And upon his brother's wife – ועל אשת אחיו

Overview

The משנה states if someone was בא על אשת אחיו he is obligated to pay קנס. There are various difficulties concerning this case. She cannot be currently married for then there is a חיוב מיתת בי"ד. If she is widowed without children (with children she is no בתולה), then there is a חיוב יבום and certainly no חיוב קנס. In addition, רב פפא is of the opinion that the cases of הבא על אחותו וכו' are concerning a מפותה. Generally the קנס of an אנוסה ומפותה belongs to the father (unless she is a יתומה etc.). If she was once an ארוסה, the קנס belongs to her (according to one opinion). However, a מפותה herself can never receive payment; for since she consented, the קנס is assumed to be נמחל. How can this case of הבא על אשת אחיו be justified? She is a מפותה (according to רב פפא), she was once an ארוסה (אשת אחיו) so קנסה לעצמה, however, a מפותה receives no קנס לעצמה. Our תוספות will discuss these issues.

פירש רבינו חננאל דפריך בירושלמי אשת אחיו ולא יבמה היא לו וזקוקה לו –

The ר"ח explained that the ירושלמי תלמוד **asks;** the משנה mentions **that הבא** על pays קנס, how can that be; **is she not his יבמה?! And** therefore **she is bound to him** to receive either יבום or חליצה -

ומה קנס וכרת שייך בה –

And how is the concept of either **קנס or כרת applicable by her.**[1]

ומשני בשיש לו בנים מאשה אחרת ואיירי במת מן האירוסין –

And the ירושלמי **answered that** her husband (the brother of the מאנס) **had children from another wife** (which removes the זיקה of יבום) **and** the משנה **is discussing** a case where her husband **died while** they were **betrothed** before the נישואין, so she is still a בתולה.

The ר"ח comments on this ירושלמי:

והוא הדין דהוה מצי לאוקמה כשגירשה –

And in fact the ירושלמי **could have similarly established** the משנה in a case **where she was divorced** from her husband (מן הארוסין). In that case there is no יבום.[2]

תוספות asks a question:

וקשה לבינו יצחק בן רבי אברהם לרב פפא –

And the ריב"א has a difficulty; according to רב פפא -

דמוקי הך מתניתין במפותה בפרק בן סורר (סנהדרין דף עד. ושם) **תקשי דהיכי מצי לאוקומי הכי –**

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[1] The ירושלמי is assuming that since the case of אחות אשה is (only) כרת as the משנה states, she cannot be currently married to his brother (for then there would be a חיוב מיתת בי"ד), and she also has no children (for then she would not be a בתולה [and ineligible to receive קנס]). Therefore her husband must have died childless; in which case she is זקוקה ליבום.

[2] See רש"י ד"ה ועל אשת אחיו. See 'Thinking it over # 1.

who establishes in פרק בן סורר that our משנה (of הבא על אחותו וכו') **is discussing a seduced** woman (only, and not an אנוסה[3]), **there is a difficulty, how can he establish** the משנה **in such** a situation of a מפותה -

דהא נתארסה ונתגרשה קנסה לעצמה[4] (נקמן דף לח.) וכיון דלעצמה מפותה אין לה קנס –

For the rule is that a נערה **who was** previously **betrothed and divorced** and subsequently violated **she receives her קנס**[5] (and not her father as is the usual case). **And since it is hers** and she is a **מפותה she receives no קנס -**

כדאמרינן בגמרא (נקמן מ.) ובריש נערה[6] משום דמדעתה עבדה –

As the גמרא states further, **and in the beginning of נערה** פרק that a מפותה receives no קנס (when it is due to her, and not to her father), since **she did it with her consent[7].** רב פפא maintains that the case(s) of (הבא על אחותו and) הבא על אשת אחיו וכו' is concerning a מפותה. There is קנס by a מפותה only when it is paid to the father. The case of הבא על אשת אחיו is concerning a woman who was divorced or widowed (מן הארוסין). A woman who was נתארסה וכו' receives the קנס herself; it is not paid to the father. How then can רב פפא establish the case of הבא על אשת אחיו by a מפותה; there will be no קנס paid to this מפותה!

תוספות anticipates a possible solution (and negates it):

וכי תימא דקסבר תנא דמתניתין כרבי עקיבא דברייתא[8] דקנסה לאביה הוי –

And if you will say that (according to רב פפא) **the תנא of our משנה** (who awards a קנס to אשת אחיו) **agrees with ר"ע of the ברייתא** who maintains **that the קנס** of a נערה שנתארסה ונתגרשה **belongs to the father.** This would resolve our difficulty; since קנסה לאביה, then we can discuss a מפותה (as well), for if קנסה לאביה then the father of a מפותה always receives the קנס.

תוספות negates this answer:

אם כן אכתי תיקשי ליה סיפא דקתני (שם לו:) הבא על בתו פטור –

For if this is so (that the משנה is following the view of ר"ע דברייתא that קנסה לאביה [even if נתארסה וכו']), the **סיפא** of our משנה **is difficult according to** the תנא;[9] **for the משנה states that הבא על בתו is exempt from קנס,** and the משנה gives the reason -

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[3] See the גמרא there that there is a difficulty with the מאנס paying קנס; since he is ניתן להצילו בנפשו.for being רודף אחר הערוה he should be פטור מקנס on account of קם ליה בדרבה מיניה.

[4] This is the view of ר"ע in the משנה there. She is considered to be independent of her father in this respect after her אירוסין (וגירושין).

[5] This is derived from the פסוק (דברים [תצא] כב,כח) אשר לא אורשה.

[6] דף מב,א.

[7] It is considered as if she was מוחל the קנס. See 'Thinking it over # 2.

[8] דף לח,א. The גמרא there (ע"ב) says that there are תרי תנאי ואליבא דר"ע.

[9] The סיפא is difficult to understand; how can there be a חיוב קנס by בתו על הבא. The קנס belongs to the father anyway. If we would maintain that by נתארסה קנסה לעצמה, then we could explain the סיפא of בתו in a case of נתארסה. See (הארוך) מהרש"א [that we need not necessarily maintain that the סיפא is only by a מפותה (see commentary on the margin of תוספות)] and סוכ"ד אות עד. However now that the רישא maintains that even נתארסה קנסה לאביה, so תוספות assumes the same would apply to the סיפא of בתו על הבא that even if קנסה לאביה.

משום דקם ליה בדרבה מיניה -

because he receives the greater punishment of מיתת בי"ד. If however we maintain that קנסה לאביה, why is it necessary to give the reason of the פטור on account of קלב"מ -

תיפוק ליה דקנסה לאביה הוי -

We can derive that the father is פטור from קנס **since the קנס belongs to the father** (whether נתארסה or not)**;** there can be no obligation for one to pay himself. There is no need to mention קלב"מ.

תוספות anticipates and negates a possible solution. We cannot say that we maintain that קנסה לעצמה[10] (and that will explain why the פטור is only because of קלב"מ) -

דאי לעצמה תיקשי ליה דמחלה -

For if the קנס belongs **to her,** (and we are discussing an ארוסה [לאחר שאנתארסה]) there is the difficulty in the רישא (by הבא על אשת אחיו) **that she forfeited** the קנס with her consent. If we maintain קנסא לאביה then the סיפא is difficult, why do we need the פטור of קלב"מ; if we maintain קנסא לעצמה why is there a חיוב קנס by הבא על אשת אחיו, for since she is a מפותה (according to רב פפא), there is no חיוב קנס.

תוספות continues that (even if we maintain [with great difficulty] that the רישא is of the opinion that קנסא לאביה and the סיפא maintains קנסא לעצמה, nevertheless) if we maintain that the רב פפא is referring both to the רישא and the סיפא, that in both situations we are referring only to a מפותה, then there is a greater difficulty:

וממה נפשך תקשי סיפא -

And in any event סיפא of הבא על בתו **is difficult** according to ר"פ **whichever** way **you choose** to interpret the משנה. If קנסה לאביה then there is no need for קלב"מ since it belongs to the מפתה; if קנסה לעצמה (for it is a case of נתארסה), then by a מפותה there is no קנס. Why does the משנה state that הבא על בתו has no קנס because of קלב"מ, when there are much simpler reasons?!

To summarize: רב פפא maintains that our משנה that is מחייב קנס for חייבי כריתות (including הבא על אשת אחיו) is concerning only a מפותה. In the case of אשת אחיו, she was נתארסה וכו'; in which case קנסה לעצמה (according to ר"ע דמתניתין). A מפותה is מוחל her קנס. How can there be קנס by אשת אחיו?! The alternative is to (reluctantly) presume that our משנה follows ר"ע דברייתא that בנתארסה the קנס is לאביה. Therefore he collects the קנס by אשת אחיו. However if we assume that our משנה maintains קנסה לאביה by נתארסה it should be assumed that the סיפא of the משנה also maintains that by נתארסה קנסה לאביה. This would present a difficulty in the סיפא (even if it is discussing an אנוסה) where it states that הבא על בתו is פטור מקנס since קלב"מ. This סיפא is difficult; it should be obvious that הבא על בתו is פטור from קנס (even) without קלב"מ! Who should pay the קנס to whom?! The קנס belongs to the father who was the מאנס! However if we were to maintain that בנתארסה קנסה לעצמה then we could have explained the case of הבא על בתו is when she was נתארסה וכו'. The משנה teaches

[10] The סיפא is discussing בתו who was נתארסה וכו'; the רישא and סיפא will follow the תרי תנאי אליבא דר"ע, respectively.

that since קלב"מ the father is פטור from paying the daughter the קנס. The סיפא must maintain קנסה לעצמה while the רישא maintains קנסא לאביה. This is difficult to assume.[11]
In addition if we assume that according to רב פפא, the סיפא of בתו is (also) concerning only a מפותה, there is no way to explain בתו. If קנסה לאביה (then whether נתארסה or לא נתארסה) there can be no חיוב קנס (from the father [the מפתה] to the father). And if we will say that she was נתארסה and קנסה לעצמה, there still is no חיוב קנס, for a מפותה is מוחל the קנס. There is no need to exempt the father on account of קלב"מ, since there is no חיוב קנס to begin with.[12]

תוספות offers an answer:

ומיהו בירושלמי[13] מוקי לה כשבא עליה עד שלא מת ומת והוא הדין עד שלא בגרה ובגרה -

However in the ירושלמי תלמוד **he establishes** the case of הבא על בתו in a situation where (she was never נתארסה, and) the father was **בא עליה before his death and he died** before the העמדה בדין (in which case the estate owes her the money);[14] **and similarly** we can establish the משנה in a case where the father was בא עליה **before she was a בוגרת** (she was still a נערה) **and she became a בוגרת** (before the העמדה בדין).[15] In either of these cases, she would have received the קנס either by inheritance or by maturity (were it not for the פטור of קלב"מ).

תוספות offers an alternate answer:

ולמאי דאמר בירושלמי[16] דמפותה אינו פטור אלא מבושת ופגם –

And according to what the **ירושלמי** תלמוד **states that by a מפותה, he is exempt only from** paying for the **בושת ופגם -**

אבל קנס אינה יכולה למחול אתי שפיר –

However she cannot be מוחל the קנס;[17] the case of הבא על בתו **will be properly understood** (as well as הבא על אשת אחיו), that (even) if קנסה לעצמה (nevertheless) even a מפותה receives the קנס [were it not for the קלב"מ].[18]

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[11] This difficulty is regardless whether we assume that the סיפא of בתו is (also) concerning a מפותה.
[12] The last question is (in a sense) not as strong as the initial question which assumes that we maintain קנסה לעצמה; for this is the view of ר"ע דמתניתין. Therefore it is not understood why there is a חיוב קנס by אשת אחיו. The last question is merely that קלב"מ is not necessary (by בתו); it is not however a question on the דין.
[13] כאן ה"ג. See 'Thinking it over' # 3.
[14] The explanation may be as follows: when we say that קנסה לאביה ([even] by לא נתארסה), it really is owed to her; however since she is ברשות אביה, the father collects the קנס (even when she is a מפותה, for she has no right to be מוחל something which [eventually] belongs to him). By בתו, when the father is still alive, there can be no העמדה בדין, because no one is claiming anything from anyone. The father is the מפתה and he receives the קנס. However when the father dies (before העמדה בדין), and she becomes independent, she has a claim on her father's estate for the קנס which was due to her (and merely transferred to her father) and was never נמחל. The father's estate must now pay her this קנס.
[15] See previous footnote # 14. When she becomes a בוגרת and independent from her father she can (retroactively) claim the קנס that was (originally) due to her (and merely transferred to her father).
[16] כאן ה"ז.
[17] The ירושלמי explains that קנס can only be collected after העמדה בדין in בי"ד, so that at the time it was a דבר שאינו ברשותה (דבר שלא בא לעולם) therefore she cannot be מוחל; as opposed to בושת ופגם which he owes her regardless of the העמדה בדין.
[18] The הבא על אשת אחיו of רישא can (even) maintain דקנסה לעצמה כר"ע דמתני'; and the הבא על בתו of סיפא will maintain that (even if) קנסה לעצמה כר"ע דברייתא (she receives no קנס since קלב"מ).

ומיהו בש"ס דידן משמע דאין לה אפילו קנס –

However our תלמוד בבלי seems to maintain that a מפותה **does not even receive the קנס -**

דמוקי הא דאלו הן הלוקין לקמן בגמ' (דף לב.) ביתומה ומפותה שאין לה קנס –

For the גמרא **establishes that which is stated in אלו הן הלוקין** פרק that the reason the בועל receives מלקות and not קנס, is because there the משנה is discussing **a יתומה** (where the father cannot receive the קנס) **and a מפותה, who receives no קנס.** It is evident from that גמרא that a מפותה is not paid anything including קנס.

Summary

The case of הבא על אשת אחיו is when she was either נתגרשה מן האירוסין or the deceased husband had children from a previous marriage. This case presents difficulties if we maintain like רב פפא that we are discussing a מפותה and נתארסה ונתגרשה קנסה לעצמה. The סיפא of הבא על בתו is difficult according to ר"פ; for whether we maintain קנסה לעצמה or לאביה there is no need to exempt the father on account of קלב"מ. There can be two resolutions: either that the case of בתו is when the father dies (or she was בגרה) קודם העמדה בדין; or that קנס cannot be נמחל (according to the ירושלמי).

Thinking it over

1. The ירושלמי maintains that the case of אשת אחיו is where he had children from another wife. The ר"ח (and רש"י) maintains that she was a גרושה.[19] What are the advantages of each interpretation?

2. What would the דין be in a case where the קנס is due to the מפותה (not to her father) and she stated to the מפתה initially that she is not מוחל the קנס?[20]

3. The ירושלמי explains that the case of הבא על בתו is when כשבא עליה עד שלא מת ומת. Seemingly the ירושלמי could have answered that we are discussing a מפותה who was נתארסה ונתגרשה, in which case קנסה לעצמה and she cannot be מוחל the קנס (according to the ירושלמי)!![21]

[19] See footnote # 2.
[20] See footnote # 7. See סוכ"ד אות עא.
[21] See footnote # 13. See סוכ"ד אות צ"ב.