

YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

TALMUDIC METHODOLOGY

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***BOSHET* PAYMENTS**

If a person physically assaults another individual, he must render five different payments: damages, medical coverage, unemployment, compensation for pain caused, and charges for embarrassing the victim. The final form of restitution, the "*boshet*" payment, stands out as unusual, and the nature of this payment will be discussed in this *shiur*.

From the outset, it is apparent that *boshet* payments are different from the payments listed (or alluded to) in *Mishpatim* (*Shemot* 21). Most *Rishonim* derive the *boshet* payment from an independent *pasuk* in *Devarim* 25 regarding a woman who intervenes in a dispute to protect her husband. If she seizes the garment of her husband's disputant and causes embarrassment, "her hand is to be removed." Although the literal meaning suggests a very harsh punishment, the *gemara* (*Bava Kama* 28a) interprets this to refer to monetary payment (based on a *gezeira shava* to the laws of *eidim zommemim*).

Another possible source for *boshet* payments is a *pasuk* in *Vayikra* 24. In discussing the laws of personal assault, the Torah generalizes, "As he [the aggressor] inflicted upon the victim, so should be administered to the aggressor." The *Torat Kohanim* derives the payments of *boshet* based on the excess language. Even if no physical damage is inflicted (for example, if the aggressor flicked the ear of the victim or uncovered a woman's hair), payments must be rendered to abide by the principle of "*ka-asher asah, kein yei'aseh lo*."

It is striking that *boshet* payments were not included in the *pasuk* describing other restitution for *chavala*, and this distinction highlights a structural question. Does the Torah ultimately view embarrassment as an integral component of the physical attack and an element that warrants "typical"

restitution? Without a *pasuk*, we might have assumed that it was not an integral part of the assault. Since the *pasuk* DOES stipulate *boshet* payments, are we to assume that these charges stem from the act of assault? Or does *boshet* remain UNCONNECTED to the actual assault? Perhaps the Torah merely provides an INDEPENDENT apparatus to obligate compensation for embarrassing another.

The two different possible sources give very different impressions. The *pasuk* in *Vayikra* 24 appears to INTEGRATE *boshet* within the general charges for assault. The overall section describes *chavala*, and the specific *pasuk*, "*ka'asher ya'aseh kein yei'aseh lo*," seems to stretch the parameters of assault payments to include even something as general as *boshet*. By contrast, the context of *Devarim* 25 does not discuss assault charges; the scenario depicts embarrassment occurring WITHOUT associated assault. By obligating payments, the Torah may be describing an independent responsibility to reimburse for embarrassment caused.

The question of whether *boshet* payments stem from the assault proper or entail an INDEPENDENT obligation that INCIDENTALLY OVERLAPS WITH ASSAULT PAYMENTS may influence an interesting detail regarding *boshet* payments. Unlike the other four payments, which are obligated even when an assault is committed negligently, *boshet* is only mandated if the aggressor INTENDED to damage the victim. As the *gemara* in *Bava Kama* (27a) describes, if the *chovel* negligently fell off a roof and damaged another person, he must render four payments; he is excused from *boshet* payments because he had no intention to damage. If, however, he twisted his body in mid-fall and did intend to damage the person below, he remits *boshet* payments as well. Why is *boshet* different from assault charges in that it requires unique intent?

Perhaps this question is related to the previous one. If the Torah's *chiddush* revealed that *boshet* is truly an integral element of the assault, perhaps only highly conscious attacks are seen as "acts" of embarrassment as well. Since the embarrassment is contextual and does not stem DIRECTLY from the assault, it can only be considered part of the attack if the action intended the embarrassment. Unique "intent" is necessary so that *boshet* is an inherent part of the *ma'aseh nezek*.

This approach toward the need for *kavana* would explain an interesting Rashi. The *gemara* (*Bava Kama* 27a) asserts that intent to embarrass is not required as long as the aggressor had general intent to damage. Based on this allowance, Rashi extends the definition even further: even if the intent was purely for personal pleasure, the aggressor must reimburse for any embarrassment. The situation Rashi refers to concerns someone who falls from a roof, notices a person below, and intends to break his own fall by landing on the victim. Even though no belligerent intent exists, since the ACTION is a conscious one, the resulting embarrassment is viewed as a consequence of that action. Even intent to derive pleasure can define the action as a conscious one.

Interestingly, the Yam Shel Shlomo, in his comments on Rashi, disagrees with Rashi's ruling and offers a very different reason that *boshet* payments require *kavana*. Without intent, whatever embarrassment entails is not halakhically recognized as "*boshet*," halakhic *boshet* is defined as INTERPERSONAL or based upon a confrontation between two parties. If one of the parties is insulted, *boshet* payments are required. Hence, if the aggressor had direct intent to embarrass or even to damage, a confrontation has occurred and the resulting *boshet* is obligated. If, however, the person falling off a roof intended to break his fall with the victim, no direct confrontation occurs, and any resulting embarrassment is not recognized as halakhic "*boshet*."

Ultimately, the Yam Shel Shlomo argues with Rashi's ruling and introduces a novel approach toward understanding the need for *kavana*. *Boshet* is indeed an INDEPENDENT payment, unrelated to the act of assault. However, without a confrontational setting, it is not the type of embarrassment that halakha recognizes or mandates reimbursement for. The need for *kavana* DOES NOT indicate the need to integrate *boshet* as part of the *ma'aseh chavala*. *Boshet* is a stand-alone payment unrelated to the act of assault. However, without *kavana*, the *boshet* is not deemed confrontational and no payments are necessary.

An interesting (and very extreme) position of Tosafot may support the position of the Yam Shel Shlomo. The *gemara* in *Bava Kama* (53b) discusses a person who teams with an animal in shoving another person into a pit. The *gemara* obligates the human aggressor to pay for assault payments, which Tosafot assume includes *boshet* payments. Tosafot question the *boshet*

payments, since their reading of the *gemara* suggests that the aggressor who pushed the victim into the *bor* DID NOT HAVE intent to damage, and in the absence of intent, no *boshet* should be obligated.

Responding to their own question, Tosafot claim that even though the shoving occurred without malignant intent, if the aggressor NOTICES the person falling and IS AWARE that he will be embarrassed, *boshet* payments are obligated. This is an extremely novel concept, as it asserts that:

- 1) Knowledge of the embarrassment is sufficient without any intent
- 2) Such knowledge may emerge well after the act of pushing has already concluded.

It is clear from Tosafot's scenario that intent is not necessary to define the ACT as a conscious one; in this instance, the awareness was completely unrelated to the act of damage. Evidently, Tosafot believed that *kavana* was necessary solely to render the *boshet* as “confrontational;” as long as the aggressor is aware of his actions, even subsequent to shoving, the *boshet* is framed by confrontation between two parties and is halakhically actionable.