Adam Mu'ad Le'olam

The $6,000 Diamond Washed Down a 48-Story Drain! Accountability for Accidental Damage

Bava Kama 27b

Teacher's Guide

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?

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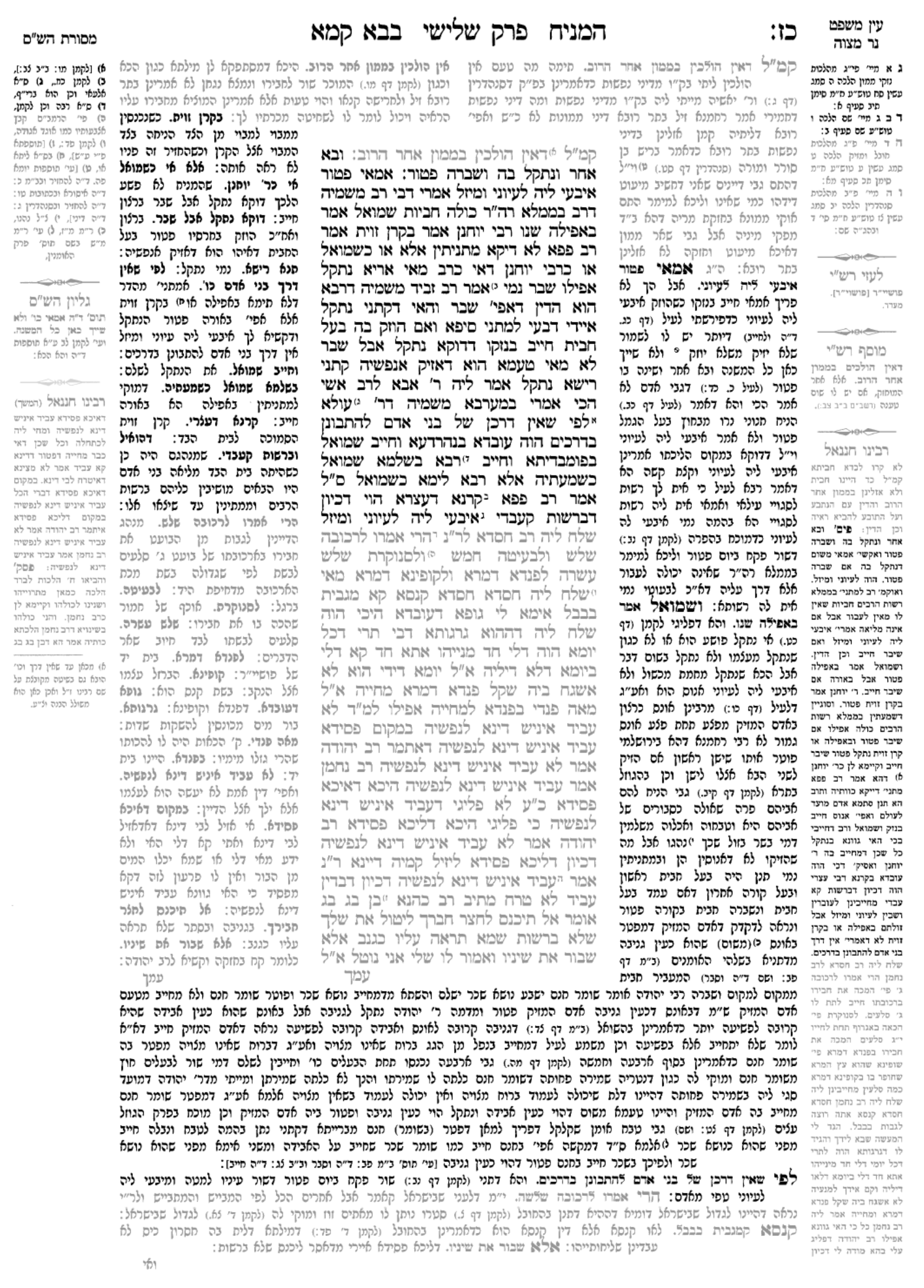
Note: This shiur is not intended as a source of practical *halachic* (legal) rulings. For matters of halachah, please consult a qualified *posek* (rabbi).

This is how Bava Kama 27b looks in the classic editions of the Talmud.



כז: המניח פרק שלישי בבא קמא

קמ"ל דאין הולכין בממון אחר הרוב: ובא אחר ונתקל בה ושברה פטור: אמאי פטור איבעי ליה לעיוני ומיזל אמרי דבי רב משמיה דרב בממלא רה"ר כולה חביות שמואל אמר באפילה שנו רבי יוחנן אמר בקרן זוית אמר רב פפא לא דיקא מתניתין אלא או כשמואל או כרבי יוחנן דאי כרב מאי אריא נתקל אפילו שבר נמי אמר רב זביד משמיה דרבא הוא הדין דאפי' שבר והאי דקתני נתקל איידי דבעי למתני סיפא ואם הוזק בה 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 דרכן של בני אדם להתבונן בדרכים הוה עובדא בנהרדעא וחייב שמואל בפומבדיתא וחייב רבא בשלמא שמואל כשמעתיה אלא רבא לימא כשמואל ס"ל אמר רב פפא קרנא דעצרא הוי דכיון דברשות קעבדי איבעי ליה לעיוני ומיזל שלח ליה רב חסדא לר"נ הרי אמרו לרכובה שלש ולבעיטה חמש ולסנוקרת שלש עשרה לפנדא דמרא ולקופינא דמרא מאי שלח ליה חסדא חסדא קנסא קא מגבית בבבל אימא לי גופא דעובדא היכי הוה שלח ליה דההוא גרגותא דבי תרי דכל יומא הוה דלי חד מנייהו אתא חד קא דלי ביומא דלא דיליה א"ל יומא דידי הוא לא אשגח ביה שקל פנדא דמרא מחייה א"ל מאה פנדי בפנדא למחייה אפילו למ"ד לא עביד איניש דינא לנפשיה במקום פסידא עביד איניש דינא לנפשיה דאתמר רב יהודה אמר לא עביד איניש דינא לנפשיה רב נחמן אמר עביד איניש דינא לנפשיה היכא דאיכא פסידא כ"ע לא פליגי דעביד איניש דינא לנפשיה כי פליגי היכא דליכא פסידא רב יהודה אמר לא עביד איניש דינא לנפשיה דכיון דליכא פסידא ליזיל קמיה דיינא ר"נ אמר עביד איניש דינא לנפשיה דכיון דבדין עביד לא טרח מתיב רב כהנא בן בג בג אומר אל תיכנס לחצר חברך ליטול את שלך שלא ברשות שמא תראה עליו כגנב אלא שבור את שיניו ואמור לו שלי אני נוטל א"ל עמך

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?

Let us look to the sources of the Oral Torah. The Mishnah states a basic principle concerning damages that people cause.

Source 1. Mishnah Bava Kama 26a – Man is responsible for damages he caused.

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.	אָדָם מוּעָד לְעוֹלָם, בֵּין שׁוֹגֵג, בֵּין מֵזִיד, בֵּין עֵר, בֵּין יָשֵׁן. סִמָּא אֶת עֵין חֲבֵרוֹ וְשִׁבַּר אֶת הַכֵּלִים, מְשַׁלֵּם נֶזֶק שָׁלֵם:

Even though we can empathize with Jeff's frustration at having to pay for something broken so innocently and suddenly, according to halachah his liability is clear-cut. His attempt to shift the burden for the breakage onto the storeowner's shoulders – because he did not post a warning sign – is thus ineffectual: A person is liable even for breaking something accidentally – even in his sleep!

The Gemara teaches us that this liability is founded on a biblical verse.

Source 2. Bava Kama 26b – What is the biblical source for liability for accidental damages?

מְנָא הָנֵי מִילֵי? אָמַר חִזְקִיָּה, וְכֵן תַּנָּא דְּבֵי חִזְקִיָּה: אָמַר קְרָא, "פֶּצַע תַּחַת פָּצַע," לְחַייְבוֹ עַל הַשּׁוֹגֵג כְּמֵזִיד וְעַל הָאֹנֶס כְּרָצוֹן.

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.

Rashi explains the methodology of this Oral Torah derivation.

Source 3. Rashi Bava Kama 26b – Why does this teach me about accidental damages?

פֶּצַע תַּחַת פָּצַע - קְרָא יְתֵירָא הוּא לְהַהוּא דְּרָשָׁה, דְּהָא כְּתִיב, "כִּי יִתֵּן מוּם בַּעֲמִיתוֹ כַּאֲשֶׁר עָשָׂה ... "

"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)."

(Note: The full quote in Shemot 21:24-25 is the famous, "An eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound, a bruise for a bruise." There was never a Jewish court that inflicted physical injury in revenge or retribution; the only corporal punishments ever imposed are the death penalty and makkot [lashes], where legislated by the Torah. Why would the Torah express monetary punishment in a way that could be misunderstood and taken literally to require a Jewish court to mutilate a guilty injurer?

Rambam [Maimonides in Laws of Injury and Damage 1:3], among others, explains that in Heaven, the injurer really *deserves* to lose his own eye, etc., and does not achieve atonement by monetary compensation alone. He must sincerely request forgiveness from the victim. The courts, however, only have the authority to legislate monetary penalty. [See the Artscroll Stone Chumash, p. 423.])

The Torah in Vayikra 24:19-20 directly obligates someone who injures another to compensate for the damage. The seemingly extraneous verse in Shemot 21:25 ("A wound on account of the wound"), which follows a discussion of accidental killing (Shemot 21:22), comes to extend a person's liability to include even an inadvertent injury. Based on this derivation, the Gemara (Bava Kama 26b) explains that man is "super-obligated," even for unintentional damage.

The Shulchan Aruch rules accordingly.

Source 4. Shulchan Aruch Choshen Mishpat 378:1 – Man must compensate for accidental damage.

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 מָמוֹן חֲבֵירוֹ, וְאִם הִזִּיקוֹ אַף עַל פִּי שֶׁאֵינוֹ נֶהֱנֶה חַיָּיב לְשַׁלֵּם נֶזֶק שָׁלֵם, בֵּין שֶׁהָיָה שׁוֹגֵג, בֵּין שֶׁהָיָה אָנוּס.

We are responsible for damage we cause whether the owner posts a sign in his store or not. Based on Torah Law, compensation for damages can be claimed by the owner without creating any special rules for the store.

We are responsible for damage we cause even if it is the result of innocuous carelessness.

According to this ruling, unless the artist forgoes his claim (unlikely), Jeff must pay for the wind chimes (and if the owners claim the money, the wealthy patron of the exclusive club will have to compensate for the $77,000 bottle of brandy and the museum visitor for the $400,000 Chinese vases!).

KEY THEMES OF SECTION I

- **A person is held responsible for accidental damages he causes. This obligation is based on a biblical verse, and is formulated in the Mishnah. As the Shulchan Aruch records, it also has the force of practical law.**
- **This liability applies even to innocent carelessness. Even if a storeowner posts no sign or gives no warnings to those who walk through his store, one who causes damage is still obligated to pay.**

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?

Let us first apply what we have already learned in Section I.

How would you rule in this case based on the sources we learned above?

The answer appears to be: **"Of course he must pay."** As we saw, in the Mishnah (Source 1) and later codified in the Shulchan Aruch (Source 4) a person is liable not only for accidental damage, but even for damage beyond his control: "whether it was inadvertent or beyond his control."

Yet, the following Mishnah, found on the page following Source 1 in Tractate Bava Kama, indicates that the matter is not so simple.

Source 5. Mishnah Bava Kama 27a – A man tripped on a jug and broke it.

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 הַמַּנִּיחַ אֶת הַכַּד בִּרְשׁוּת הָרַבִּים וּבָא אַחֵר וְנִתְקַל בָּהּ וּשְׁבָרָהּ, פָּטוּר. וְאִם הֻזַּק בָּהּ, בַּעַל הֶחָבִית חַיָּב בְּנִזְקוֹ.

The obvious question: How can this Mishnah be reconciled with the previous Mishnah (Source I)? Did we not learn that people are liable even for accidental damage? Why is the pedestrian not liable for the broken jug?

Apparently there is more to the picture, as we will see. First, let us first better our understanding of this Mishnah by looking at the following case.

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?*

We will now look at a passage from the Talmud that gives us an insight into the principles behind the ruling of the above Mishnah (Source 5). The Gemara cites a number of approaches.

Source 6. Bava Kama 27b – Why is the damager exempt from liability for the broken jug in the Mishnah (Source 5)?

אַמַאי פָּטוּר אִיבָּעֵי לֵיהּ לְעַיּוּנֵי וּמֵיזַל, אָמְרֵי דְּבֵי רַב מִשְׁמֵיהּ דְּרַב בְּמְמַלֵּא רְשׁוּת הָרַבִּים כֻּלָּהּ חָבִיּוֹת, שְׁמוּאֵל אָמַר בַּאֲפֵלָה שָׁנוּ, רַבִּי יוֹחָנָן אָמַר בְּקֶרֶן זָוִית.

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

אָמַר רַב פָּפָּא לֹא דַּיְקָא מַתְנִיתִין אֶלָּא אוֹ כִּשְׁמוּאֵל אוֹ כְּרַבִּי יוֹחָנָן דְּאִי כְּרַב מַאי אִרְיָא נִתְקַל אֲפִילּוּ שָׁבַר נַמִּי ? !

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?!"

אָמַר רַב זְבִיד מִשְׁמֵיהּ דְּרָבָא הוּא הַדִּין דַּאֲפִי׳ שָׁבַר וְהַאי דְּקָתָנֵי נִתְקַל אַיְידֵי דְּבָעֵי לְמִתְנֵי סֵיפָא וְאִם הוּזַק בָּהּ בַּעַל חָבִית חַיָּיב בְּנִזְקוֹ דְּדַוְקָא נִתְקַל אֲבָל שָׁבַר לֹא מַאי טַעְמָא הוּא דְּאַזְּיק אֲנַפְשֵׁיהּ קָתָנֵי רֵישָׁא נִתְקַל.

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.**'"	אָמַר לֵיהּ רַ׳ אַבָּא לְרַב אַשִׁי הָכִי אָמְרֵי בְּמַעֲרָבָא מִשְּׁמֵיהּ דְּרַ׳ עוּלָּא לְפִי שֶׁאֵין דַּרְכָּן שֶׁל בְּנֵי אָדָם לְהִתְבּוֹנֵן בַּדְּרָכִים.

According to Rabbi Ulla, people are not expected to inspect the ground as they walk; they are entitled to walk in a public domain normally, without having to constantly check if they will break something under their feet.

The other rabbis only exempt a walker under special circumstances – the jug owner impeded traffic by filling the whole sidewalk with jugs; the jug owner surprised pedestrians with his jug as they turned the corner; the jug owner placed his jug in a public thoroughfare at night when it was difficult to see.

The Shulchan Aruch rules according to Rav Ulla's principle.

Source 7. Shulchan Aruch Choshen Mishpat 412:1 – What is our ruling?

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.	הַמַּנִּיחַ אֶת הַכַּד בִּרְשׁוּת הָרַבִּים וּבָא אַחֵר וְנִתְקַל בּוֹ וּשְׁבָרוֹ, פָּטוּר, שֶׁאֵין דֶּרֶךְ בְּנֵי אָדָם לְהִתְבּוֹנֵן בַּדְּרָכִים.

Since we do not expect people to inspect the ground as they walk, it follows that when somebody steps on something or bumps into something that is not plainly visible to the reasonable walker, he will be exempt from damages. Bob will therefore be exempt from paying the damages.

What about the medical expenses?

The Shulchan Aruch continues to address the question of somebody who trips and is injured.

Source 8. Shulchan Aruch Choshen Mishpat 412:1 – Who pays for the injury?

If the person who stumbled over the jug is injured by it, the owner of the jug is liable for the damages.	וְאִם הוּזַק בּוֹ, בַּעַל הַכַּד חַיָּיב.

However, there is a significant difference between Bob and Chaim. Bob tripped over the bottles, causing damage inadvertently – but Chaim intentionally kicked the bottles down, and his breaking them can hardly be called accidental. What is the halachah for somebody who causes intentional damage under such circumstances?

The Shulchan Aruch (based on the above Gemara in Bava Kama 27b) rules as follows:

Source 9. Shulchan Aruch Choshen Mishpat 412:2 – What is the halachah in cases of intentional damage?

וְאִם מִילֵּא כָּל הַדֶּרֶךְ כַּדִּים שֶׁאִי אֶפְשָׁר לַעֲבוֹר, אֲפִילּוּ שְׁבָרוֹ בְּיָדַיִם פָּטוּר. וּמִיהוּ אִם בְּשָׁעָה שֶׁשִּׁיבְּרָם הוּזַק בַּחֲרָסֶיהָ, פָּטוּר, אע״פ שֶׁזֶּה מִילֵּא כָּל הַדֶּרֶךְ, דְּאִיהוּ דְּאַזִּיק אֲנַפְשֵׁיהּ.

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.

If a person entirely blocks up the sidewalk with his merchandise, so that there is no normal way of passing through (assuming there is no convenient option of skipping onto the road and getting past), a pedestrian will be exempt from liability even if he intentionally breaks the goods. However, if there is a reasonable way around, somebody who damages the goods intentionally will be liable to pay the damages.

Thus, the question of Chaim's liability will depend on just how clustered the sidewalk was with bottles. However, there is no question that Chaim won't be able to claim the cost of his medical treatment. Had Bob, who tripped over bottles accidentally, been injured, a claim would be in order; with regard to Chaim, who broke the bottles intentionally, no claim can be filed.

After having seen the application of these two halachot of the Mishnah – the unequivocal liability on the one hand, and the possible exemption on the other – we must now address the apparent contradiction between them.

One Mishnah (Source 1) deems a person responsible for accidental damage and damage beyond his control, whereas the other Mishnah (Source 5) exempts him from damages he causes while walking. **Are there or are there not limits to a person's responsibility for damages?**

The answer to this question is that yes, there are, in fact, limits. However, to define their boundaries we must first deepen our understanding of the factors that might exempt accidental damage. We will do this by introducing the next case, *The Braking Cyclist.*

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?

A third Mishnah from Bava Kama sounds very similar to our cycling accident. It involves two people walking in a public thoroughfare, one carrying a barrel and another, following him, carrying a large beam of wood. If the beam would smash into the barrel, it could feasibly break it.

Source 10. Mishnah Bava Kama 32a – Abrupt stop causes broken barrel.

... הָיָה בַּעַל חָבִית רִאשׁוֹן וּבַעַל קוֹרָה אַחֲרוֹן, נִשְׁבְּרָה חָבִית בַּקּוֹרָה, חַיָּב. וְאִם עָמַד בַּעַל חָבִית, פָּטוּר. וְאִם אָמַר לְבַעַל קוֹרָה עֲמֹד, חַיָּב. וְכֵן זֶה בָּא בְּנֵרוֹ וְזֶה בְּפִשְׁתָּנוֹ:	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.

How does our barrel and beam Mishnah compare with our bicycle scenario?

Noah – back bicycle	Seth – middle bicycle	Adam – front bicycle
Seth stops abruptly because of Adam stopping abruptly. Seth's bicycle gets destroyed when Noah (for no fault of his own) cannot stop quickly enough.		
beam owner	barrel owner	
Barrel owner stops abruptly and the barrel is broken when the beam owner (for no fault of his own) cannot stop quickly enough.		

Who is obligated to pay for the trashed bike?

Adam?

Although Adam did cause the damage by his sudden and unpredictable stop, his cause is **indirect** (he caused Seth to brake, and Noah to smash into him). Based on Bava Kama 56a, the rule is that in cases of indirect damage, the person who caused the damage is exempt from payment – though he remains morally obligated to pay (in the words of the Gemara, he is חַיָּיב בְּדִינֵי שָׁמַיִם – exempt in earthly judgment, but obligated according to "heavenly judgment").

The ideal solution will thus be for Adam to agree to pay for the damages. Yet, if Adam refuses to pay (perhaps claiming that Noah was tailgating), could we make a case that Noah should be responsible?

This case appears similar to the Mishnah in which the person carrying the beam is exempt from liability where the person carrying the barrel made a sudden stop (Source 9). On the one hand, Noah the bicyclist is like a beam owner following Seth the bicyclist in the place of the barrel owner. Noah trashes Seth's bike because of

Seth's sudden brake, which should exempt him from liability.

However, in this instance Seth was not at fault for the abrupt stop, and it was rather the result of Adam's negligence. The question is whether this will make a difference: True, Seth was not at fault, but neither was Noah.

In order to reach an answer to this question (which will be given below, after Source 14, p. 18), we must first deepen our understanding of why the person carrying the beam in the above case of the Mishnah (Source 10) is exempt from liability. What happened to the principle (Source 1) whereby "A person is considered forewarned in all situations (and therefore liable for damage he causes), whether he damages accidentally or purposely, awake or asleep"? Didn't the Gemara (Source 2) add the words, "to hold him as accountable for accidental damages as for premeditated damage, and for damage beyond his control just like willful damage"? If a person is liable even for accidental damages, why is the beam owner exempt from the damage he caused?

To address the issue, we introduce the case of *The Harmful Sleeper*.

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?

Tosafot addresses this issue, first citing the Talmud Yerushalmi:

Source 11. Talmud Yerushalmi Bava Kama 2:8 – Sleepers have limited liability.

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).	אָמַר רַב יִצְחָק: מַתְנִיתָא בְּשֶׁהָיוּ שְׁנֵיהֶם יְשֵׁינִין, אֲבָל אִם הָיָה אֶחָד מֵהֶן יָשֵׁן וּבָא חֲבֵרוֹ לִישַׁן אֶצְלוֹ, זֶה שֶׁבָּא לִישַׁן אֶצְלוֹ הוּא הַמּוּעָד.

The Yerushalmi teaches that the first sleeper is exempt from liability. Tosafot explain as follows:

Source 12. Tosafot Bava Kama 27b – There are two types of situations beyond one's control (*ohness*).

Here (in the Gemara - Source 6) the pedestrian tripped over a stumbling block that he was not	הָכָא שֶׁנִּתְקַל מַחֲמַת מִכְשׁוֹל וְלֹא אִבָּעֵי לֵיהּ לְעִיּוּנֵי אָנוּס

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.

הוּא וְאַף עַל גַּב דִּלְעֵיל (דַּף כו:) מְרַבִּינָן אוֹנֶס כְּרָצוֹן בְּאָדָם הַמַּזִּיק מִפֶּצַע תַּחַת פֶּצַע אוֹנֶס גָּמוּר לֹא רַבִּי רַחֲמָנָא דְּהָא בִּירוּשַׁלְמִי פּוֹטֵר אֹתוֹ שֶׁיָּשַׁן רִאשׁוֹן אִם הִזִּיק לַשֵּׁנִי הַבָּא אֶצְלוֹ לִישַׁן.

According to Tosafot, the Yerushalmi teaches us that there are two levels of circumstances beyond a person's control: A level of ***ohness gamur***, damage that is totally beyond his control, and ***regular ohness***, damage that is out of a person's control, but that can still be prevented by an extremely high level of care and vigilance. For the level of *ohness gamur*, a person is exempt from damages, because the situation was entirely beyond control; for the level of regular ohness, a person bears responsibility.

What is the principle underlying this distinction? Tosafot apparently understands that the principle whereby a person is always responsible for his damages derives from the fact that a person must always be on his guard – he is always "forewarned." If, however, there was nothing humanly possible to guard from – the circumstances were entirely beyond human control – it follows that the blanket liability does not apply. A person is not "forewarned" for something that no warning can avail (Rabbi Moshe Feinstein in Dibrot Moshe, Bava Kama 19:6).

The distinction raised by Tosafot is key to resolving our still unresolved questions: 1) Why is the beam owner exempt from liability when he runs into a barrel whose owner stops short, and 2) Who assumes responsibility in the case of the bicycle pile-up. However, we must first clarify that Tosafot's position is actually contested, as we will learn in the following case – *The $6,000 Diamond Down the Drain*.

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 accidently 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?

(Because Debra fully trusted what Carol said, there is no need to bring proof that there was a diamond there in the first place.)

What do you think Tosafot would rule here?

Would you classify this as *ohness gamur* – absolutely and totally beyond my control – or as regular *ohness* – "I could have been more careful"?

The diamond sliding down the drain seems to be totally outside of Debra's hands. Who in their wildest dreams would imagine a precious diamond sitting in a cup in someone's kitchen cabinet? Tosafot would thus probably rule that Debra is off the hook.

Yet, Tosafot's approach is not unanimous. The Ramban (Nachmanides), in the following section of his commentary on Bava Metzia 82b, disputes Tosafot's approach and writes that a person is responsible even for damage that is entirely beyond his control. Debra is thus liable for the lost diamond!

According to the Ramban, the liability of a person for damages he causes does not depend on his negligence, or even on the fact that he could have been more careful. Rather, the idea behind his liability is that a person is always held responsible for the results of his actions. Even if those actions could not be prevented, they remain his actions, and he is thus responsible to remedy their results.

What will the Ramban say concerning somebody who damages in his sleep? The Ramban has a novel approach to explain the above ruling of the Yerushalmi (Source 11, exempting the first sleeper for damage caused to somebody who came later).

Source 13. Ramban's Commentary on Bava Metzia 82b – Man is obligated even for damages beyond his control.

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

וְהֵם הֵשִׁיבוּ שֶׁאֵינוֹ חַיָּיב בְּאוֹנְסִין גְּדוֹלִים. וְסָמְכוּ אוֹתָהּ מִן הַיְרוּשַׁלְמִי שֶׁאָמְרוּ בְּיָשֵׁן וּבָא חֲבֵירוֹ וְיָשַׁן אֶצְלוֹ הוּא הַמּוּעָד. וְאִי אֶפְשִׁי לְהַעֲמִידָהּ, דְּהָתָם מִשּׁוּם דְּשֵׁנִי פָּשַׁע בְּעַצְמוֹ,

וְכֵן מַה שֶּׁאָמְרוּ בְּאִם הָיָה בַּעַל קוֹרָה רִאשׁוֹן וּבַעַל חָבִית אַחֲרוֹן וְכֻלָּהּ מַתְנִיתִין, וְכֵן מַה שֶּׁאָמְרוּ לְפִי שֶׁאֵין דַּרְכָּן שֶׁל בְּנֵי

are not expected to inspect the ground as they walk.	אָדָם לְהִתְבּוֹנֵן בַּדְּרָכִים,
In all these cases they exempted the damaging party from liability because the victim was negligent with his own property.	כֻּלָּם כְּשֶׁהֵם אָדָם הַמַּזִּיק מִשּׁוּם פְּשִׁיעָה דְּנִיזַק פָּטְרוּ בָּהֶם ...

According to the Ramban, the only cause for exemption is the victim's negligence: If a victim is negligent in bringing the damage upon himself, the damaging party is exempt from liability. Barring the victim's negligence, a person is *always liable* for damages he causes – as the simple reading of the Mishnah (Source 1) indicates – and he must pay compensation even if circumstances were entirely beyond his control.

It follows that according to the Ramban, a person's liability does not stem from any guilt over carelessness – he is liable even if he took every precaution. Rather, a person is liable for damages because he assumes total responsibility for all damages he causes. The only means by which a person can be exempted from liability for damages is where the victim was negligent.

The following passage (from another Gemara in Bava Kama) appears to support the Ramban's approach.

Source 14. Bava Kama 26b – Man is liable for totally unforeseen damages.

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 הָיְתָה אֶבֶן מֻנַּחַת לוֹ בְּחֵיקוֹ וְלֹא הִכִּיר בָּהּ וְעָמַד וְנָפְלָה לְעִנְיַן נְזָקִין חַיָּיב ...

The exemptions given in the cases noted above – the broken jug (Source 5), the broken barrel (Source 10), and the sleeper (Source 11) – are explained by the Ramban as drawing from the victim's negligence. The second sleeper was negligent in placing himself next to the first; the barrel owner was negligent in making a sudden stop; and the jug owner damaged his own jug by negligently placing it in a public thoroughfare (in light of the principle that people do not inspect the ground as they walk).

For cases in which the victim is not negligent, such as that of the stone falling from a person's lap and damaging, the damaging party is liable even though the circumstances were beyond his control.

However, Tosafot will defend their own position, by explaining that in the case of the fallen stone the person in question could have been more careful, and this is not considered a circumstance that is totally beyond control. According to Tosafot, all the cases of exemption must be explained by the fact that circumstances were totally beyond the person's control, and this will not apply to the case of the dropped stone.

Returning to the case of the lost diamond, the ruling will thus hinge on the dispute between Tosafot and the Ramban. According to the Ramban, since Debra is the one who caused the damage, she is obligated to pay: the fact that circumstances were beyond her control is not reason for exemption, unless the victim was negligent

(which she wasn't in this specific case). But Tosafot will counter that Debra is not liable for damages that were totally beyond her control, to the point that we could not have expected her to "be more careful," and Debra is therefore exempt.

Let us now return to the bicycle case: Adam (riding first) braked suddenly, causing Seth (riding second) to brake abruptly, causing Noah (riding third) to crash into Seth.

What would the Ramban say about Noah's responsibility, and what would the Tosafot say?

According to Tosafot, Noah will be exempt from liability because the damage was completely beyond his control. Adam braked suddenly, as did Seth, and Noah could not stop himself in time. We might perhaps suggest that he could have left more distance between himself and Seth, but we learn from the Mishnah (the case of the barrel and the beam) that this is not sufficient cause to obligate him. Thus, Noah is exempt from liability, and all Seth can do is hope that Adam will pay for the damage, though Adam's liability is only a non-enforceable moral obligation.

According to the Ramban, however, the fact that Noah was unable to stop and the damage was beyond his control is not sufficient to exempt him from liability. The only cause for exemption is the victim's negligence. In this case, Seth was not negligent, because his sharp brake was a direct result of Adam's, and under the circumstances braking sharply was the right thing to do. Therefore, the Ramban will deem Noah liable to pay the damages.

How do the Shulchan Aruch and Rema (the basic authorities on which contemporary halachah is based) rule?

Source 15. Shulchan Aruch and Rema, Choshen Mishpat 378:1 - The Shulchan Aruch rules according to the Ramban, and the Rema according to Tosafot.

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 חֲבֵירוֹ, וְאִם הִזִּיקוֹ אע״פ שֶׁאֵינוֹ נֶהֱנֶה חַיָּיב לְשַׁלֵּם נֶזֶק שָׁלֵם, בֵּין שֶׁהָיָה שׁוֹגֵג בֵּין שֶׁהָיָה אָנוּס, (וְיֵשׁ אוֹמְרִים דַּוְקָא שֶׁאֵינוֹ אָנוּס גָּמוּר).

(*We inserted the words, "some say," based on the Shach's comment 378:2.)

Conclusion: The two main halachic authorities, who set the tone for halachic rulings from the 1500s to the present day, are split on this topic. The Shulchan Aruch rules in accordance with the Ramban and Rambam (who in Hilchot Choveil Umazik 6:1 takes the same position as the Ramban), so that a person is liable for all damages he causes, even those totally beyond his control. The Rema, however, follows the approach of Tosafot whereby a person is not liable for damages that were totally beyond his control.

In general, Jews of Ashkenazi descent will follow the ruling of the Rema, whereas Jews of Sephardi descent will follow the Shulchan Aruch.

KEY THEMES OF SECTION II

- **A person is not necessarily held accountable for all accidental damage he causes. For instance, if someone places his own object in a location where people are not expected to check, and someone innocently breaks it (such as by walking normally through a public thoroughfare, or by sitting down on a chair), the owner cannot claim compensation for damages. If the person who trips over the object sustains injuries as a result, the owner of the object is held liable.**
- **If a person causes damage with intent, he is held liable for the damages, unless the owner of the damaged property left him with no choice but to cause the damage. Even where he has the right to cause intentional damage (for instance, if the objects in question entirely blocked up the sidewalk, preventing people from passing by), he cannot claim damages if he was injured in the process of breaking the relevant objects.**
- **Tosafot vs. the Ramban**
  Tosafot and the Ramban differ on how to interpret a number of cases where a person who causes damage is exempt from liability.
    - **A "first sleeper" is exempt from liability for damages he caused to a totally unforeseen "second sleeper" (who comes later). Tosafot explains that a person is not responsible for totally unforeseen damages, whereas the Ramban explains that a person is always responsible for damages he causes, yet is exempt if someone else is negligent in causing his own property to be damaged.**
    - **"The jug breaker" is exempt from liability for damages to a jug placed in a public walkway because, as the Gemara explains, people are not expected to inspect where they walk. Tosafot explains that such damage is considered totally beyond the walker's control, and he is therefore exempt. The Ramban counters that one who places an object in the path of normal walkers is in effect bringing damage upon his own property. This exempts the damager from liability.**
- **Tosafot and the Ramban will argue on how to rule in such cases as the damage caused by Noah the biker and Debra the diamond dropper. In both of those instances, the damage was beyond the control of the person who caused it. Tosafot will exempt Noah and Debra, whereas the Ramban will obligate them. Regarding concrete halachah, the Shulchan Aruch rules in accordance with the Ramban and holds someone responsible for damage beyond one's control and the Rema rules like Tosafot, exempting the damager from liability under such circumstances.**

CLASS SUMMARY

When are you liable for compensation for damage? What if you break something by accident?

When a person causes damage to property, he is liable even if it was done accidentally, even if the owner put up no warning signs, and even if it came about through innocent carelessness. The Ramban and the Shulchan Aruch go one step further, ruling that a person is even liable for damage that was beyond his control.

When are you exempt from liability for unintentional damages?

Tosafot and the Rema, based on a passage in the Yerushalmi and their interpretation of a number of halachot in the Mishnah, write that a person is not liable for damages that were totally beyond his control. The Ramban and the Shulchan Aruch only exempt from damages in situations where the owner of the damaged object was negligent, and in effect brought the damage upon himself.

What are the theoretical assumptions underlying the above principles?

According to Tosafot, liability for damages is based on guilt and negligence. The standards obligating a person to avoid damaging with his own body are very high; the damager must pay even when he was somewhat careless, or where he could have been more careful. However, a person is not liable for *ohness gamur*, damage totally beyond his control.

The Ramban takes a much more stringent position. Liability for damages is based on a person's overarching responsibility for his own actions, irrespective of negligence or otherwise. Therefore, only when a victim is considered to have caused damage to his own property is the damaging party exempt from paying.

Is there ever an exemption from liability for intentional damage?

Yet, but only rarely. Only if the owner of the damaged property left you with no choice but to cause damage (such as entirely blocking up a thoroughfare with one's possessions) will the damaging party be exempt even for intentional damage.

RECOMMENDED 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)?