YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA KAMA**

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Dedicated in memory of
Joseph Y. Nadler *z”l*, Yosef ben Yechezkel Tzvi

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***Bava Kama* – Shiur 17c (part 3 of 3)**

**Payment for Loss of Livelihood and its relationship to payment for depreciation resulting from injury (II)
(85b-86A)**

**Rav Shmuel Shimoni**

### III. The Serial injurer

Rava asked: If he had cut off [another man's] arm and before any appraisement had been made he also broke his leg, and again before any appraisement had been made he put out his eye, and again before any appraisement had been made he made him at last deaf, what is the law? Do we say that since no valuation has yet been made one valuation would be enough, so that he would have to pay him altogether for the value of the whole of him? Or perhaps we appraise each occurrence by itself and award damage accordingly? The practical difference would be whether he would have to pay for *tza’ar* (pain) and *boshet* (humiliation) of each occurrence separately. It is true that he would not have to pay for *nezek*, *ripuy* (healing) and *shevet* regarding each occurrence separately, the reason being that since he has to pay him for the whole of him the injured person is considered as if [the *mazik*]killed [the *nizak*] altogether, and he already paid him his entire value; but as regards *tza’ar* and *boshet*, the payment should be made for each occurrence separately, as he surely suffered *tza'ar* and *boshet* on each occasion separately.

If, however, you find it [more correct] to say that since no appraisement had been yet made he can pay him for the value of the whole of him altogether, what would be the law where separate appraisements were made? Do we say that since separate valuations were made the payment should be for each occurrence by itself, or since the payment had not yet been made he has perhaps to pay him for the value of the whole of him? This remains undecided. (85b)

 This passage has been understood in various different ways. We will consider the primary explanations and what follows from them. The Rosh's understanding seems to be the simplest from a logical perspective and so we shall open with it. The Rosh writes that regarding *nezek* it is obvious that we must assess the depreciation in the *nichval*'s value resulting from all the injuries. As for *shevet*, compensation must be paid for the relative *shevet* at each point: for the time between the severing of his hand and the breaking of his leg he is entitled to *shevet* as a *shomer kishu’in*; for the time between the breaking of his leg and the putting out of his eye, he is entitled to *shevet* as a door-keeper, etc. As opposed to our reading of the Gemara, according to the Rosh's reading the Gemara's uncertainty relates to *tza'ar*, *ripuy*, and *boshet*. Here the Rosh emphasizes that it is obvious that there is liability for these three payments with respect to all the injuries, for even a person who causes an injury to a deaf person is liable for these three payments, which do not relate to the impairment of his economic value and work potential.

The uncertainty is very limited – do we see the various injuries "as if they were inflicted in one swipe," in which case we must assess them in one sweeping assessment, this assessment working to the advantage of the person who caused the injury. Here the Gemara considers three possibilities: one swipe, an assortment of independent injuries, and an intermediate position according to which the matter depends on whether or not an assessment was made between the different injuries, which fixes each injury as a distinct legal event, the law regarding which has already been determined. The Rosh decides in favor of the intermediate position, based on his own reasoning (even though the Gemara left the matter undecided): "According to what I have explained that the only ramification is with respect to the difference between separate and general assessment, why should another assessment be made after he already became liable with the first assessment." That is to say, the uncertainty is only how to conduct the assessment, but once the assessment was already made (and it was certainly legitimate to conduct it in the manner that it was conducted), there is no need for an additional assessment.

 In general, this understanding of the passage was adopted also by the Tosafot, s.v. *nehi*. They, however, do not say that the *chovel* must pay graduated *shevet* for the intermediate periods: "It is right that he should not pay for *nezek* and *shevet*, for all this is included in the payment for his entire value." It is difficult to understand how it follows from the payment for his entire value that there is no liability for the *shevet* during the period that preceded the point in time when the *chovel* became liable for the injured party's entire value. This is especially difficult in light of the fact that the law regarding *nezek* and *boshet* is presented as obvious, while the uncertainty that is raised afterwards is whether all the incidents are treated as "one swipe" (as formulated by the Rosh), or "they are considered as if they were all done at once" (as formulated by the Tosafot). That is to say, the Gemara's assertion that the law regarding *nezek* and *boshet* is obvious is valid even if it is not considered as if they were all done at once. It seems that according to the Tosafot it is not reasonable to impose liability for the *nichval*'s entire value, and at the same time obligate him to offer compensation for the loss of work days, though it seems to us that the chronology here should have led to a different conclusion. The matter requires further study. See also below.

**Rashi's position:** The difficulty in Tosafot'sposition, that the injured party is not entitled to compensation for his *shevet*, applies already to Rashi, who explains: "But not *shevet*, for he pays him the entire amount that he had been worth at the outset, so that he is his slave." We already saw in the past what Rashi writes in his commentary to the Torah, that the payment for *nezek* gives the person who caused the injury proprietary rights in the body of the injured party. Rashi here continues along these lines. But the difficulty remains:[[1]](#footnote-1) A debt was created toward this "slave" before he turned into a slave. Consider the following: Had the person been working for me, and I owed him his wages, and later I purchased him as a slave, would I be exempt from paying him his wages. And if I rented an apartment from the person and I owed him the rent money, and later I purchased the apartment from him, am I not still liable to pay him the rent?

 It has been suggested[[2]](#footnote-2) to reconcile the viewpoints of Rashi and Tosafot on this point, that they understand that liability for *shevet* is compensation for the impairment of the injured party's work potential, and not for the loss of income from the expected work. This understanding does not necessitate conclusions for our case, but Rashi and Tosafot took it another step further, understanding that payment for *shevet* is essentially a type of compensation for *nezek* – temporary impairment of a particular ability of the body, and drawing a conclusion that is not necessary that when payment is later made for the entire value of the body there is no longer any reason to pay for partial impairments of the body.

 [We will see below the viewpoint of the Rambam that it is possible to impose liability for *nezek* that exceeds the entire value of the injured party, but it seems that Rashi and the Tosafot understood that not only is there no **economic** room for this, but from a **halakhic** perspective as well there is no room to impose additional liability for injury to the body, even though it makes a difference, when payment is made for the entire value.]

 The point on which Rashi differs from the Tosafotand from the Rosh relates to the payment for *ripuy*. Rashi had our reading of the passage, that there is no obligation to pay for healing for each occurrence, but his reasoning is different than what is found in the Gemara before us: "Since he has to pay him for the whole of him, the injured person is considered as if [he had been] killed altogether" (the Maharsha in the second edition claims that Rashi did not have this reading). Rashi explains the matter as follows: "Not *ripuy*, because he was healed in the meantime." In contrast to what is implied by our reading (which we will deal with in the framework of the position of the Ra'avad), according to Rashi we are not dealing with an exemption from liability for *ripuy*, but rather that regarding *ripuy* it is obvious that we must make one global assessment of the expected medical costs, and not consider the individual events. This stands in contrast to the payments for *tza'ar* and *boshet*, which are payments for the event that occurred, and about which there is room for doubt, as is maintained by the Rosh and Tosafot.

What is the difference between *ripuy*, on the one hand, and *tza'ar* and *boshet*, on the other? It seems that this is based on the view of the *Kovetz Shiurim*, which we discussed at length in the *shiur* on *ripuy*, that this payment differs from the rest of the payments in that it is not a *chiyuv mamon*, but rather an obligation to heal the injured party. Rashi maintains that since the injured party had not yet healed and his condition since his previous injury was already updated, then certainly when we come to translate the obligation to heal into a *chiyuv mamon* we must examine the current medical needs. And furthermore, the passage implies according to Rashi that the obvious nature of the law regarding *ripuy* applies even when an assessment was made in the middle and the sum of the compensation for *ripuy* was fixed. There is still no need to pay that sum if the situation changed and the amount needs to be updated, for even as a sum of money it is merely a means of healing the injured body.

 The Rosh and Tosafot may disagree about this understanding of *ripuy* (and perhaps they agree on this point with the position of the Rambam, as we explained it in that same *shiur*). Alternatively, they might say that after a monetary obligation has been created from the obligation to heal, it is no longer subject to change due to changed circumstances.

**The Rambam's position:** The Rambam (*Hilkhot Chovel u-Mazik* 2:13) codifies the uncertainty in our passage as follows:

If he put out [another man's] eye and before any appraisement had been made he also cut off his hand, and again before any appraisement had been made he cut off his leg, and again before any appraisement was made, he made him deaf - since an evaluation was not made for each of the injuries and ultimately, the person who caused the injury was required to pay the victim's entire value, that is all that he is obligated to pay…. If, however, the injured party seized payment for every injured limb and for his entire worth from the property of the person who inflicted the injury, it is not expropriated from him.

 It is clear that the Rambam decided the first uncertainty in our passage in a lenient manner with respect to the person who caused the injury,[[3]](#footnote-3) and the second uncertainty he left as a question that was not decided.[[4]](#footnote-4) But the Rambam's understanding of the uncertainly is exceedingly surprising (and it stands to reason that it also contradicts the reading of the Gemara before us). The Rambam understands that the Gemara's entire discussion does not relate to *tza'ar*, *boshet* and *ripuy* (and we also don't know the law regarding *shevet*). The discussion is focused entirely on *nezek*, and this is the place where the question arises whether to make a single assessment of the injured party's entire value, or whether to calculate each organ separately. As opposed to the Rosh, the Rambam maintains that with respect to the value of the body as well, the whole is not equal to the sum of its parts. Assessing each limb separately according to the decrease in value that it causes the body as a whole will in practice lead to a **larger** sum than a single assessment of the decrease in value of a slave who suffered a "total loss." Therefore a doubt arises here whether to assess each of the injuries as they occurred, or perhaps when the *nichval* receives his entire value, the history of the injuries no longer has any meaning.

 The Ra'avad in his strictures to the Rambam objected to this ruling, which seems to contradict our passage. It is, however, in his novellae to *Bava Kama* that we see the Ra'avad's comprehensive treatment of the various stages of our passage.

**The Ra'avad's position:** We already related to the Ra'avad's position in our *shiur* on payment for *ripuy*, but today we will see it in its full version as discussed in the Ra'avad's novellae to our passage. Let me preface by saying that I tried very hard to understand the Ra'avad's position, and considered various alternatives, but in the end I achieved only limited success. I will present the main points of his position, and welcome the help of my readers to suggest a full explanation of it. The Ra'avad says as follows:

The practical difference would be whether he would have to pay for *tza'ar* and *boshet* of each occurrence separately. It is true that he would not have to pay for *nezek* and *ripuy* regarding each occurrence separately, the reason being that the injured person is considered as if [he had been] killed altogether, and he already paid him his entire value, and there is no assessment of *ripuy* and *boshet* for the dead. But for *tza'ar* and *boshet* the payment should be made for each occurrence separately, as he surely increased his *boshet* and *tza'ar*. Or perhaps since they did not evaluate him until he killed him, there is no evaluation of *tza'ar* and *boshet* for a dead person.

If, however, you find it [more correct] to say that since no appraisement had been yet made he does not pay him, what is the law if they evaluated him, but he did not pay him before he made him deaf? Do we say that since they evaluated him, he already became liable to him, or perhaps since he did not yet pay him, and now he became liable to pay him his entire value, it is as if he killed him little by little, in which case he pays him only his entire value.

 The Ra'avad's reading is like ours, that the uncertainty relates only to *tza'ar* and *boshet*. As opposed to the Tosafot and the Rosh, who understood that there is certainly liability regarding *tza'ar* and *boshet*, and the uncertainty was only with respect to the proper mode of assessment, the Ra'avad understands that the uncertainty relates to the question whether or not there is at all liability for *tza'ar* and *boshet* after a person has been made deaf. Why is this so?

 First of all, the words of the Ra'avad imply, as opposed to what is explicitly stated in the Tosafot, that it is obvious that one who causes an injury to a deaf person is not liable for *tza'ar* and *boshet*, for "there is no assessment of *ripuy* and *boshet* for the dead."

 This is difficult to understand for two reasons. One difficulty is that even were we dealing with a person who actually died, if the person who caused him injury had become liable to pay him certain money, why should he not pay the money to his heirs?[[5]](#footnote-5) This difficulty is surmountable. It would appear from the Ra'avad that there is no problem with the liability itself, but rather with the appraisal, that we do not appraise *tza'ar* and *boshet* for the dead. It is possible, however, to overcome this technical difficulty, for we make the assessment with a man of equal standing. But it stands to reason that when we are dealing with non-monetary damage, e.g., *tza'ar* and *boshet*, even though according to the Ra'avad, such damage leads to liability that is regarded as a *chiyuv mamon*, there is a difference between it and monetary damage. Monetary damage, even before the assessment, creates a monetary entitlement that passes in inheritance. Non-monetary damage, even though it obligates compensation for the impairment of the person's well-being, bears the nature of a personal obligation to the injured party, but not to his heirs. Only after the injured party underwent a process of assessment that translated this into a *chiyuv mamon* does it pass in inheritance.

 It is more difficult, however, to overcome the second difficulty: In our case, we are not dealing with a dead person, but with one who is alive. As may be recalled, the Ra'avad explains that one who causes another person to become deaf is liable for his entire value, since he has no market value, "because he is loathed and not hired for anything." But how does it follow from this that one who causes him *tza'ar* and *boshet* is not liable to compensate him for his *tza'ar* and *boshet*? Surely we are dealing with a living person who still has feelings! I have no answer for this difficult question.

 In any event, according to the Ra'avad, the uncertainty in our passage follows from the fact that on the one hand he humiliated him and caused him pain before he made him deaf, and therefore it is possible that the liability remains in place, while on the other hand, there was no appraisal before the injured party was turned into a "dead person," and there is no appraisal of *tza'ar* and *boshet* for a dead person. The second uncertainty in the Gemara raises the possibility that even if there were an appraisal, since he did not yet pay him, it is considered "as if he killed him little by little," and since his series of actions obligates him to pay him his entire value, there is no place to impose upon him liability for *tza'ar* and *boshet*.

 As for payment for *ripuy*, according to the Ra'avad and his reading, it is obvious that there is no room to impose liability, based on the difficult argument that "there is no *ripuy* for the dead." In the *shiur* dealing with *ripuy* I proposed to see in these words the position that *ripuy* involves only the repair of the injury, and so in a case of "total loss" there is no liability for *ripuy*. However, it stands to reason that there is no proof to such a position from this passage. According to the Ra'avad, we are dealing here, with all the difficulty in understanding this, with someone who is considered like a dead person with respect to the laws of injury, towards whom there is no liability even for *tza'ar* and *boshet*, even though these are certainly not connected to *nezek*. The difference between *ripuy*, on the one hand, and *tza'ar* and *boshet*, on the other, is based on a different point, and it stands to reason that this connects – as do other aspects of the laws of *ripuy* – to the position mentioned above (in the discussion of the view of Rashi) of the *Kovetz Shiurim*. Regarding *tza'ar* and *boshet* there is room to say that since a *chiyuv mamon* was created, it does not lapse because the injured party is now considered a dead person. But *ripuy* is not a *chiyuv mamon*, but rather an obligation to heal, and this obligation lapses when the injured party is considered a dead person.

 In any event, as stated, the Ra'avad's position is not clear to me, and I would be grateful to anyone who helps me understand it.

 Since we have discussed at great length the passages dealing with *shevet* and what follows from them, we have not been able to examine the last passage, the disagreement between Abaye and Rava regarding one who causes an injury to a Jewish slave. We might perhaps have another opportunity to discuss the matter when we reach the passage dealing with one who causes an injury to a non-Jewish slave on p. 87a.

(Translated by David Strauss)

### Sources for the next *Shiur* – *Shiur* 18

### Payment for Humiliation

 In next week's *shiur* we will deal with the fifth payment made by one who causes an injury to another person – payment for *boshet*. We will examine the passage on pp. 86a-86b, but at this point we will hardly touch upon the passages later in the chapter (90a and on) that continue the discussion of this issue. Learn the Gemara on p. 86a, "*Boshet ha-kol lefi ha-mevayesh ve-ha-mitbayesh*" until "*ha de-mikhlemu lei ve-lo mikhlam*." In addition see the following sources:

1. The assessment of *boshet* – Try to explain the three viewpoints on p. 86b. How can we understand the position of Rabbi Meir? See Tosafot, s.v. *ke-ilu*. Is a different understanding possible?

2. Intent regarding *boshet* (mishna, 86b) – p. 27a: "*Ve-amar Rabba: Nafal me-rosh ha-gag be-ru'ach she-eina metzuya ve-hizik u-biyesh*… *af al pi shelo nitkaven levayesh*"; Rashi, *Yam shel Shlomo*, chap. 2, no. 39 (see below); Tosafot 53b, s.v. *shor.*

3. If he intended to humiliate one person, but humiliated another person – Rambam, *Hilkhot Rotze'ach* 4:1; *Hilkhot Chovel u-Mazik* 1:14, and *Lechem Mishneh* (ad loc.).

4. If he humiliated a sleeping person who then died – Tosafot, s.v. *biyesho*; Rambam, *Hilkhot Chovel u-Mazik* 3:3-4); Lechem Mishneh(ad loc.).

***Yam shel Shlomo*, chap. 2, no. 39:**

Rashi explains: "If he turned over" – after beginning to fall, and he intended to fall on the person for his own benefit, so that he not hit the ground. And so also writes the Tur (no. 421). And I didn't see any of the Geonim explain the matter differently.

Nevertheless, it is Torah, and I am obligated to learn it. For the wording of the Gemara does not imply this. For it says: "Since he intended to cause an injury, etc." And this person did not intend to cause an injury, but only for his own benefit. And he is not pleased by the fact that the other person suffered an injury. Even though he is liable for all four payments, because he shouldn't have saved himself even with the other person's property, and surely not with his body, the law of *boshet* should not apply to him. And furthermore, what is the reason that he is liable for the four payments in a case of inadvertent injury that is close to intentional injury, but not for *boshet*, even though all five payments are similar to each other? Because when he did not intend to humiliate him, it is not humiliation for him, for everyone knows that he did not do it to disgrace him. But when he intends to cause him the injury, he does it to hurt him, and he is governed by the law of *boshet*. If so, in our case, when he turns over for his own benefit there should be no law of *boshet*, as he did not do it to disgrace him. And for this reason we exempt in chapter *Ha-Chovel* (p. 86b), even in a case where he intended to humiliate one person and he humiliated another person. See there. And furthermore, in the Gemara this is learned from the verse, "and she puts out her hand," and there we are dealing with a case where she really intended to cause him an injury.

1. See Maharsha, second edition, who leaves the position of Rashi unreconciled. [↑](#footnote-ref-1)
2. Tzvi Handler, "*Be-Inyan Tashlumei Chabala*," *Ha-Metivta*, 5752, p. 576. [↑](#footnote-ref-2)
3. This is apparently because the Gemara continued to another uncertainty based on taking a side with respect to the previous uncertainty ("if you find it more correct to say"), which according to the Rambam decides the first uncertainty. [↑](#footnote-ref-3)
4. Which, according to the Rambam in many places, means that we do not impose liability upon the defendant, but if the plaintiff seized the defendant's property, we do not remove it from his hands. [↑](#footnote-ref-4)
5. This is true even if a *kenas* does not pass in inheritance, for according to the Ra'avad, *tza’ar* and *boshet* are also *chiyuvei mamon* and not penalties. It should be noted that as for *boshet*, it would seem from the Gemara on p. 86b (in the passage dealing with one who humiliated a sleeping person and then died) that it is obvious that the payment passes in inhertiance to the humiliated person's heirs. [↑](#footnote-ref-5)