

THE BAIS HAVAAD HALACHA JOURNAL

Family, Business, and Jewish Life through the Prism of Halacha

VOLUME 5783 • ISSUE XLI • PARSHAS KI SEITZEI



SCAR TROUBLE: MUST ONE PAY FOR LEAVING A MARK?

Adapted from the writings of Dayan Yitzhak Grossman

The Associated Press reports:

A South Florida jury awarded \$800,000 in damages to a little girl who received second-degree burns when a hot Chicken McNugget fell on her leg as her mother pulled away from the drive-thru of a McDonald's restaurant. [Philana Holmes, mother of plaintiff Olivia Caraballo] testified on Tuesday that Olivia, now 8, calls the scar on her leg her "nugget" and is fixated on having it removed... Lawyers for McDonald's argued that the child's discomfort ended when the wound healed, which they said took about three weeks. They contended that the girl's mother is the one who has the problem with the scar, and told jurors that \$156,000 should cover damages, both past and future...¹

The plaintiff had argued that the restaurant was negligent in failing to warn about the risk of hot food, that McDonald's corporate didn't provide adequate instructions for the handling of hot food, and that the nugget, being too hot, was a defective product. We will not address here the legitimacy of those claims,

only the question of liability for an injury that heals but leaves a scar, under circumstances where the perpetrator is in fact culpable for the injury.

The Mishnah sets forth five causes of action for personal injury:

Someone who wounds another person is obligated to pay him for five things: for *nezek* (damage), for *tza'ar* (pain), for *ripui* (healing), for *shevess* (loss of work), and for *boshess* (humiliation).

How is *nezek* calculated? If he blinded his eye, cut off his hand, or broke his leg, we view the victim as if he were a servant being sold in the market, and we estimate how much he was worth before the injury and how much he is worth now. (The assailant must pay the difference.)

How is *tza'ar* calculated? If he burned him with a hot iron spit or with a hot nail—even on his fingernail, where it does not make a (market value-reducing) wound—we estimate how much money a person like this would want to take to suffer such pain. (The assailant must pay that amount.)

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info@baishavaad.org

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PARSHAS KI SEITZEI

COTTAGE LOAF

Excerpted and adapted from a shiur by
HaRav Yechiel Biberfeld

An Amoni or Moavi shall not enter the congregation of Hashem, even their tenth generation shall not enter the congregation of Hashem, to eternity, because of the fact that they did not greet you with bread and water on the road when you were leaving Egypt...

Dvarim 23:4-5

This indicates that bread baked by non-Jews is permitted *min* haTorah. Chazal later enacted a prohibition on *pas akum* (Avodah Zarah 35b). Some *Rishonim*, including the Rosh, maintain that it is entirely permitted today, either because we come from places where the *gzeirah* was never accepted, or because a later *bais din* repealed it. The Rambam and others hold that the *gzeirah* included only bread baked by nonprofessionals (*pas ba'al habayis*), but bakery bread (*pas palter*) is permitted if no *pas Yisrael* is available, due to the critical role of bread in the diet.

The Shulchan Aruch (Y.D. 112:1) follows the Rambam et al., while the Rama takes the compromise position that *pas palter* is permitted even if *pas Yisrael* is available, but *pas ba'al habayis* remains forbidden. A third approach, followed by some communities, has it that even *pas palter* is forbidden, even where *pas Yisrael* is unavailable.¹ According to the Shach, Ashkenazim

¹ See the continuation of the Shulchan Aruch in *siman* 112, which indicates this multiple times; see also *Darchei Teshuvah* (Y.D. 112:25) in the name of the *Yeshuos Yaakov*.

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The Wandering Jew

Q We'll be in a bungalow colony for Shabbos, and I don't know where the *techum* ends. How far can I go when taking a walk on Shabbos afternoon?

A The Gemara (Eiruvין 42a), discussing a traveler who stops somewhere for Shabbos and doesn't know where the *techum* ends, says he may calculate it by counting 2000 footsteps, as the average man's walking stride length is one *amah*; the Shulchan Aruch (O.C. 397:2) rules accordingly. The Biur Halacha (399:1) says that if possible, more precise measurements should be taken before Shabbos. If you plan to take a short walk—significantly less than 2000 *amos*—the footstep method may be relied upon even *lechaf'chilah*, because the likelihood of error is low (*ibid.*). Someone taller or shorter than the average

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¹ Jury awards Florida girl burned by McDonald's Chicken McNugget \$800,000 in damages. AP News. <https://apnews.com/article/mcdonalds-chicken-mcnugget-lawsuit-girl-burned-8a21d966b3db48089762352138538cd8>.

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How is *ripui* calculated? If he hit him, he must heal him (i.e., pay the costs of his healing)...

How is *shevess* calculated? (If the victim now cannot do the type of work he did before, we view him as affected by he were a watchman of a cucumber field (because that is all he can now do). The assailant must pay him the wages of a cucumber watchman for each day that the injury prevents him from doing even this simple work.)...

How is *boshess* calculated? It all depends on the status of the one who caused the humiliation and the status of the one who was embarrassed. (The humiliation is greater if the victim's status is higher or the assailant's is lower. We estimate how much someone of the victim's status would pay to avoid being embarrassed by someone of the assailant's status, and the assailant must pay that amount.)²

Note that *tza'ar* and *ripui* apply only to injuries caused by a person (*adam hamazik*), and not those caused by someone's property, e.g., his animal (*mamon hamazik*).³ Additionally, there is a dispute among the *Rishonim* whether they apply to injuries caused by a person indirectly (even where such indirect action does engender basic liability for damage—*dina degarmi*).⁴ and as we have discussed previously, *boshess* has the additional requirement of intention to humiliate.⁵ These issues are beyond the scope of this article, in which we will discuss a type of injury to which these various causes of action apply.

NEZEK

As the Mishnah states, *nezek* is the decrease in the price that the victim would fetch if sold as a servant. This takes into account the victim's profession.⁶ R' Yaakov Blau says that this calculation is rather infeasible today, because slavery is uncommon.⁷ The unfortunate truth is that slavery does exist today, and there are estimates of tens of millions of people currently enslaved around the world,⁸ but it is unclear to this author whether this trafficking in human beings is relevant to the halachic assessment of *nezek*.

In any event, the case of an injury that leaves a scar is explicitly discussed in the Gemara, which concludes that someone who wounds a girl on her face is liable for *nezek* because he has lowered her monetary value.⁹ The Rosh and the Tur explain that this refers to the reduction in both her bride-price and her

earning capacity or market value.¹⁰

In a case like Olivia Caraballo's, it would appear that neither most professional occupations nor a girl's bride-price (if such a thing even exists today in the US) would be affected by her scar, so there would be no claim for *nezek*.

SHEVESS

When someone inflicts an injury upon someone else that leaves a scar, any income lost during the convalescence would certainly be included in *shevess*, but to the extent that the scar itself causes a loss of income, that would presumably be included in *nezek*, as above.

TZA'AR

Although the Mishnah says one is liable for inflicting pain, *Rishonim* disagree about whether that is limited to pain experienced at the time of the injury or it extends to pain that endures,¹¹ so pain caused by a scar would be a matter of dispute. Further, the *Pis'chei Choshen* (R' Yaakov Blau) assumes that liability is limited to physical pain and does not extend to emotional pain ("tza'ar nafshi"),¹² so any liability for pain caused by a scar would have to be based on physical pain or discomfort rather than psychological distress.

BOSHESS

The Yerushalmi rules that there is no liability for humiliation if the injury is in a place where it isn't visible:

One who injures another person...in a place where it is not seen, he gives him two, *tza'ar* and *ripui* (and not *nezek*, *shevess*, or *boshess*).¹³

This rule is codified by the Rambam:

If he struck him in a place where it isn't seen—e.g., he struck him on his knees or on his back—he pays two, *tza'ar* and *ripui*.¹⁴

The Shulchan Aruch rules:

If he struck him in a place where it isn't seen and no one saw him, he gives him only *tza'ar* and *ripui*.¹⁵

The Sma explains that an assailant is exempt from liability for humiliation only if both these conditions are met: The injury is in such a place that it will not be seen later, and no one saw it at the time of the assault.¹⁶

The clear implication is that unlike liability for *tza'ar*, which some *Rishonim* maintain is limited to pain experienced at the time of the injury, liability for humiliation extends to that experienced subsequently. Rav Blau initially suggests that this

2 Mishnah Bava Kama 81.

3 See *Pis'chei Choshen Hilchos Nezikin* (5748) perek 11 se'if 3 pp. 309-10.

4 *Ibid.* se'if 4 p. 310.

5 For All Intents: Does Mind Matter? *Bais HaVaad Halacha Journal*, June 10, 2022.

6 *Piskei HaRosh* *ibid.* *siman* 4; Rama to Shulchan Aruch C.M. 420:15; Sma *ibid.* s.k. 17; *Pis'chei Choshen* *ibid.* se'if 9 p. 312.

7 *Pis'chei Choshen* *ibid.* n. 24.

8 Wikipedia contributors. Slavery in the 21st century. In Wikipedia, The Free Encyclopedia. https://en.wikipedia.org/w/index.php?title=Slavery_in_the_21st_century&oldid=1165299025.

9 Bava Kama 88a.

10 *Piskei HaRosh* *ibid.* *siman* 7; Tur C.M. *siman* 424.

11 *Tosfos* *Kubos* 39a s.v. *Tza'ar demai*; *Shu"t* HaRosh *kil* 101 *siman* 2; Tur, *Bais Yosef*, and Bach C.M. *siman* 420.

12 *Pis'chei Choshen* *ibid.* end of n. 32 p. 313.

13 Yerushalmi *ibid.* 81.

14 Rambam *Hilchos Chovel Umazik* 2:2.

15 Shulchan Aruch *ibid.* 420:7.

16 Sma *ibid.* s.k. 9.

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follow the Rama and allow *pas palter* (see Igros Moshe Y.D. 2:33).

Even according to the Shulchan Aruch, *pas palter* is permitted if it is of higher quality than the available *pas* Yisrael, or if it is of a different type, just as

where *pas* Yisrael is unavailable.²

The Shach (112:9) says that during *Aseres Yemei Teshuvah* one must be careful ("tzarich *lizaher*") not to eat *pas palter*, and the Minchas Yaakov says this applies even if the *pas palter* is of better quality than the available *pas* Yisrael. Moreover, the Mishnah

Brurah (242:6) says it is proper to be careful ("nachon *lizaher*") to eat only *pas* Yisrael on Shabbos due to *kvod* Shabbos. But R' Shmuel Felder rules that *pas palter* products that one prefers over their *pas* Yisrael equivalents (e.g., Stella D'oro cookies, for some) are permitted on Shabbos, because a) Shabbos is less stringent than *Aseres Yemei Teshuvah* in this

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man should adjust the step count proportionally (*ibid.* 397:2).

When counting footsteps, bear in mind that hills and valleys are measured as if they were flat (O.C. 399). So if you are climbing or descending, you may go farther than 2000 footsteps, because you haven't traveled 2000 *amos* laterally. But it's not practical to incorporate this factor, as the halachic guidelines for measuring hills are complex (see also Nesivos Shabbos 43 note 64).

Some *poskim* ask how the Gemara could allow the footstep method, given that *medidah* (measuring) on Shabbos is forbidden other than for a *dvar mitzvah* (O.C. 306:7). The Radvaz (cited in Sha'arei Teshuvah) answers that measuring the *tchum* is considered a mitzvah purpose. But the Mishnah Brurah (*ibid.* 5) says counting footsteps is only permitted if the purpose of the walk is itself a Shabbos need. Therefore, in practice, you should take a shorter stroll rather than counting footsteps, unless the purpose of the walk is to address a mitzvah need.



RAV ARYEH
FINKEL

is limited to where the humiliation is caused by people seeing the victim's mark and deducing that he had been struck, "but we do not find [liability for] humiliation subsequent to the blow that is not from the blow itself." Later, however, he is tentative on this point.¹⁷

Accordingly, a scar would engender liability for humiliation if it is clearly indicative of the injury that caused it, but it might not if it is not so indicative.

RIPUI

There are a variety of possible medical treatments for scars.¹⁸ An assailant's liability for healing would presumably include the cost of the appropriate treatment for any scar caused by his attack, although it is not clear to this author whether that would extend to a scar that does not cause *nezek*, *tza'ar*, or *boshess* but which the victim nevertheless desires to remove.

17 *Pis'chei Choshen* *ibid.* n. 51 p. 316.

18 Wikipedia contributors. Scar. In Wikipedia, The Free Encyclopedia. <https://en.wikipedia.org/w/index.php?title=Scar&oldid=1162239879>.

3 See Sha'ar HaTzyon 242:18.

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2 Shulchan Aruch Y.D. 112:5; Aruch Hashulchan 112:16.