

## **The Beth Din of America's Handling of the World Trade Center Agunot – Part One: Methodology of Agunah Crisis Management**

*by Rabbi Chaim Jachter*

The tragic events of the September 11, 2001 terrorist attack on the World Trade Center buildings resulted in over two thousand deaths. As a result of this tragedy fifteen cases of Agunot were presented to Batei Din in the New York metropolitan area. Ten of these cases were presented to the Beth Din of America, the Beth Din of the Rabbinical Council of America and the Orthodox Union. In this series of essays, we shall present the basic Halachic approaches and sources for the permission the Beth Din gave for these women to remarry based on a Halachic determination of the deaths of their respective husbands. Responsa regarding this vitally important issue have been published. The Teshuva of Rav Gedalia Schwartz, the Av Beit Din of the Beth Din of America, appears in the 5763 issue of HaDarom, the Torah journal of the Rabbinical Council of America. Teshuvot from Rav Zalman Nechemia Goldberg regarding all of the cases, and from Rav Ovadia Yosef regarding one case (a Sephardic husband) appear in the 5763 issue of Kol Zvi, the Torah journal of the Kollel Elyon of Yeshiva University. Rav Mordechai Willig's careful and methodological categorizing of the Halachic issues regarding this tragedy also appears in this Torah journal.

We should note that there is also an issue for husbands whose wives were missing. However, we are much more lenient for men (see Pitchei Teshuva Even HaEzer 1:14) since the prohibition for a married man to marry is only rabbinical in nature whereas the prohibition for a married woman to marry another man involves a very severe biblical prohibition, whose violation constitutes a capital offense. Rav Yonah Reiss, the administrator of the Beth Din of America, informed me that a number of husbands called the Beth Din of America regarding their wives who were missing after the World Trade Center attack.. Rav Reiss told me that the Dayanim followed the ruling of the Gesher HaChaim who rules that a husband may remarry if there is adequate evidence that a wife was at the place where a tragedy occurred and that most people who were in her location and situation perished.

### **Introduction**

Before discussing the World Trade Center Agunot, we will present a basic overview of the process of determining the death of a husband when no body is found. We should note that rabbis of all generations devote an extraordinary effort to resolve cases of Agunah. In fact, the Otzar HaPoskim, an encyclopedic work that summarizes the responsa literature to the Even Haezer section of Shulchan Aruch, devotes (in its 1982 edition) no less than eight volumes spanning approximately 1500 pages to this topic alone. Fifteen hundred pages merely summarize the responsa literature to the subject of Agunah! Poskim traditionally devote an incredible amount of time and effort to resolving problems of Agunah. An example is Rav Yitzchak Herzog, the chief rabbi of Israel at the time of the establishment of the state, writes (Teshuvot Heichal Yitzchak

2:9) that although his doctors gave him strict orders not to read anything, he violated their command in order to research and issue a ruling regarding an Agunah, because of the compassion he felt for the Agunah. Some rabbis were famous specifically for their special attention, sensitivity, and creativity in this area of Halacha. For example, Rav Yitzchak Elchanan Spektor (for whom Yeshiva University's Yeshiva component is named) was especially renowned for his mastery and his focus on this subject.

From the time of the Gemara, Poskim have tried to be lenient and creative as possible while maintaining the integrity of the Halachic process. Teshuvot Sam Chayi (number 17) describes the attitude of a Posek grappling with an Agunah situation, "it is comparable to one who is running away from a lion and has encountered a bear, as the battle is fought both from the front and behind; just as he fears being lenient so too does he fear being strict". For further discussion of the general attitude of profound urgency Poskim maintain towards Agunah problems, see Rav Ovadia Yosef (Teshuvot Yabia Omer 6:3) and the Otzar HaPoskim (8: 203-211).

This process continued in the twentieth century as Poskim responded to the enormous challenges that arose during that war-filled century. For example, Rav Moshe Feinstein (Teshuvot Igrot Moshe Even HaEzer 1:41-51 and 4:56-58) ruled extensively regarding Agunot because of the Holocaust. Rav Yitzchak Herzog (Teshuvot Heichal Yitzchak 2:1) writes at length about the rulings he issued regarding Agunot during the period of the Israeli War of Independence. Rav Ovadia Yosef (Teshuvot Yabia Omer 6: E.H. 3) records his rulings regarding the Agunot of the Yom Kippur War of 1973. Regrettably, Poskim have once again been summoned to deal with the many Agunot resulting from the World Trade Center terrorist attack.

### Methodology

The Otzar HaPoskim (8:203-211) outlines the basic methodology of Poskim regarding cases of Agunah. The first point Poskim emphasize is that this is not a matter for just any rabbi to resolve. Rather, it is appropriate that only a rabbi of great stature should rule upon such a matter of great urgency (see the many sources cited in the Otzar HaPoskim 8:206-207). Moreover, the practice is that whenever possible, three rabbis of eminent stature should agree before a lenient ruling is issued. The Aruch HaShulchan writes:

It is a general principle regarding permitting Agunot to remarry that in any case where a lenient ruling is not obvious and a rabbinic ruling is necessary, that even the greatest of rabbis should not issue a permissive ruling until two other great rabbis concur with his ruling. This has always been the practice of all eminent rabbis as is evident from all of the responsa literature....and one should not deviate from this practice. (E.H. 17:255)

Indeed, the Beth Din of America assembled Rav Gedalia Schwartz, Rav Hershel Schachter, and Rav Mordechai Willig, three of the foremost rabbinical authorities in

the Orthodox community, to deliberate and rule concerning the WTC Agunot. Moreover, the Beth Din of America consulted with Rav Ovadia Yosef and Rav Zalman Nechemia Goldberg who issued permissive rulings, before the Beth Din of America permitted these women to remarry. A basis for the practice of consulting numerous authorities might be the fact that in the context of a central discussion in the Gemara (Yevamot 121a) regarding Agunot, the Gemara cites a verse from Proverbs chapter eleven that teaches that salvation comes when one seeks much advice.

Teshuvot Chavatzelet HaSharon (number 28) records the practice of Poskim in resolving Agunah situations to first research the matter thoroughly. First, they arrived at a lenient decision based on common sense alone and only subsequently they explored whether there is a Halachic basis for a lenient ruling. In the WTC situation, Rav Yonah Reiss, the administrator of the Beth Din of America, devoted months of meticulous research in coordination with many public and private agencies and firms, to create the “raw material” from which the Dayanim of the Beth Din could arrive at appropriate Halachic conclusions. His research included obtaining telephone, cell phone, subway, and elevator records as well as the results of DNA testing and dental records. In fact, the leniencies of the Gemara and all subsequent authorities are predicated on the assumption that exhaustive research has been undertaken (“Ishah Daykah U’Misabah”, Yevamot 115a, Raavad to Rambam Hilchot Geirushin 13:19, and Beit Shmuel 17:10).

A hallmark of acceptable resolution of Agunah situations is proper Beth Din proceedings. The Beth Din must know the appropriate questions to ask witnesses and how to properly collect information from the witnesses. Indeed, improper collection of evidence has in the past impeded a lenient resolution of Agunah situations (see for example, Teshuvot Beit Shlomo 43).

The Otzar HaPoskim (8:204) notes that in all of the responsa literature regarding Agunot the Posek records that the witnesses were given very stern warnings to testify truthfully. Although a warning to tell the truth is a standard feature at all Beth Din proceedings (see Shulchan Aruch Choshen Mishpat 28:7), in the context of Agunot the Beth Din administers sterner warnings than usual. This is done because the rules regarding the validity of witnesses and evidence are relaxed for the purposes of permitting an Agunah to remarry. For example, women (even the Agunah), relatives, and those who are inadmissible witnesses only on a rabbinic level are acceptable witnesses in this context (Yevamot 121-122 and Shulchan Aruch E.H. 17:3). Hearsay evidence (Eid Mi’pi Eid) and the testimony of one witness are also acceptable in this context (ibid). The stern warnings are administered to counterbalance these leniencies.

We should note that Rav Ovadia Yosef (Teshuvot Yabia Omer 8:18) rules that the testimony of most non-observant Jews today is accepted in the context of Agunah. This is quite noteworthy as Rav Yosef in numerous Teshuvot (in the same volume of Yabia

Omer) rules that generally speaking, non-observant Jews are not acceptable witnesses in almost every other area of Halacha. For further discussion of the status of today's non-observant Jews regarding their acceptability as witnesses, see Gray Matter (1:83-90).

Moreover, some well-meaning people would be tempted to lie to help the Agunah since in their estimate the husband has died. The severe warnings serve to counter such attitudes. Indeed, the Rambam (Hilchot Geirushin 13:29) explains that the reason why Chazal have relaxed the laws of testifying in the context of Agunah is because people are severely disinclined to testify falsely when the lie can be discovered and they will be inextricably caught lying thereby ruining their reputations. The severe warning serves to reinforce this attitude as it instills fear in the witnesses that there will be harsh consequences if they are caught lying.

The Otzar HaPoskim (8:210) notes that the norm of Teshuvot regarding Agunot is to collect many reasons to support a lenient ruling, reflecting the enormous responsibility that weighs on the shoulders of Poskim who issue rulings on this matter. Finally, Poskim must be deliberate when issuing lenient rulings regarding Agunot. The Otzar HaPoskim (ibid) notes the practice of many rabbis to wait until the end of a year from the time the husband was missing to issue a lenient ruling. Indeed, Rav Gedalia Schwartz reports that when he consulted with Rav Ovadia Yosef regarding one of the WTC Agunot, Rav Ovadia agreed with the ruling but advised that the Beth Din wait until a year has elapsed since the September 11, 2001 attack to issue a lenient ruling.

The Otzar HaPoskim, (ibid p. 206) concludes that once a duly recognized and competent Beth Din has issued a lenient ruling to permit an Agunah to remarry, another Beth Din or Rav should not attempt to revisit the case and review the cogency of the Beth Din's ruling. Otherwise, the Agunah's plight would never be truly resolved until she receives approval of every Halachic authority in the world, which is obviously unnecessary.

We shall divide our discussion of the Bet Din rulings after 9/11 to three basic categories. The first category is when the remains of the missing husband have been found and the question is if the remains can be properly identified as that of the missing husband. The second category is when a body was not found but there is sufficient evidence that the husband was at the World Trade Center at the time of the attack, in part of the building where all or most people were unable to escape. The third category is when no remains are found and there is no obvious evidence that the husband was in the section of the WTC where all or most people were unable to escape but if the husband followed his usual routine he would have been at the part of the twin towers where most people were unable to escape.

We must also present some of the basic facts regarding the attacks on the World Trade Center that Rav Mordechai Willig records in Kol Zvi. The first plane hit the north tower

of the World Trade Center at 8:46 A.M. between floors 93-98. The Beth Din of America determined (through extensive consultation with experts) that this immediately destroyed the elevators and all stairways from the ninety-second floor and above. Thus anyone who was located in this building at the time the plane hit the building was unable to escape. Indeed, there are no known survivors from the ninety-second floor or above. The building collapsed at 10:29 A.M.

The second plane hit the Southern Tower at 9:02 A.M. between floors 84 and 87 and this building collapsed at 9:59 A.M. Only ten survivors are known of those who were at floor 78 and above at the time of impact. The ten who survived were standing by stairwell "A." The elevators and stairwell "B" were destroyed by the impact of the plane upon the Southern Tower. It seems that stairwell "A" remained intact only for a very brief time after the impact, and that only people who were standing immediately next to this stairway were able to survive. The ten survivors sustained very serious injuries and would not have survived without immediate hospitalization.

### Identifying the Missing Husband's Remains

A simple case to adjudicate would be when the husband's body was found intact within three days of his presumed death. The Shulchan Aruch (E.H. 17:24-26) codifies the Mishna (Yevamot 120a) that states that one may identify a husband only within three days of death and only if the face including the nose is intact. However, in the absence of such evidence Simanim (identifying marks) in the body of the deceased are necessary for identification. Simple identifying marks such as a ruddy complexion or being tall or short do not satisfy the requirement of Simanim in such a case. Rather, especially unique Simanim (Siman Muvhak Biyoter) are necessary to identify the husband (Shulchan Aruch E.H. 17:24). Beit Shmuel (17:72) and Aruch HaShulchan (E.H. 17:172) cite Teshuvot Maseit Binyamin (number 63) as asserting that if fewer than one in a thousand people share this feature then the feature is classified as a Siman Muvhak Biyoter.

A middle category is features that are neither very common nor very rare. Such a Siman is not automatically discounted or accepted. Rather, it has become accepted that two such Simanim may be combined to constitute a Siman Muvhak Biyoter. In addition, one such average Siman (Siman Beinoni) may be combined with other relatively convincing evidence that indicate that the body is that of the missing husband (see Pitchei Teshuva E.H. 17:106 and Aruch HaShulchan 17:172). Rav Yitzchak Elchanan Spektor (Teshuvot Ein Yitzchak 1:E.H. 20) rules that two inadequate Simanim may be combined to constitute a Siman Beinoni. The Aruch HaShulchan (ibid) cites this opinion and modifies it by stating that "numerous" inadequate Simanim may be combined to constitute a Siman Beinoni and that each case must be judged independently by the leading Halachic decisors of the time.

There is an enormous volume of responsa concerning the classification of various features. This literature is summarized in the Otzar HaPoskim (5:288-324), regarding no less than one hundred and sixty-five bodily features. In addition, the Otzar HaPoskim (5:206-280) summarizes the writings of the Poskim regarding what

combinations of Simanim are adequate to identify a husband.

Two of the most relevant issues in this regard for the WTC Agunot are the admissibility of dental records and of DNA evidence. The Beit Shmuel (17:72) rules that a hole that goes through an entire tooth constitutes a Siman Muvhak. The Aruch HaShulchan (E.H. 17:173), writing in the late nineteenth century, asserts that holes in teeth do not constitute a Siman Muvhak as they are very common. However, Rav Moshe Feinstein (Teshuvot Igrot Moshe E.H. 4:57, writing in 1959) and Rav Ovadia Yosef (Teshuvot Yabia Omer 6: E.H. 3:4, writing in 1974) rule that dental records are acceptable as a component to an identification of a missing husband. Rav Ovadia explains that the dental records are much more specific than the identifying marks that the Aruch HaShulchan addressed. Rav Zalman Nechemia Goldberg notes in Kol Zvi that the practice among Batei Din in Israel is to accept dental records as a Siman Muvhak Biyoter. The Beth Din of America partially relied upon dental records for identifying some of the missing husbands.

Poskim have most recently been asked to address the Halachic status of DNA testing. Poskim do not accept or require a DNA test to determine an individual's status as a Mamzer (see Rav Yosef Shalom Eliashiv, Kovetz Teshuvot 135; Rav Shmuel Vosner and Rav Nissim Karelitz, Techumin 21:123; and Rav Shlomo Dichovsky's responsum published in Teshuvot Bikkurei Asher, the responsa of contemporary Jerusalem rabbinical court judge Rav Masood Elchadad, number six). However, Rav Shmuel Vosner and Rav Nissim Karelitz (Techumin ad. loc.) rule that DNA is admissible as partial evidence together with other corroboratory evidence to determine the identity of a missing husband. They believe that DNA evidence constitutes a Siman Beinoni. In fact, Rav Yonah Reiss, the director of the Beth Din of America, reports that Rav Eliashiv also ruled in the context of the WTC Agunot that one may partially rely upon DNA evidence for identification purposes. Rav Vosner and Rav Karelitz, much prefer a DNA test using a sample from the missing person's personal effects (such as hair from his hairbrush or saliva from a toothbrush) than a DNA test that uses the DNA of immediate family to make an identification.

Rav Zalman Nechemia Goldberg wrote at some length on this issue and concludes that DNA evidence constitutes a Siman Muvhak Biyoter. He notes that since the chance of error regarding DNA evidence ranges from a billion to one to a quintillion to one, it far exceeds the requirement that a Siman be shared by less than one thousand people in order to constitute a Siman Muvhak. Rav Goldberg draws an analogy between DNA evidence and Rav Yitzchak Elchanan's ruling (Teshuvot Ein Yitzchak 31) that a photograph of a missing husband showing that he is dead is sufficient evidence of his death (the Netziv, Teshuvot Meishiv Davar 4:23 and Rav Ovadia Yosef, Teshuvot Yabia Omer 6:E.H. 3:3 also regard photographs as a Siman Muvhak Biyoter). It is important to note that Rav Shlomo Zalman Auerbach (cited in Nishmat Avraham E.H. 1:37) seems to regard DNA evidence as conclusive evidence regarding all areas of Halacha. Rav Eliezer Waldenburg is also cited (ibid) as ruling that DNA evidence constitutes partial evidence for Halachic purposes. The Beth Din of America partially

relied upon DNA testing in the identification of some of the missing husbands. A major question, though, arises whether one may rely upon the civil authorities reports of their identification by dental records or DNA testing. The Shulchan Aruch (E.H. 17:14) codifies a ruling of the Gemara (Gittin 28b) that one may not rely upon the report of a non-Jewish court that they have executed a Jew. Rishonim explain that we are concerned that the authorities are falsely reporting that they executed the individual in order to glorify the effectiveness of their judicial system or simply to instill fear upon the residents of the land. Acharonim debate whether we may rely upon a government issued report that someone has died when it is clear to us that the reasons offered by the Rishonim are not relevant. In the early nineteenth century this issue was debated by two of the premier authorities of the time, Rav Mordechai Banet (Parashat Mordechai E.H. 27) and the Chatam Sofer (E.H. 43). Later nineteenth century authorities such as Rav Yitzchak Elchanan Spektor (Teshuvot Be'er Yitzchak E.H. 27) and Rav Shlomo Kluger (Teshuvot HaElef Lecha Shlomo E.H. 97) accepted the lenient view. In fact, the Aruch HaShulchan (E.H. 17:80, writing in the late nineteenth century) records that the lenient view has become the more accepted view (though he adds that the most thorough investigation possible should be conducted in order to corroborate the report). Rav Yitzchak Elchanan's reasoning on this matter is quite cogent. He notes that unlike other areas of Halacha a non-Jew's testimony is valid regarding Agunot if he speaks about the matter in passing (Meisiach L'fi Tumo). On the other hand, a non-Jew has credibility in other areas of Halacha if he testifies about a matter in his professional capacity (Uman Lo Mar'ei Anafshei), such as a chef testifying that a certain food item does not have the taste of a non-kosher ingredient that mistakenly fell in to the food item (see Shulchan Aruch Yoreh Deah 98:1, Shach Y.D. 98:2, and Biur HaGra Y.D. 98:2). Accordingly, reasons Rav Yitzchak Elchanan, a non-Jew testifying in his professional capacity is certainly believed in the context of Agunot where the Halacha is extraordinarily lenient about the type of testimony that is accessible.

Rav Moshe Feinstein (Teshuvot Igrot Moshe E.H. 1:48) admits the testimony of the United States War Department that the plane of a missing husband plunged into the English Channel during World War II and (Teshuvot Igrot Moshe E.H. 4:58:7) the testimony of the Belgian government that the Nazis transported a missing husband to Auschwitz. Rav Ovadia Yosef (Teshuvot Yabia Omer 7:14) admits the testimony of the Russian government that a missing husband died in a battle with the Nazis during World War II.

Accordingly, the Beth Din of America partially relied upon the New York City Medical Examiner's testimony regarding DNA tests administered under his auspices. Rav Willig notes that he and members of the Beth Din of America were permitted to visit and evaluate the procedures of the New York City medical examiner's laboratory. Rav Willig was duly impressed by the professionalism of this office and concluded that the chance of error in the operation of this office is virtually nil. In fact, Rav Yonah Reiss reports that the Medical Examiner's office told him that dental records are examined no less than five times to insure an accurate identification.

In addition, Rav Zalman Nechemia ruled that we may rely upon American Airlines assertion that a missing husband was on board one of the planes that crashed into the WTC. He asserts that they also have a professional reputation to uphold and thus may be trusted according to Halacha. He adds that there is no apparent reason for American Airlines to lie about such a matter as it only serves to increase their exposure to liability for the passenger's death.

We should add that the reluctance of some Poskim to recognize the results of dental record and DNA tests as a Siman Muvhak Biyoter appears to stem from the dispute regarding the admissibility of the reporting of the civil authorities. Poskim might be concerned that not all DNA laboratories pay scrupulous attention to detail to avoid errors.

Another very important issue whether the discovery of personal items of the missing husband near at the scene of the assumed death constitutes sufficient evidence of the husband's death. In fact, one of the missing husbands remains were not found, but a pair of pants (that had pieces of skin and bones) containing his wallet that held his driver's license and credit cards were found in the WTC wreckage.

The Shulchan Aruch (E.H. 17:24) rules that even highly unique items that are found on a body, cannot serve to identify the body. The Shulchan Aruch explains that we are concerned that the missing husband lent these items to someone else. The Shulchan Aruch makes no exceptions to this matter and apparently is strict even with items that one normally does not lend. The Chelkat Mechokeik (17:42) notes that other Poskim disagree and accept the discovery of highly unique and personal items such as one's wallet or ring that one does not normally lend to others, to identify the body. In fact, the Beit Shmuel (17:69) rules leniently regarding such items that people do not normally lend to others. The Pitchei Teshuva (E.H. 17:95) presents a very lengthy summary of this issue, which he introduces by writing, "there exists a great dispute among the Poskim regarding this matter." In fact, the Otzar HaPoskim (5:173-204) summarizes rabbinic rulings regarding ninety-five personal items found on or very near bodies whether they constitute things that people would not normally lend.

Rav Moshe Feinstein (Teshuvot Igrot Moshe E.H. 4:57) and Rav Ovadia Yosef (Teshuvot Yabia Omer 6: E.H. 3:2) rule leniently and partially rely upon the discovery of such items to identify a missing husband. Thus, Rav Gedalia Schwartz reports that the Beth Din of America partially relied upon the discovery of the pants of a missing husband that contained his wallet that included his driver's license and credit cards. One might add that although one might lend clothing to others, one does not normally share his business attire with others. Today, most businesspeople are very meticulous about their appearance and dress and would normally only wear items that are professionally tailored to fit them perfectly. Thus, it would be highly unlikely for someone to lend his pants to someone to go to his business office on a workday. Rav Zalman Nechemia presents a similar approach as he writes that in today's affluent society, there is not a great concern for lending of pants.

### When No Remains Are Found

A great challenge for the Beth Din of America were those missing husbands whose remains were not found. Indeed, Chazal (Yevamot 121) are strict when a husband appeared to drown in Mayim She'ein Lahem Sof (waters which have no boundary). Chazal do not permit the wife to remarry even though most people who were lost in Mayim She'ein Lahem Sof perish, because the husband might have surfaced somewhere down the river unbeknownst to us. Tosafot (Yevamot 36b s.v. hah) note that a Mi'ut HaMa'tzui (a significant minority) of husbands might have been saved in such situations. Thus, in any situation where no remains were found and the husband was in a situation where a significant number of people were saved, the Halacha does not permit the wife to remarry. Although the Halacha normally follows the majority (see Chullin 11), Tosafot explain that in this situation the rabbis were strict due to the severity of the sin of a married woman marrying another man.

Nonetheless, there are many circumstances and possible avenues for leniency. For example, the Shulchan Aruch (E.H. 17:23) codifies the Mishna (Yevamot 122a) that records a case where people witnessed a man from afar proclaim that, "I, so-and-so, the son of so-and-so, have been bitten by a snake and am about to die." Chazal permitted the wife to remarry even though the husband's body was never found. Rabbi Jonas Prager records (in an essay published in the Fall 2002 issue of the Journal of Halacha and Contemporary Society) that the Beth Din of the Belzer community released a woman from the status of Agunah based on similar circumstances even though the husband's body was not yet found. The husband called a friend on his cellular phone from a very high floor in the WTC and informed him that he was about to die and was on the phone until the moment of death. Rav Ovadia Yosef (in his responsum regarding a WTC Agunah) notes that Halacha regards voice recognition (Hakarat Tiv'ah D'Koloh) as a valid means of identification (Gittin 23a) and that many Poskim accept a woman's telephone appointment of an agent to accept a Get (Teshuvot Beit Yitzchak E.H. 2:13, Teshuvot Shaarei De'ah 1:194, Teshuvot Mahashag 2:250, and Teshuvot Igrot Moshe E.H. 1:139).

The first step for a Beth Din to issue a lenient ruling in such a case is to establish that husband and wife were at peace with each other, in order to establish that the man did not have any apparent motivations to flee his family (see the Mishna Yevamot 114b). Rav Yechezkel Landau (Teshuvot Nodah B'Yehuda 2:E.H. 47) adds that the Beth Din should investigate whether the man established a regular pattern of returning home each day after work or a brief trip. Rav Landau explains that once this is established there are serious indications (Raglayim LaDavar) that the husband is no longer alive. Rav Landau explains that "although this is insufficient basis for which to issue a permissive ruling, nonetheless, it is point of departure from where it is appropriate to search for leniencies within the Halacha" to permit the woman to remarry. The subsequent step for the Beth Din was to establish that a husband was in a section of the World Trade Center where very few or no people survived at the time of the terrorist attack. This was established by e-mail messages (as noted by Rav Ovadia

Yosef in his responsum on the WTC Agunot), telephone calls, or eyewitnesses. Rav Ovadia Yosef addresses a relatively easy case where the husband called his wife from the WTC after the plane hit the north tower stating that he was evacuating his office in the north tower that was located above the ninety-second floor.

A harder case is when the husband called that he arrived at work before the plane hit his building, and where there is no evidence that he was in the building at the time when the plane hit the building. In one case, the husband phoned his wife that he arrived at his office in the north tower (above the ninety-second floor) at 8:20 A.M. and subsequently was not heard from. Rav Zalman Nechemia ruled that Halachic principle of Chazaka (that the status quo was maintained) applies, since there is no reason to assume that the status quo was disturbed. An analogy to a common Halachic experience is relying upon the Kashrut of an Eruv on Shabbat that was inspected before Shabbat. The Halacha permits relying upon the status quo (Chazakah) unless there is a Rei'utah (a disturbance to the Chazakah) to the status quo. We should note that the assumption that there was no disturbance to the Chazakah is valid for those who were in the northern tower, but not for those in the southern tower, as many people evacuated the southern tower after the northern tower was hit.

Rav Mendel Senderovic (the Rosh Kollel of the Milwaukee Kollel) writes in the *Kol Zvi* that it appears difficult to rely on Chazakah in the case of Agunot as the Halacha does not permit relying upon Rov in a Agunah situation. Indeed, since the Gemara (Kiddushin 80a) states that a majority is stronger Halachic evidence than a Rov, it appears obvious that the Halacha cannot rely upon Chazakah to permit an Agunah to remarry. Rav Mendel cites that Rav Yitzchak Elchanan (*Teshuvot Ein Yitzchak* 2:1) did not rely upon Chazakah alone to permit an Agunah to remarry. However, in Rav Yitzchak Elchanan's case he ruled leniently as there was also a Rov upon which to base a leniency. Rav Yitzchak Elchanan asserts that a combination of a majority and a Chazakah may be relied upon to permit an Agunah to remarry. In the WTC situation Rav Mendel argues that in addition to the Chazakah there exists a Rov that if the missing husband actually survived he would have contacted his family.

Once it is adequately established that the husband was in the most vulnerable section of the WTC at the time of the attack, the Beth Din began exploring avenues for leniency. One possible means of leniency was suggested by Rav Gedalia Schwartz and endorsed by Rav Ovadia Yosef based on the following case in the Gemara. The Shulchan Aruch (E.H. 17:30) codifies the Gemara (Yevamot 121b) that records that if one witnessed a husband fall into a cauldron of fire, he may testify that the husband died. The Beit Shmuel (17:92) rules, though, that this leniency applies only if the fire was one where the husband would be unable to extract himself. We should note that Halacha does not concern itself with the possibility that a miracle occurred and the husband was saved unbeknownst to all (see Yevamot 121b and Tosafot Yevamot 121b s.v. Ein).

Rav Ovadia Yosef ruled that this situation applies to those caught at or above the floors where the terrorists penetrated the WTC with the planes. A huge fire erupted as the

terrorists chose a very large plane that was on a cross-country flight that contained an enormous volume of fuel. Those individuals who were tragically caught at that point can be described as being trapped in a cauldron of fire. Rav Gedalia Schwartz adds that although we did not see the individual husbands being trapped in the fire, knowledge that he was located in the area constitutes sufficient evidence of his death. Rav Schwartz believes that it is analogous to the case cited in the *Otzar HaPoskim* (6:128-129) where a fire erupted in a ship where a husband was held prisoner in the bottom of the boat. *Teshuvot B'tzeil HaKesef* (2:4) ruled leniently in that case despite the fact that witnesses did not actually see the husband being engulfed by the fire because the husband was shackled in chains and had no possibility of escape.

Rav Gedalia Schwartz suggested another avenue of leniency, which Rav Ovadia Yosef also adopted. The Shulchan Aruch (E.H. 17:51) codifies the Gemara (Yevamot 114b) that rules that a wife is believed when she testifies that her husband died in a building collapse only if she also testifies that she buried him. The Gemara explains that testimony that the husband was in the building at the time of its collapse does not constitute sufficient evidence of death because we are concerned that the wife merely assumes that he died while it is entirely possible that he survived.

Nonetheless, a responsum from World War One demonstrates that there are situations where a husband's presence in a building when it collapsed constitutes sufficient proof of his death. Rav Avraham Yitzchak HaKohen (*Teshuvot Ezrat Kohen* 25 cited in *Otzar HaPoskim* 8:83) issued a ruling regarding a case where a Jewish soldier in the British army was in a railway station that was attacked by a German artillery barrage and a mountain of dirt subsequently fell upon the building. Rav Kook ruled that only in the case described by the Gemara and Shulchan Aruch does the building collapse not constitute evidence of death because there was a possibility that the husband was not struck by the collapsing building materials. Such a situation is analogous to a Mayim Sh'ein Lahem Sof situation. However, in the case presented to Rav Kook the mound of dirt was so great that it was impossible for the husband to survive the building collapse. Similarly, Rav Meir Arik (*Teshuvot Imrei Yosher* 2:24) ruled in a case where a train that was transporting troops fell off a large bridge. Since in Rav Arik's judgment it was impossible for the passengers to survive the fall, the plunge off the bridge alone constituted sufficient proof that the husband perished. Accordingly, Rav Schwartz and Rav Ovadia Yosef argue that even if the husband somehow survived the fire on the top floors of the WTC, we may assume that he would have been inevitably killed during the collapse of the twin towers.

Moreover, the *Aruch HaShulchan* (E.H. 17:247) suggests that in case where after a building collapsed people dug in the rubble in a thorough search for survivors and the husband was not found, we may assume that the husband perished in the building collapse. Rav Yosef applies this ruling in the case of the WTC tragedy as an exhaustive search was conducted to search for survivors. **Six Leniencies Regarding a Mayim She'ein Lahem Sof Situation**

There are at least six lenient considerations regarding a situation of Mayim She'ein

Lahem Sof. First, Tosafot note that Chazal were strict in a case of Mayim Sh'ein Lahem Sof, because in a significant minority of cases the husband may have survived the calamity. However, very few individuals who were at or above the point of impact of the planes survived the WTC attack. Thus, the stringency that Chazal applied to a Mayim Sh'ein Lahem Sof situation might not apply to the WTC tragedy. Moreover, even if there is a doubt whether a situation should be categorized as a Mayim She'ein Lahem Sof situation, the *Beit Shmuel* (17:105) and the *Aruch HaShulchan* (E.H. 17:224) rule leniently since the Mayim Sh'ein Lahem Sof stringency is only rabbinic in nature. In a case when there is a doubt concerning a rabbinic law one may rule leniently.

Second, Rav Moshe Feinstein (*Teshuvot Igrot Moshe* E.H. 1:43) presents a lenient approach regarding the matter of Mayim She'ein Lahem Sof in his rulings regarding husbands who were missing in the Nazi Holocaust. Rav Moshe argues that Chazal issued the stringency of Mayim She'ein Lahem Sof only in a situation where only one or a few individuals are missing. However, Rav Moshe contends, Chazal did not apply this to a situation where large numbers of people are missing.

Thus, Rav Moshe ruled that if there is adequate knowledge that a husband was taken to a Nazi concentration camp and has not been heard from in years following the War (and there is no reason to believe that the husband is in the Soviet Union) then we permit the wife to remarry even though a minority of people did survive the concentration camps. Similarly, one could argue that the Mayim Sh'ein Lahem Sof stringency does not apply to the WTC tragedy because so many people are missing.

Interestingly, Rav Moshe states at the beginning of his responsum that a motivation for his very lenient approach to the Agunot of the Nazi Holocaust is his concern that a strict ruling in that situation might be too difficult for most women to bear. Rav Moshe notes that the Ohr Zarua (twelfth century Germany, number 693) already articulated this concern. Rav Moshe observes that if this concern was relevant in the time of the Ohr Zarua, then it is most certainly relevant in the modern era as well.

Third is that many Acharonim develop the idea that the stringency of Mayim Sh'ein Lahem Sof does not apply in a situation where there are Trei Rubei (two majorities). A classic example of this approach is a ruling by Rav Chaim of Volozhin and all of the Sages of Vilna of his time (cited by the *Pitchei Teshuva* E.H. 17:133). A man fell from a tall bridge onto ice and subsequently fell from the ice into water with an outlet and the body was never found subsequently. Rav Chaim ruled leniently as there were Trei Rubei in that situation. First is that most people who fall from the bridge onto the ice perish and second that most people who are swept into water with no outlet and are not found have perished.

The *Pitchei Teshuva* notes that some Acharonim did not subscribe to this leniency. In fact, many Acharonim note that Tosafot (Yevamot 121a s.v. L'kula) appears to reject the Trei Rubei leniency. Tosafot note that the Gemara (Yevamot 121a) is strict even in a case where a renowned Torah scholar was lost in Mayim Sh'ein Lahem Sof, even though most likely word would spread if he survived. There exists a Trei Rubei in this case since a majority of those who are lost in a Mayim Sh'ein Lahem Sof have perished

and most likely word would have spread if the renowned Torah scholar survived. Tosafot note that nevertheless the Gemara forbids even the wife of a missing renowned Torah scholar to remarry! Rav Yitzchak Elchanan (*Teshuvot Ein Yitzchak* 1:22 and 2:1) defends the Trei Rubei leniency by noting that the case of the Gemara and Tosafot differs from that of Rav Chaim Volozhin. The Trei Rubei of Rav Chaim Volozhin emerged virtually simultaneously whereas the Trei Rubei of the Gemara and Tosafot do not. The second “majority” emerges only when one relinquishes hope that word will come that the renowned Torah scholar has survived.

The Trei Rubei leniency has become an accepted approach among Poskim, as Rav Zalman Nechemia notes in his WTC responsum. Rav Simcha Zelig, the Dayan of Brisk, Lithuania in the early twentieth century, writes (*Dvarim Achadim* number 43, cited in *Teshuvot Yabia Omer* 7:E.H.14) that the Trei Rubei approach has become an accepted approach in Halacha provided that the husband has been missing for quite some time. Rav Moshe Feinstein (*Teshuvot Igrot Moshe* E.H. 1:48) applies this principle to a case where a plane crashed into the English Channel during World War II and Rav Ovadia Yosef (*Teshuvot Yabia Omer* 6:4) applies the principle in a case when an Israeli pilot’s plane was shot down by enemy fire and fell into the sea. In both cases Trei Rubei exist as the pilot of a plane that crashes into the sea will most likely not survive and most people who are lost at sea (*Mayim Sh’ein Lahem Sof*) do not survive. Rav Yitzchak Herzog (*Teshuvot Heichal Yitzchak* 2:8) applies this principle in a case where a car plunged down a steep incline and into the sea.

Rav Ovadia Yosef applies the Trei Rubei to the WTC situation. He reasons that most or all people at or above the point of the planes’ impact perished and that most (if not all) of those who survived were discovered by the rescuers who made an extraordinary effort. Rav Ovadia adds that even if the application of the Trei Rubei approach is not appropriate in the WTC situation then one may rely upon a S’feik S’feikah (a double doubt). One doubt is whether he perished in the fire and one doubt is whether he perished in the collapse of the WTC. Rav Ovadia thoroughly reviews the dispute among the Acharonim whether a S’fek S’feikah is a valid Halachic tool to resolve an Agunah situation. He concludes that it is certainly a valid principle according to Sephardic tradition (recall that the WTC case Rav Ovadia adjudicated involved a Sephardic husband).

A fourth avenue of leniency is an approach that is often quoted in cases of Igun resolution of the past hundred and fifty years. The Gemara (*Yevamot* 121a) is strict in case of *Mayim Sh’ein Lahem Sof* because of concern that the husband has survived unbeknownst to his wife. The Gemara suggests that perhaps we might be lenient in case of the wife of a renowned Torah scholar because if he survived, word would have spread of his survival. The Gemara reflects the reality that even during times of poor communication, Jews managed to spread the word and reputation of a great Torah scholar.

The Trumat HaDeshen (*Psakim* 139) suggests that in his time (the late medieval period) there is more reason to be lenient because of improved means of communication since

the time of the Gemara. He reasons that the Gemara did not wish to distinguish between a wife of a Torah scholar and others because of the principle of “Lo Plug,” that Chazal do not make special exceptions to their rules. However, reasons the Trumat HaDeshen, in a time of improved communication, if any husband survived the Mayim Sh’ein Lahem Sof word would be communicated to the wife and thus there should be longer any need to be strict in case of Mayim Sh’ein Lahem Sof. However, the reasoning of the Trumat HaDeshen was not accepted as normative (see *Shulchan Aruch* E.H. 17:32 and 34).

Nonetheless, the Chatam Sofer (*Teshuvot* E.H. 58, cited in the *Pitchei Teshuva* E.H. 17:135) argues that there is more room to be lenient in his day (the early nineteenth century) as post offices function in every village and newspapers spread news throughout the world. If the husband survived, then he or the local rabbi would send letters or advertise in a newspaper of the husband’s survival. This approach of the Chatam Sofer engendered much discussion that is summarized in *Teshuvot Yabia Omer* 7:E.H. 14:7 and in Rav Ovadia Yosef’s responsum regarding the WTC tragedy. Rav Moshe Feinstein, in writing about the Agunot from the Nazi Holocaust (*Teshuvot Igrot Moshe* E.H.1:43) that in his time there is even more reason for leniency since the time of the Chatam Sofer as methods of communication have improved greatly since the time of the Chatam Sofer. Rav Ovadia writing in regard to the WTC tragedy writes that the logic for leniency is even greater in 2001 as telecommunications and methods of communications have improved even more.

We should note that Poskim do not rely on this line of reasoning alone, as it virtually eliminates a rule from the Gemara, something Poskim are loath to do. Second, this line of leniency underscores the importance of the Beth Din accurately establishing that the husband and wife were on good terms before the husband’s disappearance, to reduce the possibility that the husband has taken advantage of the tragedy to disappear and establish a new identity.

A fifth avenue of leniency is the lenient approach of Rav Eliezer of Verdun (late medieval period) that is cited by the Mordechai at the conclusion to his notes to Masechet Yevamot. Rav Eliezer of Vardun notes that the Gemara states that in case of Mayim Sh’ein Lahem Sof, that the wife is forbidden. However, he argues, that the Gemara does not state that she is forbidden forever. Thus, he reasons that if after a very long period of time it seems obvious to the great rabbinic authorities of the time that the husband has died, then the rabbis are authorized to permit the wife to remarry. Rav Eliezer of Vardun reports that he relied upon this approach in a case when a husband was lost at sea and had not been heard from in four years.

Poskim have vigorously debated the cogency of this argument. The Mordechai cites two major authorities who rejected Rav Eliezer of Vardun’s leniency. The Beit Yosef (E.H. 17) firmly rejected it, arguing that it is entirely without basis in the Gemara. However, other authorities such as the Mahri Bei Rav (number 13) and the Mabit (*Teshuvot* 1:187) defend the cogency of Rav Eliezer of Vardun’s leniency. In practice, Poskim from the time of Rav Yechezkel Landau (*Teshuvot Nodah B’Yehuda* 2

E.H. 47) until Rav Moshe Feinstein (*Teshuvot Igrot Moshe* E.H. 1:43) and Rav Ovadia Yosef (*Teshuvot Yabia Omer* 7:14) utilize the leniency of Rav Eliezer of Vardun as a S'nif L'hakel (lenient consideration). However, as noted by Rav Eliezer Waldenburg (*Teshuvot Tzitz Eliezer* 15:59) Poskim disagree about the length of time it is necessary to wait to conclude that the missing husband is dead. The opinions include one year, two years, and four years. In the case of the WTC tragedy Rav Ovadia Yosef advised the Beth Din of America to wait a year before issuing permission for the Agunot to remarry.

Finally, a sixth avenue of leniency is the approach of *Teshuvot Shvut Yaakov* (3:110). He notes that the Gemara states that in a Mayim Sh'ein Lahem Sof situation, if the woman mistakenly remarried then B'dieved (after the fact) the Beth Din does not require her to separate from her new husband. The *Shvut Yaakov* notes the principle that "Sha'at HaD'chak K'B'dieved Dami," (in a case of great need one may permit that which is normally permitted only B'dieved). The *Shvut Yaakov* reasons that when an Agunah is a young woman and is quite anxious to remarry, a Sha'at HaD'chak situation exists that justifies permitting that which is normally permitted only B'dieved. Thus, he permits the Agunah to marry in such a situation. This ruling of the *Shvut Yaakov* engendered much discussion and controversy (see *Otzar HaOskim* 7:37-39). In practice, many Poskim use this leniency as a S'nif L'hakel (Rav Yitzchak Elchanan Spektor, *Teshuvot Ein Yitzchak* 22; Rav Yitzchak Herzog, *Teshuvot Heichal Yitzchak* 2:9; Rav Eliezer Waldenburg, *Teshuvot Tzitz Eliezer* 15:59; and Rav Ovadia Yosef, *Teshuvot Yabia Omer* 7:16). Rav Yonah Reiss told me that many of the Agunot from the WTC attack were very young woman and that the approach of the *Shvut Yaakov* was a consideration in the rulings of the Beth Din of America.

### **No Empirical Evidence that the Husband was at the WTC at the time of the Attack**

The most difficult task faced by the Beth Din of America was a situation where the Beth Din was unable to discover any empirical evidence that a particular missing husband was at the WTC at the time of the attack. An approach pursued by the Beth Din was the possibility of relying on the husband's patterns of arriving at work at the WTC. Rav Yonah Reiss was able to obtain the husband's "Metro Card" records for the months of August and beginning of September 2001 as well as the elevator records for the month of August 2001 (people signed into the WTC elevators with an ID card), and subway records of September 11, 2001. Rav Reiss was able to determine that based on his patterns of the past month, the husband appears to have entered his office in the WTC a few minutes before the attack. After making this determination, DNA identification were made on the missing husband's remains.

The question is whether one may rely on the man's patterns to conclude that he was at the WTC at or above the point of impact of the hijacked planes. The following two *Teshuvot* serve as precedent for leniency. Rav Yitzchak Herzog (*Teshuvot Heichal Yitzchak* 2:9) considers the possibility of partially relying on a husband's patterns to determine that a man was at a particular place where a bridge collapsed into the

water. He cites as a precedent a ruling by the Taz (Yoreh Deah 69:24) that if a woman is unsure if she salted a piece of meat before she cooked a particular piece of meat, she may rely on the assumption that she followed her normal pattern of having salted the meat. The Taz cites as a precedent the Gemara (Brachot 16) that if one is reading the Shema and is unsure if he has read the Pasuk of "Uch'tavtam" of the first section of Kriat Shema or the second section, the Safek is resolved if he had begun to read the Pasuk "L'ma'an Yirbu". Since one normally recites L'ma'an Yirbu only after having read the second Uch'tavtam, the Gemara rules that he may rely on the assumption that he followed his usual pattern.

Dayan Ehrenberg (*Teshuvot Dvar Yehoshua* 13) relies on a similar approach to determine that a husband's usual pattern of travel to work placed him at the point where a terrorist attack occurred in Tel Aviv in 1950. Dayan Ehrenberg cited the Mabit (number 135) as a major precedent in this context. A mid-twentieth century Israeli Posek, Rav Ovadia Hadaya (*Teshuvot Yaskil Avdi* 5:20) also adopts a similar approach to Rav Ehrenberg in a case that he adjudicated. Rav Schwartz and Rav Zalman Nechemia rule that this approach may be used as a consideration to be lenient in the WTC case. We may add that there is more reason to be lenient in the WTC case than in the cases of the Mabit and Dayan Ehrenberg, as the Beth Din established empirical evidence of the missing husband's travel patterns in the months of August and September.

## Conclusion

Unfortunately, every tragedy that befalls the Jewish People adds another layer to the voluminous literature regarding releasing women from the status of Agunah. We hope and Daven to Hashem that the WTC tragedy should be the last of these tragedies and that the days of the Mashaich arrive when the prophecy of "Bilah HaMavet LaNetzach" will be fulfilled and the Halachic literature regarding the Agunah will be of only theoretical interest.