

It collapsed; that is different

נפל שאני -

OVERVIEW

The גמרא states that even according to the מאן דאמר that היזק לא שמיה היזק nevertheless if there originally was a dividing wall, which subsequently collapsed; both neighbors are obligated to rebuild the wall. תוספות will explain¹ why there is a difference whether originally there was a wall or not. Seemingly if ה"ר לאו ש"ה, there never should be an obligation to build (or rebuild) a wall!

תוספות explains: The reason they are required to rebuild the wall is -

שהורגלו לעשות דבר הצנע בחצר ולא למדו לזהר² זה מזה:
for the partners became accustomed to do private things in the חצר and they have not adjusted to be wary of each other.

SUMMARY

The היזק ראייה by a fallen wall is greater, since the neighbors are already accustomed to do much of their private work in the חצר.

THINKING IT OVER

1. Explain why נפל שאני' and תוספות רש"י reject each other's interpretation of נפל שאני'.³
2. What would be the נפק"מ לדינא between תוספות רש"י and נפל שאני'?⁴

¹ See נפל שאני' רש"י ד"ה נפל for a different explanation why נפל שאני'.

² The מ"ד ה"ר לא ש"ה agrees that ה"ר causes damage. However, he maintains that there is not sufficient damage (and he is not directly causing it) to obligate him to build a wall. The reluctant partner claims that the damaged party can use the חצר privately when the neighbor is not watching. In the case of נפל, however, that argument is undermined. The neighbor cannot now limit his use of the חצר to certain times, for he is already accustomed to use the חצר privately at all times (לא למדו לזהר זמ"ז). [In addition] this past private usage while there was a wall, may give him a certain right (חזקה) that his חצר is dedicated to be used for private matters (שהורגלו לעשות דבר הצנע בחצר). It is necessary to rebuild the wall to reinstate and protect this right. See סוכ"ד ובל"י.

³ See מהרש"א.

⁴ See בל"י אות לה.