

Adam Mu'ad Le'olam

The \$6,000 Diamond Washed Down a 48-Story Drain!

Accountability for Accidental Damage

Bava Kama 27b

Signs saying, “You break – you pay!” or “Lovely to look at, delightful to hold, but if you break it, we consider it sold,” hang on the walls of gift shops around the globe. Storeowners realize the risk of accidental damage and wish to avoid problems before they crop up.

Sometimes damage is far more serious than a broken vase or a busted Rubik's cube. Here are two extreme examples of high profile accidental damage:

London's Evening Standard reported in July 2012 that a \$77,000 bottle of cognac was accidentally broken by a wealthy patron at an exclusive club after he asked to study the bottle. The two-century-old brandy was scheduled to be included in a Guinness World Record-breaking cocktail later in the week.

In January 2006, the BBC reported that a forty-two-year-old regular visitor to the Fitzwilliam Museum in Cambridge tripped over an untied shoelace and broke three Chinese vases valued at over \$400,000. Perhaps you have read about or experienced other such examples.

Should the breaker be liable? Why or why not? What is a person's level of responsibility regarding other people's property?

In this shiur we will examine key passages from the Talmud's Bava Kama, the main source for Jewish Law of damages, and we will explore the extent of human responsibility.

KEY QUESTIONS

- When are you liable for compensation for damage? What if you break something by accident?
- When are you exempt from liability for accidental damage?
- What are the theoretical assumptions underlying the above principles?
- Is there ever an exemption from liability for intentional damage?

CLASS OUTLINE

Section I. Innocent Carelessness

Case 1. The Backpacker and the Wind Chimes

Section II. Totally Beyond One's Control

Case 2. iPad in the Hallway

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Case 4. The Braking Cyclist

Case 5. The Harmful Sleeper

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Note: This shiur is not intended as a source of practical *halachic* (legal) rulings. For matters of halachah, please consult a qualified *posek* (rabbi).

SECTION I Innocent Carelessness

Please consider the following case.

Case 1. The Backpacker and the Wind Chimes

Jeff and Jacques were on their way back to the airport after a twenty-one day international hiking trip that culminated in a trek through the mountains of southern Israel. They spent the night before their flight at a hostel in Tel Aviv, and the next morning they decided to pick up some gifts for family at the Nachalat Binyamin arts and crafts fair.

Jeff, bearing all of his gear on his back, stood between a booth selling glass wind chimes and another selling hand-made ceramics. Wishing to show a text message to Jacques, Jeff made a sudden turn. Stunned by the sound of crashed glass, Jeff realized that the extra pair of boots attached to his backpack had knocked out two wind chimes and that his sleeping bag had smashed a third. Jeff was extremely apologetic, helped pick up all the parts, and started moving on. The owner of the shop was irate – he showed the price tags on the three items and told Jeff, “You owe me 1000 shekels (250 dollars).” Claiming it was a total accident, Jeff looked around and pointed out that there is no “You break you pay!” sign, implying that the owner foots the bill for breakage.

Do you agree with Jeff’s reasoning? What legal impact do you think hanging a sign, warning customers that they will be liable for any damages, would make?

How would you defend the shopkeeper in court?

Source 1. Mishnah Bava Kama 26a

A person is considered “forewarned” in all situations (and therefore liable for damage he causes), whether he damages accidentally or purposely, awake or asleep. If someone blinded his friend’s eye or broke his vessels, he pays full damages.

אדם מוּעָד לְעוֹלָם, בֵּין שׁוֹגֵג, בֵּין מְזִיד, בֵּין עַר, בֵּין יָשׁוּן. סָמָא אֶת עֵיַן חֲבֵרוֹ וְשִׁבַּר אֶת הַכֵּלִים, מִשְׁלֵם גְּזֵק שְׁלֵם:

Source 2. Bava Kama 26b

What is the source [of this blanket liability for damages]? Chizkiya says, and it was likewise taught at the Yeshiva of Chizkiya: The verse (Shemot/ Exodus 21:25) states, “[He must compensate for] a wound on account of the wound he inflicted,” to hold him as accountable for accidental damages as for premeditated damage, and for damage beyond his control just like willful damage.

מִנָּא הֵגִי מִיְלֵי? אָמַר חִזְקִיָּה, וְכֵן תִּנָּא דְבֵי חִזְקִיָּה: אָמַר קָרָא, “פָּצַע תַּחַת פָּצַע,” לְחִיּיבוֹ עַל הַשׁוֹגֵג כְּמְזִיד וְעַל הָאֵנֶס כְּרָצוֹן.

Source 3. Rashi Bava Kama 26b

“A wound on account of the wound” – This verse (Shemot 21:25) is seemingly superfluous, but comes to teach us this derivation (that man is liable for accidental damage), for the Torah already states (Vayikra/Leviticus 24:19-20), “When one wounds his friend, what he did will be done to him (meaning, he will have to pay compensation).”

פְּצַע תַּחַת פְּצַע - קָרָא יְתִירָא
הוּא לְהַךְ דְּרַשָּׁה, דְּהָא כְּתִיב,
”כִּי יִתֵּן מוֹם בְּעַמִּיתוֹ כְּאֲשֶׁר
עָשָׂה ...”

Source 4. Shulchan Aruch Choshen Mishpat 378:1

It is forbidden to damage another's property. If one caused damage – even though he did not benefit from it – he is obligated to compensate completely, whether it was inadvertent or even beyond his control.

אָסוּר לְהַזִּיק מְמוֹן חֲבִירוֹ, וְאִם
הִזִּיקוֹ אַף עַל פִּי שְׂאִינוֹ נִהְיָה
חַיִּיב לְשַׁלֵּם נֹזֵק שָׁלֵם, בֵּין
שְׂהִיָּה שׁוּגֵג, בֵּין שְׂהִיָּה אֲנוּס.

SECTION II Totally Beyond Control**Case 2. iPad in the Hallway**

Lugging a ton of things, Mike was trudging through the hallway of a busy student union, and he was exhausted. It was the end of a long day, and he needed a quick pickup. Remembering the Coke machine he had passed a few minutes before, he made a U-turn. There was no way he was going to carry all that stuff back, so he laid down his backpack, gym bag, groceries, six-pack of mineral water, and placed his iPad on the top of the pile. He fished for some coins and ran back to the Coke machine.

Jimmy and Ron were also walking through the student union. They had just left an Israel advocacy meeting, wrapped up in a heated discussion, when Ron tripped and fell...on a backpack, gym bag, groceries, and mineral water. The iPad went flying...into a cement wall, resulting in a cracked screen, chipped case, and total malfunction.

Mike returned a minute later with a cold Coke, only to meet the fallen Ron and his broken iPad.

Does Ron have to pay for the iPad? Can you make a convincing case that he does?

Can you come up with a defense for Ron, who claimed blamelessness?

What do you think?

Source 5. Mishnah Bava Kama 27a

If one person leaves a jug in a public thoroughfare, and a pedestrian comes and stumbles on it and breaks it, the pedestrian is exempt from damages. If the pedestrian is injured, the owner of the jug is liable for the damages.

משנה מסכת בבא קמא ג: א
המניח את הפד ברשות הרבים
ובא אחר ונתקל בה ושברו,
פטור. ואם הוזק בה, בעל
החבית חייב בגזקו.

Case 3. Bottles on the Sidewalk

Gary Cohen was feeling a little stifled in Toledo, Ohio, so he got himself a summer job in Manhattan as a delivery man for a beverage distributor. One Wednesday afternoon he unloaded an order of bottles – fine wines, Coke, Sprite and Snapple – congesting the tiny sidewalk in front of the Clybourne Hotel on 76th Street, between West End and Broadway. He ran in to get someone to sign for the delivery, leaving his partner in the driver's seat of the van talking on his phone. A large group of Texan tourists were streaming down the sidewalk.

You can guess what happened: first, Bob Levi from Dallas stumbled over a partially open box of 2004 French Merlot, smashing a number of bottles to pieces. Then, Chaim Strauss from Houston decided to hurry ahead and had no patience for the bottle-cluttered sidewalk. As he was kicking a path to get through bottles of Mango Madness Snapple, one of the bottles broke and cut his leg. Hatzalah arrived and took him to the local ER clinic for the cuts he had sustained. By the end of the day, Chaim received a \$600 charge for medical bills from the ER clinic and Bob and Chaim were charged \$400 by Gary Cohen's boss for the broken wine and beverages. Imagine the argument that ensued...

Do Bob and Chaim have to pay for the upscale red wine and the rest of the broken bottles? Who is responsible for the medical bills?

Let's think a little more about this case.

How do you think the following variations might affect Bob and Chaim's liability:

- What if the sidewalk was **partially or fully blocked** with the piles of bottles?
- What if the bottles were piled up right **at the corner** where people turn from another street?
- Let's say it was **nighttime** and the nearby street lights were out, rendering the street quite dark?

Source 6. Bava Kama 27b

Why is he exempt from liability? Surely he should have looked where he was going?! The Yeshiva of Rav quoted Rav as saying that the Mishnah relates to a case where someone filled the entire public thoroughfare with barrels. Shmuel said that the Mishnah was referring to someone walking in the

אמאי פטור איבעי ליה
לעיוני ומיזל, אמרי דבי
רב משמיה דרב בממלא
רשות הרבים כלה חביות,
שמואל אמר באפלה שנו,
רבי יוחנן אמר בקרן זנית.

dark. Rabbi Yochanan said that the Mishnah is referring to someone who turns a corner.

Rav Papa said, “Our Mishnah is only understandable according to Shmuel or Rabbi Yochanan; for according to Rav, why does the case discuss tripping – even if the walker were to break bottles intentionally as he walks along the street, he would be exempt from liability?!”

Rabbi Zvid said in the name of Rava, “Even one who breaks intentionally is, in fact, exempt. Nonetheless, the Mishnah uses the verb ‘tripping’ to teach us the law stated at the end of the Mishnah, ‘If the pedestrian is injured, the owner of the jug is liable for the damages.’ This liability applies only if the pedestrian trips and is injured; if the walker intentionally kicks a path through the bottles and is injured, the owner of the jugs is exempt. What is the reason (for the bottle owner’s exemption)? It is because the pedestrian injured himself. Therefore, the first part of the Mishnah states ‘tripping.’”

Rabbi Abba said to Rav Ashi, “Thus, they said in the West (in the Land of Israel) quoting Rav Ulla: [He is exempt] because **people are not expected to inspect the ground as they walk.**”

אמר רב פפא לא דיקא מתניתין אלא או כשמואל או כרב יוחנן דאי כרב מאי אריא נתקל אפילו שבר נמי ! ?

אמר רב זביד משמיה דרבא הוא הדין דאפי' שבר והאי דקתני נתקל אידי דבעי למתני סיפא ואם הוה בעל חבית חייב בנזקו דדוקא נתקל אבל שבר לא מאי טעמא הוא דאזיק אנפשיה קתני רישא נתקל.

אמר ליה ר' אבא לרב אשי הכי אמרי במערבא משמיה דר' עולא לפי שאין דרך של בני אדם להתבונן בדרכים.

Source 7. Shulchan Aruch Choshen Mishpat 412:1

If one person leaves a jug in a public thoroughfare and another comes and stumbles on it and breaks it, the one who breaks it is exempt from damages because people are not expected to inspect the ground as they walk.

המניח את הכד ברשות הרבים וקא אחר ונתקל בו ושברו, פטור, שאין דרך בני אדם להתבונן בדרכים.

Source 8. Shulchan Aruch Choshen Mishpat 412:1

If the person who stumbled over the jug is injured by it, the owner of the jug is liable for the damages.

ואם הוה בעל חבית חייב.

Source 9. Shulchan Aruch Choshen Mishpat 412:2

If he filled the entire thoroughfare with jugs, so that there is no way to get around them, the person causing the damage is exempt even if he did so intentionally. However, if he was injured in the process of breaking them, the owner of the jugs is exempt from liability – even if he blocked up the thoroughfare – because the other party is responsible for his own injury.

וְאִם מִילָא כָּל הַדֶּרֶךְ בְּדִים שְׂאִי
אֶפְשָׁר לְעָבוֹר, אֶפְיִלוּ שְׂכָרוֹ
בְּיָדִים פְּטוֹר. וּמִיָּהוּ אִם בְּשַׁעָה
שְׂשִׁיבָרָם הוֹזֵק בְּחֶרְסִיהָ, פְּטוֹר,
אֲעִ"פּ שְׂזָה מִילָא כָּל הַדֶּרֶךְ,
דְּאִיָּהוּ דְּאִזְיָק אֲנִפְשִׁיהָ.

Case 4. The Braking Cyclist

Seth and two friends went for a bike ride on a paved country road. At one point, Adam, the cyclist in front of him, braked suddenly, without warning and for no good reason. Seth had no choice but to brake abruptly in order to avoid crashing into Adam. Fortunately, he was able to do so, but unfortunately, Noah, the cyclist directly behind him, was unable to stop in time, and he crashed into Seth. Thank God, Seth only sustained minor cuts and bruises, but his bicycle was wrecked.

Can Seth claim any payment, either from Adam, the cyclist in front of him, for braking so irresponsibly and causing all this, or from Noah, the one behind him, for actually crashing into Seth?

Source 10. Mishnah Bava Kama 32a

In a case where the owner of the barrel was walking first and the owner of the beam was following, if the barrel broke because the beam [rammed into the barrel], the beam owner is liable. But if the barrel owner stopped abruptly, the beam owner is exempt. If the barrel owner called out to the beam owner, "Stop!" the beam owner is liable. The same is true for one person carrying his candle and another carrying his flax.

... הִיָּה בְּעַל חֶבֶת רֵאשׁוֹן וּבְעַל
קוֹרָה אַחֲרוֹן, נִשְׁבְּרָה חֶבֶת
בְּקוֹרָה, חֵיב. וְאִם עָמַד בְּעַל
חֶבֶת, פְּטוֹר. וְאִם אָמַר לְבְּעַל
קוֹרָה עָמַד, חֵיב. וְכֵן זֶה בְּאֵ
בְּנֵרוֹ וְזֶה בְּפִשְׁתָּנוֹ:

Case 5. The Harmful Sleeper

Imagine a group of people on a camping trip. At bedtime, one person picked a nice vacant area and placed his sleeping bag there and went to sleep with no one next to him. Later, totally unbeknownst to him, someone bedded down next to him. Then the first sleeper caused damages to the second sleeper: he hit him in the face or rolled over his glasses.

Should the first sleeper be liable for absolutely and totally unforeseen damages?

Source 11. Talmud Yerushalmi Bava Kama 2:8

Rav Yitzchak said: the Mishnah (that obligates payments for damage done during one's sleep) is referring to a case of two people who went to sleep next to one another at the same time (and one of them damaged the other). However, if one of them was already asleep and the second person came to sleep near him later, only the one who came later is liable for damages (the one who was sleeping first is exempt).

אמר רב יצחק:
מתניתא בשקו
שניהם ישנין, אבל
אם היה אחד מהן
ישן ובא חברו לישן
אצלו, זה שבא לישן
אצלו הוא המועד.

Source 12. Tosafot Bava Kama 27b

Here (in the Gemara - Source 6) the pedestrian tripped over a stumbling block that he was not expected to have seen, and this is considered beyond his control (and he is exempt from payment). Even though earlier in Baba Kama 26b, based on the extra verse, “[He must compensate for] a wound on account of the wound he inflicted,” we derived the ruling that a person is obligated for damages beyond his control just as he is for willful damages, the Torah does not obligate a person for something totally beyond his control (*ohness gamur*). We see this from the Yerushalmi which exempts the first sleeper for damage to the second sleeper who came later.

הכא שנתקל מחמת מכשול
ולא אבעי ליה לעיוני אנוס
הוא ואף על גב דלעיל (דף
כו:) מרבינן אונס
כרצון באדם המזיק מפצע
תחת פצע אונס גמור לא
רבי רחמנא דהא בירושלמי
פוטיר אתו שישן ראשון אם
הזיק לישני הבא אצלו לישן.

Case 6. The \$6,000 Diamond Down the Drain

Debra visited her engaged cousin, Carol, during spring break at her third floor apartment in a 48-story Chicago condominium. In the middle of the first night after she arrived, Debra got the munchies. She took a mug from the back of the dairy cabinet, rinsed it off, went to the freezer, and took a couple of scoops of Chunky Monkey ice cream. After finishing, she cleaned the mug, set it in the drying rack, and inadvertently knocked the liquid soap into the sink, spilling half of it. She spent a few minutes washing the soap and suds down the drain, finally heading off to sleep. In the morning, Debra came into the kitchen finding Carol looking pale and upset. What was bothering her? After Debra had first gone to sleep, Carol accidentally knocked the diamond out of her ring setting, and had placed the diamond (for safekeeping) in the back of the dairy cabinet inside the very mug Debra later used for ice cream. Debra had unknowingly washed the diamond down into the 48-story drain!

Does Debra have to pay for the diamond?

Source 13. Ramban's Commentary on Bava Metzia 82b

They (the Tosafot) responded [to the question of exemption for damages beyond a person's control] that one is not obligated to compensate for damages totally beyond control. They supported their position from the Yerushalmi concerning a person who was sleeping and another came and slept next to him – only the second person is considered “forewarned” (the first sleeper is exempt from damages). I cannot support this explanation, for in the case of the Yerushalmi [the first person is exempt because] the second person brought the damages upon himself.

This is also the case when the beam owner was in front and the barrel owner followed, and the rest of that Mishnah. Likewise, when they said that people are not expected to inspect the ground as they walk. **In all these cases they exempted the damaging party from liability because the victim was negligent with his own property.**

וְהֵם הִשִּׁיבוּ שְׂאִינוֹ חַיִּיב בְּאֵי וְנִסִּין גְּדוּלִים. וְסָמְכוּ אוֹתָהּ מִן הַיְרוּשָׁלְמִי שְׂאֲמָרוֹ בְּיָשָׁן וּבָא תְּבִירוֹ וְיָשָׁן אֶצְלוֹ הוּא הַמוֹעֵד. וְאֵי אֶפְשִׁי לְהַעֲמִידָהּ, דְּהֵתָם מְשׁוּם דְּשִׁנֵּי פְּשַׁע בְּעֶצְמוֹ,

וְכֵן מָה שְׂאֲמָרוֹ בְּאֵם הָיָה בְּעַל קוֹרָה רֵאשׁוֹן וּבְעַל חֲבִית אַחֲרוֹן וְכֻלָּה מִתְּנִיתִין, וְכֵן מָה שְׂאֲמָרוֹ לְפִי שְׂאִין דְּרַכָּן שֶׁל בְּנֵי אָדָם לְהִתְבּוֹנֵן בְּדַרְכֵיכֶם, כֹּלָם כְּשֵׁהֶם אָדָם הַמְזִיק מְשׁוּם פְּשִׁיעָה דְּנִיזְק פְּטָרוֹ בְּהֵם ...

Source 14. Bava Kama 26b

Rava said: If there was a stone on someone's lap that he was unaware of, and when he stood it fell [and caused damage] – he is liable for damages.

אָמַר רַבָּה הִיָּתָה אָבֶן מִנְחַת לוֹ בְּחִיקוֹ וְלֹא הִכִּיר בָּהּ וְעָמַד וְנִפְלָה לְעַגְבָּן נִזְקִין חַיִּיב ...

Source 15. Shulchan Aruch and Rema, Choshen Mishpat 378:1

It is forbidden to damage another's property, and if he causes damage, even if he derives no benefit from it, he is liable to pay the full damage. This applies whether it was done by accident or even in circumstances beyond control (*ohness*) [Comment by the Rema: Some say that he is not liable if it was totally beyond his control (*ohness gamur*)].

אָסוּר לְהַזִּיק מָמוֹן תְּבִירוֹ, וְאִם הִזִּיקוּ אַע"פ שְׂאִינוֹ נִהְיָה חַיִּיב לְשַׁלֵּם נִזְק שְׁלֵם, בֵּין שֶׁהָיָה שׁוֹגֵג בֵּין שֶׁהָיָה אָנוּס, (וְיֵשׁ אוֹמְרִים דְּנִזְקָא שְׂאִינוֹ אָנוּס גָּמוּר).

**RECOM-
MENDED
ADDITIONAL
READING****Books**

“Oops, Sorry: Accidental Damages in Halacha,” in Rabbi Immanuel Bernstein’s *Journeys in Talmud*, pp. 226-239. This excellent article formed the basis of a large portion of Section II of this shiur. He also presents an analysis of the Rambam’s approach, distinguishing between damages to property and injury to people.

Dayan Tzvi Shpitz’s *Mishpetei Hatorah*, Volume I, Simanim 1, 2, and 3. These cases are now translated into English in *Cases in Monetary Halachah* by Artscroll Publications. The case in this NLE Thinking Gemara shiur about the discarded diamond is based on one of his essays. Be sure to see the first essay concerning a tenant who discarded his landlord’s spoiled defrosted chickens, only to be informed that there was \$10,000 hidden in them!

Online Articles

“A Driver’s Liability in Halacha and Civil Law,” by Rabbi David Hool, at <http://www.dinonline.org/2010/02/23/a-drivers-liability-in-halacha-and-civil-law/>

”The Fateful U-Turn,” by Rabbi Yirmiyahu Kaganoff, at <http://www.yeshiva.co/midrash/shiur.asp?id=7629>

“Medical Malpractice in Halacha,” Rabbi Aaron Tendler’s English rendering of Dayan Tzvi Shpitz’s article, at <http://www.torah.org/advanced/business-halacha/5757/vol2no25.html>

Discussion question for Case 4, The Braking Cyclist: Is the braking light on a bicycle or car equivalent to the barrel owner calling out, “I am stopping!” (Source 10)?