

Mazik

PART IV NIZKEI BOR: CREATING AN OBSTACLE

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

A STATIC DAMAGER:

Let us begin with the Mishna's definition of the mazik of *bor*, which literally means a pit that one created and failed to protect. A *bor* is defined as "*ain darko lailaich ulehazik*", a source of damage that, unlike an animal or a fire, does not move and do damage. This is the unique characteristic of *bor*, that no act of damage is actually performed upon the victim. Rather, it is the victim himself who actually does the damage by stumbling into the pit that had been created.

Now, is this description an essential element? The gemara (Bava Kama 6b) discusses a case where someone has a tree or wall on his property that is at risk of collapse. If Beis Din warns him to remove the threat and he ignores the warning, he is liable for damages that occur when they fall. The gemara is directly referring to damages that are caused by the fallen items, which take the place of a classic *bor* that others can stumble over. The Rishonim discuss the damages that are caused by the impact of the fall – is that also a form of *bor*, or is this categorized as *nizkei aish*, damage caused through an object's force? Tosafos and the Rosh conclude that it would not constitute *nizkei aish*, because there was no external force that caused it to fall, unlike a fire that moves through wind. Therefore, they conclude that it would be considered a *bor* even in regard to the damage caused by the impact of the fall. As we'll later see, the fact that it is a *bor* means that the owner will not be liable for damages to anything other than humans and living beings.

PILOTLESS MAZIKIM:

Following this line of reasoning, one can even question whether damages caused by pilotless technology would be considered a *bor*. For example, if a driverless car crashes and causes damage, or a robotic vacuum damages a visitor in the home. No human was involved in the action; it was a machine that did it. While the closest comparison

is *nizkei shor*, damage caused by an animal that you own, these machines don't qualify as living beings, which is the primary factor in *nizkei shor*. *Nizkai aish* too, may not be an accurate classification for these things because there is no external factor involved in causing the damage to occur, which is an essential component of *aish*. (This is why live animals themselves aren't considered *nizkai aish*.)

These Rishonim provide a precedent, albeit an inconclusive one, to consider these things *nizkei bor*. Although they caused damage while moving, this doesn't preclude their classification as a *bor*, just as a falling tree is categorized as *bor*.

A FORMLESS PIT:

There is a fascinating question raised by the Chazon Ish, which highlights a fundamental aspect of *bor*. The Gemara (ibid 26b) states, "One who throws an object from a roof onto cushions positioned below, and someone removes the cushions causing the object to smash, or even if [the one who threw the object] removes them himself, he is exempt, because at the time of throwing, his shot "arrows" were interrupted."

The Chazon Ish wonders whether the one who pulls the cushions away is considered to be creating a *bor*. After all, he "dug up" the pillows which proceeded to land and break into his "pit". This isn't relevant to the case of the gemara, because a *bor* isn't liable for inanimate objects that fall within it. But the Chazon Ish presents a case where someone throws an animal off the roof, and someone removes the cushions. Here, *bor* would be applicable.

The Chazon Ish concludes that this is not a *bor*. A flat surface with no obstacle on it is not considered a *bor*. Although in this particular case, the flat ground has the ability to cause damage, it is inherently not a *bor*.

Consider the following case: on Yom Tov someone had their oven set to 200 degrees on "Shabbos mode", meaning

that the display doesn't show anything. Someone else raises the temperature to 350, without notifying the owner. Later, the owner receives a serious burn due to the raised temperature that he wasn't expecting. Is raising the temperature akin to creating an obstacle, which would make him liable for the damage he caused to the owner?

It's very possible that according to the Chazon Ish, he would not be liable. An oven set to 350 is not a *bor*, as that is a normal setting. If, however, he raised it to 500 degrees, this would be viewed as a *bor* and he would be liable.

EXEMPTION OF INANIMATE OBJECTS:

It's important to bear in mind, that whenever we discuss damages in regards to a *bor*, we only refer to damages that happen to people or live animals. Damages to "vessels", which includes all inanimate objects, exempt. Moreover, even regarding humans, the creator of a *bor* is only liable for damage in the category of *nezek*, irreparable damage which lowers the victim's value in a hypothetical slave market. Whereas, other expenses, such as medical expenses to heal the damage, or his lost wages while incapacitated, are exempt. This means that the liability of *bor* is extremely limited.

Note, however, that this is only regarding his liability in *beis din*. The Birkas Shmuel famously writes that there he remains fully culpable according to the laws of Heaven. On the other hand, the Chazon Ish is inconclusive on this point, but he is inclined to say that the Torah's exemption applies to the laws of Heaven as well.

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