



## Babba Kama Daf 86

### THE BOSHES PAYMENTS

בבבא קמא דף פ"ו. מאן תנא, להא דתנו רבנן, נתכוון לבייש את הקטן ובייש את הגדול, נותן לגדול דמי בושתו של קטן. לבייש את העבד ובייש את בן חורין, נותן לבן חורין דמי בושתו של עבד. מני, לא רבי מאיר ולא רבי יהודה ולא רבי שמעון. קא סלקא דעתך קטן קטן בנכסים גדול גדול בנכסים, אי רבי מאיר האמר כולהו בהדי הדדי נינהו. ואי רבי יהודה האמר אין לעבדים בושת. ואי רבי שמעון האמר נתכוון לבייש את זה ובייש את זה פטור, מאי טעמא כקטלא מה קטלא עד דמתכוון ליה, דכתיב וארב לו וקם עליו עד שיתכוון לו, בושת נמי עד דמיכוין ליה, דכתיב ושלחה ידה והחזיקה במבושיו, עד שיתכוון לו. לעולם רבי יהודה וכי קאמר רבי יהודה אין לעבדים בושת למיתבא להו, אבל למישם שיימינן בהו.

- א -

### One who intended to embarrass one person and embarrassed another person

*One who embarrasses someone without intending to is exempt according to all opinions / Rabi Shimon and the Chachamim disagree about one who intends to embarrass one person and embarrasses another person / Whether Rabi Shimon's source is a derashah from a possuk or whether it is a logical argument that this is not considered intent, as is the case regarding murder*

-גמרא, תוספות, שיטה מקובצת, ראב"ד-

א. It is written in the Torah,<sup>1</sup> “Ki yinatzu anashim yachdav ish v’achiv v’karvah eshes ha’echad l’hatzil es ha’ishah miyad makeihu v’shalchah Yadav v’hechezikah bimushav – v’katzosah es kapah lo sochos einecha.” From this possuk is learned the obligation to pay for embarrassing another person, and by extension, the fact that one who injures another person must pay compensation for the shame that the victim suffers [boshes] aside from the damage that the injury incurs [nezek].

About this, the Mishnah<sup>2</sup> teaches that if one falls from a roof and damages as well as causing embarrassment to someone, he is liable to pay for the nezek as well as the boshes, unless he intends to embarrass. The Rif brings a version of the Mishnah that learns from the possuk “v’shalchah yadah” that one is not liable for boshes unless he intends to embarrass. As was mentioned, the matter

under discussion is one who falls from a roof without intention neither to injure nor to embarrass.

The current Gemora teaches another detail. Rabi Shimon holds that if one intends to embarrass one person and embarrasses another person, he is exempt. Just as, regarding one who kills someone, one who intended to kill one person and killed another is exempt, as is written “V’arav lo v’kam alav,” which insinuates intention for a particular person, so too is one only liable for boshes if he intends to embarrass that person. This is learned from “v’shalchah yadah v’hechezikah bimvushav.”

Two different and fundamental approaches are said about this in the Rishonim.

Tosfos<sup>3</sup> explains that Rabi Shimon learns this from the possuk “bimvushav.” According to Rabi Shimon, this possuk should be interpreted to teach that if one intends to embarrass one person and embarrassed another, he is exempt from paying boshes. Tosfos asks what the Chachamim, who hold that one is liable for boshes even if he intended to embarrass a different person, learn from the possuk “bimvushav.”

Tosfos<sup>4</sup> explains that this is the reason that the Chachamim child liable one who intended to embarrass a

slave and embarrassed a free man. In regard to the death penalty for killing someone, even the Chachamim holds that if one intended to kill a non-Jew, for whom is not liable to be put to death, and killed a Jew, he is exempt, as is learned in Makkos daf 7b from the *possuk* “*bivli daas*.” Seemingly, the same should be said also about the liability for *boshes* that if he intended to embarrass a slave, for whom he would be exempt, he should remain exempt even if he embarrassed a free man. Tosfos writes that nevertheless, this is not the case because the Chachamim only exempt the above case regarding murder because they learn it from the *possuk* “*bivli daas*.” Regarding *boshes*, however, the Chachamim have no source that one who intended to embarrass a slave and embarrassed a free man should be exempt. Only according to Rabi Shimon, who exempts, from the *possuk* “*bimvushav*,” one who intends to embarrass one person and embarrassed another person, will one be exempt if he intended to embarrass someone for whom there is no liability. According to the Chachamim, who do not interpret this *possuk*, one who intended to embarrass a slave will be liable just as one who embarrass someone other than he intended for will be liable.

However, the Shittah Mekubetzes writes, quoting Rabbeinu Yeshayah, that Rabi Shimon’s halachah that one who intended to embarrass one person and

embarrassed another is exempt is not learned from a *possuk*. Rather this is a halachah that is extrapolated from the halachos of one who murders. Since the *possuk* regarding the liability for *boshes* is said about one who intended to embarrass, Rabi Shimon, who holds that one who intends to kill one person and killed another is not considered to have intended to kill and is exempted from the *possuk* “*v’arav lo*,” holds also regarding *boshes* that one is not considered to have had intention unless he intended to embarrass the same person that he actually embarrassed.

Similarly, the Chiddushei Haraavad writes that he does not know the source for the fact that Rabi Shimon holds that one who intends to embarrass one person is exempt if he embarrassed someone else. He adds that it is possible that it is learned from a logical argument. Just as one who intended to kill one person and killed another person is exempt, as is learned from “*v’arav lo*,” so too regarding *boshes*, since there is only a liability for one who intends to embarrass, Rabi Shimon will require that there should be intention to embarrass the one whom he actually embarrassed. However, if one embarrassed someone other than the person he intended to embarrass, this will not be considered as intention to embarrass. See more about this later on.

- ב -

## One who intended to embarrass a slave and embarrassed a free man

*According to those who hold that Rabi Shimon’s halachah is based on a logical argument, why do the Chachamim hold liable one who intended to embarrass a slave although the slave is not subject to the liability of boshes / One who intends to injure someone is liable for boshes even if he had no intention to embarrass him / One who intended to embarrass a non-Jew and embarrassed a Jew / One who intended to spit on someone’s clothes and the spit landed on his body*

-אור שמח, מנחת שלמה-

ב. The Ohr Sameach<sup>5</sup> brings these two approaches in the explanation of the words of the Gemora. He asks, according to the approach of the Shittah Mekubetzes, how Rabi Shimon could exempt one who intended to embarrass someone other than his eventual victim by

comparing this case to a case of murder. If Rabi Shimon could draw such a comparison, considering one who embarrassed a mistaken victim as not having intention to embarrass just as a similar case regarding murder would also be considered unintentional, the same should apply to the Chachamim. At least in a case where one intended to embarrass a slave and embarrassed a free man, he should be exempt. Regarding murder, the Chachamim agree that one who intended to kill a non-Jew and killed a Jew is exempt because it is considered as not having had intention to kill. If so, if Rabi Shimon’s halachah is based on an extrapolation from the halachos of murder, the same comparison should be made in the opinion of the Chachamim. One who intends to embarrass a slave



should be exempt because one is exempt from any payment of *boshes* to a slave.

He resolves this question based on an additional principle that is found earlier, on daf 27a, regarding intent for *boshes* that one is liable for *boshes* if he intended to damage even if he did not intend to embarrass. The Gemora states there that if one fell from a roof and deliberately turned himself in mid-fall to land on a person so that he would not be hurt by his fall, he must pay for both the damages incurred and the *boshes*. This is because he intended to fall on that person and to damage him. This is learned from the *possuk* “*v’hechezikah*” that if he intended to damage, even if he did not intend to embarrass, he is liable.

The Rambam<sup>6</sup> also writes that one who falls from a roof, if he turns himself, he is liable for *boshes* because one who intends to damage, even if he did not intend to embarrass, is liable for *boshes*. The Shulachan Aruch<sup>7</sup> also codifies this halachah.

The Chiddushei Hame’iri<sup>8</sup> explains that one who injures someone intentionally is considered as if he intended to embarrass him and is liable for *boshes* because he intended to embarrass. However, if he fell of a roof without being able to stop himself and turned himself in midair in order to save himself by falling on someone else, is considered to have intention to injure that person because he knows that he will be injure him by saving himself. In this case, although there was

no intention to embarrass, he is nevertheless liable for *boshes*. This is because one who intends to injure someone is liable also for *boshes*, as is learned from the *possuk* “*v’hechezikah*.”

Based on this principle, the Ohr Sameach concludes that this may be the reasoning of the Chachamim that one is liable for embarrassing someone while intending to embarrass a slave although one who kills a Jew intending to kill a non-Jew is not liable. Although one who embarrasses a slave is exempt from paying *boshes*, one who injures a slave must pay the other four payments for bodily harm. If so, just as one who intended to injure someone is liable for *boshes* even without intention to embarrass because the intention to embarrass is embedded in the intention to injure, so too one who intended to embarrass a slave and embarrassed a free man is considered as one who intended to embarrass someone who is subject to the liabilities of *boshes* since the slave is subject to the other payments of bodily damage. Regarding *boshes*, intention to damage is considered as intention to embarrass and therefore, one who intends to embarrass a slave and embarrasses a free man is liable even according to the Chachamim. Even though, regarding murder, if one intended to kill a non-Jew and killed a Jew, he will not be liable, a slave is considered as subjects to the liabilities of *boshes* through the fact that he is entitled to the other payments of bodily harm. [1]

Based on this, the Ohr Sameach concludes that if one

## NOTES

[1] The Ohr Sameach comments that one can still ask why according to the Chachamim, who hold that one who intends to embarrass a slave and embarrasses a free man is liable, he must pay only the *boshes* of a slave. Why does he not have to pay the *boshes* that is commensurate for the person that he actually embarrassed? One who intends to damage someone and did not intend to embarrass him, pays him the amount of his *boshes*, and if so, one who intended to embarrass a slave and embarrassed a free man, who is liable according to the Chachamim because the other payment of damage are relevant to him, should receive the amount due to a free man and not the amount due to a slave.

However, he explains that the two issues are not comparable. One who intends to injure someone and not embarrass him, since he at least intended to injure someone to whom he would have to pay *boshes* if he would embarrass him and it is likely that embarrassment will occur as a result of the injury, must pay the correct amount of *boshes* as is due to the victim. However, when

one intended to embarrass a slave and embarrassed a free man, his intention was not likely to cause embarrassment to a free man and, although it is considered as having intent to embarrass a free man since a slave is relevant to the other payments, he cannot be held liable for more *boshes* than he intended to cause. Since he intended to embarrass a slave and not a free man, he intended only for a small *boshes* and not a large *boshes*, so he cannot be held liable for the full *boshes* of a free man.

As an aside, it is evident in the Gemora that one who intends to embarrass an adult and embarrasses a child must give only the amount of the *boshes* of a child to the adult and not the full amount of *boshes* of the adult. Similarly, one who intended to embarrass a slave and embarrasses a free man, as has been mentioned, pays only the amount of *boshes* that is due to a slave. It must be investigated whether this is a general rule in the halachos of *boshes*, i.e., that one does not pay more than the *boshes* that he intended to cause. It is possible that even if one would do a certain action to embarrass

intended to embarrass a non-Jew and embarrassed a Jew, he can be exempted from paying *boshes* even according to the Chachamim. This is because a non-Jew is not entitled to any of the payments for bodily harm, and just as one who kills a Jew intending to kill a non-Jew is exempt even according to the Chachamim, so too one who intended to embarrass a non-Jew will be exempt if he actually embarrassed a Jew. In this case, he indeed intended to embarrass one who was not entitled to any payment connected to *boshes* or other damages.

This is only according to the reasoning of the Shittah Mekubetzes, who explains that Rabi Shimon's halachah that exempts one who embarrasses one person while intending to embarrass someone else is extrapolated from the halachos regarding murder and is not considered as intention. According to this, one who intends to embarrass a non-Jew and embarrasses a Jew is also exempt because this is not considered intention to embarrass at all [aside from a slave, where it is considered intention to embarrass because he is subject to the other payments of damage]. According to Tosfos, however, certainly one who intended to embarrass a non-Jew and intended a Jew will be liable. Tosfos explicitly writes that Rabi Shimon exempts one who embarrass a victim

for whom he did not intend because he learns this from the *possuk* "*bimvushav*," and not because he learned this from murder. According to the Chachamim, there is no such *possuk* to exempt one who embarrass the wrong person and the same halachah would apply to one who intended to embarrass a non-Jew and embarrassed a Jew.

The Minchas Shlomo<sup>9</sup> comments on the conclusion of the Ohr Sameach, which was that the Chachamim holds liable one who embarrassed a free man while intending to embarrass a slave is, according to the Shittah Mekubetzes, because a slave is considered subject to the payments for bodily damage. He writes that according to this, one who intended to spit on someone's clothes and spat by mistake on the person's body, is exempt from paying *boshes*. This is because one who spits on someone's clothes is exempt, as is stated on daf 81a, and since he intended to do something for which there would be no liability for *boshes*, he is considered as someone who embarrassed someone who has no entitlement at all for *boshes*. In this case, one cannot say that he should be liable because it is considered as if he had intention to damage, because one who intended to spit on someone's clothes had no intention at all to damage. If so, he should be entirely exempt from paying *boshes*.

## NOTES

someone and would not know that a greater embarrassment than he intended would result, he would only be liable for the smaller amount. For example, if two people were quarrelling in the street and one of them pushed the other to the ground, this would be an example of a small embarrassment. If, unknown to him, there was a muddy puddle on the floor that dirtied his victim and caused him far greater embarrassment than he intended to cause, it is not clear whether he must pay for the greater amount or the lesser amount. It is possible that since he intended to embarrass the victim by

pushing him to the ground, it makes no difference whether he intended to cause a large or small amount of embarrassment [this is indicated by the Minchas Shlomo]. According to this, the reason that one who embarrassed an adult while intending to embarrass a child is that was a lack of intention about the second person; he did not intend at all to embarrass the adult. Therefore, although this is considered, according to the Chachamim, as if he had intention to embarrass, this is only commensurate to the amount of *boshes* that the child would have suffered.

## מראי מקומות

1. דברים כ"ה 2. בעמוד ב' 3. ד"ה עד 4. ד"ה אבל 5. פרק א' מהלכות נזקי ממון הלכה י"ד 6. פרק א' מהלכות חובל ומזיק הלכה י"ב 7. חו"מ סי' תכ"א סעיף י"א 8. שם 9. שם