדים זוממין¹⁵ דסמיך ליה לאו דחסימה -

For we derive the rules of all מלקיות from the מלקות which is written regarding ע"ז, where the prohibition of muzzling is written next to it -

דארבעים יכנו בעדים זוממין כתיב¹⁶ -

¹³ If ע"ז would be a קנס (as ר"מ maintains) we derive מוצש"ר from לוקה ומשלם (since they are both קנסא), and the rule of מיתה ומלקות (that he receives only one) but not by משום רשעה אחת וכו' we would establish that only in a case of ממון ומלקות (where he receives both [see later in this discussion]). However since according to the רבנן the payment of ע"ז is ממון, we cannot derive it from מוצש"ר (which is קנסא), therefore we can establish the לימוד of כדי (even) by מלקות וממון (as well).

¹⁴ See footnote # 5.

¹⁵ See footnote # 16. Immediately following the מלקות of פסוקים (דברים [תצא] כה-א, ג) the תורה writes (in 'ד' פסוק) לא תחסום שור בדישו (one is not permitted to muzzle an ox while he is threshing). We derive from the סמיכות that the חיוב is only by a לא which similar to לאו דחסימה (meaning [for instance] that it must be a לעשה לאו, etc.).

For the rule of he shall smite him forty times (the חיוב מלקות) is written regarding ע"ז (as well) -

ולפי שמפורש בהן מלקות ילפינן כולהו לאוי דליהוי דומין ללאו דחסימה דסמיך ליה¹⁷ -

And since מלקות is written explicitly by ע"ז, so we derive that all לאוי for which one receives מלקות should be similar to the לאוי of חסימה which is written near the rules of מלקות, which is discussing ע"ז -

וכי היכי דעדים זוממין אין לוקין ומשלמין בכל ענין בין בממון בין בקנס -

So just like by ע"ז they are not לוקין ומשלמין in any event whether the payment is קנס or ממון -

דמקרא מלא דבר הכתוב¹⁸ כדי רשעתו משום רשעה אחת אתה מחייבו כולי -

For it is an explicit פסוק of רשעתו כדי which teaches us that you may hold him liable for one רשעה only, etc. but not for two רשעות (meaning ממון and מלקות); this limitation is valid -

אפילו נתחייבו קנס כגון בשעה שהעידו טבחו או מכרו שור של גניבה הם או אחרים בשבילם -

Even if they were liable for a קנס, for instance¹⁹ if at the time when they testified (falsely), they slaughtered or sold a stolen ox,²⁰ either the ע"ז themselves or²¹ others did it on their behalf, the rule would be that they receive only the קנס punishment, but do not pay the קנס

הכי נמי בכל מלקיות -

The same thing is by all מלקיות that they receive only one punishment (the מלקות, but not the monetary payment²²).

To review; once the חכמים establish that ע"ז is ממון and not קנס, therefore we cannot derive that

¹⁶ See והכחו and והצדיקו את הצדיק וגו' (דברים [תצא] כא,א-ב) in פסוקים where עולא states that the two are referring to עדים זוממים (even though the פרשה of ע"ז is in יט,ש (שופטים יט,ש), עיי"ש.

¹⁷ לאוי and לאוי שיש בו מעשה (like לאוי דחסימה) have to be similar to מלקיות (because שלא ניתן לעשה מלקות, it certainly follows that (in a certain sense) the מלקות חייבי need to be similar to עדים זוממין who are written in the פרשה of מלקות itself (see footnote # 16); so just as by עדים זוממין the rule is לוקין ומשלמין אין the same applies to all חייבי מלקות that

¹⁸ See footnote # 5.

¹⁹ Seemingly since the רבנן maintain that ע"ז is ממונה, so how is it possible that they should be מחוייב a קנס, therefore טובח ומכר. See 'Thinking it over'.

²⁰ If one slaughters or sells a stolen ox he must repay the owner five times the value of the ox. These extra payments are considered קנס, not ממון.

²¹ טובח ומכר at the time that they were testifying. By טבחה ומכרה the rule is that יש שלח לדבר עבירה, so if others did it on their behalf it is considered as if the ע"ז did it themselves, and would be liable, if not for the כדי רשעתו limitation.

²² This is what the גמרא assumes in the question (so how is he required to pay קנס), however according to עולא (in the answer) the rule will be that he pays the money and is exempt from מלקות.

The rule of ע"ז is ²³ כדי רשעתו from אין לוקין ומשלמין are ע"ז rather, but מוצש"ר from לוקין ומשלמין is mentioned in the פרשה of מלקות, ²⁴ so therefore we derive that all חייבי מלקות are ע"ז (just as we derive all מלקות from ע"ז, which is written immediately following the פרשה of מלקות). By ע"ז the rule of אין לוקין ומשלמין is in all cases even if the תשלומין is קנס (for כדי לוקה ומשלם there is no חייבי מלקות), similarly by all חייבי מלקות there is no קנס (ממון וקנס) regardless whether the תשלומין are ממון or קנס.

²⁵ offers an alternate answer.

ועוד תירץ רבינו יצחק בן אברהם דרבנן נמי מצו סברי דעדים זוממין קנסא²⁶ -

And additionally, the רבנן answered that the ר"מ is a קנס like ר"מ, which begs the question why do they not derive that ע"ז are from לוקין ומשלמין - מוצש"ר

ומכל מקום לא ילפינן ממוציא שם רע משום דכדי רשעתו משמע בממון ומלקות²⁷ -

לוקין ע"ז should be מוצש"ר that ע"ז do not derive from רבנן But nevertheless, the רבנן (from which we derive that מאיר משום) ואין אתה מחייבו משום, ומשלמין, since the פסוק of רשעתו (ב' רשעות seems to be discussing a case of מלקות וממון) -

אבל לרבי מאיר משום בנין אב²⁸ דמוציא שם רע²⁹ מוקי כדי רשעתו למיתה ומלקות -

However, מוצש"ר of בנין אב maintains that on account of the ר"מ the מיעוט of רשעתו by מיתה and מלקות but not by ממון ומלקות -

ומפיק ליה ממשמעותיה³⁰ -

²³ See footnote # 5.

²⁴ See footnote # 16.

²⁵ The question was that from מס' מכות it seems that by מלקות וקנס the rule is משלם.

²⁶ Therefore since we see that the רבנן maintain by ע"ז that משלם (because of רשעתו) this proves that even מוצש"ר from ע"ז the rule is משלם and קנס. We need to explain however why indeed the רבנן do not derive ע"ז from מוצש"ר, as ר"מ does.

²⁷ The reason we do not derive ע"ז from מוצש"ר is not because ע"ז is ממון and מוצש"ר is קנס (for if that were the reason the inference would be that by מלקות and קנס he would receive both, for we can derive קנס from מוצש"ר), rather the reason is that the מיעוט of רשעתו (which is written by זוממין [see footnote # 16]), which excludes punishing him for both תשלומין ומלקות is 'stronger' than our ability to derive from מוצש"ר that משלמין. Therefore there is no longer any inference from the רבנן that by ממון וקנס the rule is משלמין, but on the contrary, since זוממין is עדים (which we derive from ע"ז [see footnote # 17]) applies, whether it is ממון or קנס..

²⁸ It means if the תורה states a rule in one place we apply it elsewhere, unless there is sufficient reason to distinguish between them. We build up (בנין אב) this law to apply elsewhere.

²⁹ There is an inherent contradiction between מוצש"ר (that משלמין) and the מיעוט of רשעתו (that מחייבו). The רבנן resolve this contradiction by saying since the מיעוט of רשעתו is by מלקות וממון (by ע"ז) we cannot derive from מוצש"ר which opposes the ruling of רשעתו. However ר"מ maintains that there is no contradiction, for the מיעוט of רשעתו is by מיתה ומלקות that he is לוקה, however by מלקות וממון the rule is derived from מוצש"ר. Their dispute is based on whether רשעתו is referring to מלקות (the רבנן) or מיתה ומלקות (the view of ר"מ). See footnote # 30.

³⁰ The accused is being והפילו השופט והכהו לפניו כדי רשעתו. The תורה writes מלקות. The מיעוט of רשעתו is discussing מלקות. The תורה limits this punishment of מלקות that it should not be extended to another punishment; משום מלקות.

And removes the מיעוט of מ"מ ר"מ from it simple meaning which is מלקות ומיתה and he establishes it for מיתה ומלקות.

A third approach:

אי נמי טעמא דרבנן כדמפרש בירושלמי³¹ דמוציא שם רע חידוש הוא -
Or you may also say the reason of the רבנן not to derive מ"מ ר"מ from ע"ז by לוקה ומשלם is as it is expressed in תלמוד ירושלמי that the חוב of a ר"מ מוצש"ר is a novelty -
דבדיבור גרידא מיחייב³² -

That the ר"מ מוצש"ר is held liable just for speaking alone –

responds to the anticipated question:

דאף על גב דעדים זוממין נמי בדבוריהו מיחייבי -
For even though the ע"ז are also liable for speech alone, so why cannot we derive ע"ז from מוצש"ר? תוספות distinguishes -

מכל מקום לא הוי חידוש כולי האי דעל ידי דבורם היה נפסד -
Nevertheless, by ע"ז the novelty is not that great compared to מוצש"ר, since by ע"ז the accused would have suffered a loss on account of their testimony (speech) -
אבל³³ במוציא שם רע לא איתעבד מעשה בדבורו אלא על ידי עדים³⁴ -

However by מוצש"ר nothing would have happened by his speech if there were עדים. Therefore we cannot derive ע"ז from מוצש"ר.

concludes (this is referring to the last two תירוצים of תוס' that ע"ז is קנסא):

וכן משמע לקמן (דף לה, ב) דאפילו עדים זוממין קנסא אין לוקה ומשלם קנס -
And this is also indicated later that even if we assume that ע"ז is a קנס, nevertheless the ע"ז are not לוקה ומשלם -

(the רשעה for which he is receiving מלקות), but not for another רשעה (like payment). This is the understanding of the רבנן, which follows the simple משמעות of the פסוק. However, according to ר"מ that מ"מ ר"מ is referring to מיתה ומלקות (that he receives מיתה, but not מלקות), this does not seem to fit with the simple interpretation of the פסוק. Nevertheless ר"מ interprets it so, in order that there would not be any contradiction between מוצש"ר and מ"מ ר"מ.

³¹ פ"ג ה"א. In our ירושלמי on טז, א. According to this answer, ע"ז is קנסא, so there is no question (see footnote # 26). The לוקה ומשלם that it should be מוצש"ר that we do not derive from ע"ז (if ע"ז is קנסא) offers a different answer why.

³² We rarely find that someone is liable just for speaking without doing any action. Therefore since there is such a חומרא by מוצש"ר, we cannot derive that in other cases where there is no such חומרא that it should be מוצש"ר.

³³ תוספות is asking that by מוצש"ר as well she would suffer a great loss by his דיבור, for she would be put to death, so why is ע"ז a greater חידוש than מוצש"ר. To which תוספות replies (see following footnote).

³⁴ The husband's claim that she was מזנה would not be accepted (if she denies it). Rather the case of מוצש"ר is where he brings [false] עדים that she was מזנה. If they were מזנים we apply the dual punishment (of מלקות וממון) to the מוצש"ר, so it is not the מוצש"ר that caused the potential loss, but rather the עדים (זוממין), therefore it is a great חידוש that nevertheless he is liable. However, by ע"ז they themselves would have caused a loss, so it is not such a great חידוש that they are liable for their דיבור, and we cannot derive ע"ז from מוצש"ר, which is a greater חידוש.

דאמר ולרבה דאמר לרבי מאיר חידוש הוא שחידשה תורה בקנס³⁵ מתניתין³⁶ במאי מוקים לה -
Where the גמרא states, 'and according to רבה, who maintains that it is a novelty
which the תורה was מחדש regarding קנס, how will he establish our משנה', this
concludes the citation from the גמרא continues -

ואמאי לא מוקים לה כרבי עקיבא דסבירא ליה בפרק קמא דבבא קמא (דף ה.) -
But why does not רבה establish the משנה like ר"ע who maintains in the first
פרק of ב"ק that -

עדים זוממין קנסא הוא³⁷ דלדידיה לא שמעינן דאית ליה מת ומשלם³⁸ -
מת ומשלם is a קנס, for according to ר"ע we never heard that he maintains
אלא משמע דאין שום תנא דסבר לוקה ומשלם³⁹ אלא רבי מאיר לחודיה:
Rather it seems from this that there is no תנא who maintains except
לוקה ומשלם for ר"מ alone.⁴⁰

Summary

offers three interpretations why we cannot infer from the רבנן (who do not
derive ע"ז from מוצש"ר), that by קנס the rule is לוקה ומשלם.

Thinking it over

writes that ע"ז are not לוקין ומשלמין even if it was a קנס payment, for instance
אין לוקין ומשלמין they were טבח ומכר.⁴¹ However, it would seem that this rule of
applies only (in the case of ע"ז) if the חיוב מלקות and the חיוב תשלומין came as a result
of their testimony, but not if the חיוב ממון was for something completely unrelated
to their testimony, like the טבח ומכר where seemingly they should be לוקה ומשלם!⁴²

³⁵ maintains רבה (see לקמן לד, ב) that if the payment is a קנס, he is obligated to pay it even if it comes together with a חיוב מיתה.

³⁶ The משנה on לב, א states that if one is על בתו there is no קנס (because he is חייב מיתה), however ר"מ according to רבה maintains that by קנס, he is חייב both מיתה and קנס.

³⁷ Therefore, we understand that he is לוקה ומשלם, for since ע"ז we can derive from מוצש"ר that מוצש"ר.

³⁸ However, the משנה of בתו is understood that he is פטור from קנס since there is a חיוב מיתה, and ר"ע never ruled that מוצש"ר is לוקה ומשלם (even by קנס); it is only ר"מ according to רבה who maintains that by קנס he is לוקה ומשלם.

³⁹ Therefore, we cannot establish the משנה like ר"ע, because only ר"מ maintains לוקה ומשלם.

⁴⁰ However, according to the first answer of תוס' that ע"ז is ממון, for if it would be קנס we would derive it from מוצש"ר that לוקה ומשלם. Therefore, according to ר"ע (who maintains קנסא ע"ז) the rule would be לוקה ומשלם so we can establish the משנה like ר"ע.

⁴¹ See footnote # 19.

⁴² See שלמה.