

NEHENE V'YORED PART I

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

INTRODUCTION

In this series of shiurim, we will discuss the topic of *yored v'neheneh*, i.e. when one must compensate another for a benefit they derived. We will try to define these terms, identify which cases are included, study some of the relevant *sugyos*, and determine the practical halacha for such cases. At the outset, we should note that the status of *neheneh*, the obligation caused by deriving benefit, within Choshen Mishpat is more ambiguous than the *chiyuv* of *geneivah*, for example. In the case of *geneivah*, the situation is straightforward: one performs an act of stealing and must return the object stolen or its value. Likewise, a partnership between two parties or an employer-employee relationship creates certain obligations or responsibilities due to the relationship, which are discussed clearly in other areas of Choshen Mishpat. But a situation of *hanaah*, as we will see, does not perfectly fit into either category.

THE DIFFERENCE BETWEEN HANAAH AND NEZEK

The Gemara (Bava Kama 112b) discusses a case of orphans whose father bequeathed them a barn with cows. The orphans assumed that all of the cows had belonged to their father, since as the Gemara states elsewhere, a halachic *chazakah* exists that any item in one's possession can be assumed to belong to him. The orphans, therefore, decided to slaughter one of the cows for food. Unbeknownst to them at the time, that cow actually belonged to someone else, and their father had recently borrowed or rented it from the owner. In this case, they are not *chayav* for *geneivah* or for their act of *nezek*, since they acted entirely legitimately in slaughtering the cow. Rather, the Gemara rules that they are *chayav* for a different category known as "*dmei neheneh*" (a monetary obligation due to the *hanaah* received). In other words, although the value of a cow is much greater than the amount of its meat when slaughtered (since it can be used to produce milk, work in the field, transportation, and other uses), the orphans only owe 2/3rds of the value of the meat, since this is the value of the benefit they derived from the cow, minus a third due to the fact that they took it without knowing they'd have to pay for it.

A similar case is mentioned in the Gemara elsewhere (Bava Kamma 20) concerning an animal in the *reshus harabim*. Although the owner of the animal is generally exempt from damages of *shein v'regel* caused by the animal in the *reshus harabim*, if the animal eats produce that belongs to someone else (e.g., strawberries), the owner only pays the value of the *hanaah* derived, i.e., the value of the fodder or other animal food that he saved due to the produce consumed. Although the value of the damage to the owner of the produce is much greater than that (since the strawberries are worth more than fodder), the owner of the animal only pays the value of the *hanaah* received, not the value of the damage.

ONE SIMILARITY BETWEEN HANAAH AND NEZEK

Although the *chiyuv* of *neheneh* is distinct from that of *mazik*, there may be some overlap between them. The Rashba (Teshuvos 4:13) and the Ketzos (C.M. 391:2) entertain the possibility that just like in all cases of wrongdoing, such as *nezek* and *geneivah*, one must pay with *meitav* (the highest-grade land) if he pays with land, perhaps in a case of *neheneh* one must also compensate using *meitav*. Although the Rashba and Ketzos conclude that a *neheneh* does not pay with *meitav*, it is evident from the very discussion that some overlap does exist between the *chiyuv* of *nezek* and that of *neheneh*. How do we understand this?

R. Baruch Ber explains (Birkas Shmuel, Kesubos) that this understanding can be inferred from a number of *sugyos* in the Gemara as well. R. Baruch Ber writes that he asked his *rebbe*, Rav Chaim Soloveitchik, to explain the Gemara's ruling (Kesubos 30b) concerning one who has meat stuffed down his throat by someone else. The Gemara states that in such a case, one must pay the owner 2/3rds of the value of the meat, since although the act of eating was involuntary, he nevertheless derived *hanaah* by eating it. But the Gemara also states that if the meat was of a forbidden fat (*cheilev*), the one who ate it is *patur* from compensation due to the principle of *kam lei*, which dictates that one only receives the more severe of two punishments for one action, and here eating *cheilev* is subject in principle to *kareis* or *malkus* (if done intentionally). R. Baruch Ber was bothered that *kam*



lei applies strictly to punishments or penalties, so why would the *chiyuv* of *neheneh* here be exempted, if it is more of a reality than one derived benefit?

Rav Chaim responded that the *mechayev* of *neheneh* here is that one “took” something from another when eating it, which does qualify as a penalty of sorts. Rav Chaim employed the formulation of Tosafos (Kesubos 56a) that *neheneh* is defined as a *chiyuv* similar to a *milveh hakesuvah baTorah* (a loan written in the Torah), meaning a financial *chiyuv* caused by a person’s action.

Rav Chaim’s source for this assertion may have been from Tosafos (Bava Kamma 101a s.v. *oh dilma*), who express a similar idea. The Gemara there posits that if Reuven’s fabric was dyed by Shimon’s dyes without anyone’s direct involvement [“a monkey did it”], Reuven is not obligated to pay him for any services. Tosafos question why Reuven wouldn’t be obligated due to the fact that he derived *hanaah* from having a colored garment? They answer that *hanaah* is defined as a person or his animal taking something, or a person himself ingesting something. Whereas, in the case of the fabric, Reuven did not take anything; he was simply given his fabric that was now dyed with Shimon’s dyes. The Shach (C.M. 391) cites this Tosafos and derives from it that the *chiyuv* of *neheneh* involves some element of taking, and as mentioned, R. Chaim developed this idea as well.

R. Shimon Shkopf (Shaarei Yosher 3:25) offers a parallel for this idea. He cites the ruling of the Gemara (Pesachim 25) that if one smells incense from *avodah zarah* while walking on the street, he does not violate the prohibition against deriving benefit from *avodah zarah* if he did not have *kavanah* to enjoy the smell. The Ran there wonders why one’s *kavanah* should matter; if he benefits from it, then he should be *chayav* for *hanaah* from *avodah zarah* either way. R. Shkopf explains the Ran’s answer that the *chiyuv* of *hanaah* relates only to taking *hanaah*, not having *hanaah*. Since “taking” something expresses ownership over it, one is only *chayav* for *hanaah* involving such “taking,” but not for *hanaah* that one has without taking. Therefore, one who merely smells while walking is not defined as having “taken *hanaah*” from the smell and is not *chayav* if he did not specifically have *kavanah* to enjoy the smell. In conclusion, although the *chiyuv* for *neheneh* is not identical to the *chiyuv* for *mazik*, certain elements of the definition of *neheneh*, such as the requirement for “taking,” do overlap with the criteria for *mazik*.

THE CHIYUV OF MISHTARSHEI

The Gemara (Chullin 131) introduces an additional *chiyuv* known as *mishtarshei*. This *chiyuv*, which is similar in a way

to *neheneh*, refers to cases where one substantively benefits monetarily from another, and can obligate him even without any *ma’aseh* of taking. For example, the Gemara there says that if the king’s tax collectors wish to appropriate a portion of Reuven’s property for taxes but mistakenly take grain that was untithed, Reuven must use other produce and take tithes against that which was taken. The reason is that Reuven’s other property has automatically benefited from the actions of the collectors since no more tax will be taken from it. This *chiyuv* of *mishtarshei* is actually more similar to *halvaah* than *neheneh* in that for both, one accrues a monetary benefit from the assets of another.

Tosafos there distinguishes between the *chiyuv* of *mishtarshei* and *hanaah* with the following *nafka mina*. With respect to *hanaah*, one is always *chayav* if he derives benefit, e.g., when consuming food belonging to someone else, even if he could have decided not to eat that day. By contrast, with respect to a case of *mishtarshei*, Tosafos says that one is not *chayav* (such as in a case where one saved money by not having to pay for a meal) if he theoretically could have fasted instead, since the *chiyuv* is for the substantive bottom-line benefit that one has. Only for that form of benefit is one responsible even if he did not “take” anything.

HOW FAR DOES HANAAH EXTEND?

As we will discuss in the next shiur, there is a machlokes in the Gemara whether one is *chayav* to compensate in a case of *zeh neheneh v’eh lo chaser* (one individual benefits and the other does not lose out), such as using someone’s house when they are not home. It’s important to note that the entire question there relates only to a case of *hanaah* where one “takes” from the other, as discussed above. Thus, using someone’s property by sleeping there is defined as “taking” and thus qualifies as *hanaah* that is subject to the discussion of *zeh neheneh v’zeh lo chaser*. As opposed to, Rav Asher Arieli explains, for example, that one stuck outside in a downpour who stops underneath an awning to protect himself from the rain is certainly not *chayav* to pay anything to the owner of the awning, since that is not defined as “taking” the awning in any way.

For this reason, the Gemara (Pesachim 25b) states that one is not *chayav* for *me’ilah* when benefiting from “*kol, mareh v’reiach*” (sounds, sights, and smells) of *hekdes* in the Beis Hamikdash. Even if one enjoys smelling the *ketores* or listening to the music of the Leviyim, one is not *chayav* for *me’ilah* since, as discussed above, through smelling or listening one has not “taken” or appropriated anything that would qualify as having taken a *hanaah*.