**PARASHAT HASHAVUA**

This parasha series is dedicated

in memory of Michael Jotkowitz, z"l.

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PARASHAT MISHPATIM

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Two Concepts of Justice in the Torah's Laws of Damages

By Rav Meir Spiegelman

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Dedicated in memory of

Avraham Rymald z"l

Avraham ben Elimelech Shimon

Whose yahrzeit is 21 Shvat

By the Horowitz Family

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"AN EYE FOR AN EYE"

At the beginning of parashat Mishpatim, we find a number of verses which the Halakha interprets in a way that seems different from the literal meaning. The most famous example of this phenomenon is the law of "an eye for an eye" (Shemot 21:24).

The literal formulation of this verse suggests that one who injures his fellow's eye should be punished by actually having his own eye put out.[[1]](#footnote-1) We may prove this from the section dealing with false witnesses (eidim zomemim). The Torah stipulates that a certain type of false witness is punished "an eye for an eye" (Devarim 19:21). It is not clear what kind of testimony renders him deserving of losing his eye. It would seem that witnesses can be regarded as attempting to put out someone else's eye if they assert that he had injured someone else and put out his eye. If we say that this person, who supposedly put out someone else's eye, is obligated only to pay monetary damages, then the witnesses weren't plotting to have his eye put out; they were plotting only to make him liable for a monetary payment. If this is so, then why do we punish them by putting out their eye? We therefore have no choice but to conclude that this section, too, comes to teach us that according to the simple meaning of the text, a person who injures his fellow is punished with the injury of the same limb, and not with monetary damages.

The Rambam addresses this question and writes that the simple meaning of the text is indeed different than the instructions set out in the Halakha. What the Torah means to say is what should, by rights, be done – even when this ideal may not be realized, because of various considerations. Hence, from a simple reading of the text there arises a certain perception of the concept of justice that cannot be realized in a practical fashion because of various technical difficulties, or – alternatively – as a result of different principles of justice that contradict it. (Such problems arise from the sugya in Bava Kama: how is the ideal of "an eye for an eye" to be realized in the case of a person who put out the eye of his fellow, who had only one eye, etc.) Below I shall examine several cases expressing different principles of justice, which lead to the discrepancy between the simple reading of the text and normative halakha.[[2]](#footnote-2)

"IF TWO MEN STRIVE…"

One of the issues addressed in our parasha is that of injury caused to a person as a result of a violent act on the part of someone else. There are three places in which the Torah relates to this subject, two in our parasha and the third in parashat Emor:

1. "And if men shall strive… he shall pay only for his loss of time and for his complete healing" (Shemot 21:18-19).

2. “And if men fight and they strike a woman who is pregnant, such that she miscarries… as the woman’s husband will place upon him, and he shall pay as sentenced by the court. But if a calamity occurs, then you shall give a life for a life, an eye for an eye…” (ibid., 22-23).

3. "And if a person maims his neighbor, then as he has done – so shall be done to him; a fracture for a fracture…" (Vayikra 24:19-20).

Our parasha, then, presents two cases, with a different law for each. In the first case, the culprit is obliged to pay only for lost work time and for medical expenses. In the second case, however, he is liable for the damage itself, and this he is to pay in corporal terms: "an eye for an eye."

The Torah emphasizes that in the first case, the victim recovers from the blow he received ("If he rises and walks about upon his staff…"). However, it is not clear whether the recovery has been complete or whether the person has returned to general functionality but has suffered permanent damage to some limb or organ. Aside from this, in the second case the Torah makes the culprit liable even for a bruise ("a bruise for a bruise"), and there are few instances of bodily harm that don't involve at least a bruise. So why does the Torah not invoke monetary compensation for the injury itself in the first instance, too?

One way of dealing with the difference between the two cases is to propose that they only look different: the law stipulated in the one case should be applied also to the other. If this is so, then the bottom line in both cases is that all three types of damages must be paid: loss of work time, medical expenses, and compensation for the actual injury. This is the direction taken by the Oral Law, but here the obligation of paying damages is interpreted as monetary payment rather than actual reciprocal injury to the culprit. But the literal text does not sit well with this approach:

a. As we noted above, in the Written Law the obligation as to damages is a tangible one; the eye of the culprit is to be removed. Hence, it is not appropriate that the culprit also be obligated to pay medical expenses and loss of work, for then he would end up paying twice. Together with the obligation of paying medical expenses and loss of work to the victim, he would also have to bear the cost of the medical expenses for the damage inflicted on himself as punishment.

b. In parashat Emor, the Torah mentions only the obligation concerning the injury itself, using the image of “an eye for an eye.” If the law is that all three types of damages must be met (injury, loss of work, medical costs), then why is this not made explicit?

c. The two cases brought in our parasha appear in close proximity, but they are separated by the section dealing with a person who strikes his servant. If these parashiot are indeed meant to complement one another, why do they not appear consecutively? (Even if we explain that the Torah elaborates in one place and is concise in another, we would still expect the lengthy presentation to appear somewhere else altogether, not very close to the original discussion, which was halted by the following parasha.)

There is a different way of explaining the differences between the three parashiot. According to this approach, the Torah indeed sees fit to apply different obligations in different scenarios of damage, in accordance with the circumstances involved in each.

Indeed, a review of the three parashiot in question reveals that three different scenarios are being discussed. In the first case, the Torah describes two people fighting, where the one injures the other. If this is the context in which the injury takes place, the victim bears a certain degree of indirect responsibility for having been harmed, for he took an active part in the fight. The second instance, in contrast, presents two people fighting who then (unintentionally?) harm a third party. The third party in this case is the woman, who bears no responsibility for the fight.

Hence we may assert that there are three situations of injury, with the Torah addressing them in three separate places:

1. people fighting, where one injures the other;
2. people fighting and unintentionally causing injury to a third party;
3. a person causes an injury to someone else without any (immediate) fight between them ("And if a person causes another person to be maimed…").

These three instances give rise to different punishments:

i. In the first instance, there is no payment of damages for the injury itself (perhaps because the damage is not permanent); the obligation involves only medical costs and loss of work.

ii. In the second case, payment is for the injury itself: “an eye for an eye.” (Where the fetus has not paid with its life, it is the woman’s husband who determines the sum: “as the woman’s husband shall place upon him.”)

iii. In the third case, the obligation is the same as in the second case: "an eye for an eye."

The determination of the level of severity of these instances is not a simple matter. Clearly, the case presented in parashat Emor is the most serious of all, for there the injury is inflicted deliberately through no fault of the injured party.[[3]](#footnote-3) The calibration of the two instances in our parasha, however, is more complicated. On the one hand, the guilt of the culprit is more serious in the first case, for he struck deliberately (although it happened in the heat of the argument, it is still certainly a deliberate act), whereas in the second case the injury was not caused deliberately. On the other hand, from the point of view of the victim, in the first case he bears a greater degree of guilt, for he took part in the fight (the Torah states, "If men strive," rather than "if a person should strive with his neighbor"), and results of this sort are to be expected. In the second case, the victim bears no guilt at all.

GUILT VS. RESPONSIBILITY

In order to evaluate accurately the exact balance of severity of the two cases, we must address the distinction between two different concepts: guilt and responsibility.

A person can be responsible for a certain situation even when he is not guilty.[[4]](#footnote-4) Guilt means that a person, either deliberately or through criminal negligence, caused a certain situation. On the other hand, a person can be responsible for certain events even when he cannot be blamed for them happening.

The "punishment" meted out to a person by the Torah differs in these two situations. When a person is responsible for a situation (but not guilty), he must do whatever he can to return things to the way they were. The idea here is repair of damage. But when a person is guilty of creating a certain situation, the Torah adopts the principle of "measure for measure," i.e., the act perpetrated by that person (whether deliberately or through negligence) returns to him and harms him in the same way in which he "tried" to harm someone else.

This distinction exists in several places, most noticeably in those parashiot dealing with property damage. The first two parashiot in parashat Mishpatim that deal with this issue serve to illustrate this distinction: "If a person causes a field to be consumed" on one hand, as opposed to "if a fire breaks out…" on the other (Shemot 22:4-5).[[5]](#footnote-5) The difference between the two parashiot turns on the fact that the first describes an intentional act performed by the person with the aim of causing harm. In this instance, then, he is not only responsible for the damage caused, but also bears guilt for it. His punishment is therefore that "he must pay of the best of his field." If we understand this as referring to the culprit's field – as the simple reading of the text would suggest – then the Torah is not only demanding payment for the damage, but is also attempting to strike at the culprit in the same way that he struck at the victim. The act of damaging the field returns to the culprit, and he ultimately turns out to have damaged his own field, as it were.

In the second parasha, the person did not mean to cause harm. Therefore he is responsible only for the actual damage caused to his fellow, and for this he must pay. In this instance, there is no special emphasis on the damage returning, as it were, to the culprit; he is merely obligated to pay for the damage caused to the field.

Similarly, we may interpret the obligation of a person who digs a pit and thereby causes the death of his fellow's animal: "the owner of the pit shall make amends and shall pay money to its owner, and the dead animal shall be his" (ibid. 21:34). This is not merely a demand that the culprit pay, but also a ruling that he must pay the value of the ox, with the intention that the damage ultimately falls on the shoulders of the culprit instead of on the victim. For the same reason, the culprit receives the dead ox – as though the Torah is telling us, "The culprit loses (the value of) an ox, while the (value of the) ox remains in the hands of the victim, as in the beginning."

Another parashia in which we see the application of this principle is that of the ox that gores. As a general rule, when an ox causes damage as a result of its owner not restraining it properly, its actions are attributable to the owner. Thus we may understand the law that when an ox known to be aggressive kills a person, the owner of the ox is deserving of the death penalty, but he may pay a ransom instead, because in this case the owner of the ox is not considered an actual murderer. This is the case regarding an ox that has been proven to be aggressive.

The law concerning a docile ox involves one of two cases: either the ox gores another ox, or the ox gores a person. In the second instance, the owner of the ox is exempt from any payment at all. If, however, the ox gores another ox, then the owner is obliged to pay half of the damage. This requires some explanation: how can it be that the killing of an ox involves heavier damages than the killing of a person?

In light of the distinction between guilt and responsibility, these laws make sense. When we are dealing with a tame ox that suddenly becomes violent, there is no element of guilt. The owner cannot be held guilty for the fact that his tame ox has suddenly gone wild and caused damage. The connection between this person and the damage that his tame ox has caused takes the form of responsibility, rather than guilt. However, the Torah establishes that the owner of the ox is not the sole responsible party. The responsibility is shared jointly between him and the victim. Again it must be emphasized that we are not speaking here of guilt. The question here is a different one altogether: who is responsible for the damage or, in other words, who will pay the veterinary fees for the injured ox? The Torah rules that the two parties must be regarded, in this case, as partners, who bear jointly the debt that is created as a result of the damage. Therefore the value of both live oxen, prior to the goring, must be estimated and then compared with the situation after the goring (one ox alive and the other dead). The difference between these two estimates is divided equally between the two parties. What we have here is not a demand for payment, but rather a joint responsibility to deal with the situation that has come about, and therefore we divide the difference between the two people.

Now we can understand why, when the tame ox gores a person, the owner is not liable for any payment. As soon as we reject the principle of guilt, we cannot demand monetary damages from the offending party. The case of an ox killing a human being cannot be addressed in monetary terms, because human life cannot be estimated in such terms (unless we are talking about a ransom). Therefore the owner of the ox cannot be required to pay half of the "responsibility," and so he is exempt.

With regard to the three examples that we have analyzed in the sphere of property damage, Chazal's approach does not match what we have said. In the instance of the law "if a person causes a field to be consumed," they interpret the words "of the best of his field" as referring to the victim's field – thereby destroying our entire thesis. Likewise, concerning the damages relating to the pit, they interpret the words, "the dead animal shall be his" as referring to the victim, who receives back his own dead ox, rather than to the culprit. Also, obviously, there is the punishment of "an eye for an eye," which Chazal treat as a graphic expression referring exclusively to monetary payment.

The thread connecting all of these instances is the different concept of justice that Chazal set forth in the Oral Law. While a literal reading of the text proceeds from the point of view of the culprit, where he himself must suffer the damage that he intended to cause to the other party, the perception of Chazal in the Oral Law has as its fundamental principle not the punishment of the culprit but rather the attempt to repair the damage and to provide compensation for the victim.

Thus we conclude that the difference between the literal expression, "an eye for an eye," and the way in which it is interpreted by the Sages is just one facet of a fundamental difference between the Written Law and the Oral Law. While the Written Law emphasizes the guilt of the culprit and the attempt to cause him the same damage that he has caused to others, the Oral Law comes with an ideal of justice that focuses on appropriate compensation for the victim and returning the situation to its former state. The Rambam's statement applies just as well to this fundamental distinction between the Written Law and the Oral Law: the Torah describes the situation as it should have been, in an ideal and theoretical way. The Oral Law, in contrast, comes not to present theoretical justice but rather to formulate the concept of justice as it relates to our tangible reality and the requirements of our world of action.

INJURY VS. LOSS OF WORK AND MEDICAL COSTS

We may now return to the three parashiot dealing with a person who causes injury to his fellow, and sort out the relationship between them.

In principle, as we have said, the Torah demands that the culprit pay for his guilt in causing the damage, and this guilt finds expression in the punishment of "an eye for an eye.” In the first parashia this punishment is absent, because in this case the victim in fact shares some of the guilt. When the victim, too, is to some extent guilty of causing his own injury, then the culprit is not liable for his guilt but rather for his responsibility for the injury. There is no payment for the actual injury; he pays only medical expenses and loss of work.

Here we must ask, why does the Torah not oblige the culprit to pay for the actual injury, and for anguish, as part of his responsibility for the injury he caused? We can answer this question by drawing a distinction between the types of payment. Payment of medical costs and loss of work arise from losses that were not incurred directly at the time of the injury; at the time of the injury, they still represent a future loss. Therefore it is the duty of the culprit to prevent the victim for having to fund these expenses. The injury itself, on the other hand – together with the accompanying anguish, embarrassment, etc. – represents damage that has already been done. The event has already passed, and the culprit cannot prevent the victim from bearing these "costs." The only way in which the culprit can pay is by having the same injury that he caused to his friend applied to himself – and this option exists only where there is guilt. In our case, the guilt is absent, and so the only payment that the culprit is required to provide is for medical costs and loss of work.

Payment for actual injury exists only in the other two parashiot. In the case described in parashat Emor, the culprit is required to pay because it is he who bears guilt for the injury. The obligation to pay damages in the case of the pregnant woman, in our parasha, may be understood in one of two ways.

a. Here, too, the culprit bears guilt, because the woman played no part in the fight. This is true even if we say that the blow to the woman was entirely unintentional.

b. Alternatively, we may claim that since the damage was caused not to a live person but rather to a fetus, who does not enjoy the same status as a full-fledged living human being, therefore the Torah demands payment of damages even when there is only responsibility but not guilt. There can be no monetary evaluation of human life, but we may discuss such a concept in relation to a fetus in utero.

Despite these distinctions set forth in the Written Law, the Oral Law does not distinguish between the various instances, and in fact unites the various parashiot into a single discussion. This approach may be understood against the background of the fundamental difference between the Written Law and the Oral Law, as explained above. The Oral Law does not regard payment of damages as a way of bringing the damage back onto the head of the culprit. Indeed, such an act can be relevant only where the culprit is guilty of causing the injury, and not only responsible for it. But the Oral Law sees the payment simply as monetary compensation for the victim, with a view to returning the situation to what it was. The ability to demand that the culprit bear responsibility for all elements of the injury (the injury itself, anguish, medical costs, loss of work, embarrassment) does not depend on the question of guilt. The concept of guilt is irrelevant if all that we are trying to do is to provide compensation for the victim. Thus, we may conclude that we need only examine the culprit's responsibility, and then burden him with the various payments of damage accordingly.

(Translated by Kaeren Fish)

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1. There are some commentators who try to assert that "an eye for an eye" is to be interpreted literally even according to the Halakha; however, a ransom can be paid for major limbs that are permanently injured, for the prohibition against taking a ransom is stated only in relation to murder. This claim is problematic, for it suggests that if the culprit does not wish to pay, we may be able to invoke the principle of "an eye for an eye," while actually according to Halakha this is not true. [↑](#footnote-ref-1)
2. The formulation, "an eye in place of an eye (ayin be-ayin)" instead of "an eye for an eye" (ayin tachat ayin) arises because here ultimately the eye is not put out. See below. [↑](#footnote-ref-2)
3. Even though this law appears as part of the story of the blasphemer, it is not presented in the context of a dispute between people. [↑](#footnote-ref-3)
4. I shall address only a few examples. [↑](#footnote-ref-4)
5. This is highlighted in the law of "adam muad le-olam" (a person is always liable to full indemnity for damage he causes), according to those Rishonim who apply it even in a case of complete accident. [↑](#footnote-ref-5)