

בור This is

היינו בור –

Overview

The גמרא states that the צד השוה of our משנה teaches us to include the case (mentioned in a different משנה) of הכותל והאילן שנפלו (where they are חייב if warned them ולסתור (לקוץ ולסתור). The גמרא asks that seemingly no צד השוה is necessary for it is similar to בור (if he was מפקיר the אילן ואתל then it is similar to בור according to everyone, and in a case of לא אפקרינהו according to שמואל). Our תוספות will discuss when the אילן ואתל actually did the damage; while they were falling (where it is seemingly similar to אש), or after they came to a rest (where it is similar to בור).

לכאורה נראה דמיירי כשהזיקו כותל ואילן בשעת נפילה גופה –

It seemingly appears that the גמרא is discussing a case where the wall and the tree caused damage while they were actually falling (not after they fell) - ואפילו הכי מדמה ליה לבור -

And nevertheless¹ the גמרא compares the case of שנפלו, to the case of בור.

תוספות will now prove that the אילן ואתל damaged while in motion, (and nevertheless it is similar to בור [and not to אש])

מדלא קאמר הכא אי בהדי דקאזלי קמזקי היינו אש –

Since the גמרא does not say here (as it said in previous cases) 'if it damaged while moving then it is the same as אש'. The reason the גמרא does not say this, is because the גמרא assumes that the אילן ואתל damaged while in motion [and nevertheless the גמרא would rather compare it to בור (and not to אש)].

תוספות offers another reason that we must assume that the case of הכותל והאילן is in a situation where it damaged while moving and not after it came to rest.

ועוד דאי בהיזק דלאחר נפילה מיירי אמאי פטור מלשלם –

And in addition if הכותל והאילן is in a situation where the damage was done after it fell and came to a rest², then why is he exempt from paying for the damages he caused (when ב"ד did not order him ולסתור); for even though the אילן ואתל fell באונס, nevertheless –

הלא כיון שנפלו מיד היה לו לסלקן –

¹ A בור damages in its place without moving, while the אילן ואתל damaged while moving, and nevertheless the גמרא considers שנפלו הכותל והאילן to be similar to בור (as תוספות will shortly explain).

² At this point תוספות is assuming, that is why it is compared to בור. However if it נפילה בשעת נפילה it would be similar to אש.

Once they fell, he should have removed it immediately. He is a פושע for not removing the כותל ואילן, and should be held liable for all damages caused by them after they came to rest and he was able to remove them³.

offers an additional proof that the כותל ואילן cannot be discussing a case where it damaged נפילה תוספות:

ועוד דאם כן לא הוה ליה למיתני לקוץ ולסתור –

And furthermore⁴ if it was so (that it damaged נפילה), then the משנה **should not have stated** ‘if they gave him time to **chop down** (the tree) **and dismantle** (the wall)’, then he is חייב; for the damage did not occur on account of a falling tree and wall; it happened after it came to rest -

אלא נתנו לו זמן לפנותו ולסלקו כיון דבהיזק דלאחר נפילה איירי –

But rather the משנה should have stated; ‘**they gave him time to clear and remove the fallen** כותל ואילן’, **since we are discussing a damage that occurred after it fell.** The reason he is liable is because he neglected to remove the debris; not because he failed to chop down or disassemble the tree and the wall⁵.

concluded that the case of הכותל והאילן is when they damaged נפילה and the גמרא compares it to בור. anticipates the obvious question (which was mentioned previously), that -

אף על גב דבור אין הולך להזיק ואלו הולכים ומזיקין -

Even though בור does not move to cause damage (but rather it damages in its place), **and these** (כותל ואילן שנפלו) **are moving and damaging;** how can we derive them from בור since they are different?!

responds that nevertheless -

יש לנו ללמד מבור –

We can derive from בור that they are חייב -

– דעדיף היזק דידהו שהולכים ומזיקין מבור שאינו הולך ומזיק אלא מזיק במקומו –

For their manner of damaging (by כותל ואילן), **where they move and damage, is a greater cause for liability than בור is, since בור does not move and damage, but rather it damages in its place⁶.**

concluded that the משנה of הכותל והאילן is in a case where they were נפילה. Now directs his attention to a case where they were נפילה תוספות:

³ See (הארוך) א"ה מרש"א who explains that תוספות is referring to the case where אפקרינהו; for if אפקרינהו then it is a case of אונס where he is פטור, as just mentioned in the previous ד"ה.

⁴ Perhaps תוספות means that even if we can refute the previous proof and argue that the reason he is פטור (לאחר) (when בי"ד did not allot him time) is because we are discussing a case where the damage was done (נפילה) before the owner was able to remove the debris; nevertheless there is this additional proof.

⁵ If he had time לפנותו then he will be חייב even if it damaged during the allotted time of ולסתור.

⁶ There is more reason to hold the (בעל ה) כותל ואילן (בעל ה) liable than the בעל הבור. The fact that כותל ואילן is הולך does not prevent us from deriving them from בור. On the contrary they are more חמור than בור. If בור is חייב then כותל ואילן are certainly חייב. תוספות, however did not explain (yet) why כותל ואילן that damaged בשעת נפילה, should not be derived from אש. See “Thinking it over” # 1.

ונראה דבהיזק דלאחר נפילה נמי מצי איירי ופטור מלשלם –

And it seems that the משנה **may also be discussing** a case where the כותל **damaged** **and yet they are exempt from paying** (when בי"ד did not order them [ולפנות] לקוץ ולסתור).

will now reconcile this last statement with that which תוספות previously argued that if it damaged נפילה לאחר then he should be חייב (even if בי"ד did not warn him), for he neglected to remove the damaging article; תוספות responds:

וכגון שלא נודע לבעליו שנפלו או ידעו ולא יכלו לסלקו כל כך מהר –

And for instance that the owner was not aware that the fell, or (even) if they knew that it fell, however they were not able to remove it that quickly and it caused damage before the owner could prevent it, therefore they are פטור.

will now respond to an additional earlier proof that we cannot be discussing a היזק לאחר נפילה:

והא דלא קתני נתנו לו זמן לסלקו ולפנותו משום דבהיזק נפילה גופה נמי מיירי –

And the reason the משנה did not state, ‘they gave him time to remove and clear away the obstacle’, which is the appropriate warning if we are discussing a נפילה לאחר; it is **because the משנה is also discussing a case where it damaged while it was actually falling;** the משנה is including both cases: where it damaged נפילה בשעה and also נפילה לאחר. Therefore it was necessary to mention that היזק בשעת נפילה which applies to a נפילה נתנו לו זמן לקוץ ולסתור ולפנותו קאמר –

And indeed the משנה means that ‘they gave him time to (either) chop or dissemble (in the case of נפילה בשעת) and to clear the debris (in the case of נפילה לאחר).’⁷

deals now with his original argument; if we are (also) discussing a נפילה בשעת why did not the גמרא compare it to אש as opposed to בור:

והשתא אתי שפיר דמדמה ליה לבור טפי מלאש –

And now (that the משנה is discussing both cases, נפילה בשעת and נפילה לאחר) it is properly understood that the גמרא compares כותל ואילן rather than to אש (the גמרא does not say אש היינו אש).

ואף על גב דבשעת נפילה יש לדמותו לאש כמו לבור –

And even though that in a case of נפילה בשעת, the כותל ואילן can be equally compared to אש as well as to בור –

will explain why אש ובור are equally similar to כותל ואילן:

⁷ When בי"ד ordered him to remove the crumbling wall or rotting tree, they allotted him the necessary time to both dismantle and remove it. The משנה did not deem it necessary to enumerate all the types of warnings that are given to him for the different types of damages that can occur. It was sufficient to mention the warning for one type of damage נפילה בשעת (which is לקוץ ולסתור) and it would be understood the type of warning included for a damage נפילה לאחר (which is ולפנות).

דמאש חלוק במה שאין כח אחר מעורב בו ומבור חלוק במה שאין תחילת עשייתו לנזק -
For כותל ואילן are different from אש by the fact that there is no other
force intermingled in it⁸; and כותל ואילן are different from בור by the fact
that they were not initially created to cause damage⁹; so since כותל ואילן are
equally similar (or dissimilar) to אש ובור, why does the גמרא compare then only to בור?!

explains: תוספות

אלא לכך דימה אותו לבור משום דבהיזק דלאחר נפילה אין לדמותו כלל לאש אלא לבור:
Rather the גמרא compares them to בור because in the case of a לאחר
היזק (where they damaged in their place), they cannot be compared at all
to אש (which causes damage when it moves) but only to בור (which damages
only in its place)¹⁰.

Summary

The משנה of שניפלו והאילן הכותל is discussing both cases whether they
damaged בפילה or בשעת נפילה.

Thinking it over

1. עדיף מבור are בשעה נפילה that damaged כותל ואילן mentioned that תוספות 1.
since they are הולכים ומזיקים. How then does the גמרא state that we cannot
derive them from שור (alone) since a שור is ולהזיק; דרכו לילך and להזיק; seemingly כותל
are also מזיקים ומזיקים¹¹ ואילן.

2. כח אחר since they have no חלוק מאש are כותל ואילן mentions that תוספות 2.
קולא is a כח אחר מעורב בו¹² that previously תוספות stated. However, מעורב בו
How then is אש different from כותל ואילן; on the contrary we can certainly
derive כותל ואילן from אש (as תוספות said concerning בור who is [only] מזיק
?!¹³ במקומו).

⁸ The כותל ואילן fell because of their deterioration (and their own weight), as opposed to אש which damages because of the (external) wind. See "ש סוף סי' א'". See 'Thinking it over' # 2.

⁹ תוספות does not say that כותל ואילן are different from בור, for בור is ומוזיק ומזיק (see the הולך ומזיק) (see בור from כותל ואילן previously said that this is all the more reason to derive כותל ואילן from אש); for as תוספות previously said that this is all the more reason to derive כותל ואילן from אש (as תוספות said concerning בור who is [only] מזיק).

¹⁰ If we were discussing only a case of נפילה, then we could have compared כותל ואילן to either אש or בור; however now that we are discussing נפילה also, which is different that אש, therefore we compare it to בור, which is applicable in both cases of נפילה and בשעת נפילה.

¹¹ See "ח' ר"נ אות ר"ו and מהרש"א מהוד"ב".

¹² See תוספות ה,ב ד"ה כי.

¹³ See תפארת שמואל, נח"מ, בל"י וכו'.