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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**shiur #17A: Hachovel #5**

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

**Rav Shmuel Shimoni**

[Editor’s note: Due to length, this *shiur* is being split in three. The second part of this *shiur* will be sent out next week, and the third part in two weeks.]

 In this *shiur* we will continue to examine the passages dealing with the payments for *shevet* (loss of livelihood) and *nezek* (depreciation resulting from injury), and through them we will also deepen our understanding of the other payments imposed upon a *chovel* (one who causes an injury to another person). Since the *shiur* will be unusually long owing to the heavy nature of these issues, I wish to begin with the most basic issue among those we will be discussing today, which continues the discussions that we saw in the previous *shiur* concerning the foundations of liability for *shevet* and its relationship to *nezek*. We will then continue with the earlier passages. Anyone who is pressed for time should focus on the first section of this *shiur*.

### I. *Shevet* that temporaily diminishes the injured party's value

 Before we examine the case arising in our passage, I wish to preface with a comment about payment for *nezek* of the type common in our chapter, e.g., the amputation of a hand. When we dealt last week with the passage stating that "the requirements of justice do not suffer," we saw that the Ba'al ha-Ma'or maintains that the assessment of *nezek* examines the depreciation between the person's state prior to the injury and his state after the injury, that is to say, the difference in value between a healthy thirty-year old man and a thirty-year old man whose hand had been amputated and who is also in need of several months of convalescence. However, the more prevalent position among the Rishonim is that of the Tosafot and the Ramban (*Milchamot*, 30b in Alfasi), that the liability is less than that, as we consider only the difference between the person's state prior to his injury and the state of a person of the same age who already went through convalescence and is left only with the permanent damage caused by the injury. That is to say, the situation is somewhat "patched-up" to the benefit of the *chovel*, such that we ignore the expected period of recovery. This "patching-up" of the situation can be understood in two different ways:

1) In general, payment made for damage relates only to the permanent depreciation in value of the damaged object, in this case the body of the *nichval* (injury victim).

2) In the case of a *chovel* who becomes liable for the five payments, we calculate the payment for *nezek* in light of the fact that there is also liability for *shevet* that compensates the victim for the temporary impairment of his earning power, and therefore we consider only his permanent depreciation in value. According to this proposal, the determination of liability for *nezek* takes into account the payment made for *shevet*, parallel to the fact that the determination of liability for *shevet* takes into account the payment made for *nezek*, and therefore payment is made as if the injured party were a *shomer kishu’in* (watchman of cucumber beds). As I have already noted, payment for *shevet* and payment for *nezek* are two payments that to a certain degree relate to the same issue, the impairment of the victim's ability to work, and theoretically it would have been possible to fully compensate for this impairment through one of them. The payment made for *nezek* could have included compensation for the temporary incapacitation, as argued by the Ba'al ha-Ma'or. On the other hand, the payment for *shevet* could have included compensation for the loss of earning power, full and partial, for the rest of the injured party's life. The Torah chose to make use of two different obligations (for various reasons, some of which we discussed in the first *shiur* on chapter *Ha-Chovel*[[1]](#footnote-1)), and established boundaries in order to prevent overlapping between them.

 The practical difference between these two understandings is clear: how are we to assess payment for *nezek* in situations in which there is no payment for *shevet*, e.g., if a person unintentionally injured another person, if an animal injured a person, or if a person injured an animal? According to the first understanding, payment for depreciation only covers permanent damage. According to the second understanding, in such cases there is no reason to artificially limit the assessment of the damage. On the simple level, it would seem that the second understanding is more just, as it tries to cover the full extent of the damage.[[2]](#footnote-2) This question will be further clarified later in the *shiur*.

 Following this introduction, let us turn our attention to our passage, which addresses damage that is entirely temporary:

Rabba asked: What is the law regarding *shevet* that [temporarily] renders the injured person of less value? How so? For example, where he struck him on his arm and the arm was broken but will ultimately recover fully. What is the law? [Shall we say that] since it will ultimately recover fully he need not pay him [for the value of the arm], or perhaps [not so], since for the time being he diminished his value?

But this matter that was doubtful to Rabba was quite certain to Abaye taking one view, and to Rava taking the opposite view. For it was stated: If he struck him on his arm and the arm was broken, but [in a manner] that it would ultimately recover completely, Abaye said that he must pay for *shevet gedola* (general loss of livelihood), plus particular *shevet*,[[3]](#footnote-3) whereas Rava said that he must only pay him for the *shevet* for each day [until he recovers]. (85b-86a)

 Rashi explains that even though the passage speaks of *shevet,* the discussion relates to *nezek* – the injury temporarily caused the injured party to be idled from his work. This certainly entitles him to compensation for *shevet*, and in addition there is a temporary depreciation in value. The question is whether or not this temporary depreciation in value entitles the injury party to compensation for *nezek* (as the Meiri formulates Rava's opinion: "Whatever will ultimately recover fully is not included in *nezek* "). According to most of the Rishonim(apart from Rabbeinu Efrayim in the *Shita Mekubetzet*), the law is in accordance with the view of Rava that there is no liability here for *nezek*. Let us focus then on the position of Rava, and afterwards we will briefly consider the view of Abaye.

### The viewpoint of Rava

 The Ramban, in his words mentioned above, relates to our passage, and uses it to support his position that there is no compensation for temporary injuries in the framework of *nezek*:

This is similar to that which we said about someone who struck another person on the arm and the arm was broken but will ultimately recover fully, that we do not assess the diminishment in his value since it will ultimately recover fully. Here too the diminishment in value owing to the illness will ultimately be fully restored when he recovers.

 The Ramban sees in Rava's viewpoint support for his position that no payment is made for *nezek* for a temporary injury, and therefore when the entire injury is temporary, there is no room for liability for *nezek*. [We will later see how the Ramban relates to the viewpoint of Abaye.]

 According to Rava, in this case all payment is made in the framework of *shevet*. As noted by Rashi, it is clear that there is no room here for payment for *shevet* as if he were a *shomer kishu’in*, for there is no payment here for nezek that must be taken into account when calculating the *shevet*. Therefore, full compensation must be made for the injured party's *shevet*. The Tosafot Ridsharpens the difference between such a payment based on *shevet* and payment for *nezek* that we would impose were we ready to recognize temporary injury as *nezek*. First of all, compensation for injury relates to damage that already occurred and must be paid now. *Shevet* – according to the simple understanding – occurs each day that the injured party is unable to work. The Tosafot Rid argues, however, that it may be proposed that compensation for *shevet* must also be paid immediately at the time of the injury based on an estimate of the days on which it may be expected that the injured party will be unable to work.[[4]](#footnote-4) Nevertheless, there is still a difference between payment for temporary depreciation resulting from the injury and payment for *shevet*. This is because the assessment of *nezek* is based on the slave market, and it takes into account the psychological biases that are found in that market. Such biases are liable, according to the Rid, to raise the liability beyond the expected loss of work-days, or else diminish it:

It may be argued that someone who buys a slave with a broken arm does not lower the price very much, because he is confident that ultimately he will recover fully, or else it may be argued that since he will not be fit for work for a long time, he lowers the price a lot.

### Temporary injury when the law of a *chovel* does not apply

 As we already know, liability for *shevet* as an independent obligation is part of the four payments apart from compensation for *nezek*, which stem from the special Scriptural decree in the passage dealing with a *chovel*. This liability does not apply in the following cases: when one person unintentionally caused an injury to another person; when one person's animal caused an injury to another person; when a person caused an injury to another person's animal. Rava's position, that temporary injury is not treated as an injury, once again raises the question that we already raised earlier: what happens when in one of these cases the injured party is temporarily incapacitated and unable to work? Here there is a major disagreement among the Rishonim in several places. We will consider the matter as it is discussed in *Tosafot Rabbeinu Peretz* (ad loc.). Rabbeinu Peretz relates to the issue with respect to the third case – an animal that was caused an injury.

 Rabbeinu Peretz first wishes to exempt "a person who caused an injury to another person's horse that will ultimately recover fully." If a temporary injury is not considered an injury, there are no grounds to impose liability. It turns out that Rava's considerations are not influenced by the fact that fitting compensation can be made within the framework of compensation for *shevet*, but rather by the fact that temporary injury does not generate an obligation to offer compensation, even though it temporarily diminishes the value of the property. In the end Rabbeinu Peretz cites the position of Rabbeinu Chayyim Kohen Tzedek, who says that fundamentally the plaintiff should be exempted, but in practice liability should be imposed based on the law of *garmi*, "lest a person provoke his fellow, and the latter will go off and cause an injury to the former's animals, causing them injuries from which they will eventually recover after a few days, and he will be exempt."

 However, Rabbeinu Peretz also cites the position of the Ritzva, who disagrees on the fundamental level and says that in the case of an animal – as opposed to the case of a person who caused an injury – *shevet* is included in the payment for the injury.[[5]](#footnote-5) Why is this so? Originally I thought that this may be based on the difference – somewhat philosophical – between a human being and an animal. An animal is a creature whose very essence is defined by its capacity to work. It can be argued that an ox should not be seen as an independent entity called an ox, but rather as five years of ox work from this point on. A human being, in contrast, is an independent entity whose work potential is only one aspect of his being. Therefore, in the case of a person, inability to work is a separate category of damage, whereas in the case of an animal, its inability to work is part of the fundamental damage, for the five-year work potential was reduced to four and a half years.

While this idea in and of itself appears to be correct, it seems to me that it does not account for the difference between an animal and a human being. In the end, even in the case of a human being, *nezek* is calculated in economic terms – by assessing the person's value were he sold as a slave in the market place, subject to the economic interests that underlie this market.

 In any event, we must examine the rationale presented by the Rishonim as the basis for their position. The Ritzba writes as follows:

There is no comparison between injury to an animal and injury to a human being, for certainly in the case of injury to a human being, compensation must be given for *shevet*, but not as part of compensation for *nezek*. But in the case of an injury to an animal, I can always say to you that it must be made as part of compensation for *nezek*. The reason is that in the case of a human being, whose value is great, and the diminishment in his value is not evident in the assessment, compensation must be made as payment for *shevet*. Alternatively, because a person does not stand to be sold. But in the case of an animal, who value is small, and the diminishment in its value is evident in its assessment, I can always say to you that even according to Rava compensation is made as payment for *nezek*… for the damage is before us, for would he wish to sell it immediately, its value would be diminished because of the period of its inability to work. Therefore it seems that the exemption that we grant a person from liability for causing the loss of an animal's work is [only] in a case in which he locks the animal in a house and causes it to be idle from work, but not when he causes it an injury.

 The Ritzba maintains that the exemption from liability for causing the loss of an animal's work is only in the case of "pure" loss of work, e.g., when the person locked the animal in a room. But when there is physical injury, the assessment of the *nezek* includes loss of work. Why does this not contradict the principle that we saw above, at least according to Rava, that temporary injury is not recognized as injury?

The Ritzba explains that we are not dealing here with a fundamental principle according to which temporary injury is not recognized as an injury. As a rule, we assess the damaged item following the injury and calculate the depreciation in value in comparison to its value prior to the injury, and there is nothing to prevent us from including temporary depreciation in our calculations. In the case of a human being, however, there are two reasons that compensation for *nezek* does not provide a satisfactory solution for the loss of work days. One reason is that when we are dealing with an asset of high value, such as a slave, two months' loss of work does not significantly impact upon the price – this in contrast to an animal. A second reason is that a human being "does not stand to be sold."[[6]](#footnote-6)

However, these two reasons are merely explanations for the fact that "compensation must be made as payment for *shevet*." In essence we are dealing with an explanation of the verse that teaches that the Torah established a separate track of compensation for *shevet* that is intended to cover temporary damage. Since such a track exists, it is possible to limit the assessment of *nezek* to permanent damage. When there is no liability for *shevet*, it is clear that there is no reason to limit the assessment of the damage, and therefore it includes all damage. In the case of an animal that was caused an injury, this will yield reasonable compensation for the temporary loss of work potential. When a human being suffers an unintentional injury, or when he is injured by an animal, the problems pointed out by the Ritzba exist, but they are not the reason that compensation for the *nezek* does not cover the temporary injury. The fact that a person's "value is great, and the diminishment in his value is not evident in the assessment," does not justify total disregard of this diminishment in value. The sum may be small, but this does not justify not imposing liability. Only in the case of a *chovel* (who intentionally causes an injury), regarding whom the Torah introduced the track of *shevet*, is there justification to limit the compensation for *nezek*. Therefore, in contrast to what may be understood from an initial reading of the words of the Ritzba, the primary distinction is not between a human victim of injury and an animal, but rather between the case of a *chovel* and all other cases.

 As for the practical law in the case of an animal that was injured, the Shulchan Arukhin one place (307:6) cites the two opinions in the Rishonim, and in another place (340:2) it cites only the opinion that grants exemption, and this is also the view of the Rema. The Netivot (340:3) argues, however, that even according to those who grant exemption, this is only in a case of *shevet* when there was no *nezek*, as in our passage, because liability is only created when there is permanent damage. But if there is permanent damage, even of a very small amount, compensation must be made for all diminishment in value, and this includes the entire period during which the animal was incapable of doing work.[[7]](#footnote-7)

According to the Netivot, there would have been room to say that in the case of a *chovel*, who is liable for the five payments, the *shevet* should be included in the payment for *nezek*. However, if we do not want to tie the Netivotto the exceptional opinion of the Ba'al ha-Ma'or, who indeed maintains this position, we are forced to say – in line with what we said above – that when there is a separate track of payment for *shevet*, the assessment of *nezek* does not consider temporary damage, and the Netivot's words apply only in a case when there is no liability for *shevet*.[[8]](#footnote-8)

[Editor: We will continue with part II next week.]

1. The reason that compensation for *nezek* does suffice to properly compensate for *shevet* will be further explained below in the framework of the position of the Ritzba. [↑](#footnote-ref-1)
2. The Rambam himself raised a reservation in connection with the viewpoint of the *Ba'al ha-Ma'or* that is valid for all assessment of damage, that the evaluation of a sick person excessively diminishes his value after the injury because people do not want to buy slaves while they are sick. However, as was noted in the previous *shiur*, this difficulty in itself does not necessitate that we ignore the period during which the injured party was idled from work in the framework of the evaluation of the damage. [↑](#footnote-ref-2)
3. We already noted several times the interesting use of the term "general loss of livelihood" (*shevet gedola*) as a designation – according to Rashi – for compensation for depreciation. On the face of it, we may conclude from this that in essence compensation for depreciation resulting from injury comes to compensate for the loss of the injured party's potential earnings, only that in practice we are lenient with the person who caused the injury, and do not assess all the lost wages, but only the injured party's depreciation in value. However, precisely in this case we can easily assess – and we do assess – the *shevet* for the entire period of the injury, but nevertheless Abaye maintains that we must add to this the "general loss of livelihood," for the reason to be explained below. [↑](#footnote-ref-3)
4. It would seem that if the liability is for the financial loss of unemployment, this assessment is a great novelty in that it imposes compensation for a loss that has not yet occurred. However, in the previous *shiur* we saw an understanding according to which liability for *shevet* is for the impairment of the injured party's body's capability of working. In that case, the impairment already occurred, and the assessment merely determines the extent of the impairment in accordance with the facts that are known at the time of the injury. [↑](#footnote-ref-4)
5. The words of the Ritzba are formulated more strongly in the *Or Zaru'a*, *Bava Metzia*, no. 262. There the Ritzba concludes: "This is self-evident, a stake that will never totter, and alas for those who say otherwise, for nowhere in Scripture, in the Mishna, or in the Talmud, do we find that one who causes manifest damage to another person's property is exempt from liability." [↑](#footnote-ref-5)
6. I do not fully understand this reason. In the end we assess the depreciation in consideration of the fact that there is a slave market (see p. 84a, in the passage dealing with "an ass that once bit off the hand of a child," that the injured party is actually taken to the slave market). It is, however, possible that the more limited market makes it more difficult to put a price on the loss of the two months of work. [↑](#footnote-ref-6)
7. The Netivotadds in support of the position that imposes liability, and based on his careful reading of the verses (!) regarding the definition of "injury" in the case of a human being and in the case of an animal: "Granted in the case where a person causes an injury to another person, where we learn the liability for the injury from the verse 'hand for a hand,' and in that case there is the loss of a limb. This stands in contrast to an injury caused to an animal, liability for which is derived from the verse, 'He that strikes an animal shall restore it,' which implies for mere striking, even without the loss of a limb, he compensates for the injury." According to this, we must examine the definition of injury in the case of an animal that causes an injury to a person. It seems to me, however, that the prevalent approach defines injury in the same way for a person and for an animal, at least as long as we are not dealing with a case in which there is liability for *shevet*. [↑](#footnote-ref-7)
8. It is recommended that one review the discussion in the *Posekim* that we saw in the previous *shiur* that is based on the discussion that we just saw in the Shulchan Arukh. It should be noted that the Netivot's position is that healing that is required for the full or partial repair of the damage is included in the *nezek*. In the earlier *shiur*, we inclined toward this position; on the other hand, we were inclined to say that when the law of a *chovel* applies, and there is a separate obligation to compensate for *ripuy*, it is not included in *nezek*, for in this case the compensation for depreciation is limited to the permanent damage that will remain after the recovery process. The Netivot himself maintains that "the *ripuy* mentioned in the Torah" is not the *ripuy* that is necessary for the repair of the damage, but at most the healing that hastens the recovery. As I have tried to demonstrate in this *shiur*, even the Netivot would be forced to accept our position regarding *shevet*, that even though *shevet* when there is *nezek* can be included in *nezek*, when there is no *nezek*, it is not included in *nezek*, but in *shevet* (with the practical difference being that it is not a *kenas*, according to the Rambam, and it can be imposed even today, according to the Shulchan Arukh). It should further be noted, that when *shevet* is included in *nezek*, this means that we assess the decrease in the value of the injured person/animal, and include in this the temporary loss of work potential; but when we include *ripuy* in *nezek*, we noted a certain difference between the approach of the Yam shel Shelomo (no. 22), who considers the decrease in value in consideration of the fact that *ripuy* is required, and the approach of the Netivot and *Responsa Shevut Ya'akov*, who impose liability for healing in the framework of the depreciation (all this in contrast to the view of the Chazon Ish, who recognizes no liability for *ripuy* outside the framework of the *ripuy* mentioned in the Torah). [↑](#footnote-ref-8)