YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)
****

TALMUDIC METHODOLOGY
By: Rav Moshe Taragin

SHIUR #15: *RESHUT HA-RABIM* (PART 3) IS THE *MAZIK* EXONERATED BECAUSE THE *NIZAK* IS NEGLIGENT?

In the previous two *shiurim* (11metho.htm and 12metho.htm), we outlined two very different understandings of the *reshut ha-rabim* exemption for *shein* and *regel*. The Rosh claimed that the exclusion is purely formal – a Torah mandated discount for *shein* and *regel* damages. The Rif, on the other hand, claimed that the exemption is based on intuitive and logical premises: since animals typically walk through the *reshut ha-rabim* (*urchei*), we cannot obligate owners to compensate for damages that occur during normal or routine activity. The *Amaraim* themselves apparently debated this question, as they argued regarding whether location or form of consumption is the determining factor in establishing payment obligation.

Interestingly, there may be a third understanding of the *reshut ha-rabim* exemption, which is not as clearly articulated as the other two approaches but may be implied by several *gemarot*.

Perhaps the *gemara* that best reflects this new model is the discussion between Rav and Shmuel concerning the situation of *mekazeh makom* (21a). What would happen if a person unilaterally allows public passage through his property? If he positioned his items in this newly established public thoroughfare and they were damaged, would *shein* and *regel* payments apply? Shmuel claims that payments would indeed be obligated, since the legal status of this area is unchanged; the items were located in *reshut ha-yachid*, and no *reshut ha-rabim* exemption can be applied. Rav disagrees and claims that *shein* and *regel* payments are not applied EVEN THOUGH THE AREA IS STILL CONSIDERED a *reshut ha-yachid*. The owner of the animal can deflect guilt by accusing the

“victimized” owner of the damaged items, "You (the owner of the damaged items) are guilty because you positioned your items so close to a *reshut ha-rabim* (IN AN AREA OF PERMITTED PASSAGE)."

This strategy of defense is completely new – the *mazik* deflects his guilt by establishing negligence on the part of the *nizak*. If the *nizak* is (also) a *poshei'a*, the *mazik* does not have to offer payment. In the SPECIFIC case of the *gemara*, the *nizak* is negligent; even though he placed his fruits on his own property, by placing them so close to the public domain and inviting passage, he ultimately is negligent and forfeits any payments.

Based on Rav's logic, we can EXTRAPOLATE to a situation of ACTUAL RESHUT HA-RABIM – the reason the *mazik* is exempt in THAT case is because the *nizak* HIMSELF is considered a *poshei'a*! Since he knew that animals typically traverse a *reshut ha-rabim* and placed his items in harm's way, the *nizak* was negligent and bears responsibility for the ultimate damage; he is not a candidate for reimbursement.

This option of understanding the *reshut ha-rabim* exemption as based on the *nizak's* negligence in leaving his items in harm's way may have been raised by R. Zeira, who posed a question regarding a case of “*mitgalgel*,” or rolling items- (19a). The Ra'avad suggests that R. Zeira was referring to a situation in which the fruits were located in a *reshut ha-yachid* and the animal dragged them into *reshut ha-rabim* and consumed them. If this is true, the damage took place entirely in a *reshut ha-rabim*; why should there be any question regarding culpability? After all, *shein* damages in *reshut ha-rabim* are exempt, either due to a formal ruling (Rosh) or an intuitive concept (Rif). The Ra'avad (and possibly Rashi) suggests that since the food was originally located in a *reshut ha-yachid* – EVEN THOUGH THE DAMAGE TOOK PLACE ENTIRELY IN *RESHUT HA-RABIM* – payments are obligated. The implied logic is that the only reason that *reshut ha-rabim* damages are generally exempted is because the fruits were PLACED THERE NEGLIGENTLY. In this instance, where the items were positioned in a *reshut ha-yachid* but were dragged into *reshut ha-rabim* no negligence occurs and therefore no exemption applies, even though all of the damage took place in a *reshut ha-rabim*. R. Zeira may have been investigating whether the *reshut ha-rabim* exemption is based on the logic of the Rif or Rosh

or whether it is rooted in the *peshiya* of the *nizak*, and he conjured up a case that would contrast the two approaches.

A third indication that the *reshut ha-rabim* exemption is based on the negligence of the *nizak* may stem from an interesting comment of Rashi (14a). Ravina discusses a field that is owned jointly by partners, who have an understanding that each can walk their animals through the area, but only ONE can store his fruits there. Ravina claims that if the animal of one partner damaged the fruits of the partner licensed to store his fruits, the animal owner must offer payments. Most *Rishonim* are surprised by this position – if each partner can traverse the area with his animal, it should be considered a *reshut ha-rabim*, and no *shein* damages should be obligated! In fact, Tosafot are so surprised by Ravina's approach that they actually amend the text and claim that Ravina was referring to a situation in which NEITHER partner had license to transport animals. In such an instance, the invasion of the aggressor animal into an area from which it was banned can be likened to damages that occur in a *reshut ha-yachid*, and payment is obligated. If, however, EACH partner had license of animal passage, the field would be similar to a *reshut ha-rabim* and the damages exempt from payment.

Rashi, however, is not troubled by Ravina's ruling, accepting it at face value. If each animal is allowed passage, why should payments be offered?

Perhaps Ravina adopted the THIRD theory behind the *shein* and *regel* exemption in a *reshut ha-rabim* – since the *nizak* was negligent, the *mazik* is exonerated. TYPICALLY, fruits stored in public areas are considered the negligence of the *nizak*, but if the *nizak* has explicit permission to store his fruits in the area, he cannot be considered a *poshei'a.* In the absence of the *nizak's* negligence, the *mazik* pays, even though the area may be defined as *reshut ha-rabim.*

An interesting case raised by the *gemara* (23a) may also imply this third understanding of the *reshut ha-rabim* exemption. The *gemara* poses a strange situation referred to as "*pi para*" (literally, "the mouth of the cow"), and the *Rishonim* debate the exact details of this inquiry. Rabbenu Tam assumed that the *gemara* discusses a scenario in which a third party thrusts food into the

mouth of the animal, who proceeds to consume the food. Would the negligence of a THIRD party exempt the animal from damages? Presumably, the *gemara*'s question is premised upon viewing the *reshut ha-rabim* exemption as based on the negligence of the *nizak*, who placed his items in harm's way. If the *nizak's* negligence can cancel payment and obligation of the *mazik*, perhaps a third party's negligence can accomplish the same. There is certainly room to distinguish between a *nizak's* guilt and that of a third party and the respective impacts upon the *mazik's* potential payments, and perhaps this was the basis of the *gemara*'s query. However, the very suggestion of exonerating a *mazik* due to peripheral guilt is an idea that presumably underwrites the *reshut ha-rabim* exemption.