YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**GEMARA BAVA KAMA 5771**

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

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.

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**SHIUR #11: Hezek She-eino Nikar**

**Based on shiurim by Rav Moshe Taragin**

The gemara in Bava Kama (5a) raises the issue of hezek she-eino nikar in light of R. Oshaya and R. Chiya's respective lists. Hezek she-eino nikar (1) refers to damages that are non-physical or non-tangible. For example, instead of burning someone else's fruit, a person uses them in the ritual service of avoda zara, thereby rendering them forbidden. He has caused damage to the owner of the fruit in that the latter can no longer use them. However, he has not inflicted direct physical damage on another's property.

The gemara questions why R. Oshaya does not include the category of hezek she-eino nikar - after all R. Chiya listed three examples: one who impurifies another's teruma (metameh), one who mixes teruma with chulin (medameh) and one who sacrifices items to avoda zara (menasekh) thereby rendering them "forbidden." Why does R. Oshaya not list these forms of damage as well?

 The gemara responds as follows. There is a debate whether hezek she-eino nikar is considered real damage, carrying primary liability. This issue is debated by the gemara in Gittin (52a). According to one opinion, "hezek she-eino nikar shmei hezek" – non-physical damages are considered real forms of damage and are subject to reparations. According to the alternate opinion, "lav shmei hezek" - they are not considered payable on a Biblical level. However, the Rabanan levied fines to prevent people from exploiting others through this form of damage.

Our sugya in Bava Kama justifies R. Oshaya's exclusion of hezek she-eino nikar as follows: If R. Oshaya considers it to be real damage, there would be no need to list it separately (having already listed standard physical damages). Alternatively, if R. Oshaya does NOT regard it as "real" damage, there is no reason to list it. Even though the Rabanan instituted payments for this non-physical damage, such payments would be considered Rabbinically-ordained "fines," which R. Oshaya admittedly did not list.

 At this stage attention is turned to R. Chiya who DOES list hezek she-eino nikar cases distinct from standard hezek. Does this indicate that he ruled that non-physical damage is not REAL damage and not payable Biblically (based instead on Rabbinic fines) and hence deserving of separate mention? Had he decided that hezek she-eino nikar were indeed authentic damage, listing them alongside standard hezek would be redundant. The gemara responds that even R. Chiya could conceivably rule that such hezek IS defined as standard hezek and payable. He merely listed two VARIETIES of authentic damage – discernible and invisible (non-physical).

**Standard Hezek and Eino Nikar**

 This debate leaves much to be discussed. Both R. Chiya and R. Oshaya's lists were probed for their respective positions regarding non-physical damages. This shiur will address one specific issue - how did these Amora'im view the Rabbinic fine? Assuming that these forms of damage are not Biblically payable and the Rabanan merely instituted a fine – what is the resulting nature of these payments? This issue might be reflected by the "proximity" or relationship between standard hezek and non-physical forms.

 What did the Rabanan institute? Did they levy a fine to prevent abuse through these non-physical damages? Or did they REDEFINE halakhic "nezek" to include non-physical forms? Indeed, mi-de'oraita only physical destructive acts are defined as hezek. The Rabanan broadened the category of halakhic damage to include all varieties. This question has many manifestations.

The gemara in Bava Kama 117a suggests that the Rabanan imposed payments only in cases of significant financial loss. Had they redefined hezek she-eino nikar as halakhic damages, this distinction would not be acceptable. Real hezek payments are made regardless of the value of the damages. If the Rabanan confer hezek she-eino nikar with the status of Rabbinic damage, liability must be universal. Possibly this gemara viewed their takana (enactment) less as a redefinition of the nature of damage and more as a selective fine.

A second opinion regarding the selectivity of Rabbinic payments can be found in the Ra'avad's comments to Bava Kama (98a). The gemara discusses one who rubs off the image embossed on coins. He too has caused "abstract loss" (since the currency is no longer usable), but no physical damage to the metal weight. The gemara excuses payment since it is a form of hezek she-eino nikar. The Ra'avad asserts that at least rabbinic payments should be rendered. He concludes that since such cases are uncommon (eino shakhi'ach) no payments are required. Here too, we witness selectivity in obligating payments. Such qualification would only be consistent with the position that the rabbinic takana is an extra-halakhic fine intended to prevent exploitation. In infrequent cases no takana was ever enacted. If however, the Rabanan redefined the structure of hezek, such limitations would be illogical.

Our sugya itself might contribute to this debate. R. Chiya, by listing hezek she-eino nikar, automatically affixes to it the meitav clause (2). Like standard hezek, someone who inflicts non-physical damage must make payments from meitav. The gemara seemed comfortable with this rule, even if R. Chiya would hold that hezek she-eino nikar carried only a Rabbinic liability. Does the fact that the Rabbinic obligation has to be rendered from meitav indicate that the Rabanan indeed redefined this as authentic hezek? If it were merely a fine to protect abuse, would meitav apply? The comments of the Ra'avad are illuminating: Since the Rabanan fined the perpetrator AND DEFINED IT AS MONETARY DEBT, whatever they decreed they fashioned similar to the Biblical system (kol de-takin rabanan ke-ein de'oraita takin). This statement seems to attribute the meitav rule to a fundamental similarity between Biblical payments for standard hezek and Rabbinic payments for hezek she-eino nikar. The Rambam's explanation of this meitav rule is also revealing. In Hilkhot Chovel U-mazik 7:2 he writes that payment must be made from the choice lands "as is the rule for all who cause damage." This last clause seems to ascribe the meitav rule to a structural parallel between classic hezek and eino nikar subsequent to the Rabbinic decree.

Of course, this aforementioned suggestion of the Ra'avad must be reconciled with his comments to BK 98 that hezek she-eino nikar payments are rendered only for frequent forms of damage. This would indicate that the Rabbinic payments are selective and do not comprise "real" hezek. If so, why are they paid in meitav? It would appear as if the Ra'avad provides conflicting signals regarding the Rabbinic decree of hezek she-eino nikar.

In truth, the gemara's analysis of R. Chiya's list is somewhat revealing. The gemara was very accepting of R. Chiya's separate listing of hezek she-eino nikar, ASSUMING it was only a Rabbinic payment. As such, R. Chiya was justified in listing it as a separate category from physical hezek. If indeed the Rabanan redefined eino nikar as real halakhic hezek, would R. Chiya still be warranted in listing it separately from classic hezek? Indeed it is different in as much as it is only rabbinic; but structurally it is very similar to classic hezek and could possibly be subsumed within classic hezek without requiring separate mention.

The gemara does not determine R. Chiya's position vis-a-vis hezek she-eino nikar. However, it is very comfortable assuming he holds "lav shmei hezek" and the Rabanan required payments. If this were true, our gemara presents a bit of an enigma: on the one hand meitav payments akin to standard hezek are required, yet this form of hezek is listed separately from classic hezek.

**Other cases?**

One final question emerges from our sugya regarding hezek she-eino nikar and the rabbinic decree. Can the rabbinic payment be imposed in any and every case of hezek she-eino nikar? Or can we only apply it to the specific cases which the Rabanan stipulated (metameh, medameh and menasekh)? The gemara in BK 117 already excluded payments for minor losses. What about different scenarios of formidable loss? If the Rabanan defined non-physical damage as authentic, we would apply these payments "across the board." If, however, they levied fines, we would possibly be more minimalist in imposing fines ONLY in cases they initiated. Certainly, the Ra'avad's initial thought to extend payment to one who defaces currency implied the freedom to apply hezek she-eino nikar to cases which the Rabanan did not explicitly mention. Of course, he ultimately rejected that extension because this case was uncommon and not addressed by the Rabanan. The Rambam (Chovel U-mazik 7:2) added that payments are made for non-physical damages such as the three stipulated in Gittin – "as well as any smaller cases." This last clause would seem to give the green light to possibly extending the payments to cases not mentioned by the Rabanan.

This question returns us to R. Chiya as well. By stipulating these three cases of hezek she-eino nikar as paying meitav, did he intend to exclude other cases? R. Chiya was obviously very exact in his numbering system. The three instances he mentioned are halakhically identical in terms of payment and meitav. Why did he mention three and allow his list to balloon to twenty-four? See Tosafot (s.v. Ve-katani) who was troubled by this issue. Could R. Chiya have been suggesting that only these three cases carry Rabbinic payment and meitav to the exclusion of other cases? This would obviously affect the nature of the rabbinic institution.

Endnotes:

1. The terms hezek and nezek can be used interchangeably.

2. Meitav refers to payments made from one's best lands. We will deal with this issue in a future shiur, IY"H.

Sources for next week's shiur - The Structure of Avot:

Note: This shiur which will deal with the structure of avot must be understood in light of several gemarot throughout the first 6 dapim. The mekorot therefore span several of these gemarot. Hopefully, future shiurim will be more bounded by the actual dapim which the shiur has "reached."

1) Mishna 2a, gemara 5a "Mai ka-amar ... sichsicha avanav (6b) ve-chazar ha-din.

2) Tosafot 5b s.v. Le-hilkhoteihem.

3) Rosh BK 1:1 "Ha-tzad ha-shaveh ... ba-davar.

4) BK (28a) Mishna, Gemara ... Mammono hu; Rashi s.v. Aval; Tosafot BK (3b) s.v. Mishoro; Ra'avad (28b s.v. Ve-rav "ih nami ... end of the piece.

Questions:

----------

1) Had the Torah only written bor and another av (5b) and we had deduced the remainder from those two - how would the structure of avot have been affected?

2) Could you provide an alternative answer for the gemara's question as to why the Torah enumerated each av independently?

3) Could something be 'chayav' to pay without being specifically designated as belonging to a particular av?

4) How can we explain the phenomenon of a tolada being more severe than an av?