ACCOUNTABILITY FOR ACCIDENTAL DAMAGE

"אָדָם מוּעָד לְעוֹלָם"

Signs saying, "You break it – you bought it!" 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 session we will examine key passages from the 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?**

1 – A Person's Always Responsible

Source 1. Mishnah & Gemara Bava Kama 26a & 26b

Mishna: A person is considered forewarned[1] 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.	**משנה** אָדָם מוּעָד לְעוֹלָם, בֵּין שׁוֹגֵג, בֵּין מֵזִיד, בֵּין עֵר, בֵּין יָשֵׁן. סַמָּא אֶת עֵין חֲבֵרוֹ וְשִׁבֵּר אֶת הַכֵּלִים, מְשַׁלֵּם נֶזֶק שָׁלֵם:
Gemara: What is the source [of this blanket liability for damages]? Chizkiya says, and it was likewise taught at the Yeshiva of Chizkiya: The verse (Shemos 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.	**גמ'** מְנָא הָנֵי מִילֵי? אָמַר חִזְקִיָּה, וְכֵן תַּנָּא דְּבֵי חִזְקִיָּה: אָמַר קְרָא, "פֶּצַע תַּחַת פָּצַע," לְחַיְּיבוֹ עַל הַשּׁוֹגֵג כְּמֵזִיד וְעַל הָאֹנֶס כְּרָצוֹן.
Rabba 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 לְעֵנַיִן נְזָקִין חַיָּיב

Rashi explains the methodology of this Oral Torah derivation.

Source 2. Rashi Bava Kama 26b – Why does this teach me about *accidental* damages?

"*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 24:19-20), "*When one wounds his friend, what he did will be done to him (meaning, he will have to pay compensation)."*	פֶּצַע תַּחַת פָּצַע - קְרָא יְתֵירָא הוּא לְהַהִּ דְּרָשָׁה, דְּהָא כְּתִיב, "כִּי יִתֵּן מוּם בַּעֲמִיתוֹ כַּאֲשֶׁר עָשָׂה ... "

The Mishna establishes that a person is always responsible for his actions (as far as damage-liability is concerned), even while he's sleeping!

It's important to note that the source for this high-level liability is an extraneous verse in the Torah. In other words, *logically-speaking, ones liability would not extent this far; it's only because of a Biblical source, which extends ones responsibility, that one is indeed obligated to such extremities*, such as even while he's asleep, or standing-up with a rock in his pocket.

As is common in regards to just about every halacha in the great sea of Torah called the Talmud, this concept of 'super-liability' is not so cut & dry…

[1] ז"ל הדברות משה [סי' י"ט ס"ב] ולפ"ז יהיה מדויק לשון אדם מועד לעולם שבמתניתין דְּפִירוּשָׁן דְּהוּא מְוּתְרָה לְהַזָּהֵר בְּכָל אוֹפָן מלשון והועד בבעליו בקרא שהוא לשון התראה כפרש"י בחומש עכ"ל

2 – CONTRADICTION: "JUGS IN THE STREET"

Source 3. Mishnah Bava Kama 27a

Mishna: 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.	**מִשְׁנָה** הַמַּנִּיחַ אֶת הַכַּד בִּרְשׁוּת הָרַבִּים וּבָא אַחֵר וְנִתְקַל בָּהּ וּשְׁבָרָהּ, פָּטוּר. וְאִם הֵזִּיק בָּהּ, בַּעַל הֶחָבִית חַיָּב בְּנִזְקוֹ.
Gemara: 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. **R' Yochanan** said that the Mishnah is referring to someone who turns a corner. …Rabbi Abba said to Rav Ashi, "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.'"	**גמ'** אַמַּאי פָּטוּר אֵיבָּעֵי לֵיהּ לְעַיּוּנֵי וּמֵיזַל, אָמְרֵי דְּבֵי רַב מִשְּׁמֵיהּ דְּ**רַב** בְּמְמַלֵּא רְשׁוּת הָרַבִּים כֻּלָּהּ חָבִיּוֹת, **שְׁמוּאֵל** אָמַר בַּאֲפֵלָה שָׁנוּ, רַבִּי **יוֹחָנָן** אָמַר בְּקֶרֶן זָוִית. …אָמַר לֵיהּ ר' אַבָּא לְרַב אַשִׁי הָכִי אָמְרֵי בְּמַעֲרָבָא מִשְּׁמֵיהּ דְּ**ר' עוּלָּא** לְפִי שֶׁאֵין דַּרְכָּן שֶׁל בְּנֵי אָדָם לְהִתְבּוֹנֵן בַּדְּרָכִים.

After all the dust has settled amongst the 4 different opinions offered in the Gemara (Rav, Shmuel, R' Yochanan, & Ulla), to explain why the passerby is not responsible to 'look where he's going', a glaring question still remains: what about the Mishna (source 1) which clearly states that a person is ***always*** responsible for damages!!!

In other words, let's direct our question towards Rav Ulla (whom the practical halacha follows): what difference does it make that "*people are not expected to watch the ground as they walk*", the Torah says you're liable anyways!?!

How would you resolve this contradiction??

There are 2 main routes offered by the Rishonim (medieval commentators) to resolve this contradiction. No route is without its pitfalls, and, as we shall see, the practical halachic differences ("נפקא מינה") are obvious & very relevant:

3 – THE OPINION OF TOSAFOS

Source 4. Tosafos Bava Kama 27b [ד"ה ושמואל]

Here (in the Gemara - Source 3) 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*).	הָכָא שֶׁנִּתְקַל מַחֲמַת מִכְשׁוֹל וְלֹא אִבָּעֵי לֵיהּ לְעִיּוּנֵי אָנוּס הוּא וְאַף עַל גַּב דִּלְעֵיל (דַּף כו:) מְרַבִּינָן אוֹנֶס כְּרָצוֹן בְּאָדָם הַמַּזִּיק מִפְּצַע תַּחַת פָּצַע אוֹנֶס גָּמוּר לֹא רַבִּי רַחֲמָנָא

According to Tosafos, 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? Tosafos 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 reasonably 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.[2]

"**Slumber-Party Mishap**"

Tosafos continues, and provides a strong proof supporting this distinction, quoting another Gemara:

Source 5. 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).	אָמַר רַב יִצְחָק: מַתְנִיתָא בְּשֶׁהָיוּ שְׁנֵיהֶם יְשֵׁינִין, אֲבָל אִם הָיָה אֶחָד מֵהֶן יָשֵׁן וּבָא חֲבֵרוֹ לִישַׁן אֶצְלוֹ, זֶה שֶׁבָּא לִישַׁן אֶצְלוֹ הוּא הַמּוּעָד.

The Gemara itself seems to highlight the exact same distinction of Tosafos! If 2 people go to sleep in the same bed (i.e. in close proximity) at the same time, the 'damager' is responsible, even though it was an accident. If, however, the 2nd person crawls in to bed after the 1st person has gone to sleep (i.e. and he therefore had no idea that this was going to be a slumber-party!), then the 1st-person is off the hook. Why? Because this case is a total-accident! Totally unforeseeable!

[2] עיין בדברות משה ב"ק סי' י"ט דמבאר שם באריכות

4 – DISSENTING EVIDENCE: THE WILD-WINDS

Source 6. Bava Kama 27a – Falling off a roof by a gust of wind

Rabba said: If a person falls from a roof because of an uncommon (gust of) wind, and damages, he's liable for the damages.	ואמר רבה נפל מראש הגג ברוח שאינה מצויה והזיק חייב על הנזק

An "uncommon wind" is typically Chazal's way of describing what may be called in our times as a "natural disaster" or "freak a nature" etc. In other words, a natural phenomenon which occurs very infrequently. And yet, Rabba says that ***even*** under such extreme circumstances, if one damages another due to 'uncommon winds' he's nonetheless responsible! This would seems to be in the category of an '*ohness gamur*' (unforeseeable accident), and, even still, he's held accountable!!!

> *(Tosafos himself addresses this case, and is forced to say that the 'uncommon wind' referred to is not of the type of a ohness gamur, but, rather, is classified as a regular ohness, which one should have **some** foresight may occur)*

The dissenting opinions use this case as a critical piece of evidence against Tosafos, and provide an altogether different explanation to resolve the parameters of "*a person is considered forewarned in all situations*":

5 – THE OPINION OF RAMBAN

Source 7. Ramban's Commentary on Bava Metzia 82b

They (the Tosafos) 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.***	וְהֵם הֵשִׁיבוּ שֶׁאֵינוֹ חַיָּיב בְּאוֹנְסִין גְּדוֹלִים. וְסָמְכוּ אוֹתָהּ מִן הַיְּרוּשַׁלְמִי שֶׁאָמְרוּ בְּיָשֵׁן וּבָא חֲבֵירוֹ וְיָשַׁן אֶצְלוֹ הוּא הַמּוּעָד. וְאִי אֶפְשִׁי לְהַעֲמִידָהּ, דְּהָתָם מְשׁוּם דְּשֵׁנִי פָּשַׁע בְּעַצְמוֹ,
…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.**	…וְכֵן מַה שֶּׁאָמְרוּ לְפִי שֶׁאֵין דַּרְכָּן שֶׁל בְּנֵי אָדָם לְהִתְבּוֹנֵן בַּדְּרָכִים, כֻּלָּם כְּשֶׁהֵם אָדָם הַמַּזִּיק מְשׁוּם פְּשִׁיעָה דְּנִיזָּק פָּטְרוּ בָהֶם ...

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 indeed *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 (i.e. *ohness gamur*)!!

> In other words, according to the Ramban a person's liability does not stem from any lack of vigilance – he is liable even if he took every precaution. Rather, a person is liable for all damages that ***he*** causes. The only means by which a person can be exempted from liability for damages is where the victim was negligent.

This approach answers both of the proofs offered by Tosafos, casting them both in a totally different light:

1) Tripping on the Jug – The reason why the 'damager' is absolved is **not** because it was an "unforeseeable-accident", but, rather, since the one who placed the jugs there was himself negligent by doing so!

2) Slumber-Party Mishap – The reason why the 'damager' (1st one asleep, in the case where the 2nd person came later) is absolved, is **not** because it was an "unforeseeable-accident", but, rather, because the 2nd-guy was negligent by crawling in to bed beside a deep-sleeping grizzly-bear!!

6 – PRACTICAL DIFFERENCE

Think:
What is a scenario in which a practical difference will emerge between the opinion of Tosafos and the Ramban??

A difference will arise in a case of an unforeseeable-accident, which involves no negligence on part of the one who is damaged:

- Tosafos will absolve the damaging party;
- while the Ramban will obligated for damages.

For example:

"The $6000 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?

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? Tosafos would thus probably rule that Debra is off the hook.

According to the Ramban, however, since Debra is the one who caused the damage, she *may* obligated to pay: the fact that circumstances were beyond her control is not reason for exemption, unless the victim was negligent (which would not appear to be so in this scenario).

7 – PRACTICAL HALACHA

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

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*) (**Rema**: Some say[3] that he is not liable if it was totally beyond his control).	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).

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, so that a person is liable for all damages he causes, even those totally beyond his control. The Rema, however, follows the approach of Tosafos 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.

[3] We inserted the words, "some say," based on the Shach's comment 378:2

More Examples:

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. *Is Jeff responsible?*

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. *Is Ron responsible?*

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?