

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 אדם or שן), 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.

פירוש כיון דקרא¹ לא דייקי לא כמר ולא כמר² –

The explanation³ of this question (ואימא מבעה זה המים) is that **since the פסוק (ים) (concerning מבעה) are not conclusively accurate either according to one view** (of רב, that it refers to אדם) **or the other view** (of שמואל that it refers to שן), let us offer a third option, that מבעה refers to water⁴.

תוספות has a difficulty:

ואם תאמר והיכן כתיב מיס בתורה –

And if you will say; and where is a מזיק of 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?⁵

תוספות answers:

ויש לומר מושלח 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 ושלח את ⁶בעירה; the word ושלח refers to the מזיק of מים. We can prove that ושלח 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 ושלח refers to מים.

תוספות anticipates a difficulty and resolves it:

ואף על גב דשילח בעירה בבהמה איירי –

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

מכל מקום מים נמי משתמעו מייניה 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

¹ Others amend the text to read 'קראי' in the plural.

² See ג.ב. בסופו.

³ רב who anticipates the following difficulty: why should we say that מבעה refers to מים; in opposition to רב who maintain that it refers to either אדם or שן.

⁴ If מבעה would refer to water, the לשון מבעה would be appropriate, for water is מבעה (it bubbles; see following ד"ה מי (תוספות ד"ה מי 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 *רש"י* ב, א ד"ה ארבעה that the אבות are those מזיקין that are clearly stated in the תורה.

⁶ שמות [משפטים] כב, ד.

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:

ולעיל⁷ דבעי במאי מוקמינן לה לא מצי מוקמינן במים –

And previously when the גמרא asked why was it necessary to cite the פסוק of משלחי רגל השור והחמור to teach us that ושלח means רגל; seemingly without the פסוק of משלחי רגל I would still know that ושלח refers to רגל, for **what else can the פסוק be referring to** (this concludes the question of the גמרא)? continues that seemingly, now, this is not a valid question for if not for the פסוק of משלחי 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 ושלח is discussing water (also), it is still necessary for us to assume this פסוק is (certainly) discussing animal matters (such as שן ורגל), **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 **of what type is it; how did it do damage? If he directed a stream of water upon the גיזק, 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 **מים** of אב)!

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

And if the water came upon the גיזק 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 פרק!**

answers:

ויש לומר דמיירי בכח שני וקא משמע לן דבכח שני נמי חייב –

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 מזיק of מים, for damages caused even by a secondary force⁸.

⁷ דף ג,א.

⁸ Our גמרא is assuming (in this הו"א) that מים is an אב and is teaching us that כח שני is indeed פטור. See מהר"ם. The גמרא in סנהדרין is according to the מסקנא where there is no אב of מים, and therefore כח שני is indeed פטור. 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 כח שני, the perpetrator is ממיתה, for it is not his כח; however by נזיקין even כח שני can be חייב, just as ממונו is חייב (see אות קיז ר"נ אות קיז).

תוספות offers an alternate solution:

אי נמי בתר דנחו ולא דמי לבור כגון פותקין ביבותיהן דלקמן (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**⁹ בור, because we are discussing **for instance** the case where people **open their sewers, which** the גמרא mentions **later**¹⁰. This sewer water later collected¹¹ and someone was damaged by the standing waters. The פסוק teaches us that the בעל המים is חייב for the אב of מבעה.

תוספות anticipates a difficulty:

ואף על גב דאתי במה הצד¹² –

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

תוספות answers:

הוה אמינא דאיצטריך לכותבו לחייב כלים –

For I would think that it is necessary for מים **to written** in the תורה as a different אב **in order to make** the בעל המים liable if the מים damaged כלים -

דמבור לא הוה שמעינן –

For we could not have assumed that he is חייב for כלים, if we derived מים solely from the צד השוה which includes בור, for בור is פטור on כלים.¹³ 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 מבעה refers to מים by 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 חיים!¹⁴ **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 מים המזיק are not מדויק according to either רב or שמואל. The case of

⁹ אב. תוספות anticipates the difficulty that if the מים did damage שנחו it is בור; there is no need for a new אב.

¹⁰ דף נ,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 # 11] nonetheless they are liable for damages. This is different from בור, since the sewers are emptied ב"ד.

¹¹ It would seem to have been collected and done damage in the רה"י, since we derive מים from ושלח where the פסוק clearly states אחר. See, however [previous footnote # 10], חידושי ר"נ אות קטו.

¹² See לקמן, נ,א. According to the משנה of the צד השוה רב אדא בר אבהו comes to include פותקין ביבותיהן וכו'.

¹³ See 'Thinking it over' # 3.

¹⁴ The גמרא (shortly) uses this reasoning to refute the suggestion that מבעה זה האש.

is either if it damaged שני בכח, or it damaged שנחו; and the פסוק teaches us that the מים המזיק is חייב even for כלים.

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 כח שני of מים be a תולדה of אש. Why do we need a new אב for מים?!¹⁵

2. תוספות explains that the מזיק of מים is in a case of ביבוחיהן 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 ברשות just as בור); however the תורה teaches that the מזיק of מים is חייב even for כלים!¹⁶

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 (c) למד?¹⁷

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?¹⁸

¹⁵ See בל"י אות פב.

¹⁶ See אמ"ה.

¹⁷ See footnote # 13.

¹⁸ See חדושי ר"נ אות קטז.