

# The Hit You Can't Forget: A Purim Torah about Tort Law

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It is known that Rama rules (Orach Chayim 695:2) that a person is not liable for damages that occur during Purim festivities. What is not well known is that this law has ramifications well outside the Holiday of Purim. For example, perhaps the most famous football injury ever took place Nov. 18, 1985 on Monday Night Football. The Redskins attempted a flea flicker and Lawrence Taylor was not fooled. He came blitzing and sacked Joe Theisman, breaking his leg and ending his career. Theisman went on to have a successful career as a broadcaster, but would never play again. Taylor's actions, although not premeditated, potentially cost Theisman a considerable amount of money. What would have happened in a beis din had Theisman sued?

Our discussion begins with a mishna (Bava Kama 26a): "A man is liable for all of his damages, whether they be accidental or purposeful, whether he is awake or asleep. If he blinds the eye of his friend, or if he breaks vessels, he pays full damages." The gemara further teaches (Bava Kama 26b) in the name of Chizkiya that a man is liable for accidental damages as he is for intentional damages, and for unavoidable damages as he is for willful damages. Thus it appears quite simple that a man is responsible for any damage caused by his direct actions, be they willful or not.

Tosafos (Bava Kama 27b) however begin to limit the scope of these obligations, arguing that there are instances of unavoidable damage that a person would not be liable to pay. They claim that even though Chizkiya taught that a man is liable for unavoidable damages, in an instance where the damage is absolutely unavoidable the Torah would not obligate him to pay. Tosafos finds precedent for such a ruling in Yerushalmi (Bava Kama 2:8). Yerushalmi teaches that if a man goes to sleep, and while he is asleep another fellow lies down beside him, should the first fellow damage the second amidst his slumber he would not be obligated to pay. Tosafos explain that the first fellow had no way of knowing the second fellow was there and thus we see that in instances of absolutely unavoidable damages a man is exempt from payment.

Ramban (Bava Metzia 82b) takes issue with Tosafos arguing with the simple reading of the Bavli, that a man is always obligated to pay for damages he causes. Ramban claims "Why should he be exempt from payment, a man is always liable be it unavoidable or willful damage?"

Ramban claims that the reason Yerushalmi exempts the first sleeping fellow is not because one is exempt from payment in cases when the damage is absolutely unavoidable, but rather because when the second fellow lies down beside the already sleeping man he is the one being negligent. He brings the damage upon himself, and therefore cannot claim compensation.

At first glance it might seem tempting to suggest that our question revolves around the argument between Tosafos and Ramban. Tosafos might suggest that damage caused in a sporting event is absolutely unavoidable, and thus exempt from damages, while Ramban would maintain that a man is obligated to pay for any damage he causes regardless of whether he could have avoided them. But such a suggestion is objectionable from both sides. It is difficult to maintain that our case is a case of unavoidable damages because the tackle is done intentionally, and thus perhaps even Tosafos would obligate payment. Conversely, even if we assume that this is not an unavoidable damage, perhaps when someone agrees to play the game they accept a certain level of risk, and thus if they are hurt it might be comparable to Ramban's interpretation of Yerushalmi where the second fellow is himself negligent, and perhaps even Ramban would exempt any damages.

Perhaps a more relevant argument amongst Rishonim can be found in Sukka 45a. The Mishna tells us that on the seventh day of Sukkos after the obligation of lulav and esrog has been fulfilled "*miyad tinokos shomtin es lulavehem v'ochlim esrogehem*". Tosafos, quoting Rashi, explain that after the fulfillment of the mitzvah adults would, without permission, take the four species from the hands (*miyad*) of children and eat their esrogim. They continue, "And this is not considered stealing because that was what they were accustomed to do in celebration. We can learn from here to exempt young men who joust with each other to create joy for a bride and groom should one of them tear the clothing of the other or injure his horse, because jousting is what they are accustomed to do in order to create joy." Tosafos thus assume that any damage caused during an accepted form of amusement would not be subject to liability.

Rosh (Sukka 4:4) argues with Rashi's interpretation of the Mishna as well as with the expansion of Tosafos. Rosh explains that after the fulfillment of the mitzvah of lulav and esrog, immediately (*miyad*) the children would take apart their own set of four species, eat the esrogim and play games with the lulavim. Having disregarded Rashi's understanding of the Mishna, Rosh has no source to permit damage caused while creating joy. It should not therefore surprise us that Rosh (Teshuvos HaRosh 105:5) argues with Tosafos and obligates payment should one of the jousters cause damage.<sup>21</sup>

Tur (Choshen Mishpat 378) rules in accordance with his father, Rosh, that should a groomsman cause damage while jousting he is obligated to pay full damages. The same should of course be true for damage caused while dancing at a modern wedding. Rama (Choshen Mishpat 378:9) however quotes Tosafos: "Young men who ride on horses to create joy for the bride and groom are exempt from damages should they harm each other's property amidst the playful happiness

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<sup>21</sup> Bach (Choshen Mishpat 378:9) suggests that Rosh only argues with Tosafos because in his place and time the custom of jousting was not well spread and accepted enough to exempt damages. Bach maintains, however, that Rosh fundamentally agrees with the law that one is not liable for damages brought about by an accepted recreational activity.

since it is the custom to perform such activities; the same would be true of other forms of happiness.” Similarly Rama rules in Hilchos Purim (Orach Chayim 695:2) that should a person cause damage to another amidst their Purim festivities he would not be obligated to pay. Thus it appears that Rama rules in accordance with Tosafos and any damage caused during an accepted form of recreation should not be subject to liability<sup>22</sup>.

Magen Avraham (Orach Chayim 695:7) quotes an argument whether this exemption applies only to monetary damage or even to bodily harm. We might then have to split our decision. According to some, if amidst a sporting event a player damaged the uniform of his opponent he is exempt from payment, but should he damage another players’ person he would still be liable<sup>23</sup>. Perhaps the basis for such a split is the mishna in Bava Kama 92a. The Mishna teaches that if person A gives permission for person B to damage his property, person B cannot be held accountable for any damage he causes. The mishna continues though, that if person A grants permission for person B to damage his person, person B would still be liable for any damage he causes. We see clearly that there is a divide between damage caused to one’s property where one can allow others to damage, as opposed to damage done to one’s person where we do not have such rights. According to this approach, Tosafos was only lenient with regard to monetary harm, but not bodily harm. This divide is accepted as law by Aruch Hashulchan (Orach Chayim 695:10).

However, it appears that Rama does not accept this divide, and maintains this exemption even in an instance of bodily harm<sup>24</sup>. We need to thus understand why damage caused amidst a recreational activity would be different than a person granting permission for his friend to harm him in which case the friend would still be liable?

Tur (Choshen Mishpat 421) quotes from his father (Teshuvos HaRosh 101:6): “There were two fellows wrestling with each other, and one wrestler slammed his adversary to the ground and fell on top of him, blinding his friend when he knocked him down. What is the law? The answer appears that he is exempt from payment ... for in this case when they wrestle together they both knowingly enter into the wrestling, and the damage is done without intent, for it is known that when two people wrestle the goal is to pin the other fellow to the ground, and since they wrestle with all of their strength it is impossible to take caution to knock your adversary down gently so he should not get hurt, and thus as each of them tries to knock the other fellow down they forgive (*mochlin*) each other, and it is based on this understanding that they wrestle<sup>25</sup>.”

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<sup>22</sup> Vilna Gaon Choshen Mishpat 378:25. It is possible to argue that this exemption is only for happiness amidst the performance of a mitzvah, and cannot be expanded to other forms of recreation. This appears to be the opinion of Maharshal (Yam Shel Shlomo Bava Kama 5:1) and Aruch HaShulchan (Orach Chayim 695:10 and Choshen Mishpat 378:21).

<sup>23</sup> Such an approach would fit well with the words of Rama in Hilchos Nizikin, but would be forced in his language in Hilchos Purim.

<sup>24</sup> Darche Moshe (Choshen Mishpat 378:5) quotes this law in the name of Morechai and Aguda without distinguishing between the two, and while Mordechai’s words are inconclusive, Aguda maintains this exemption even in an instance of bodily harm.

<sup>25</sup> Accepting Bach’s opinion (that the Rosh agrees with Tosafos that one is not liable for damages caused by an accepted recreational activity) will resolve the apparent contradiction between Teshuvos HaRosh 101:5 quoted in

Beis Yosef questions this ruling based on the Mishna Bava Kama 92a. Rosh exempts payments that occur as a direct result of recreational activity because when one decides to take part in that activity they assume a certain degree of risk associated with normal behaviors during that activity. Thus by participating in the activity they forgive others who may harm them. However the mishna specifically states that one is held liable for bodily harm even if the injured party instructed you to do it, so how would the logic of the Tur apply to bodily injury?

Beis Yosef responds that “perhaps we can differentiate a case where one party forgives his friend from a case where they each forgive each other.” Based on this logic, Rav Caro rules (Shulchan Aruch Choshen Mishpat 421:5) in accordance with Rosh to exempt the wrestlers from liability for damages. What is the basis for this distinction? Sema (Choshen Mishpat 421:10) explains that this is more than just forgiving damage, which the Mishna says is not effective to exempt liability. In this case they each partake in the action of damage against themselves. Perhaps when a person chooses to partake in a recreational activity he knows the risks involved and if he is hurt, like Ramban’s explanation of Yerushalmi, he has himself been negligent.

It would appear from all of the above that provided the harm is perpetuated during the normal course of play and that the harm is not done willfully, a person would not be liable for damages, bodily or monetary, that occur amidst a game or any other recreational activity.

There is however one final caveat. Rabbi Dov Lior (Shut D’var Chevron 101)<sup>26</sup> rules that if amidst a basketball game damage is caused when a foul is perpetrated the person who commits the foul would be liable for the damage. His rationale is that when one agrees to play basketball he only forgives damage that would result from playing by the rules of the game, such as if an errant pass would cause damage, but he does not forgive actions that are against the rules of the game. Thus Rabbi Lior reasons that since fouls are against the rules of the game, a person does not forgive damage caused by a foul and the person committing the foul would be liable to pay.

I believe, however, that while fouls are against the rules of the game, they are certainly a large part of the game. When one agrees to play basketball they know that there is a good chance that they will be fouled and thus forgive the damage caused by fouls, just as they would implicitly forgive damage caused by an errant pass. It would be much more surprising to a player if they were not fouled throughout an entire game than if they were fouled, and while a person does not think he will get injured from those fouls he certainly expects to be fouled and thus his implicit forgiveness should still be intact<sup>27</sup>. Perhaps Rabbi Lior would be correct in regards to a flagrant foul, even if the intent is not to harm, since the damaged party might not have expected such a foul to have been committed.

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Tur Choshen Mishpat 378 and Teshuvos HaRosh 101:6 quoted in Tur Choshen Mishpat 421. The Vilna Gaon (Choshen Mishpat 378:25) did not accept this approach and must therefore assume that the damage caused in jousting was not to be expected so that when the jousting began none of the participants would have granted implicit forgiveness. Alternatively, Rabbi Aaron Levine suggested to me that Rosh only exempts damage when wrestling in the instance where the wrestlers are professional, but should random people agree to wrestle they would be liable just like the jousters.

<sup>26</sup> Thank you to Rabbi Yehuda Turetsky for pointing out this source to me.

<sup>27</sup> See P’risha Choshen Mishpat 421:7 that since the wrestler expects to be hit, the fact that he does not think the hit will damage him does not negate the forgiveness.

We have seen that the ruling of Rama (Orach Chayim 695:2), that one is not liable for damage that occurs amidst Purim festivities, is not the only instance where a person would not be liable for damages that he causes. Perhaps though we can see special significance to the application of this law in Hilchos Purim based on an insight from Rabbi Yonason Sacks.

The halacha is clear (Shulchan Aruch Orach Chayim 686:2) that should Purim, as it does this year, occur on Sunday, Taanis Esther is observed on the preceding Thursday. Sheiltos (67) points out that generally speaking we have a halachik tendency to push off depressing days and not to make them sooner. Thus should most fast days fall on Shabbos we generally push off the fast until Sunday, as opposed to making the fast sooner on any day before Shabbos. Rabbi Hai Gaon explains that while most fast days serve to remind us of tragedy, Taanis Esther is in fact a part of the celebration of Purim. Rabbi Sacks explains that an essential component of the experience of Purim is to move directly from the depression of the fast into the celebrations of the day. In celebrating Purim we celebrate not only the salvation, but we also see in retrospect the necessity of, or the growth achieved by the troubles as well. It should not surprise us that at the very party the Jews were punished for attending, Vashti is killed, setting the scene for salvation. If we looked only at the party we would have thought everything was terrible, but amidst the depression was the source of salvation.

While the celebration of Pesach is a celebration of God's revealed miracles, Purim is a celebration of God's hidden miracles. When experiencing a revealed miracle you don't need broad vision to see the salvation of Hashem, but when experiencing hidden miracles it is necessary to see how the story unfolds from beginning to end in order to recognize how each stage is part of the salvation of Hashem. Rabbi Sacks suggests that this is why (Shulchan Aruch Orach Chayim 690:17) when we read Megillas Esther we open up the entire Megilla, because we can only recognize God's hidden miracles, the salvation of Purim, if we see the whole story. If we only look at the small section which is before us we will not see the salvation of Hashem, but if we look at the Megilla from beginning to end and see the whole story we recognize the hand of God.

If the central theme of Purim is recognizing the presence of the Yad Hashem in times when it is not apparent, perhaps it would be antithetical to the nature of the day to obligate payment for damages caused amidst Purim festivities. To charge someone for damages supposes, perhaps, that some wrong has been perpetrated. But with a deep understanding of the nature of Purim we would be certain that while it may look unfortunate now, if we could see the whole picture we would understand that it is an integral part of our salvation.