

And let us say that מבעה refers to water

ואימא מבעה זה המים –

OVERVIEW

The גמרא (after it concludes discussing the dispute between רב ושמואל whether מבעה is שן or אדם), suggests that perhaps מבעה refers to the מזיק of water. תוספות will explain: a) the necessity for this suggestion, b) why water can be considered an אב, and c) what is meant by the מזיק of מים.

פירוש¹ כיון דקרא² לא דייקי לא כמר ולא כמר³ -

The explanation of this question (ואימא מבעה זה המים) is that **since the** (פסוקים) **are not conclusively accurate either according to one** view (concerning מבעה) **or the other** view (of שמואל that it refers to אדם), let us offer a third option, that מבעה refers to water.⁴

תוספות has a difficulty:

ואם תאמר והיכן כתיב מים בתורה⁵ -

And if you will say; and where is מים **written in the** תורה? How can the גמרא ask that perhaps מבעה refers to the מזיק of מים, when we do not find a מזיק of מים explicitly in the תורה?

תוספות answers:

ויש לומר מושלח⁶ וכן הוא אומר (איוב ה') ושולח מים על פני חוצות -

And one can say; that we derive the מזיק of מים **from** the פסוק of בעירה; the word ושלה refers to the מזיק of מים. We can prove that ושלה refers to מים **for so it says** in a פסוק **'and he sends waters on the surface of the outdoors.'** We derive from this פסוק in איוב that ושלה refers to מים.

תוספות anticipates a difficulty and resolves it:

ואף על גב דשילח בעירה בבהמה איירי -

¹ The introductory word פירוש indicates that תוספות anticipates the following difficulty: why should we say that מבעה refers to מים; in opposition to רב ושמואל who maintain that it refers to either שן or אדם.

² Others amend the text to read 'קרא' in the plural.

³ See גב בסופו.

⁴ If מבעה would refer to water, the לשון מבעה would be appropriate, for water is מבעה (it bubbles; see following תוספות) as opposed to מבעה זה האדם (where it should have been called בועה) or מבעה זה השן (where it should have been written נבעה).

⁵ See ד"ה ארבעה that the אבות are those מזיקין that are clearly stated in the תורה.

⁶ שמות [משפטים] כב, ד.

⁷ פסוק י'.

And even though that the phrase ושלח את בעירה is certainly referring to cattle; how can we consider that ושלח refers to מים. מים responds that -

מכל מקום מים נמי משתמע מיניה מדאפקיה רחמנא בהמה בלשון ושלח -

Nevertheless we can also derive water from this פסוק of ושלח, since the תורה chose to refer to the בהמה with the term ושלח; instead of using a different term. This teaches us that the phrase of ושלח את בעירה is referring to water, in addition to referring to רגל דבהמה.

anticipates an additional difficulty and resolves it:

ולעיל⁸ דבעי במאי מוקמינן לה לא מצי מוקמינן במים -

And previously when the גמרא asked why was it necessary to cite the פסוק of פסוק; seemingly without the פסוק; to teach us that ושלח means רגל; **what else can the פסוק be referring to** (this concludes the question of the גמרא)? תוספות continues that seemingly, now, this is not a valid question; for if not for the פסוק of רגל why **could we not** say that the פסוק of ושלח **is referring to מים?!**

responds that this question is not valid:

דכי נמי מוקמת במים אית לן לאוקומי במילי דשור מדכתיב בעירה -

For even if the פסוק of ושלח is discussing water (also), it is still necessary for us to assume this פסוק is (certainly) discussing animal matters (such as רגל), **since the תורה writes בעירה**, which refers to cattle.

asks:

ואם תאמר והני מים היכי דמי אי דמשקיל עליה בדקא דמיא ובכח ראשון כחו הוא -

And if you will say; and these waters, which the גמרא suggests that it is an אב **of what type is it; how did it do damage? If he directed a stream of water upon the ניזק, and it was the initial burst that caused the damage; then it is considered his power;** it would be an אדם המזיק (there is no need for a new אב of מים)!

ואי בכח שני גרמא בעלמא הוא כדאמרין בהנשרפין (סנהדרין דף עז,ב) -

And if the water came upon the ניזק only from a secondary force (not from the initial (burst or) flow, **then the מזיק is merely a cause of the damage** (but not directly doing the damage), and is therefore not liable for it, as the גמרא **states in הנשרפין**!

answers:

ויש לומר דמיירי בכח שני וקא משמע לן דבכח שני נמי חייב⁹ -

⁸ דף ג,א.

⁹ Our גמרא is assuming (in this ה"א) that מים is an אב and is teaching us that כח שני is חייב. The גמרא in הנשרפין is

And one can say that we are discussing where the damage was from the secondary force and this פסוק is teaching us that one is liable by the מים of מזיק, for damages caused even by a secondary force.

תוספות offers an alternate solution:

אי נמי בתר דנחו ולא דמי לבור¹⁰ כגון פותקין ביבותיהן דלקמן¹¹ (דף ל,א) -

If you wish we can also answer that the water damaged after it rested (something fell into this standing water), however it is not similar to בור, because we are discussing for instance the case where people open their sewers, which the גמרא mentions later. This sewer water later collected¹² and someone was damaged by the standing waters. The פסוק teaches us that the מים בעל חייב for the אב of מבעה.

תוספות anticipates a difficulty:

ואף על גב דאתי במה הצד¹³ -

And even though we derive this ruling of פותקין ביבותיהן from the מה הצד of our משנה; why is there a necessity to consider מים an אב?!

תוספות answers:

הוה אמינא דאיצטריך לכותבו לחייב כלים דמבור לא הוה שמעינן -

For I would think that it is necessary for מים to be written in the תורה as a distinct אב in order to make the מים בעל חייב liable if the מים damaged כלים, for we could not have assumed that he is חייב for כלים, if we derived מים solely from the השוה צד which includes בור, for בור is פטור on כלים.¹⁴ Therefore the גמרא asked that מים should be considered an independent אב and be liable for כלים as well.

תוספות concludes:

והוה מצי למיפרך מאי לא זה וזה שיש בהן רוח חיים אלא דבלאו הכי משני שפיר:

And the גמרא could have rebutted this suggestion that מים refers to מבעה by

according to the מסקנא where there is no אב of מים, and therefore כה שני is indeed פטור. See מהר"ם. Alternately the גמרא in הנשרפין is discussing a case where a person was killed through this stream of water, therefore it is understood that if it is merely a כה שני, the perpetrator is פטור ממיתה, for it is not his כה; however by נזיקין even a כה שני can be חייב, just as אדם ר"נ אות מא וחדושי ר"נ אות קיז (see חייב is ממונו).

¹⁰ אב. תוספות anticipates the difficulty that if the מים did damage שחור it is בור; there is no need for a new אב.

¹¹ דף ו,א. The גמרא there cites a משנה that even though people are occasionally permitted to empty their sewers into the רה"ר [see, however, following footnote # 12]) nonetheless they are liable for damages. This is different from בור, since the sewers are emptied ב"ד ברשות.

¹² It would seem to have been collected and done damage in the רה"י, since we derive מים from משלח where the פסוק clearly states אחר. See, however [previous footnote # 11], חידושי ר"נ אות קטו.

¹³ See לקמן ו,א. According to the משנה of the צד השוה רב אדא בר אבהו the פותקין ביבותיהן וכו' comes to include.

¹⁴ See 'Thinking it over' # 3.

asking, if מבעה refers to מים **what** does the משנה mean when it states **that these two** (שור ומבעה) **that are alive are not** like אש? If מבעה is מים than it does not have a רוח (מים is מבעה)¹⁵ **However** the גמרא **soundly refutes** this suggestion (that מבעה is מים) **without resorting to this** refutation.

SUMMARY

The גמרא suggests that מבעה זה המים (for ושלח can refer to מים [also]), since the פסוקים are not מדויק according to either רב or שמואל. The case of מים המזיק is either if it damaged שני בכח, or it damaged שנחו; and the פסוק teaches us that the מים כלים is חייב even for המזיק.

THINKING IT OVER

1. One of תוספות answers is that the מים did damage שני בכח. Seemingly אש also does damage (only) שני בכח, and is nevertheless חייב. Let the מים be a תולדה of כח שני. Why do we need a new אב for מים?¹⁶

2. תוספות explains that the מים of מזיק is in a case of ביבותר in order it should not be similar to בור. Seemingly we can say that it is similar to בור (and he placed the מים שלא just as בור); however the תורה teaches that the מים of מזיק is חייב even for כלים!¹⁷

3. When something (c) is derived through a צד השוה (from a & b) and the two מלמדים (a & b) have different rulings; what rulings apply to the למד (c)?¹⁸

4. תוספות discusses כח ראשון and כח שני. There may be two different ways to describe them. A. כח ראשון is the initial flow of water (e.g. if someone opens a faucet), and כח שני refers to the waters that follow after the initial flow.

B. כח ראשון is the immediate effect of the water; the water damages by its initial force, and כח שני is when the water does damage later when it reaches a spot at some distance from its original source and its initial force is diminished (completely). Which of these explanations would be most appropriate for our תוספות?¹⁹

¹⁵ The גמרא (shortly) uses this reasoning to refute the suggestion that האש מבעה זה האש.

¹⁶ See בל"י אות פב.

¹⁷ See אמ"ה.

¹⁸ See footnote # 14. See previous משורר ד"ה מ"ה [TIE 'Thinking it over' # 3].

¹⁹ See חדושי ר"נ אות קטז.