YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA KAMA 5771**

**Shiur #15: Cheresh, Shoteh Ve-katan;**

**Kofer for all mazikim**

**(9b)**

**Based on shiurim by Rav Moshe Taragin**

**A. Cheresh, Shoteh Ve-katan**

The gemara cites a beraita which elaborates upon this theme. If one placed an item in the care of a cheresh shoteh ve-katan (a blind or deaf person, or a minor - none of whom are capable of properly guarding the item from damaging), he is obligated to pay for the resulting damage. The beraita limits this obligation to cases of bor and shor but not to eish. In deciphering this beraita, the gemara probes for a case in which bor and shor would require payment, yet eish would be exempt. The gemara concludes that the beraita refers to one who delivered a bound animal or a covered pit to the guardianship of a cheresh or katan. Despite his efforts, if the animal is freed or the bor becomes uncovered, he is obligated to pay. By contrast, if he delivers a smoldering coal into their custody, he is excused from payments, if a fire spreads. Justifying this difference, the gemara claims 'an animal regularly frees himself from his restraints and a pit has a tendency to become uncovered.' Consequently, transferring them, even in a 'guarded state', does not remove culpability. A coal, however, will usually become extinguished and therefore the original person bears no responsibility. The Rishonim differ in their explanation of why the deliverer of a tied animal or a covered pit should be culpable. After all, he performed a legitimate form of guarding!

**Ra'avad, Tosafot**

 The Ra'avad claims that indeed the quality of the restraints, or of the covering, was inferior and he therefore bears responsibility. This position prompts the obvious question: If the original measures were inadequate, what new aspect of the law ('chiddush') is our beraita bringing to light? It is obvious that inefficient watching obligates a person to pay for nizkei mammon - the first mishna in Bava Kama states as much and the ensuing gemarot are replete with this theme. Not only must a person watch his possessions but the quality must be 'ka-ra'ui' - adequate. A second question centers around the role of the cheresh. Why does the beraita focus on these three cases? After all, the provider of inadequate shemira is responsible, even if he does not appoint a cheresh as his stand-in. Why would the beraita address a specific instance to declare a general rule having little to do with the specific case?

 Tosafot offer a different view. When the gemara justified the owner's responsibility by saying 'an animal generally frees itself' its intention was that an animal will be set loose by the cheresh or katan who will tamper with the restraints, or modify the cover of the bor. By delivering these items to potential 'tamperers,' the owner is liable EVEN THOUGH he provided an otherwise adequate form of shemira. Though Tosafot solve the problem of why the cheresh situation is addressed, their position still raises a textual difficulty. The gemara claimed that a shor normally frees itself and a bor will naturally become uncovered. It does not attribute these processes to the tampering of the cheresh or katan.

 Tosafot's position and the question raised merely reminds us of the inherent tension within this sugya: On the one hand, the gemara addresses a case of delivering the item to a cheresh, suggesting that this transfer plays some role in establishing an obligation for the owner. Yet, when actually defining the basis for that chiyuv, the gemara reasons that these animals free THEMSELVES - apparently rendering the role of the cheresh irrelevant and returning us to our point of departure: Why did the gemara address the specific case of cheresh? Rashi and the Ramban are the Rishonim whose position best embraces these seemingly conflicting strands within the gemara.

**Rashi, Ramban**

Rashi comments that indeed the owner would have been liable for a shor which freed itself EVEN without the interference of the cheresh. The gemara's rationale that a shor will free ITSELF has little to do with a cheresh. However, the beraita informs us that even if, ultimately, it is the cheresh who undoes the restraints, the original owner is responsible, even though he was not directly responsible for their actions. Evidently, Tosafot felt that an owner should anticipate their interference and hence allowing their access is itself negligence. Rashi and the Ramban reasoned that their interference is less likely and we might have thought that such an event would be classified as 'o-nes' or some other exemption for the owner. This beraita convinced us otherwise: since the animal will eventually free ITSELF the owner is culpable EVEN if the cheresh tampered.

 What Rashi is less helpful with, is exactly WHY the owner should be liable. After all, if such interference cannot be predicted (and without the beraita we might have excused the owner since an accident ultimately occurred), how might we understand the beraita's conclusion? Does the beraita intend to merely inform us that such tampering is predictable and should be anticipated to the point that the owner is held culpable for the actions of the cheresh? Or does the beraita maintain the unpredictability of the interference, but nevertheless establish liability for the owner?

 Where Rashi is tacit, the Ramban (in his comments to BK 52b) is more expressive. He reasons that indeed, even in the beraita's conclusion the situation of a cheresh remains an 'o-nes,' which in general excuses the owner from liability. Since, however, the owner was negligent by 'abandoning' the animal and enabling a situation whereby the animal might free itself, he is liable even if the damage occurs through some unforeseen circumstance. This principle is known as 'techilato bi-peshiya ve-sofo be-ones' an initial negligence, followed by a subsequent o-nes, regarding which the gemara in Bava Metzia (42a) obligates both a shomer and a ba'al (owner) respectively. The Maggid Mishneh (Rambam, Hilkhot Nizkei Mammon 4:6) agrees with the Ramban's explanation. Though the principle of techilato bi-peshiya is a familiar and generally accepted one, its application in our sugya to the case of bor can be questioned (see for example the Ba'al Ha-ma'or who asserts that the principle does not apply to cases of nizkei bor). In fact, by not mentioning this principle, Rashi might be indicating that our case works through a different logic.

**Rambam**

 The final approach to the sugya is expressed by the Rambam. Like Tosafot, he claims that the owner is responsible only if he transferred the item to the cheresh. Unlike Tosafot, however, the owner is responsible even if the animal freed itself. We return to the original conundrum: If the obligation stems from the animal's capacity to untie its restraints, why does the beraita obligate payment ONLY if the animal was given to a cheresh? Might there be different standards for the original watchman and his delegate?

If one retains personal guardianship and provides effective measures which are subsequently compromised by the animal, one is excused from payment. However, one does not have the right to remove effective protection from the animal. Hence, if one chooses to delegate this responsibility to another, he must select a suitably capable person, since ultimately the animal CAN free itself. Consequently, one is held liable for transferring the animal to an inept watchman. Bearing this in mind, we can understand the distinction made earlier between eish and the other mazikim. A coal will slowly extinguish and is not deemed a mazik. One is therefore allowed to transfer this item to another. A restrained animal, however, is still potentially hazardous. That potential mandates that one sustain an effective watch and the failure to do so obligates payment. [An interesting spin-off, pointed out by R. Soloveitchik zt"l, is that this implies that a covered pit is nevertheless viewed as a mazik, albeit a guarded mazik. This has many ramifications, but we will not discuss them here. -Editor]

**B. Kofer payments in cases of other mazikim**

 The Torah specifies kofer payment in cases of a shor mu'ad which kills a human. Would such payments apply in other varieties of mazikim? The gemara (BK 26) clearly exempts a human murderer from paying kofer. What about an animal which murders through shein or regel? What about a bor which murders? Would these cases also obligate kofer payment?

 The gemara in Bava Kama explicitly excludes bor and eish from kofer. Tosafot claim that this exemption is based upon a gezeirat ha-katuv (a biblical injunction). Tosafot broaden the gemara in Bava Kama (26a) which exempts a human murderer from paying kofer based upon the concept: 'alav ve-lo al ha-adam' (kofer payment is due for murder caused by one's animal and not for a human murder). According to Tosafot, this gemara exempts murder through eish, as well as murder through bor from kofer. The gemara itself does not supply a pasuk excluding bor and eish, which might indicate that this exclusion is intuitive and does not require such literary mention. How might we understand this issue: Why would we require a specific exclusion and why might we infer it as obvious?

 To better understand the parameters of kofer, we might begin with the gemara in BK 26a which questions kofer payments in cases of regel. Even though the murder could have been anticipated (and prevented), the act was not performed with intent to murder. Keren, however, is obligated in kofer since the animal had belligerent intent (this is part of the definition of keren). Might kofer payments be mandatory only if an act of MURDER occurred? Many Rishonim in their commentary on the verses in the Torah assume that the owner of the animal is indeed deserving of mita bi-yedei shamayim (death by the hands of heaven) and that kofer is merely a form of atonement to absolve that penalty. If, indeed, we view kofer in that light, we might obligate its payment only in cases in which the animal has carried out a murder and the owner, through his negligence, can be seen as a contributing force. If the animal was 'going about its business' or even deriving some form of benefit, we might be less likely to consider the death as murder, choosing instead to classify it as loss of life through the actions of an animal. Kofer might not apply if murder was not committed; murder is not committed if the animal has no malicious intent.

 The gemara's conclusion is somewhat questionable. The gemara in Bava Kama 26 seems to rule that one pays kofer even for regel. The gemara in Bava Kama (40) seems to quote a different position, which rules that regel does not pay kofer. These two positions could be debating one of two factors:

1) Does kofer depend on the death being defined as murder?

2) Could regel and shein be considered acts of murder by the animal even without malicious intent?

Consequently, we could obligate shein and regel in kofer either due to their being viewed as murder, or because kofer is applied even in cases of manslaughter.

Even if we rule that shein and regel do make kofer payments, we might not witness a similar obligation in the case of bor and eish. If, in theory, kofer is the result of murder and shein and regel are considered acts of murder despite the absence of malice, we might not necessarily define bor and eish - carried out by inanimate objects - as acts of murder. However, if kofer is a compensatory type of payment and is consequently applicable irrespective of the definition of murder, then we might be more inclined to obligate kofer in the cases of eish and bor as well.

 This might impact the explanation of our gemara. Tosafot felt that theoretically kofer should apply to eish and bor. If they apply to regel and shein (according to the gemara in Bava Kama 26), why should they be inapplicable to bor and eish? The only reason they are excluded is because of a gezeirat ha-katuv. We might have disagreed with Tosafot's premise. Indeed, according to the gemara in Bava Kama 26, regel and shein make kofer payments - but only because they are considered acts of murder. The same cannot be said about bor and eish since the loss of life is not enabled by animate objects. The lack of kofer is intuitive and does not stem from a special pasuk.

Sources and Questions for next week's shiur:

Sources:

Bava Kama 10a "Chomer … divrei ha-kol."

Bava Kama 51a "De-tanya … teiku" (51b).

Shitta Mekubetzet 10a s.v. Ha-chofer.

Meiri Bava Kama 9b s.v. Amar Meiri.

Tosafot Bava Kama 51a s.v. Ha-acharon.

Shitta Mekubetzet Bava Kama 51a s.v. Aval (in the name of the Re'a)

Tosafot Bava Kama 10a s.v. Shayar.

Bava Kama 49b mishna, gemara … Ba'a lo.

Bava Kama 3a "Ve-khi ka-amar Rav Pappa … li-nezikin."

Rashi 3a s.v. Ve-zeh av.

Tosafot 3a s.v. Lo.

Questions:

1. Which position seems more logical – that of Rebbi or that of Rabanan?
2. What are the two sources for Rabanan's position provided by the gemara in Bava Kama 51a?
3. Which source reflects better the explanation of the Meiri and which reflects Rabbenu Yonatan better?
4. What would Rabanan claim regarding someone who increases a bor from six to seven tefachim?

5) How 'different' is a bor of nine from a bor of ten, based on the gemara in Bava Kama 3a?