

זה¹ הכלל כל המשלם יותר על מה שהזיק כולי -

This is the rule; whoever pays more than what he damaged, etc.

Overview

The משנה gives a general rule that whenever the payment is more than the damage (it is considered a קנס) and he does not pay it, based on his admission alone. תוספות reconciles this ruling with another seemingly contradictory ruling.

תוספות responds to an anticipated difficulty:

ואפילו למאן דאמר בפרק שור שנגח ארבעה וחמשה (בבא קמא דף מ,א) -

And even according to the one who maintains in 'וה' ד' שור שנגח ד' -

דכופר היינו דמי המזיק² -

That the כופר (redemption) payment means the value of the one who caused the damage, nevertheless -

לא חשיב יותר ממה שהזיק אף על פי שפעמים שוה מזיק יותר מניזק דפדיון נפשו³ הוא נותן:

It is not considered that he is paying more than he damaged, even though sometimes the ניזק is worth more than the מזיק (so it should be considered a קנס), because he is giving the redemption of his soul and this is what his soul is worth.

Summary

Even if כופר is דמי מזיק, it is not considered a קנס, since he is not reimbursing the victim, but rather paying the value of redeeming his own soul.

Thinking it over

Can we say that if כופר is דמי מזיק it is no longer ממון but rather כפרה, and indeed it is like קנס and he will be עצמו ע"פ, פטור, and our משנה maintains כופר is (דמי ניזק)⁴ ממון, therefore he is עצמו ע"פ משלם?

¹ The marginal note indicates that this תוספות (as well as the previous האומר תוס' ד"ה האומר) are referencing the משנה (and should be inserted prior to the two וד"ה רבי וד"ה רבי).

² The rule is that if a שור המועד kills a person the owner of the ox must pay כופר (redemption) money. See שמות (משפטים) 21:28. There is a dispute there in the גמרא whether the כופר is the value of the ניזק (the dead victim) or the מזיק (the owner of the ox). In any event the כופר payment is not considered a קנס and it has to be paid even עצמו ע"פ, as our משנה states עצמו ע"פ משלם. See 'Thinking it over'.

³ If we maintain דמי מזיק, the תורה is teaching us that the בעל השור has to redeem himself for causing such a terrible loss; he is not paying for the loss, rather he is redeeming himself from being punished corporally.

⁴ See רש"י ד"ה הרי who writes קסבר כופרא ממון, indicating perhaps that if it were כפרה he would not pay עצמו ע"פ. See משניות אות מו on תוס' רע"א and שיטה מקובצת.