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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***Bava Kama* – Shiur 17b**

**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* was split in three. The first part of this *shiur* was sent out last week. The last part will be sent out next week.]

### Liability for *shevet* – Full wages or as an idle worker

Rashi and the Rif disagree about the precise manner in which *shevet* is assessed according to Rava. Rashi writes: "He pays him for each day as workers are paid in the market place." Since we do not make an evaluation as if he were a *shomer kishu’in*, he must pay the full wage of a worker. In contrast, the Rif (31a) writes: "It stands to reason that we assess him as if he were an idle worker." The Rif mentions here a term that appears in several places in the Gemara when a person is compensated for the loss of a day's pay. He is not paid the full wage that he lost, but rather the sum in exchange for which he would have been ready to give up a day of work and receive a vacation day. A person prefers to work and earn money rather than remain unemployed and earn nothing, but the possibility of earning money and not working is preferable to working, and there is no justification for offering this to the worker. For example, if we assess that a person who earns $100 a day is ready to give up his work and stay at home in exchange for $90, the latter is the proper compensation.[[1]](#footnote-1) As stated, the Rif maintains that this is the amount that must be paid in our case as *shevet*.

Strictures to the Rif, known as *Me'a She'arim*, that were composed by the author of the *Ittur*, are published at the end of the standard editions of the Talmud after the Rif and the Mordekhai (57a in Alfasi). In stricture no. 8 he offers two comments to the Rif's novel position on our passage:

1) When we are dealing with compensation for outright injury we should not consider the fact that the victim is an idle worker; by Torah law the person who caused the injury should be liable for the full amount of the damage. However, we must examine this in relation to other passages that examine the issue of consideration given to certain factors when assessing damage, and especially to the passage on p. 59a that brings together several disagreements regarding "depreciation of the vines" – do we take into consideration the fact that the damage saved the *nizak* (person who suffered the damage) from having to lay out certain money, or do we impose liability for the full amount of the damage.

2) A comparison cannot be drawn between a person who remains at home and enjoys a vacation day to a person who is bedridden against his will owing to his injury. According to the second argument, even if fundamentally there is room to deduct the benefits enjoyed by the person who suffered the injury, in our case there is no real benefit.

The Rosh (no. 6) agrees with the Rif and adds: "And similarly, all compensation for *shevet*." This implies that even when there is payment for *shevet* when there is also *nezek* and the injured party is assessed as if he were a *shomer kishu’in*, we must still assess his wage as if he were an idle *shomer kishu’in*. The Rambam, on the other hand, explicitly states otherwise:

How is the *shevet* evaluated? If he did not cause the person to lose a limb, but instead caused him to become sick and invalid, or his arm swelled but it will return to its original size, the person who caused the injury must pay the victim for his *shevet* for each day, like an unemployed worker of the trade in which he is employed. If he caused him to lose a limb or cut off his hand, he must pay him full compensation for his hand; this being "damage." In this instance, we judge him as if he were a *shomer kishu’in*. We evaluate how much such a watchman would earn each day and calculate the number of days he will be incapacitated. This is the amount the person who caused the injury must pay.

The Rambam distinguishes between *shevet* when there is no *nezek*, in which case the injured party is compensated as an idle worker in accordance with the viewpoint of the Rif, and *shevet* when there is *nezek*, in which case the injured person receives full compensation as a *shomer kishu’in*. What is the reason for this distinction? I am not convinced about this, but it is possible that the Rambam maintains that there is a fundamental difference regarding the nature of the liability for *shevet* in the two cases. When there is *nezek*, compensation is given for the ordinary type of damage in the laws of damage, which obligates full compensation for the loss. In this situation, even when payment for *shevet* is made for the loss of work days, the payment is made as a supplement to the payment for *nezek*, in order to cover the full amount of the loss, and when payment is made for *nezek* there is no room to consider the slight benefit offered by being idled from work. In contrast, when payment is made for *shevet* when there is no *nezek*, we are dealing with a liability that from the outset does not relate to a physical injury, but only to a monetary loss of potential earnings. Here there is room to consider various monetary considerations, including the benefit of staying at home.[[2]](#footnote-2)

This can be connected to the question with which we dealt in the past, whether the laws of damage are focused on the loss suffered by the object or by the person. We can say that according to the Rambam, the ordinary laws of damage are focused on the damage to the object, and in this case the person's body, and only in the case in which there is liability for *shevet* when there is no *nezek* does there arise a track of liability for the loss suffered by the person.

### The viewpoint of Abaye

Let us move on now to briefly consider the viewpoint of Abaye in our passage, which has not been accepted as normative law. Abaye maintains that even a temporary injury gives rise to liability for *nezek*, and the liability for *shevet* is limited to the amount that the person could have earned as a *shomer kishu’in* while he was instead confined to his bed.

We saw above that the dominant approach in the Rishonimis that the evaluation of the *nezek* does not include *shevet*, but only the permanent damage. This is emphasized by the Ramban, who adduces proof for this from the viewpoint of Rava in our passage, that in the case of a temporary injury, there is no compensation for *nezek*, but only for *shevet*. But the Ramban adds that even Abaye agrees that when there is a permanent injury, we do not include the temporary *shevet* in the framework of the *nezek*:

Even according to the one who disagrees there, agrees here that we never assess the value of a sick slave, for if so he would become liable to pay for *shevet*, which is the diminishment of his value.

If I correctly understand his words, the Ramban explains that even according to Abaye compensation must be made for *nezek* only when there is a physical injury – e.g., a broken hand – even though that injury is temporary. That is to say, even according to the viewpoint of Abaye we do not include in the framework of compensation for *nezek* the fact that the injured party will be bed-ridden for several months, but there is compensation for an injured limb even though that injury will eventually heal. It turns out then that the questions that we raised regarding separating the loss of work potential from the assessment of depreciation are valid even according to the viewpoint of Abaye, only that according to him this is only true regarding loss of work potential, but not for temporary injuries.

On the face of it, given a perfect market place, the amount to be paid according to Abaye for *nezek* and *shevet* together should be identical to the sum to be paid according to Rav for *shevet* alone.[[3]](#footnote-3) Slave buyers would deduct from the price that they would pay had the slave not been injured the value of the coming months during which the slave will be unable to work. This is the sum that Rava would give as *shevet*. Abaye would split this amount and calculate only the sum that they would deduct for the loss of the hand during this period, and this amount would be compensation for *nezek*, and in addition the person who caused the injury would pay for the injured party's *shevet* as a *shomer kishu’in*, this being liability for *shevet*. The Tosafot, however, point out that this is not the case in practice:

S*hevet* that [temporarily] renders the injured person of less value, what is it? For example, where he struck him on his arm and the arm was broken but will ultimately recover fully. [What is the law?] For besides the *shevet* each day until he recovers, there is a diminishment of his value, as people are not experts to see whether his hand will ultimately recover fully, and they will not enter themselves into an uncertain situation to buy him as one who is healthy and in control of his two hands, and they will think that he will never recover. But regarding a matter that we know will ultimately recover fully, Abaye agrees that he only pays him for his *shevet* each day.

The Tosafotpoint to a psychological tendency to excessive pessimism. Many buyers would assume that the incapacitation will not come to an end in the foreseeable future, and would not want to buy such merchandise. There is then during the period under discussion a depreciation in value. The plain sense of their words implies that in such a situation people would be willing to pay the price of a slave with an amputated arm (and according to this it would seem that a person who cuts off a broken arm would be **exempt** from compensation for the *nezek*). The *nezek* that must be paid in addition to the *shevet* according to Abaye is the entire gap that was created in the market value, despite the fact that in a short while the injured party will recover and will appear like top-quality merchandise, because the law of compensation for *nezek* is determined according to the depreciation in market value at the high point of the damage.

But the most novel point in the words of the Tosafot lies in their halakhic assertion that in the case of an injury that they know will recover fully, Abaye would agree that we only impose liability for *shevet*, with a practical ramification according to those who maintain that compensation for *nezek* is a *kenas* (penalty), whereas liability for *shevet* is a *chiyuv mamon* (monetary obligation). The matter requires explanation – if indeed Abaye recognizes a temporary injury as an injury, why is this limited to the situation in which there is distortion in the market place?

It is possible that we are dealing with additional proof for the approach of the Ramban, that as a rule temporary injury is not included in *nezek* resulting from the injury, but only in *shevet* (at least in those situations when liability for *shevet* is possible). According to Abaye, when there is a temporary injury for which there is no compensation in the framework of *shevet*, it is recognized as *nezek*. However, we are not dealing with a real financial loss for the injured party. He was not going to sell himself, and the only real financial damage from his perspective is his loss of work potential. However, since we view a person's body as an asset with economic value, for which compensation must be offered when that value is diminished, when there is a temporary injury that will find no expression in *shevet*, it is included in the framework of *nezek*. But when the injury will receive identical compensation in the framework of *shevet*, there is no justification for deviating from the general rule regarding *nezek*, that it does not include temporary injury.

### II. but if he made [the other] deaf, he must pay for the value of the whole of him.

Rava said: If he cut off [another's] arm he must pay him for the value of the arm, and as to *shevet*, the injured person is to be considered as if he were a *shomer kishu’in*; so also if he broke [the other's] leg, he must pay him for the value of the leg, and as to *shevet* the injured person is to be considered as if he were a door-keeper; if he put out [another's] eye he must pay him for the value of his eye, and as to *shevet* the injured person is to be considered as if he were grinding in the mill; but if he made [the other] deaf, he must pay for the value of the whole of him.

It is not clear why the Gemara relates to a deaf person as one who has lost all ability to work, so that he may be likened to a person who is dead. As it follows from the continuation of the passage that will be discussed below, this is not only a stringency imposed on the *chovel*, but also a stringency imposed on the *nichval* regarding the four payments in addition to *nezek*. Even with respect to the *nezek*, if a person made another person deaf in a case of *ones* (circumstances beyond his control), according to the view that a *mazik* is exempt in a case of *ones*, anyone who at some later point inflicts an injury upon the deaf person, severing his arm or taking out his eye, will not be liable for *nezek*, because he caused an injury to a body that has no economic value. Why then does a deaf person lack all monetary value?[[4]](#footnote-4)

The Tosafot Rid(ad loc.) understands that he is like an idiot who has no intelligence. But this is difficult, for a person who is not deaf from birth, and can even talk, does not fall into the category of an idiot, and he is not "the deaf person about whom the Sages spoke in all places" (*Teruma* 1:2). The Tosafot (s.v. *chersho*) raise the objection that the Gemara in *Arakhin* (2a) implies that a deaf person has the value of a slave that is sold in the market place. Rabbeinu Tam distinguishes between a person who is deaf by way of an act of God, who has financial value, and a person who is deaf by way of a human act, who has no such value. I do not understand the distinction.

The Ri, in contrast, distinguishes between a deaf person who has a trade and is capable of working, and a deaf person who has no training, and is incapable of doing odd physical jobs (this too is difficult). The Tosafotin *Arakhin* (2a, s.v. *cherish*) explain that only a deaf person who can recover has monetary value. Rabbeinu Yehonatan, cited in the *Shita Mekubetzet* on our passage, explains that the law that "if he made [the other] deaf, he must pay for the value of the whole of him," was said only after his arm was cut off, his leg was broken and his eye was taken out. In such a case the deafness is the final blow that leaves the injured party with no additional work possibilities.

The Ra'avad in his novellae adopts a different approach: "If he made him deaf, he is worth nothing, because he is loathed and not hired for anything." The Ra'avad assumes that a deaf person's market value is zero, as nobody would be interested in buying him. Accordingly, **even though he is capable of working,** the rule that the injured party is evaluated like a slave that is sold in the market place decides the matter, and leads to the conclusion that a deaf person has no monetary value, for leniency and for stringency. The ramifications of this idea for the other payments will be discussed below in the framework of the Ra'avad's explanation of the continuation of the passage.

It should be noted that the Rosh (sec. 5) agrees with the Ri who distinguishes between a deaf person who has a trade and one who lacks a trade. The Rosh writes that regarding a deaf person with a trade, "he does not pay him his entire value, but rather we evaluate how much [the injured party] was diminished in value." A difficulty arises here, for as we saw in the previous *shiur*, the Rosh in sec. 4 maintains that even though the *nichval*'s *nezek* is determined in accordance with his profession, that is only to add to his assessment, but not to reduce it so that he would be entitled to less than an unskilled worker. According to what he says here, it turns out that the deaf person suffers a loss because of his trade and is not entitled to his entire value.[[5]](#footnote-5)

Perhaps it might be suggested that paying the deaf person his entire value constitutes an exception to the general principle of assessing the damage in accordance with the loss in value. The assumption that he will not be able to work in a reasonable manner interferes with the "normal" assessment of the depreciation – we are not dealing here with a total impairment of his basic physical capabilities, but a special consideration based on the absence of reasonable employment opportunities. Therefore, when there are employment possibilities, this consideration is not valid, and there is no room for the argument that a person with a trade should not be forced to suffer a loss, because we are not dealing with the fundamental layer of physical capabilities that were impaired. Nevertheless, what I have proposed here requires further study.

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

1. See Yam shel Shelomo, no. 14: "The law of an idle worker, that is, with respect to the work from which he is idle. We see how much he would take to remain idle, this depending on the type of work. For there is difficult work, the wage for which is low, in which case he would take a small amount of money to remain idle; and there is easy work, the wage for which is high, and he would have to be given a lot of money to remain idle. [↑](#footnote-ref-1)
2. See the distinction proposed by the Yam shel Shelomo, no. 14. [↑](#footnote-ref-2)
3. Let us assume for the purpose of our discussion that the hand will recover at a time that the injured party will be able to go back to work. In practice, the injured party will presumably be able to return to work as a watchman of cucumber beds even before his broken hand is restored to its previous condition, and this must be considered in the framework of determining the *shevet*. [↑](#footnote-ref-3)
4. Moralists mention this Gemara as an expression of the sense of hearing's superiority over the other senses (see Rabbeinu Yona's *Sha'arei Teshuva*, II, 12; Rabbeinu Bachye, *Kad ha-Kemach*, *Zenut ha-Lev ve-ha-Ayin*; *Shela*, *Parashat Ekev*, *Torah Or*, no. 21). But they do not explain why a deaf person is regarded as lacking all monetary value. [↑](#footnote-ref-4)
5. The Levush (420, 25) writes in this context: "He pays him his entire value if he does not have a trade, but if he has a trade and is still fit for that trade, we see how much he has diminished in value and award him that sum, provided that he does not suffer a loss owing to his trade." I don't understand how he doesn't suffer a loss because of his trade if he loses his entitlement to compensation for his entire value. [↑](#footnote-ref-5)