



## The *Cheresh* That Learned to Speak – Is He Still a *Shoteh*?

*"An eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot."*  
(*Shemos* 21:24)

*Chaza"l* famously explain that this Pasuk refers to monetary compensation for physical injury. The Gemara in *Maseches Bava Kama* (85b) discusses numerous examples of injury and compensation, including the onerous penalty for an assault that causes deafness – *"If he deafens him – he must pay his entire value"*<sup>1</sup>. The reason for this heavy penalty is that *Chaza"l* took into account the potential of the injured party to return to work when determining the appropriate compensation for a physical injury. Since a deaf person (a "*Cheresh*") effectively cannot return to almost any field of work<sup>2</sup>, the assessment of damages comprises his entire value.

This Halacha demonstrates that *Chaza"l* considered deafness to be an utter and total deficit<sup>3</sup>. Moreover, while the Halacha is that a blind person is obligated in Mitzvos and is not considered to have diminished intellect, a *Cheresh* is considered a *Shoteh*<sup>4</sup>. The reason for this is the subject of much discussion. Some argue that it is a *Halacha l'Moshe miSinai* while others contend that *Chaza"l* were certain that a *Cheresh* has diminished intellect. Either way, the status of *Shoteh* is uniformly applied to any *Cheresh*, regardless of his intelligence or aptitude, and his betrothals, divorces and acquisitions are all invalid and he is exempt from Mitzvah performance<sup>5</sup>.

[It is important to note that *haGaon* Rav Asher Weiss *Shlit"a* holds that Mitzvah performance is still relevant for people who are Halachically considered to be in the class of *Shoteh*. Therefore, others should help them fulfill *Mitzvos* and avoid *Aveiros* to the best of their ability.]

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<sup>1</sup> In the time of the Gemara, a person's value was determined by the price a similarly-abled man would fetch on the slave market. The method that would be used to determine this value in today's post-slavery world is beyond the scope of this essay.

<sup>2</sup> If he is able to return to his original vocation, the penalty is reduced. See *Shulchan Aruch, C.M.* 420:25.

<sup>3</sup> See *Gemara Chagigah* 2b and *Rashi ad. loc.* which implies that this is only true of a person who is deaf and mute. Throughout this essay, *Cheresh* will refer to someone who is both deaf and mute, unless otherwise specified. A person who has a sense of hearing, or someone who is able to speak (e.g. if he learned to speak before he became deaf) is considered to have full intellectual capacity (*Rambam, Hilchos Ishus* 2:26).

<sup>4</sup> See *Gemara Yevamos* 113a and *Shabbos* 153a that this is only true according to the *Chachamim*, whom the Halacha follows.

<sup>5</sup> See *Chagigah ibid.* and *Rashi ibid.* who contends that *Chaza"l* were certain as to the diminished intellect of a *Cheresh*. See also *Shu"t Chasam Sofer (E.H. 2L2)*, *Igros Moshe (Y.D. 4:49:1)* and *Minchas Shlomo* (34), as well as the sources they cite.



This essay will examine a fascinating question that has arisen in the modern era: If a *Cheresh* has learned or developed a form of communication with others (e.g. if he learned sign language or developed the ability to speak intelligibly), is he still considered a *Shoteh*?

The answer would seemingly depend upon the reason that *Chaza"l* considered a *Cheresh* to have the *Din* of a *Shoteh*. One possibility is that the anomaly or injury in the brain of a *Cheresh* which caused his deafness and muteness also impacts the brain's other faculties, thus rendering him a *Shoteh*. Another possibility is that his inability to communicate with others inhibits his understanding of the "ways of the world", preventing him from assuming legal responsibility, making effective decisions, and conducting himself as a Halachically-competent person.

According to most Poskim, even a person who became a *Cheresh* after birth (i.e., he learned to speak and communicate with others before losing his hearing) is still deemed to be a *Shoteh*<sup>6</sup>. If *Chaza"l* considered a *Cheresh* to be a *Shoteh* because the cause of deafness also impacts the brain's other faculties, it is understandable that even deafness that occurs or develops later in life would be a reason to consider him a *Shoteh*. However, if it is because his inability to communicate prevents him from developing the skills to interact normally with others and the world around him, if he only became a *Cheresh* later in life, after he had already grasped how to conduct himself, he should not be considered a *Shoteh*. On the other hand, perhaps once he becomes a *Cheresh*, his sense of responsibility and ability to make decisions is diminished, despite his earlier experiences.

Returning to the question of a *Cheresh* who learned to communicate, the primary relevant source in *Chaza"l* is the *Sugya* in *Maseches Gittin* of a man who developed deafness after he married a woman, but retained the ability to communicate via writing.

The Mishna in *Yevamos* (112b) rules that a person who betroths a woman and then becomes deaf cannot divorce her. Since his betrothal was valid by Torah law and the ability of a *Cheresh* to effect a divorce is only a *Takana d'Rabbanan*, he cannot uproot the marriage<sup>7</sup>.

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<sup>6</sup> As implied by the Mishna in *Yevamos* 112b. See, however, the *Pri Megadim*, General Introduction 2:4-5.

<sup>7</sup> His divorce is only effective in uprooting a betrothal made after he became a *Cheresh* which is itself only effective due to a *Takana d'Rabbanan*.



The *Gemara* in *Gittin* (71a) discusses whether a *Cheresh* may divorce his wife by issuing instructions in writing. According to *R' Kahana*, if he writes "Write and give a *Get* to my wife", we may do so, as his instructions demonstrate that he is of sound mind<sup>8</sup>. The *Gemara* later explains that *R' Kahana* was following the ruling of *R' Shimon ben Gamliel* who held that a *Cheresh* may write instructions to issue a *Get* only if he was not deaf from birth. The *Chachamim* argue and rule that no *Cheresh* can effect a divorce in any way at all. The Halacha follows the *Chachamim* (*Rambam, Hilchos Gerushin* 2:17, *Tur*, and *Shulchan Aruch E.H.* 120:5 & 121:6).

Although the *Chachamim* and *R' Shimon ben Gamliel* argue over whether a person who became a *Cheresh* after birth may issue written instructions to write a *Get*, it is clear that they both agree that a man with congenital deafness may not do so. How would he have developed the ability to write? The *Maharshal* explains that the *Gemara* must be speaking of a person who became a *Cheresh* before he became an adult (thus he was not yet considered to have intellect) but had already learned how to write. However, the *Rashash* notes that already in his time (19<sup>th</sup> century) there was a school in Vienna that taught congenital deaf-mutes to write.<sup>9</sup>

Nonetheless, in spite of having learned how to write, the *Gemara* clearly rules that a congenital *Cheresh* is considered a *Shoteh*. But what if he has mastered some form of speech – would he still be considered a *Shoteh*? This question was asked of the *Divrei Chaim* (E.H. 2:72), who was told of a certain school for students with congenital deafness in which, after a period of conscientious study, the students were able to pray, grasp religious concepts, and understand those who spoke to them if they enunciated their words clearly. Moreover, the students were able to speak a dialect of their own that would often be decipherable to a listener, although it was sometimes unintelligible. The question put to the *Divrei Chaim* was whether a student who had attended this school should still be considered a *Cheresh* and therefore unable to perform a betrothal<sup>10</sup>, divorce, etc. or whether the fact that his speech was understandable to a degree and he understood matters of the wider world meant that he could no longer be considered a *Shoteh*.

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<sup>8</sup> *Rav Kahana* ruled that it would apply even for a *Cheresh* (who is both deaf and mute). A person who is deaf and not mute or vice-versa may certainly give instructions to give a *Get* in this manner, as explicitly ruled by a *Beraisai* cited by the *Gemara ad. loc.*

<sup>9</sup> It has also been recorded historically that during this period, a method of teaching writing to people with congenital deafness had been developed.

<sup>10</sup> The case in question concerned a student from the school who wished to perform a betrothal.



The *Divrei Chaim* cites<sup>11</sup> the *Rambam* (*Peirush haMishnayos, Terumos 1:1*) who asserts that it is utterly impossible for a congenital *Cheresh* to learn how to speak! Therefore, it must be that the students who mastered some form of speech must have been slightly able to hear and were never really deaf in the first place! Secondly, he speculates that a congenital *Cheresh* who learns to speak would change his status and no longer be considered a *Cheresh*. This is also the conclusion of the *Maharsham* (*Shu"t 2:140*).<sup>12</sup>

However, the *Maharam Shik* (*E.H. 79*) was inclined to consider them *Shotim* as their mastery of some form of speech may be similar to that of a parrot, and not a sign of higher intellect. One cannot draw any conclusions from the fact that the *Gemara* and *Rishonim* do not speak of a congenital *Cheresh* who learned how to speak, because in the times of the *Gemara* such a thing was impossible.<sup>13</sup>

He adduces a proof from the aforementioned *Gemara* in *Gittin*. The *Gemara* asks why *R' Kahana* permitted a *Cheresh* to issue a divorce via written instructions yet forbid him from testifying in *Beis Din* in the same way. It answers that giving testimony is an exception, as the Torah specifically demands oral testimony ("*miPihem v'Lo miPi Kesavam*"), but, in all other matters, *R' Kahana* considers the written word to be equivalent to speech. However, *R' Kahana* only ruled this way in the case of a deaf person who had learned to write before becoming death, but not a congenital *Cheresh*, which proves that communication by a congenital *Cheresh* is invalid.

The *Maharam Shik* ultimately concludes that a congenital *Cheresh* has a "*Chazaka*" (status) of *Shoteh*, since he was born in that state. The possibility that his mastery of a form of speech would change his status is at best a *Safeik*, and a *Safeik* cannot change an existing *Chazaka*. Therefore, he should still be considered a *Shoteh*.

Many other Poskim discuss this complicated question and we cannot summarize them all here in this limited space. For further information and discussion, see *Shu"t Minchas Asher* (2:86) where this topic is discussed at length, as well as the sources quoted in footnote 5.

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<sup>11</sup> He first notes that the students' ability to write did not change their *Cheresh* status as ruled by the *Chachamim* in the aforementioned *Gemara* in *Gittin*.

<sup>12</sup> The *Maharsham* also explains that *Chaza"l* determined that a *Cheresh* should be considered a *Shoteh* irrespective of his level of acumen or intellect and even if he has no defect other than his deafness.

<sup>13</sup> The *Maharam Shik* also agrees with the *Rambam* that the muteness of a *Cheresh* stems from his deafness (therefore, it is physically impossible for a true *Cheresh* to learn how to speak). He also adds that he is considered a *Shoteh* irrespective of his level of intelligence.