YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA KAMA 5771**

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In loving memory of Channa Schreiber (Channa Rivka bat Yosef v' Yocheved) z"l,
with wishes for consolation and comfort to her dear children
Yossi and Mona, Yitzchak and Carmit, and their families,
along with all who mourn for Tzion and Yerushalayim.

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**Shiur #13: "Meitav Sadeihu Yeshalem"**

**Form and Content of Damage Payment**

**Based on shiurim by Rav Reuven Taragin**

# I) Introduction

#  After relating to the mishna's description of the types of damages for which one bears responsibility (2a-6b), the gemara (6b-8a) turns to the last line of the mishna, which relates to payment - "chav ha-mazik leshalem tashlumei nezek be-meitav ha-aretz" (The damager is obligated to pay from prime lands).

 The gemara opens with an argument between R. Yishmael (R"Y) and R. Akiva (R"A) regarding the din of "meitav" (prime fields used for damage and other types of payments). In the course of its discussion, the gemara quotes variant formulations of the debate. By examining these formulations, we will arrive at a better understanding of the nature of damage compensation.

# II) MeitavA) Nizak or Mazik (the victim of damage or the perpetrator) Rav Ashi (7a) introduces a source which quotes the debate as concerning the type of field used for payment. According to this source, the Tannaim debated whether the frame of reference used to determine meitav ought to be the nizak's (R"Y) or mazik's (R"A).

B) Conceptual Base

 The debate could be explained as a reflection of variant conceptions of the din of meitav. The Tosefta (Ketubot 12:2) explains the law as a deterrent to potential criminals. Knowledge that one stands to lose his prime estate as compensation for theft or damage, raises the stakes for a potential criminal. The gemara in Gittin 49b actually quotes this Tosefta to explain the usage of the term "tikkun olam" (ensuring a livable society) regarding meitav. However, Rashi there (s.v. Be-idit) introduces an additional justification - "One would prefer to claim a small amount of prime land in payment, than a large amount of normal land." According to Rashi, meitav is motivated not only by contempt for the mazik, but sympathy for the nizak. Basis for such an understanding of meitav can be found in the gemara in Bava Kama (7b) which explains the preference of meitav as based on its easy resale - a consideration relevant to the nizak.

 A significant difference between the two motivations might be the relative centrality of the meitav form of payment within the definition of the chov (debt). If meitav aims to ensure proper compensation, we might view it as an integral part of the chov. [This could be the basis of Tosafot's (5a s.v. Tachat) assumption that the meitav aspect of payment is automatically transferred, along with the basic chov, to eidim zomemin (1).] If, alternatively, meitav aims to deter the mazik, it might not be viewed as basic to the chov at all. Such a view would account for the gemara's suggested limitation of meitav to situations of forced collection by beit din (2).

C) The Connection Between Application and Conceptual Base

 Rashi's explanation of meitav's goal according to the mishna, differs then, from the Tosefta employed by the gemara for the same purpose. This difference can be understood if we assume the matter to have been the basis of the Tannaitic dispute over the frame of reference used for its determination. R"A's choice of the mazik's frame of reference reflects his view of meitav as a deterrent. R"Y, on the other hand, focuses on the nizak, for he understands meitav as a din instituted on his behalf - concern for the nizak demands supplying him with a field equal to his best. For R"Y, deterring the mazik for the purpose of tikkun ha-olam may be a concern, but not the primary (de-oraita) one (3).

 This explanation of the Tannaitic dispute can account for the alternative formulation of R"A found at the beginning of the sugya (6b): "Lo ba ha-katuv ela legavot le-nizakin min ha-idit (the Torah merely aims to collect from meitav)" (4). Here R"A is firmly classifying the din as one of "gevi'a" (collection). This follows logically from our two previous assumptions: 1) R"A's choice of the mazik as his frame of reference is indicative of his view of meitav as a deterrent; 2) This view allows the din to be viewed as merely part of the collection process (5).

# III) Damage PaymentA) The Amount Paid Interestingly, though, the gemara used this alternative formulation as the basis for expanding the Tannaitic debate to include other issues. This cryptic formulation of R"A caused the gemara to suggest alternative understandings not only of R"A, but of R"Y as well. First, the gemara considers the possibility that R"Y relates not only to payment's form, but also to its amount. Accordingly, the gemara understands that he requires payment of a land parcel equal to the size of the one damaged, but of better quality and, thus, greater value. Even after rejecting this formulation, R. Idi bar Avin (RIB"A) applies it to a situation where we are unsure of the quality of the damaged land.

 Although the gemara rejects even RIB"A's more limited application, Abayei (Bava Kama 59a) suggests a similar explanation of R"Y. Assuming (like RIB"A) that R"Y relates to the AMOUNT paid, Abayei understands R"Y as requiring payment to cover not only the value of the object at the time of damage, but also its POTENTIAL future growth (6).

 Tosafot (6b s.v. Ve-rebi; 59a s.v. "U-mai") attribute both suggestions within R"Y to the formulation of R"A's response - an objection to R"Y's stringency on some issue. If their debate was over the frame of reference whether mazik or nizak, neither opinion would be consistently more stringent. Although Tosafot's inference proves that there must have been a different issue debated, one wonders how RIB"A/Abayei knew the issue to be their own.

 In addition, Tosafot prove from the fact that Abayei himself links the qualitative issue (nizak/mazik frame of reference for determining form of payment) to the Tannaitic debate, that the debate related to both the amount as well as the form of payment (7). If so, one wonders why R"Y mentioned explicitly only the issue of form and not the quantitative issues raised by RIB"A/Abayei?

 Assuming this explanation of R"Y, the Penei Yehoshua (Gittin 48b s.v. Amar) also wonders how R"Y infers his rulings to both issues from the single pasuk regarding meitav.

 We have therefore seen an expansion of the debate beyond the qualitative frame of reference, to include quantitative aspects. This forces us to search for their common denominator.

 Rabbeinu Tam (8) claims that Abayei viewed R"Y's opinion as being based on a significantly different understanding of the pasuk. The simple explanation of the Torah's ambiguous reference would be that it refers to the mazik identified at the beginning of the pasuk (9). R"Y explained the pasuk otherwise, only because he understood "meitav sadeihu" as referring not to the field being used as payment, but to the damaged field. The Torah aims to tell us not only of the need to pay with the best of fields, but also of the responsibility to compensate for the best. This understanding of R"Y, assumed by the Amoraim, led them to suggest different explanations of how one might compensate for the best of fields. RIB"A inferred the need to assume damage of the best field; Abayei understood the pasuk as referring to the "best" potential of the field known to have been damaged (10).

 Rabbeinu Tam's suggestion raises two new questions. Firstly, if R"Y actually understood the pasuk to be referring to the damaged field how did he infer his second principle of "idit de-nizak" (evaluating according to the field of the damaged)? In addition, one wonders what led R"Y to read the pasuk this way.

B) Nature

 The answers to these questions can be found through our consideration of the nature of damage payment to which we can attribute two possible aims. One possibility focuses on the mazik and views the chiyuv as a punishment for, or deterrence of, his negligence. On the other hand, the formulation of the mishna on 9b served as the basis for a significantly different view. Rashi (s.v. "Hikhsharti") explains the term "hikhsharti et nizko" (I "caused" the damage) as "alai lehakhshir u-letaken et nizko" (I have to restore and repair the damage). Rashi's understanding of "lehakhshir" focuses on the nizak and portrays the payment as correcting the injustice caused to him by the damage. Rashi's second term (added to the one actually used by the mishna) - "letaken," defines the chiyuv as aiming to fix what the damage has "broken."

 According to this second approach, the chiyuv relates not merely to the value damaged, but to the actual object that demands replacement. Although damage payment does not demand an object identical to the one damaged, whatever is returned, takes its place and must be something that can be easily exchanged for it (gemara 7b). [Rav Chaim Brisk uses this point to explain the Rambam who applies the laws of claims of actual fields, to a claim regarding a damaged field (11).]

 The Machane Efraim (12) adds that, according to this approach, one would be required to compensate for the value of the object at the time that payment is finally made. As opposed to theft, which is paid "lefi damim" (the value of the object when stolen), damage payment, which aims to replace, pays "lefi mida" (the parameters of the object damaged). Since the mazik is responsible to replace the object, he must pay an amount that could conceivably acquire such an object at the point of payment.

C) The Linkage of Scope (R"Y) to Nature

 The Ra'avad (13) used this terminology to justify the gemara's suggestion that, according to R"Y, one would pay with a field equal in size to the field damaged, but of greater value. If payment needs to be "lefi mida," we might demand that one who actually uses an object of the type damaged, give one equal in size to the one damaged, irrespective of the relative values (14).

 This understanding could very well have been the basis of R"Y's reading of the pasuk. From the mishna's (9b) description of damage payment as "tashlumei nezek," the gemara (10b) infers that the remnants of the damaged object remain with the nizak. Rashi explains that "tashlum" (payment) implies that the mazik's responsibility is to replace the lost amount. We do so by adding the difference between the object's value prior to and after the damage. The scriptural basis for this din is the gemara's rendering of the Torah's usage of the term "yeshalmena" as "yashlimena" (to complete / fill up). Tosafot (s.v. Yashlimena) explains that this rendition expresses the intent of the simple reading of the verse. In truth, the Torah demands that one return the object actually damaged. Since this is obviously impossible, one returns its remnants and money instead of the irreplaceable.

 Interestingly, the root "shalem" appears in the pasuk as well - "meitav sadeihu ve-meitav karmo yeshalem." Assuming the aforementioned interpretation of this root, R"Y may have reached the conclusion (earlier attributed to him by Rabbeinu Tam) that the whole phrase relates, not to the means used to replace, but rather, the object to be replaced (15).

**IV) The Linkage of Form and Content to Nature** We saw earlier that the Tannaitic debate related both to the form and amount of payment. At this point, we can understand how the two questions might be linked, based on their shared dependence on the nature of damage payment. R"Y's understanding of meitav as a condition for proper compensation fits naturally into his conception of damage payment as replacement. Although difficult to determine which piece served as the base for the others, we can easily understand how once the one fell into place, the others followed suit. Similarly, upon examining R"A's expansive response to R"Y, the Amoraim were able to infer from R"Y's opinion concerning the frame of reference used to determine the payment's form, how he would determine its amount.

**V) For Further Study:**A) See debate quoted by Rosh (Siman 2). The position he favors clearly sees the two tracks of R"Y as totally independent. What understanding of the issues discussed in this article can be inferred from this approach?

Endnotes:

(1) See also the discussions of the Yerushalmi (Gittin 5:1) and Rishonim (Gittin 50a) regarding "shafa'a idit" - a situation in which the original idit or chov is transformed. See especially Rashi s.v. "Gova" and Ra'avad (on Rif 24b).

(2) See also Rambam (Nizkei Mammon 8:10) who, indeed, presents meitav as part of the collection procedure.(3) With regards to the gemara in Gittin, Rashi may have understood the mishna in accordance with Abayei there who, in response to the gemara's shock with the mishna's description of tikkun olam which insinuates meitav's status as merely Rabbinic, explains the mishna according to R"Y and relegates the mishna's discussion to a second, rabbinic, level of the din. See also Rasha"sh (Bava Kama 8a) and Meromei Sadeh (Gittin 49b) who link this question to the Tannaitic debate.

 This explanation can also be used to explain the gemara's linkage of the question of be-shelo/be-shel olam to R. Yishmael. See also Rabbeinu Chananel 7a.

(4) See Mekhilta which contains a similar, yet significantly different, formulation.(5) See R. Akiva Eiger (Gittin 48b "Likh'ora") who seems to assume this linkage.(6) Abayei is aware of the similarity of his suggestion to that of RIB"A. He proves his suggestion by disproving that of RIB"A. See also footnote 7.

(7) See Shitta Mekubetzet/Tosafot Rabbeinu Tam/Penei Yehoshua 59a for alternative explanations of Abayei. The suggestion of Tosafot, though, is the one adopted by most Rishonim.

(8) Tosafot Rosh Gittin 48b s.v. "Amar" quotes Rabbeinu Tam. This suggestion can be found in Rabbeinu Tam's Sefer Ha-yashar (siman 63) as well.(9) See Penei Yehoshua who highlights the difficulties in R"Y's suggested reading, which at least proves it to be by no means the simple explanation of the pasuk's ambiguous reference.

(10) See Abayei's contrast of his opinion with that of RIB"A which give one the impression that Abayei saw his suggestion as being built on the same basic assumptions made by RIB"A.(11) See Rambam, Chiddushei Rav Chaim Ha-levi To'en Ve-nit'an 5:2.

(12) Nizkei Mammon 1.(13) 6b "Ve-rebbi." See also Ramban and other Rishonim on Gittin 48b "Gemara."(14) See Kuntresei Shiurim (of Rav Gustman) (7:4) who uses this idea to justify RIB"A suggestion as well. I link RIB"A to Abayei based on the gemara's comparison between the two.(59a)

(15) See Seridei Eish (4:15) who discusses the point of Rabbeinu Tam and the meaning of the word "yeshalem" in close proximity but refrains from explicitly connecting the two issues.

**Mekorot and Questions for the next shiur on the topic of "Hiddur Mitzva Ad Shelish."**

1) See Gemara 9a "Ve-khen ... (9b) mishna." How can Rav Zeira's explanation of Rav Huna be seen in Rav Huna's actual formulation?

2) See Rashi s.v. Be-hiddur, Tosafot s.v. Ad, and Rosh siman 7. What are the various interpretations of Rav Zeira? What might have encouraged Tosafot to limit the din? What could be the difference between our context and that of the gemara quoted by Rashi? How does the Rosh differ from Tosafot? Why?

3) See Yam Shel Shlomo siman 24. How can his limitations be understood in light of Tosafot's?