YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA KAMA 5771**

**Shiur #26: *Techilato B'peshiya Ve-Sofo B'onnes***

**By Rabbi Moshe Taragin**

The gemara introduces a case of an animal which jumped off a wall and shattered vessels lying beneath that wall. The gemara infers that the owner is liable only if the animal jumped; had it accidentally fallen off the wall no liability would exist. This suggestion raises the specter of a very interesting halakha known as '*techilato b'peshiya ve-sofo b'onnes*.' According to many positions (and in fact halakha rules this way), if a person is negligent in watching his animal and ultimately an accident occurs, he still might be obligated to pay for that *onnes*. Since his initial negligence contributed to the ultimate accident which occurred, he might be liable to make payments. In our case, for example, the owner was seemingly negligent in allowing his animal to walk on top of a wall from which it could have jumped and broken vessels. Ultimately, the animal fell and broke vessels, instead of jumping, and an animal's fall is clearly defined as *onnes*. However, since the falling was precipitated by a prior *peshiya* (allowing the animal to freely walk across the wall), we might define this case as *techilato b'peshiya ve-sofo b'onnes*. The gemara actually challenges the mishna (which implies an exemption for vessels broken by the animal's accidental fall) based upon the principle of *techilato b'peshiya ve-sofo b'onnes*. In this shiur we will attempt to define the general parameters of this halakha and gauge the various applications mentioned in *Bava Kama*.

I *Techilato B'peshiya* for *Shomrim*

Any assessment of *techilato b'peshiya* must begin with its application to the world of *shomrim* (watchmen). The gemara in *Bava Metzia* (42a) addresses the situation of a *shomer* who places money in a locked wooden box and the money is eventually stolen by armed robbers. According to one opinion, although an *onnes* has occurred he must nevertheless pay, since his initial negligence (placing the money in a combustible area) facilitated the ultimate theft. Had he buried the money - as recommended, the thieves would never have located it. This position - that *techilato b'peshiya ve-sofo b'onnes* is obligated to pay - is ultimately accepted as halakha by the gemara.

A second gemara in *Bava Metzia* (36b) suggests a very important limitation to the liability of *techilato b'peshiya*. According to Abaye, if a *shomer* allows his animal to wander away (a *peshiya*, since the animal could easily become lost) and the animal died of natural circumstances, the *shomer* does not pay. Even though *techilato* *b'peshiya* is generally liable, in this specific instance the initial *peshiya* in no way CONTRIBUTED to the ultimate *onnes*; the animal would have died naturally even if confined to the house. *Techilato* *b'peshiya* obligates only if the original negligence in some way facilitated the eventual *onnes* - what the Rishonim label as '*machmat*' (literally 'because'- the *onnes* evolved in part because of the original *peshiya*). In the aforementioned case, placing the money in the box (as opposed to hiding them in the ground - the preferred manner of guarding money) allowed the armed robbers to locate and seize the money. In our case, allowing the animal to roam in no way contributed to its eventual death.

This position suggests the following understanding of *techilato* *b'peshiya*: Although not DIRECTLY the cause of damage, the *shomer*, through his *peshiya*, was a contributor. A *shomer* pays for damage not only if he is the primary cause, but even if he slightly 'contributes.' By placing the money in the box, a *shomer* contributes to the armed robbery since they would not have otherwise located the money. By allowing an animal to roam, the *shomer* doesn't contribute to its ultimate natural death and thus escapes payments.

A third discussion in *Bava Metzia* which elucidates the *techilato* *b'peshiya* clause can be found in the mishna (78a). If a *shomer* was instructed to walk the animal along a certain path and he deviated, thereby directly causing the damage, he is liable to pay. Instructed to walk in the valley, if he leads the animal up a hill and then it slips his negligence obligates payment. The owner was concerned regarding the animal's balance and therefore instructed the *shomer* to walk in the valley and not the mountains. Alternatively, if the owner requests the mountainous route and the *shomer* opts for the valley, causing the animal to overheat, the *shomer* is similarly liable since his deviation (from a cooler route to a hotter one) directly caused the death. If, however, the *shomer* changes from mountain to valley and the animal slips, or he changes from valley to mountain and the animal overheats - each is seen as death by *onnes* and the *shomer* is excused. The Rishonim wonder why the principle of *techilato* *b'peshiya* does not apply. After all, by changing routes the *shomer* exposed the animal to some new danger; even if this danger did not materialize he should still be liable!!!

The Ramban responds that changing planned routes - though a deviation from the owner's instruction - cannot be termed as '*peshiya*.' Each route poses different dangers and although he did not follow the owner's wishes the *shomer* cannot be defined as negligent. Indeed, if the death was a direct consequence of the deviation (the animal slipped on the mountain) the deviation itself obligates payment. If, however, the cause of death was accidental (slippage in a valley), the initial deviation did not lead to consequences which obligate payment. Effectively, the Ramban requires gross negligence to obligate situations of *techilato* *b'peshiya* *ve-sofo* b'*onnes*. Deviation, though sufficient to generate liability in ordinary cases, does not suffice for *techilato* *b'peshiya*.

We might see in this position an alternate view of *techilato* *b'peshiya*. Since the *shomer* was not directly responsible for the death we cannot obligate him to pay for the DAMAGE proper. Instead, we obligate him to pay for the ACT OF NEGLIGENCE itself. By not guarding the animal, he betrayed his commitments to the owner and thus might be obligated to pay for the very act of betrayal (assuming some eventual damage occurred). Hence, only gross negligence can be classified as an act of outright betrayal, (as opposed to deviation from stipulations which do not classify as negligence), and only in these conditions is a *shomer* obligated to pay for *techilato* *b'peshiya*.

SUMMARY:

We have suggested two different perspectives upon the obligation of *techilato* *b'peshiya* for shomrim. Since the *shomer* did not directly cause the ultimate damage, we might find him liable for the act of betrayal itself. Alternatively, we might be able to view him as a supplementary contributor since his original *peshiya* facilitated the ultimate *onnes*. The logical consequences of this question are as follows: what degree of negligence will obligate payment? If we aim to find him liable for the very act of negligence (even though it did not directly cause the damage) we might 'require' actual negligence which can be seen as betrayal of their original agreement. A second question involves the relationship, if any, between the negligence and the ultimate damage. We might only apply the *techilato* *b'peshiya* clause if the negligence ultimately contributed in some way to the damage - a condition referred to as '*onnes* *machmat* *ha-peshiya*.'

II *Techilato* *B'peshiya* For A *Mazik*

Having established two different models towards understanding the rule of *techilato* *b'peshiya*, we might now inspect the application of this rule to the world of *Bava Kama*. Although with regard to *shomrim* we might view these two models as equally valid, regarding *Bava Kama* one approach seems more appealing. When discussing the liability of a *shomer* we might elude the *onnes* problem by obligating for the very act of betrayal. Instead of establishing liability for the accidental damage (which was slightly facilitated by the original negligence), we stress the very act of disloyalty toward the owner as the basis of liability. After all, the owner and *shomer* formulated an agreement (which might even contain benefits for the latter) and that contract was broken. Violating this contract would certainly be cause for financial remuneration even if the violation didn't directly cause damage. By contrast, when we consider the situation of a *mazik* who never reached an agreement with the damaged party and possibly never even met him, we might find it difficult to obligate payments based upon the *peshiya* per se - independent of its contribution to the ultimate damage. Essentially, all *Bava Kama* payments originate from the fact that an item was damaged and compensation must be proffered. If we can trace this loss back to the negligent owner of the *mazik*, whose irresponsible behavior was a contributing factor, we can certainly obligate payment. The model of *techilato* *b'peshiya* by which we demand payment because of the *mazik's* facilitating - through his negligence - the damage, certainly is compatible with our view of *Bava Kama*. The alternative - to obligate based solely upon an act of betrayal - might be less operative within the realm of *Bava Kama*.

Translating this strong disposition toward one model of *techilato* *b'peshiya* (and the accompanying disinclination toward the alternate model) would yield the following view of *techilato* *b'peshiya* in *Bava Kama*: We might strongly insist upon the condition of '*machmat*' - that the *onnes* should be in some way a product of the original *peshiya*. Only in this context might we trace the loss back to its author - the *mazik* - and obligate payment. In the absence of *machmat* we might be severely handicapped in applying the clause within *Bava Kama*. Conversely, we might not be too concerned with the degree of *peshiya* since an intense level of *peshiya* was necessary only assuming the model by which we obligated the *shomer* to pay based purely upon his betrayal. Though this model was applicable to shomrim (and consequentially we might insist upon a severe form of negligence), it has little relevance to *Bava Kama*; the degree of negligence' might not be at all meaningful to *Bava Kama*.

The importance of the *machmat* clause within *Bava Kama* led many Rishonim to justify the absence of *techilato* *b'peshiya* within an important *Bava Kama* *sugya* (52b). The gemara addresses someone who covered a bor (pit) with a plate capable of withstanding the weight of lighter animals but not heavier ones. If a lighter animal should happen to accidentally fall into this bor, would the owner be obligated to pay? Should we classify the cover as a legitimate preventive measure since it protected against lighter animals falling in, or do we define it as insufficient simply because heavier ones could have fallen through? The gemara presents this debate independent of the *techilato* *b'peshiya* rule, suggesting that it might not apply. Tosafot, based on this conspicuous omission, assert that in this particular context *techilato b'peshiya ve-sofo b'onnes* might not apply, since the *peshiya* bears little relation to the ultimate damage. The accident which allowed the light animal to fall into the pit (even though a sturdy cover was placed) would have occurred even if the bor were covered with an extra-strength protection against heavy animals. Since the *onnes* did not evolve '*machmat*' - because of the *peshiya*, the *techilato* *b'peshiya* rule cannot obligate payment. This Tosafot is consistent with our expectations; the strategy by which we 'link' the damage which occurred through an *onnes* to the initial *peshiya* seems to be the most viable way to export *techilato* *b'peshiya* to *Bava Kama*. If such linkage does not exist, because the *onnes* was in no way facilitated by the *peshiya*, we cannot obligate based upon *techilato* *b'peshiya*.

Several other Rishonim adopt differing opinions as to why the gemara never invoked the *techilato* clause. The Baal Ha-maor, in a dramatic statement about the nature of *bor* *hamazik*, suggests that the entire principle of *techilato* *b'peshiya* would not be relevant to the case of *bor*, even if the necessary conditions such as '*machmat*' were to obtain. Just as *bor* is different from other paradigms of *mazik* in that it exhibits an extremely unique exemption - payment is excused if utensils are damaged in the bor - it is also dissimilar from other forms of *hezek* in that the *techilato* rule doesn't apply. Why exactly *bor* is incompatible with *techilato* *b'peshiya* and the parallel to the *keilim* exemption lie beyond the perimeters of this shiur. For an initial analysis see shiur #14in which the structural model of bor was examined, particularly as it relates to the *keilim* exemption.

The Ra'avad in his *Hagahot* to the Rif disagrees with Tosafot's view and suggests a different reason why *techilato* doesn't apply to this sugya: the *peshiya* and the ultimate *onnes* pertained to different items. The original *peshiya* manifested itself with regard to heavy animals (for which this cover was insufficient); ultimately, a light animal (for which the cover was sufficient) fell in through some accident (such as unexpected erosion). Since the *peshiya* and the *onnes* 'applied' to different objects the clause of *techilato* *b'peshiya* cannot apply.

This very concern - that the original negligence must apply to the very same object which was ultimately damaged - is raised within our *sugya* (21b) in the case of the animal which walked on top of a wall and fell on top of *keilim*. The gemara infers from the mishna that if the animal falls upon *keilim* the owner is not responsible. The gemara questions this inference: If we apply *techilato* *b'peshiya* to *Bava Kama*, the owner should be obligated because his initial negligence (allowing the animal to walk upon the wall and possibly jump upon *keilim*) facilitated the ultimate *onnes* (the animal falling upon the vessels). To this the gemara responds that the vessels were actually placed very close to the wall - so close that an animal could not intentionally jump and shatter them (for he would inevitably overshoot the utensils lying so close). Hence, allowing the animal to freely walk upon the wall does not endanger the near-lying *keilim* and no *peshiya* has been perpetrated. Rishonim wonder about this interpretation; if the vessels are so close to the wall that the animal cannot intentionally jump upon them, how could the mishna legislate liability if the animal actually found some way to jump on them and directly damage them? Tosafot Rabenu Peretz suggests an interesting solution: there were two vessels under the wall. The more distant ones could be intentionally broken and hence the owner was negligent in allowing the animal to walk upon the wall and endanger those vessels. If the animal were to jump upon those distant vessels and break them the owner would be liable - as the mishna asserts. If, however, the animal fell and 'accidentally' shattered other *keilim* lying right underneath the wall, the owner is excused from payment. Even though we might normally apply *techilato* *b'peshiya*, since in our example the *peshiya* applied to the distant vessels, (which the animal could have jumped upon), while the damage actually occurred to the closer ones, we cannot apply the *techilato* clause. Again we witness the requirement of the Ra'avad - in order to apply *techilato* *b'peshiya* to *Bava Kama* we require that the *peshiya* and *onnes* be addressed to the same item.

This insistence that the damage occur to the same object endangered by the original negligence also suggests the model of *techilato* *b'peshiya* stated earlier. If we seek to link the damage to the owner because his negligence contributed to the damage, we might insist that this linkage is feasible only if the negligence and damage occurred to the same item.

AFTERWORD:

Having suggested that only one viable model of *techilato* *b'peshiya* applies to *Bava Kama*, see Tosafot (BK 22a *s.v.* *de-apich*). Tosafot wonders about augmenting the payments of keren because the damage evolved from a negligence which in theory could have spawned regel or shein. If we apply *techilato* *b'peshiya* should we obligate keren to pay as much as regel might have if the *peshiya* would have materialized (namely 100%)? Which model of *techilato* *b'peshiya* do you think this question is premised upon?

Subsequently, Tosafot reject this possibility; does it seem that the issue hinges upon the model of *techilato* *b'peshiya* we adopt, or does it speak more directly to our understanding of the 'keren-tam' discount?

Sources and Questions for Next Week's *Shiur*:

Next week, we will discuss the fourth of the "*avot nezikin*," *eish* (fire).

1. See *Shemot* 22:5, what is implied by the Torah's description of *eish*?

2. See *Bava Kama* 22a - 23a. The gemara presents a debate between Rabbi Yochanan and Reish Lakish regarding the nature of "*eish*" - is it a form of "*mammon*" or "*chitzav*?"

3. When the gemara suggests that *eish* is a form of *mammon*, or *chitzav*, to what extent is Rabbi Yochanan or Reish Lakish's formulation to be taken literally?

Reish Lakish:

There is a debate between Rashi and Tosafot regarding the practical implications of Reish Lakish's opinion. How does Rashi answer the questions raised by Tosafot? See Shita Mikubetzet in the name of the Gilyonot of Tosafot. See also The opinion of the Talmide HaRi (cited in the Shita Mikubetzet), who seems to suggest that there may be two types of "*isho mishum mammono*."

Rabbi Yochanan:

The Rishonim question whether Rabbi Yochanan's understanding of *eish* may be extended to other areas of halakha. See Tosafot Sanhedrin 77a regarding *shechita* and *retsicha* (murder), and the explanation of Rabbi Chaim HaLevi Soloveitchik (*Hilkhot* *Shekhenim*). See also the famous question of the Nemuke Yosef (*Bava Kama* 10a in the Rif). What is the initial assumption of the Nemuke Yosef, and what is his conclusion?

The gemara concludes (23a) that Rabbi Yochanan agrees that the obligation to pay for damages caused by fire is ALSO because of *mammono*. See Rashi *d"h vekhi*, and the Shita Mikubetzet in the name of Rabbenu Yishaya, and in the name of Talmide HaRi. See also the Rambam in Hilkhot Nizke Mammon 14:15.