

## **It was not necessary... only for the depreciation of the carcass** – לא נצרכא אלא לפחת נבילה

### Overview

The גמרא explained that according to the קנסא מ"ד פלגא נזקא (meaning that in reality the מזיק should be פטור and the ניזק will not receive anything), when the חצי נזק<sup>2</sup> states (not discussing the <sup>1</sup> בתשלומין (והמזיק) we are (rather we are) referencing the פחת נבילה that occurs between the time of damage and the time of going to court. This depreciation is the loss of the ניזק, and that is his contribution to the 'payment'. תוספות will explain why accepting this פחת נבילה is considered as a payment by the ניזק; if he is basically not entitled to receive any payment at all.

anticipates a question: תוספות

**אף על גב דשקיל דלאו ידידה –**

**Even though** the ניזק is **taking what is not** rightfully his; for since פלגא נזקא קנסא, the ניזק is not entitled to any payment. Why therefore does the משנה state הניזק (והמזיק) בתשלומין; for even though the ניזק suffers the פחת נבילה, however the מזיק never owed him anything in the first place! Why is it considered as if the ניזק is contributing something? He only gains!

answers: תוספות

**מכל מקום כיון דזכייה ליה רחמנא חצי נזק –**

**Nevertheless, once the תורה entitled** the ניזק to receive a ח"נ -

**חשבינן ליה דאיתיה בתשלומין מה שפחת נבילה עליו –**

**We do consider that the ניזק is contributing, in the payment process, his loss of the depreciation of the נבילה.** Once the תורה grants the ניזק a חצי נזק he is entitled to the entire חצי נזק<sup>3</sup>. Any loss of this חצי נזק (such as the פחת נבילה) is considered as payment by the ניזק -

[anticipates an additional difficulty<sup>4</sup> (which has already been resolved):]

**ולא מצי אמר ליה למזיק קרנא דתורך קבירא ביה כדפירישית לעיל [י,ב ד"ה לא נצרכא]:**  
**(And) [For] the ניזק cannot say to the מזיק, 'the horn of your ox is buried in my cow', and therefore (the horn of) your ox is causing the depreciation,**

<sup>1</sup> The ניזק also contributes to the payment (by accepting a lesser amount than he is entitled to).

<sup>2</sup> The חצי נזק which the ניזק does not receive cannot be considered his contribution, since he should not receive anything at all.

<sup>3</sup> See 'Thinking it over' # 1.

<sup>4</sup> תוספות may be bothered why is the פחת נבילה considered that the ניזק is part of the תשלומין. The ox was killed; the נבילה belongs to the ניזק. Whatever loss the ניזק incurs afterwards (the פחת נבילה), should (seemingly) be considered a loss that any person would have if he fails to protect his property. The ניזק failed to sell his ox as soon as it was killed, therefore it is his loss. Why should this loss be attributed to תשלומין of the ניזק towards the מזיק?! See following footnote # 5 and 'Thinking it over' # 2.

and you, the מזיק, should suffer the depreciation loss.<sup>5</sup> This claim of the ניזק will not be honored **as I explained previously.**<sup>6</sup>

### Summary

The ניזק is entitled to the פלגא נזקא קנסא (once the תורה awarded it to him) and therefore the loss of פחת נבילה is considered a contribution of payment on behalf of the ניזק.

### Thinking it over

1. How did תוספות view the payment of קנסא פלגא נזקא in his (initial) question as opposed to תוספות view in the answer?
2. Is there any connection between the last question (and answer) of תוספות, and the previous discussion in this תוספות?<sup>7</sup>

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<sup>5</sup> תוספות explains that this loss of פחת נבילה is considered תשלומין of the ניזק for the היזק, since the ניזק can claim that the מזיק is causing this loss for קרנא דתורח קבירא ביה. The מזיק is continually causing the deterioration of the killed ox. This loss however must be paid for by the ניזק as תוספות concludes.

<sup>6</sup> תוספות explained there that only in a case where the cow was wounded and its condition deteriorated that we say the מזיק suffers the depreciation, for the ניזק was hoping that the cow would improve. However, when the cow died, the ניזק should have sold it immediately, and if he did not, the ניזק suffers the loss.

<sup>7</sup> See בל"י אות תכה and ח"י ר"נ אות תקלג.