

**YESHIVAT HAR ETZION**  
**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**  
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TALMUDIC METHODOLOGY  
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**THE LAWS OF SOMEONE WHO DAMAGES 'WITH  
PERMISSION'**

In general, compensatory payments for a person who damages (adam ha-mazik) are more severe than those for nizkei mammon (an animal which damages). This difference is highlighted by the mishna in Bava Kama (26) which declares that 'Adam mu'ad le-olam,' a person is always guilty and liable to pay - even if he was an "oness" or even if he performed the damage while sleeping. Though the Rishonim (Tosafot and the Ramban) debate the extent of this seemingly unlimited liability, one type of adam ha-mazik is singled out as a case in which no liability exists. The gemara in Bava Kama (99b) addresses a situation in which a shochet errs in performing his shechita and the animal becomes a neveila - which cannot be eaten. The shochet - assuming he is a man of training - is exempt from any payment; the gemara extends this concept to others involved in repairing or preparing an item. This shiur will explore the nature and scope of this 'uman' (tradesman) exemption.

Our first instinct would be to extend this clause to broader cases. Supposedly, we would define the exemption as follows: by requesting his service, the nizak recognizes the 'hazards' and implicitly waives any rights in case of non-intentional damage. Though, in general, adam is obligated to pay for non-intentional damage as well, in this case the nizak has agreed not to pursue any litigation in case of mistake. The Shitta Mekubetzet in Bava Kama (26b) endorses this concept when he writes: "Anyone who works on behalf of the nizak and damages, is excused from subsequent payment." Ostensibly, since he is working on behalf of the nizak the tradesman has been given certain latitude. This gives him the confidence and ability to perform his task well. We might define these people as mazik bi-reshut - those who are authorized to handle the item, which the ultimately damage. Although the item might be damaged, they are granted certain 'privileges.'

Taken as such, we might imagine a similar application in many different scenarios. Anytime the action a person is performing upon an item is a requested action, it should imply a waiving of rights should that item be damaged during service. Several cases present themselves which seem to contradict this notion. For example, the gemara in Bava Kama (32a) questions the rule regarding a man who unintentionally injures his wife through sexual engagement. This should easily classify as a situation of "mazik bi-reshut." The man is not only allowed but indeed has a mitzva to perform such an act and lateral unintended damages should therefore be excluded from payment. The fact that the gemara even debates the issue and

more compellingly the gemara's final ruling that indeed he must pay, would seem to contradict our earlier definition of the gemara's 'Uman' exemption.

A similar case appears in the Rambam Hilkhos Ishut 21:9. What happens if damage is performed by a spouse while they are cleaning the house? Would the other spouse be allowed to make a monetary claim? The Rambam's ruling is multidimensional. In theory, the spouse would be obligated to pay for the damaged household item. This, however, would introduce tension and antagonism into the household setting. To preserve domestic bliss, Rabanan excused payments. Yet, it would appear from the Rambam that in the absence of any rabbinic ruling payments are obligated!!! The Ra'avad rejects this possibility; instead he sees the only vehicle for obligating the spouse is to consider them a 'shomer.' As a mazik, the spouse cannot be liable, since he or she is considered 'mazik bi-reshut.' Only as a shomer can they be expected to pay.

Both the gemara and the Rambam raise situations of mazik bi-reshut in which we might still-in practice or in theory - obligate payment. Evidently, they understood the exemption for uman - the technician who accidentally damages - in a different manner which would not allow its extension to these cases.

The Rambam might have viewed the uman exclusion in the following manner: working on an item and breaking it while working, is not inherently defined as an ACT of nezek. Any change which the human confers upon the item cannot be defined as hezek but rather as his professional activity. Hezek is normally some sort of deviation from the normal manner; here, in contrast, The uman is expected to act upon other peoples' items. While fixing an item, it might break, and when it does, no deviant act has been performed.

We might look to similar situations in which an item is damaged, yet we cannot consider an act of damage as having occurred. An immediate analog might be the situation of a sho'el who borrows an item and is expected to use it. Now, in general, it is difficult to meter the degree by which his acts are defined as hezek since a sho'el pays for any incident - even an oness. Yet, there is one exclusion or case in which a sho'el does not pay - meita machmat melakha - if the animal is damaged as a result of the standard use. Why should we completely excuse the sho'el from any payment? Why do we not consider him a mazik? The answer is obvious: He is licensed to use the item and this action cannot be considered a ma'aseh hezek. (see Tosafot Bava Kama (10a) for a reference to this halacha.)

In fact, the gemara in Ketuvot (34b) speaks of a more complicated case. Children inherit a borrowed animal from their deceased father. Not knowing the identity of the animal and assuming it really belonged to their father, they sacrifice the animal and plan to eat it. The gemara excuses them from monetary compensation, demanding a 'symbolic' and cheaper payment instead. These children cannot be considered as mazikim since they were using an item they THOUGHT to be theirs. Even though in reality they were

ATTACKING someone else's item, they were not acting in a aggressive manner .

A second analog which presents itself is the case of one who damages within his own reshut – the reshut ha-mazik. The Rashba (Bava Kama 27b) excuses the mazik because he is called an oness (this is in accordance with the position of Tosafot who exempt adam ha-mazik from cases of oness). However, many disagree with Tosafot and do not excuse adam ha-mazik from "oness" payments. Yet, a person who damages in his own reshut might be excluded simply because we cannot consider his act an ATTACK – he is merely working on his estate.

We might view uman in a similar light. Being asked to tinker with an item in order to fix it, he is not merely granted extra latitude; his actions cannot be considered an attack on the object since he is involved in the act of fixing. In the case of a person cleaning the house, the breaking is not an inherent part of the task. Incidentally, while cleaning, an item might be broken. Incidentally, while involved in sexual activity, a woman might be hurt. We cannot excuse these damages, because the damage is part and parcel of the task. Only an uman enjoys this license because he is specifically asked to fix and change the item. Had the uman exemption been seen as a personal waiver to encourage the technician to work, we might offer similar waivers to house-cleaners. Instead, the uman exemption is based on the internal definition of his action, a definition which a house cleaner does not share.

This question might have influenced a very significant talmudic debate. The gemara in Bava Metzia (82b) addresses the case of guardians (shomrim) who slip and break barrels during transport. The gemara discusses their level of liability based purely upon the laws of shomrim, ignoring any potential liability for adam ha-mazik. Many have suggested that the uman exemption be extended to the shomer, since he is working on behalf of the owner. (see for example Tosafot Rabenu Peretz Bava Kama (27). According to our 'minimalist version' of the uman exemption, it would, in no way, be relevant to a shomer who is asked to guard but is not expected to make a change to the item. Effectively, when he slips, he is no longer acting as a shomer. In fact, the Ramban himself who accepts the uman exemption, develops a different reason why a shomer who slips and breaks barrels does not pay as adam ha-mazik (see Milchamot Hashem BK to the gemara 28 that when he slips he is not PERFORMING any act of damage since he has lost his balance and is being ACTED UPON by gravity). The different strategies for exempting a shomer who slips from adam ha-mazik payments might reflect the different ways to understand the 'uman' exception. Can this exception be applied to a 'shomer' who though working on behalf of the owner, is not expected to 'change' the item.