**Damage caused by two parties**

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תשע"ז

The first few perakim of Bava Kama deal with damage caused by a person’s possessions or creations, as opposed to the person himself. I would like to discuss cases where objects of two people combine to damage and how *halacha* assigns responsibility in such events.

Imagine the following two scenarios:

1) Reuven owns a cricket ball, which he has left lying in the middle of the road. Shimon, his neighbour, sees this and decides that he will return it to Reuven. He throws the ball towards an open window but misses and smashes the window. The ball that is the *mazik (*damaging item*)* is owned by Reuven but Shimon is the *ba’al hama’aseh (*the one who acted*)*.

2) The same as the first scenario, but instead of Shimon throwing the ball back, his dog does so. The ball that is the *mazik* is owned by Reuven but Shimon’s dog is the *ba’al hama’aseh*.

In both of these cases, there are two people who have contributed to the damage that has been caused and so they are both potentially liable to pay for damages. This article will discuss the relevant cases in the *gemara* and how they may differ. We hope to thereby understand who will be obligated to pay in each of the aforementioned cases.

We will discuss four cases from *maseches bava kamma*, labelled A,B,C and D.

A) Reuven owns a *chararah* which is taken by Shimon's dog.[[2]](#footnote-2) Before eating the *chararah*, the dog places it onto a haystack, thereby burning the haystack. The *mishna* says that Shimon is obligated to pay half of the value of the damage (*chatzi nezek*) for the haystack.[[3]](#footnote-3) [[4]](#footnote-4) The *gemara* asks why Reuven is not also obligated to pay for the damage.[[5]](#footnote-5) [[6]](#footnote-6)

**Rashi**[[7]](#footnote-7) understands that the question of the *gemara* is not that Reuven should be viewed as an equal partner in the damage. This would mean that Reuven would split the cost of the damage with Shimon, both ending up paying a quarter of the damage. Rather, the *gemara* is suggesting that Reuven should be a secondary partner in the damage. This means that Reuven would be responsible for the part of the cost of the damage which Shimon was not obligated to pay. Rashi understands that responsibility is placed on the *ba'al hama'aseh* before the *ba'al hamazik*, who is only negligent in keeping it protected, i.e. we penalise an active party prior to a passive party. **Ra'avad** offers this *sevara* in the case of *dlil*.*[[8]](#footnote-8)* He explains there that the owner of the *dlil* is *pattur* because the damage was done by *koach hatarn’gol*. **Tosfos Rid** also has an expression to a similar effect, *keivan d’avad hasheini ma’aseh, batel hagramasa shel rishon*.[[9]](#footnote-9)

With this understanding, perhaps we can explain Rashi's approach in a few other places:

B) Earlier in the *sugya* of *aish*, the *gemara* discusses a case in which Shimon is walking with his camel, which is loaded with hay, in a *reshus harabim*.[[10]](#footnote-10) The hay catches fire from a candle that a shopkeeper (Reuven) had placed in the entrance to his shop. Then, the building in which the shop is situated burns down due to the fire of the camel’s hay. If Reuven’s candle was inside the shop, Shimon is obligated to pay for all the damage. Rabbi Shimon ben Lakish needs to explain why this is true if *aisho mishum momono*, surely we consider the fire as having travelled by itself? He answers that the camel was alongside the entire building, and so each part of the building individually caught fire from the camel itself. Hence, we cannot attribute any of the damage to the fire having spread of its own accord. The *gemara* then says that the same should be true in the corresponding case where Reuven left his candle in the *reshus harabim*. If the camel caused the fire to spread to the entire building, Shimon should be responsible. **Rashi** does not comment to explain the *gemara's* question. The simple understanding is that only Shimon should be responsible to pay *nezek shalem* (the total value of the damage) and not Reuven. Again, we can understand this because Shimon (or rather Shimon's camel) is an active party in the damage whereas Reuven’s contribution is purely passive.

C) Rava[[11]](#footnote-11) picks the case of *bor hamisgalgel* as the case which he thinks is included in the *mishna*[[12]](#footnote-12), when the *mishna* makes a *tzad hashaveh* between the four different categories of damage. He goes through various permutations of the case in order to try and explain why there is a need for a *tzad hashaveh* and why the case is not just a regular case of *bor*. **Rashi**[[13]](#footnote-13)specifically says that including the permutation of damage caused as the *bor* was moving from one place to another is incorrect, but he does not explain why. Perhaps if the *bor* damages whilst it is moving, the person/animal which caused the *bor* to move is the active contributor to the damage whereas the owner of the *bor* only has a passive part to play. Therefore, the responsibility for the damage is on the one who caused the *bor* to move (*megalgel*). He will be *chayav* as the damage was caused by *kocho[[14]](#footnote-14)*, and therefore, the *gemara* does not even consider it as a potential explanation for the case of *bor hamisgalgel*.

D) Reuven owns a *dlil*[[15]](#footnote-15) which becomes attached to the foot of Shimon’s chicken. The chicken walks around in the *reshus harabim* and ends up breaking objects that were allowed to be there. The *mishna*[[16]](#footnote-16) states that there is a case where someone will be obligated to pay *chatzi nezek*. The *gemara*[[17]](#footnote-17) explains that because of this, the case of the mishna must be *adyei aduyei* and therefore, Shimon will be obligated to pay *chatzi nezek*.

**Rashi**[[18]](#footnote-18)explains that *adyei aduyei* means that the chicken somehow kicked the *dlil* into the object that was damaged, despite the *dlil* still being connected by a string to the foot of the chicken. If so, Reuven will be completely *pottur* from paying because when he left his *dlil* in the *reshus harabim*, he created a *bor*, but the style of the damage was *tzeroros* and therefore, he cannot be obligated to pay. This is problematic because Rashi here has unnecessarily introduced a new line of reasoning. Based on our understanding until now, he should have explained that the reason that Shimon is responsible is because his chicken was the active party, whereas Reuven’s *bor* plays a passive role.

Perhaps Rashi thought that the *mishna* wanted to obligate Shimon alone. If we would only apply the line of reasoning of active and passive roles, then Reuven should be *chayav* to pay the *chatzi nezek* that Shimon is not *chayav* to pay, because Rashi explained *adyei aduyei* as *tzeroros*! Therefore, in order to avoid a *chiyuv*, Rashi introduced a new *sevara* that excuses Reuven from any responsibility whatsoever. Rashi understands that one can only be *chayav* if the category of damage which this specific damage falls into is the same category of damage for which the *mazik* was originally set up.

**Tosfos** argues that even if it is true that the damage was not caused by a *bor*, Reuven should be responsible for the damage. This is because he created a *mazik* which was liable to be taken by another force, in our case a chicken, and damage elsewhere.[[19]](#footnote-19) This falls into the category of *aish*. It is comparable to leaving a stone on the edge of a roof which could be blown off by the wind and cause damage.[[20]](#footnote-20) [[21]](#footnote-21) This *machlokes* between Rashi and Tosfos could simply be a *machlokes* as to whether we consider the likelihood of the *dlil* becoming attached to the foot of the chicken as *motzui* (common) or not, especially as Reuven hid his *dlil*.[[22]](#footnote-22) However, Rashi also does not apply the *sevara* of *aish* in the case of *bor hamisgalgel*, in order to *mechayav* the *ba’al habor*.[[23]](#footnote-23) It would seem that Rashi did not think that the category of *aish* is at all applicable in any of these cases.

Perhaps **Rashi** understands that the nature of *aish* is that even though there is a *koach acher me'urav bo*, the eventual damage which is committed is done by the *aish* itself. Therefore, if we cannot obligate the person who moved the fire to pay, we are able to obligate the owner of the fire for his *mazik*. However, in the cases of *bor hamisgalgel* and *dlil*, the damage which is done whilst they are moving is purely due to the *koach* of the person/animal who caused the movement. Therefore, we cannot obligate the owner of the *bor hamisgalgel* or *dlil* for damage that, despite his negligence, he is not considered to have committed. Even if the *ba’al hama’aseh (either the megalgel* or the chicken) is only *chayav chatzi nezek*, we will still not obligate the owner of the *bor hamisgalgel*/*dlil* to pay anything.[[24]](#footnote-24)

**Tosfos** understands that if one can expect his *mazik* to be moved to the same extent as one would expect a *ruach metzuya*, then we can compare the *bor* to *aish*. This is despite the difference in the nature of the damage mentioned above in our explanation of Rashi. Therefore, both the owner of a *bor hamisgalgel* and the owner of the *dlil* would be *chayav* to pay.

**Tosfos**[[25]](#footnote-25) take a slightly different approach to these *gemaras*. They agree with Rashi that a *ben da'as* who commits damage with someone else's object is totally responsible and the owner of the *mazik* is not responsible at all. However, they differ with regards to the case in which the action of damage was committed by an *eino ben da'as*. In such a case, they view the two parties as equally responsible for the damage caused. This is because a *ben da'as* is solely to blame for his actions, no matter what tools he may use to cause the damage. However, with an *eino ben da'as*, the damage was caused because of the negligence of the *ba'al hamazik* as well.

C) As a result, Tosfos hold that if the *megalgel* of a *bor hamisgalgel* is an animal, and damage was caused whilst the *bor* was still moving, then the owner of the animal and the owner of the *bor* will both be *chayav* *chatzi nezek*.[[26]](#footnote-26)

D) They also argue that even the damage caused by the chicken throwing the *dlil* is the responsibility of both the owner of the chicken and the owner of the *dlil[[27]](#footnote-27)*, despite the damage not being done in the category that the owner of the *dlil* had set it up to damage.

B) Tosfos also apply this logic to the case of the camel and the shopkeeper’s candle. They suggests that in the permutation where the shopkeeper left his candle in the *reshus harabim*, the *gemara* was not asking that the camel being alongside the whole building should exempt the shopkeeper. Rather, both the owner of the camel and the shopkeeper should be responsible. Even though the camel was the active party, the camel is an *eino ben da’as* and therefore responsibility lies with the shopkeeper as well.

A) This is also their explanation for the case of the dog which took the *chararah* and set a haystack on fire. They do not explain, like Rashi, that the *gemara* wants to obligate the owner of the *chararah* to pay that which the owner of the dog is not able to pay. Rather, they explain that the *gemara* wants the two owners to split the amount of damage caused equally between the two of them.

**Rosh**[[28]](#footnote-28) elaborates on this line of thinking. He says that the *ba’al hamazik* is not only viewed as a partner in the damage caused and therefore *chayav* to split the cost of the damage with the owner of the animal that caused the damage. Because we *pasken* like Rabbi Noson,[[29]](#footnote-29) the *ba’al hamazik* is viewed as responsible for all the damage and so will be *chayav* to pay the rest of the damage, i.e. all that the *nizak* cannot claim from the owner of the animal. This means that in cases of *tzeroros*, for example, if the chicken damaged with the *dlil b’adyei aduyei* or a cow kicked a *bor* into a *reshus hayachid*, then the owner of the animal will only be *chayav* to pay *revia nezek*, a quarter of the damage, because he is considered a partner in the damage done by the *tzeroros*. It will then fall on the the *ba’al hamazik* to pay the other three quarters of the damage.

The *gemara[[30]](#footnote-30)* that brings the *machlokes* between the Rabanan and Rabbi Nasan seems troublesome with all that we have said until now in the opinions of Rashi and Tosfos. The *gemara* is discussing a case where Shimon’s ox pushes Levi’s ox into Reuven’s *bor* and Levi’s ox is injured.

**Rabanan** hold that only Shimon is *chayav* to pay. **Rashi** says that he is *chayav* either *nezek shalem* or *chatzi nezek*, depending on whether his ox is a *mu’ad* or a *tam*. He[[31]](#footnote-31) explains that Reuven is totally *pattur* because we only look at the action of pushing, which was done by Shimon’s ox. This can fit well with all we established above, an active party is primarily responsible for the damage caused. Perhaps Rashi would agree with the **Ra'avad** and **Tosfos Rid** here, in the opinion of the Rabanan. One could also suggest here that Shimon’s ox would have injured Levi’s ox even if Reuven’s *bor* had not existed and therefore, Reuven is not really a party at all to the damage.[[32]](#footnote-32) **Tosfos** says that Shimon will always be *chayav* to pay *chatzi nezek*. They are also consistent because they say that the only reason for Reuven to be exempt from paying is a *gezeiras hakasuv* that tells us that the injured ox needs to have fallen into the *bor* rather than have been pushed. The fact that they always obligate Shimon to pay *chatzi nezek* implies that they still only consider him a partner in the damage.[[33]](#footnote-33)

However, the opinion of **Rabbi Nasan** is more problematic. According to the first *lishna* of the *gemara*, he holds that Reuven and Shimon are considered equal partners in all of the damage. Perhaps we can explain this *lishna* as holding that they are each 50% responsible for 100% of the damage, meaning that they both could have caused the entire damage on their own but it so happens that they combined together to damage. Therefore, if Shimon’s ox was a *mu’ad*, they will both be *chayav* to pay *chatzi nezek*. If Shimon’s ox was a *tam*, then he is only *chayav* to pay half of his usual *chiyuv* and so he will pay *revia nezek*. Reuven is *chayav* to pay the other three quarters of the damage, because he is also considered responsible for all of the damage caused, and therefore, whatever Levi cannot claim from Shimon, he can claim from Reuven. It is clear here that **Rashi** does not obligate an active party before a passive party, rather treating them as equal partners in the damage. This seems to contradict everything that we have discussed up until this point.

The second *lishna* of the *Gemara* is marginally different. It can be simply understood as suggesting that both Reuven and Shimon are each considered 100% responsible for 50% of the damage. Each one was only able to damage in this case because of the assistance of the other. Therefore, Shimon is only held responsible for half of the damage. However, because Levi found his ox in Reuven’s *bor*, clear evidence of guilt, he can claim from Reuven the cost of the damage which Shimon is not *chayav* to pay. **Rashi** does not explicitly explain why this claim is enough to make Reuven pay more than he is technically responsible for. However, **Tosfos** explain that Reuven is held responsible for all the damage because the damage was completed by his *bor*, even though Shimon’s ox was an essential part of the damage. Here as well, **Rashi** does not hold that we first analyse the damage done by Shimon’s ox, the active party, before that of Reuven, the passive party. Instead we only look at the total picture that contains the combined action of the two of them. Why is this? What is different about this case of *bor*?

Perhaps *bor* is different from the other cases that we have quoted involving Shimon’s animal damaging with Reuven's *mazik*. As one of the *avos n’zikin* of the Torah, the damage caused by a *bor[[34]](#footnote-34)* in the place that it was created is considered an active damage equivalent to *shor* and *aish*. We cannot distinguish between the *avos n’zikin* in terms of severity or priority and their only differences are details which the *gemara* enumerates.[[35]](#footnote-35) If this is correct, then we can understand exactly why Rashi treated the *bor* equivalently to the ox whilst explaining the opinion of Rabbi Noson. He understood that they are both considered active partners in the damage!

As a result, we can conclude by differentiating between the two scenarios that we began with. In the first case, where Reuven was a passive party and Shimon was an active party, both Rashi and Tosfos would agree that all of the responsibility is on Shimon’s shoulders. However, in the second case, Reuven’s *mazik* is not a *bor*; according to Rashi, Shimon will be primarily responsible before Reuven, but Reuven does bear responsibility. And if Reuven’s *mazik* had been a *bor*, he would have equal responsibility with Shimon because he would be considered an active party!

1. Based on the shiurim of Rav Stav (given during Elul 5776) and Rabbi Conick (given throughout 5777) [↑](#footnote-ref-1)
2. A *chararah* is a ‘hot cake’ - a food that acts as a coal and can cause a fire [↑](#footnote-ref-2)
3. Bava Kama 21b [↑](#footnote-ref-3)
4. On 22a, Rabbi Yochanan holds *aisho mishum chizav* and therefore explains that Shimon is obligated to pay *nezek sholem* for *mokom gacheles* and *chatzi nezek* is referring to the rest of the haystack, because of *tzeroros*. Rabbi Shimon ben Lakish holds *aisho mishum momono* and therefore explains that the dog threw the *chararah* onto the haystack (*adyei aduyei*) and so Shimon is obligated to pay *chatzi nezek* for *makom gacheles* and he is not obligated at all for the rest of the haystack. [↑](#footnote-ref-4)
5. ibid 23a [↑](#footnote-ref-5)
6. Tosfos explains that the haystack must have belonged to Reuven in order to obligate Shimon for his dog’s consumption of the *chararah*, based on the passuk of *"u'vi'air bisdai acher"*. As such, the *gemara's* question is really that Shimon should not have to pay all of the damage. Reuven obviously does not need to pay himself! For ease of understanding, I have presumed in the main body of the text that the *gemara* is asking why Reuven isn’t obligated to pay. [↑](#footnote-ref-6)
7. ibid 23a d”h velichayav **nami** ba’al hagacheles [↑](#footnote-ref-7)
8. See the case below [↑](#footnote-ref-8)
9. In this case, it happens to be that the action of damage was committed by an animal, which is generally considered *momon hamazik*, but because here, there is one active party and one passive party, the active party is primarily responsible. [↑](#footnote-ref-9)
10. ibid 22a [↑](#footnote-ref-10)
11. ibid 6a [↑](#footnote-ref-11)
12. ibid 2a [↑](#footnote-ref-12)
13. ibid 6a *d”h i behadi de’azli mazki* [↑](#footnote-ref-13)
14. This is true if the *megalgel* is a person, but if it is an animal, then the damage is considered *tzeroros*, for which the owner of the animal is only *chayav chatzi nezek*. If so, see the following case of *dlil* for why Rashi still does not think the *ba’al habor* will be *chayav* to pay. [↑](#footnote-ref-14)
15. Any object which is tied to the foot of a chicken (Rashi) [↑](#footnote-ref-15)
16. ibid 17a [↑](#footnote-ref-16)
17. ibid 19b [↑](#footnote-ref-17)
18. ibid 19b *d”h ela masnisin* [↑](#footnote-ref-18)
19. The gemara referred to not hiding the *dlil* as negligent, so Tosfos understands that even with hiding the *dlil* properly, the likelihood of it becoming attached to the foot of a chicken is still comparable to *ruach metzuya.* [↑](#footnote-ref-19)
20. ibid 6a [↑](#footnote-ref-20)
21. Damage caused by the chicken with the *dlil* is done whilst *the* *dlil* is moving. Therefore it falls into the category of *aish*. However, *bor hamisgalgel* is specifically a case where damage is caused by something that moves from its original place but is now stationary. [↑](#footnote-ref-21)
22. Clear in Tosfos. Ra'avad holds that it makes no difference whether the *ba'al hadlil* hid it or not, either way the action of the chicken overrides his negligence. [↑](#footnote-ref-22)
23. See footnote 12 [↑](#footnote-ref-23)
24. From discussions with Mikey Kahan and Daniel Samole, based on shiurim of Rav Stav. [↑](#footnote-ref-24)
25. ibid 6a *d”h le’asuyei bor hamisgalgel* [↑](#footnote-ref-25)
26. This case seems to be one of *tzeroros* in a *reshus* *harabim*, which is problematic because *shen* *v'regel* are *pottur* in a *reshus* *harabim*. Perhaps it is *tzeroros* which travel from a *reshus harabim* and damage in a *reshus* *hayachid*, which the *gemara* on 19a says is a case in which the owner of the animal is *chayav*. [↑](#footnote-ref-26)
27. See the Rosh quoted below about how much the *ba’al hadlil* is *chayav.* Although they split the responsibility, *adyei aduyei* only creates a *chiyuv* on *chatzi nezek*. Therefore, that might be split but the *ba’al hadlil* is solely responsible for the rest of the damage. [↑](#footnote-ref-27)
28. Bava Kama 2:end2; see also Bava Kama 1:1 that this idea is dependent on the *machlokes* on 53a of Rabonon and Rabbi Noson. [↑](#footnote-ref-28)
29. Ibid 53a - see continuation [↑](#footnote-ref-29)
30. Ibid 53a [↑](#footnote-ref-30)
31. Rashi 53a s.v. *ba’al habor pattur*, s.v. *mai d’is li*, 53b *l’inyan n’zikin* [↑](#footnote-ref-31)
32. The *gemara* itself suggests this in the next case it brings of *even al pi habor*. [↑](#footnote-ref-32)
33. It is unclear to me why Tosfos does not differentiate between *tam* and *mu’ad*. If Shimon is a partner to the damage caused by his *tam*, he should only be *chayav r’via nezek*, irrespective of the fact that here, Reuven will be *pottur*. [↑](#footnote-ref-33)
34. as a *bor* [↑](#footnote-ref-34)
35. Ibid 5b - an example of this is that only a *bor* is *pottur* for damage done to *keilim*. [↑](#footnote-ref-35)