YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA KAMA 5771**

**Shiur #25: '*Mah she-neheneit*.'**

**By Rabbi Moshe Taragin**

The past two *shiurim* addressed the nature of the *shein* and *regel* exemption in *reshut ha-rabim*. The details of this halakha are 'scattered' throughout the gemara (19b-21b). At this point we will return to a topic addressed by the gemara earlier (20a-21a) - the obligation to pay '*mah she-neheneit*.'

The mishna (19b) already informed us that in a situation in which the *reshut ha-rabim* exemption applies, the owner of the animal is not pardoned completely. Though he is excused from compensatory payments of *shein*, he still must render a form of payment known as *mah she-neheneit* - literally to pay for his benefit. After all, his animal ate the food belonging to another and the owner of the animal was thus spared of feeding his animal that night. Even in the absence of *mazik*-type payments, he is still obligated to pay for the benefit he received.

The ensuing gemara (20a) broadens this discussion to one who lives upon another's field without the owner's permission. Though he never agreed to pay rent and is therefore excused from that payment, he must still pay a 'secondary' fee for the benefit he received (not having to rent an alternate lodging). The gemara is more specific than the mishna in establishing the terms and conditions of this form of payment. Without question, if the recipient benefited (he would have actually rented an alternate site instead of 'sleeping on the street'), and the victim suffered financial loss (he would have rented the site to another), payments must be made; this case is termed *zeh neheneh* (he benefits) *ve-zeh chasser* (and the other loses), and payments are certainly obligated. Alternatively, in the opposite extreme, if the recipient of the service did not benefit financially (he would not have rented an alternate site), and the victim did not suffer (he wasn't planning on renting his house in any event) - a scenario known as *zeh lo neheneh ve-zeh lo chasser* - no payments are obligated. The gemara then addresses a case of *zeh neheneh* (the recipient benefits) *ve-zeh lo chasser* (the victim doesn't suffer) and wonders about the halakha, citing several cases in an attempt to infer the ruling. How are we to understand the gemara's debate?

We might suggest the following approach. As stated earlier, if the recipient benefits while the victim suffers, payments are unquestionably obligated. What requires these payments to be made? Are we to assume that a person must pay for his financial benefits even if he is not obligated to formally pay as a *mazik* or a renter? Halakha offers many forms of obligation. Even if through various loopholes a person is excused from these payments, if he benefits he must still pay for his *HANA'AH*. After all, the mishna, discussing someone exempt from *shein* *ha-mazik* payments, termed these payments '*mah she-neheneit*.' If, indeed, we determine that the payment stems from his *hana'ah* we would likewise obligate payment in the gemara's example of *zeh neheneh* *ve-zeh lo chasser*. Why should the absence of loss on the part of the host mitigate the obligation of the beneficiary?? Just as *zeh neheneh* *ve-zeh chasser* (benefit from loss) warrants payment, so should, in theory, *zeh neheneh* *ve-zeh lo chasser* (vicarious benefit).

Alternatively, we might concede that the obligating factor of *zeh neheneh* *ve-zeh chasser* (benefit from loss) was not the gain of the recipient but rather the loss of the host. The Torah establishes payments to cover specific scenarios of financial loss - *mazik*, *ganav*, shomrim etc. Even if an individual evades these payments he must still compensate overall loss. The *mechayav* (obligating factor) might have been the loss of the host. If this were true, we might not expect payments in a case of *zeh neheneh* *ve-zeh lo chasser*. In the absence of this loss we might not anticipate payment.

In other words, the gemara's halakhic query regarding *zeh neheneh* *ve-zeh lo chasser* might reflect a broader issue: how we understand the nature of the obligation of *zeh neheneh* *ve-zeh chasser*.

In truth, we might illuminate this issue by addressing the fourth example, which, ironically, was ignored by the gemara. The gemara discusses benefit from loss, benefit without loss and lack of benefit and lack of loss. What about loss without benefit? If someone who is not dependent upon a rented house lives on a plot which is 'up' for rent (*zeh* *LO* *NEHENEH* *ve-zeh chasser*) would payments be obligated? The Rishonim debate the issue. The Rif claims that payments are obligated, while Tosafot disagree and excuse the 'beneficiary' (who didn't legally benefit since he wouldn't have otherwise rented) from payments. Assuredly, Tosafot views the obligation of the mishna as one stemming from the benefit of the recipient. As such, an obligation can exist only if he received halakhic benefit. If however, he acquired no benefit EVEN though his host suffered a loss, he is excused from payments. Alternatively, the Rif probably viewed the obligation as stemming from the loss of the host. As such, even if the recipient did not actually benefit - since he was responsible for the loss he must render payments.

SUMMARY: We have indicated two ways of understanding this subsidiary obligation known as *mah she-neheneit*, cited in the mishna for someone exempted from *shein* payments. Either the chiyuv stems from the benefit received or from the loss absorbed by the host. The two ramifications of this question would be loss without benefit and benefit without loss. The Rishonim differ as to the former case while the latter case is investigated by the gemara.

Though this analysis is suitable for the introductory section of the gemara, (which presents *zeh neheneh* *ve-zeh lo chasser* as an open question), it seems insufficient to explain the conclusion of the gemara. Ultimately, the gemara rules that *zeh neheneh* *ve-zeh lo chasser* is patur (exempt). If so, hasn't loss been confirmed as the root of the obligation? If this were the case, how might we explain Tosafot's position (again ascribing the obligation to benefit) in light of the gemara's conclusion that benefit without loss doesn't obligate payment?

We might be forced - at least according to Tosafot - to offer a different explanation for the lack of liability in cases of benefit without loss. Even if benefit sits at the heart of this obligation (and hence according to Tosafot, in the absence of benefit no payment is made even if the host suffers a loss), we still might require a loss to obligate payment for that benefit. If I gain without any corresponding loss on the part of the party from which I benefited, can I really be considered one who benefited on another's account? If I view your painting and derive pleasure - have I benefited FROM you? Can I be forced to pay for incidental benefit which I received which in no way affected you? Even if you might have the right to prevent such benefit, if I seize it without your permission can I be forced to pay for that benefit? Tosafot might have reasoned that indeed BENEFIT and not LOSS generates this subsidiary chiyuv. As such, they claim that loss without benefit will not obligate payments. However, if absolutely no loss occurs, the benefit received is merely incidental and does not demand compensation. Hence, the gemara concludes that *zeh neheneh* *ve-zeh lo chasser* does not warrant payment.

Essentially, we have determined two different functions for the financial loss of the host. According to the Rif, the loss itself obligates compensation (and hence, loss without benefit also obligates payment whereas benefit without loss does not). Alternatively, according to Tosafot benefit forces payment as long as it impacted in some way upon another.

The different roles of loss can be viewed by an interesting gemara (21a) regarding one who lives in another's house. Even if we conclude that benefit without loss carries no obligation, someone living in another's house must pay since he blackens the walls by living there. In effect, even if the host did not plan to rent his house, the tenant inflicted some loss. What the gemara does not indicate is how much must the tenant pay. According to the Rama (cited in the *Nimukei Yosef*), only the trivial amount which was lost by the darkening of the walls requires compensation. Intuitively, this position is quite logical since the tenant is simply compensating the loss suffered by the host. By contrast, the Rashba claims that the tenant. Based upon his slightly blackening the walls, must pay for the total benefit he received. This value could potentially greatly supersede the amount of loss which the owner suffers!!

In effect, the Rashba and the Nimukei Yosef might be debating the function of loss within the overall obligation. As opposed to our initial suggestion, all positions demand loss, and in the absence of such loss (a case of *zeh neheneh* *ve-zeh lo chasser*) no obligations exist. However, what still remains to be determined is whether the loss itself obligates, or the benefit, but PROVIDED that benefit inflicts some loss upon the host. If the loss itself generates the obligation, we would expect the compensation to equal the value of the loss absorbed. Alternatively, if we take the benefit as the trigger of the debt (provided of course that some loss exists), we would certainly expect the payment to be assessed in terms of the benefit - even if that value exceeds the value of the loss. The Rashba and the Rama could have been debating the same concept which forms the cornerstone of the machloket between the Rif and Tosafot. Interestingly enough, Tosafot themselves address this question in brief (21a, s.v. *ve-yahavi*) and side with the Rashba, that payment is assessed based upon benefit and not loss. This position seems consistent with the benefit-centric position which Tosafot adopted in arguing with the Rif.

The gemara itself introduces a unique case which might also be impacted by our study of the function of loss within the chiyuv of *mah she-neheneit*. The gemara suggests that even if we were to rule that a tenant must pay for his residence, if he provides a lateral benefit to the host he is excused from such payment. The gemara notes that a lived in house has advantages over a deserted one. This 'payback' exonerates him from payment even if he inflicted direct loss to the house (by preventing the host from renting). The ability for peripheral contribution or bestowal of benefit to override loss and cancel liability might depend upon our previous assessment of the function of loss within establishing an obligation. If the loss itself obligates compensation, we might agree that if such loss were offset by positive contribution it should excuse liability. By contrast, if the loss is merely secondary and a person pays for his benefit PROVIDED that benefit comes at another's expense, we might obligate as long as the benefit wasn't innocuous, even if the recipient performed some lateral constructive role. His benefit still inflicts a loss and he should pay for his 'loss-causing' benefit, regardless of the contribution he made.

A final model which might help magnify the role of loss arises within Tosafot's discussion of the gemara in Ketubot (30b). The gemara claims that if Reuven stuffs food down Shimon's throat and the latter swallows, he is obligated to pay the owner. Ostensibly, Shimon doesn't pay as a *mazik*, since he had no control of the situation and didn't initiate an act of *hezek*. Seemingly, his only obligation stems from the *mah she-neheneit* clause. Tosafot search for the loss in this case. Once the food is caught in Shimon's throat (due to Reuven) the loss has already occurred (the food being worthless for even if regurgitated it remains unusable) and Shimon subsequently receives pleasure without any loss. Based upon Bava Kama's conclusion that *zeh neheneh* *ve-zeh lo chasser* is excused from payment, no payment should be made here.

Tosafot respond that since his ultimate benefit is the product of an earlier loss we still obligate payments. Tosafot essentially allow the loss (a necessary ingredient to payment) to occur prior to the benefit received and through the actions of a different party. Had he viewed loss as the primary generator of the obligation, Shimon would not have to render payment for Reuven's actions causing that loss. Evidently, Tosafot (as noted earlier by his excusing from payment a case of loss without benefit) assert the benefit as the primary factor creating the liability. Loss is necessary so that the benefit is capable of forcing compensation. As long as Shimon's benefit is a logical consequence of some loss it can be designated as benefit which comes at another's expense and thus obligates payment.

Having examined the function of loss within establishing liability we might focus upon a separate issue - the manner by which we assess the amount of the *mah she-neheneit* payment. According to Rabah, we assess the volume of food eaten by the animal, and the owner must only pay the value of that volume of straw. Though the animal ate barley, the owner can claim that he was only planning on feeding the animal straw. He only benefited not having to feed his animal straw and his liability cannot extend any further. Rabah seems to stress the benefit of the owner in assessing the amount paid for *mah she-neheneit*. Alternatively, Rava claims that the owner must pay for the actual barley eaten. As opposed to nezek however, in which the full value of the barley is compensated, in the case of *mah she-neheneit* we assess the lower (wholesale value) known as *seorin be-zol* (a cheaper assessment), and not full market value. Evidently, Rava views *mah she-neheneit* as a derivative of *mazik*, and the assessment schemes are therefore very similar. Clearly, if we view the loss as the primary factor obligating the payment, we would certainly recognize nezek and *mah she-neheneit* as structurally similar and we would probably adopt a similar strategy toward assessing their payments.

*Mekorot* for the next shiur in Bava Kama:

*Techilat Be-Peshiya Ve-sofo Be-ones* for *Mazikim*

I. General sources pertaining to this halakha

BM (42a) *Hahu gavra*... *ve-hilkheta techilato be-peshiya* *ve-sofo be-ones chayav*

BM (36b) *Itmar*... *hakha*

BM (88a) *mishna*, *Tosafot s.v. huchmah*

Ramban s.v.

BK (52a) *Ibaye lehu... shema minei*

# Tosafot s.v. ve-shechichi

*La'al ha-ma'or* (22b in the Rif)... *Dachuk; lefikhach ein* *kol* *zeh... acharina*

*Tosafot BK (*22a*) s.v. de-apich*

II.

BK (21b) *mishna*, *gemara* ... BK (22a) *chatzi nezek*

*Tosafot* (21b) *s.v. ha*

Tosafot Rabenu Peretz al atar

Rashba al atar

Questions:

1. How might we understand the basis of the machloket between Abaye and Rava in *Bava Metzia*?

2. Why (according to the Ramban in BM) would we require gross negligence to obligate *techilato be-peshiya* of a *shomer*?

3. In theory, should the "*machmat*" requirement apply to *techilato be-peshiya* of *Bava Kama*?

4. Why would *techilato* *be-peshiya* not apply to *Bor*?

5. Why should *techilato be-peshiya* not apply when the original *peshiya* relates to an item which is not ultimately damaged?