

ON THE ASSESSMENT OF DAMAGES IN JEWISH TORT LAW AND ITS APPLICATION TO MEDICAL MALPRACTICE

MICHAEL J. BROYDE*
& CHANNAH S. BROYDE**

INTRODUCTION

The assessment of damages for non-economic losses in tort is currently undergoing a great deal of rethinking in the American legal system. Many feel that, particularly in the field of medical malpractice, these awards have gotten out of hand. A major point of contention has been large awards given for pain and suffering. As a result, a number of states have placed limitations on these awards which have generally been held to be constitutional.¹ This article attempts to present in English, the approach of Jewish law to the assessment of damages and the application of that assessment to medical malpractice.

The article is divided into three parts. Section One surveys Jewish law on the assessment of damages generally, focusing on the factors used to evaluate the proper amount of compensation. Section Two analyzes the rules of compensation for non-economic damages such as pain and suffering. Section Three applies the rules previously discussed to the field of medical malpractice, and explains why Jewish law created a number of rules unique to medical malpractice.

* Adjunct Assistant Professor of Law, Brooklyn Law School; Member Kollell Lehorah, Yeshiva University; Law Clerk, The Honorable Leonard I. Garth, United States Court of Appeals, Third Circuit, 1989-90. B.A., Yeshiva College; Ordination, Rabbi Isaac Elchanan Theological Seminary, Yeshiva University; J.D., New York University.

** Associate, Dewey, Ballantine, Bushby, Palmer & Wood, New York City. B.A. Columbia University; B.A. Jewish Theological Seminary, J.D., New York University.

1. See, e.g., *Davis v. Omitowaju*, 883 F.2d 1155 (3d Cir. 1989) (upholding as not violating the United States Constitution a cap on malpractice awards); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (same).

This topic has also provoked many law review articles; see Epstein, *Market and Regulatory Approaches to Medical Malpractice: The Virginia Obstetrical No-Fault Statute*, 74 Va.L.Rev. 1451 (1988); Nye, Gifford, Webb & Dewar, *The Causes of the Medical malpractice Crises: An Analysis of Claims Data and Insurance Company Finances*, 76 Geo.L.J. 1495 (1988); Pollack, *Medical Maloccurrences Insurance (MMI): A First-Party, no-Fault Insurance Proposal for Resolving the Medical Malpractice Controversy*, XXIII Tort Ins.L.J. 552 (1988); Wagner & Reiter, *Damage Caps in Medical Malpractice: Standards of Constitutional Review*, 1987 DET.C.L.Rev. 1005 (1987); Parsons, *Medical malpractice Damage Caps: Navigating The Safe Harbors*, 65 Wash.U.L.Q. 565 (1987); Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 Ohio St.L.J. 413 (1987); Rosen, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis With a Prescription for Comprehensive Reform*, 52 Bklyn L.Rev. 135 (1986).

I. OVERVIEW OF DAMAGE ASSESSMENT IN JEWISH TORT LAW

A. *General Principles*

Jewish tort law has viewed monetary compensation as the method of promoting justice and insuring fair compensation when a tort occurs. Although the Bible states that an eye for an eye² is the rule of law, this doctrine was never applied literally.³ Various reasons were advanced for rejecting a *lex talionis* approach to tort law. The first, advanced by Rabbi Simon Ben Yochai, was purely practical; fair measures of justice are not possible under this system.⁴ According to this rationale, at least in theory, Jewish law would approve of an eye for an eye if it would accurately dispense equal retribution.⁵ All of the other talmudic authorities, however, disagree with this reason and advance rationales which would prohibit *lex talionis* for philosophical or legal reasons.⁶ Whatever the reason, monetary compensation is and always was the rule of compensation in Jewish tort law.

B. *Categories of Fault*

Jewish tort law has four general categories of fault: intentional (*mezid*), negligent (*shogeg*), accidental (*ones*), and innocent.⁷ A person is totally innocent if his actions did not cause the damage. For example, if a painter completes his job and it is subsequently discovered that the paint contained a defect which could not have been discovered or expected before the job was completed, then the painter's actions in no way caused the damage and he is innocent. On the other hand, if the painter deliberately mixed the paint improperly, then he has caused the harm intentionally. In both cases, there is no dispute about his status; he is liable in the second case and not liable in the first. If the painter did not pay close attention to mixing the paint and, as a result, the paint was defective, then the painter is negligent. Although he had no intention of doing harm, his actions caused damage. Again, there is no dispute; he is liable.

2. *Exodus* 21:24; *Leviticus* 24:20.

3. The Talmud maintains that the nonliteral understanding of the rule is part of the oral tradition which accompanied the written text and that Jewish courts never practiced any other rule. See Introduction of Maimonides to his commentary on the Mishnah, Kapah edition (1963).

4. Babylonian Talmud, Bava Kama 84a. ("If a person who is blind in one eye already, blinds one eye of a person who can see from both eyes, what is the fair punishment?")

5. Maimonides apparently accepted this rationale and maintained that in the ideal world *lex talionis* would be the proper rule. See Maimonides, 3 Guide to the Perplexed 43:3.

6. Babylonian Talmud, Bava Kama 83a - 85a. The reasons given by these talmudists are of two types. The first is a textual analysis which argues that the Bible itself did not mean *lex talionis* literally. The second is a philosophical argument which claims that since *lex talionis* is morally repugnant, it is impossible that the Bible meant it.

7. If a person is innocent, he or she is obviously not at fault. However, innocence is mentioned here with the other categories of fault in order to make clear that *ones*, or accidental cause of damage, is not the same as innocence.

An example of accidental harm is the case of the painter who completed the job and while the paint was still wet, was pushed by a storm against the house, thereby splattering the paint. Here, his actions — his body hitting the wall — did cause the damage, but he took no steps to cause this result. It is this last case, the case of non-negligent accidents, which has caused fundamental disputes in Jewish law.

Jewish tort law is fundamentally split on the status of non-negligent accidents. At issue is whether the system is based on the concept of strict liability or that of negligence. The Talmud states explicitly that a person is always financially liable for his actions, be they intentional or unintentional (or apparently even unpreventable). Many commentators nevertheless maintained a system similar to that of common law negligence, and accordingly held that the Talmud's rule only applied where there was some fault on the defendant's part, not merely causation. The two schools of thought are those of Nachmanides (Spain, 1300) and the Tosafot (Northern France, 1200).⁸ Nachmanides maintains a system of strict liability. He reasons that the talmudic statement that a human being is strictly liable for his actions⁹ (in Hebrew, *adam mu'ad le-olam*) should be taken literally.¹⁰ Therefore, so long as causation is present, the absence of negligence is no defense.¹¹ The Tosafot, on the other hand, say that only actors who are at least partially negligent are liable.¹² They argue that the Bible itself exempts a person from liability when his violation is caused truly accidentally.¹³ Hence, causation alone is insufficient, there must also be fault.

Even Nachmanides does not extend his literal interpretation to every situation. For example, he admits that strict liability does not apply to animate objects for which the person is responsible.¹⁴ He also concedes that a person is not strictly liable for his actions if the injured party was himself negligent.¹⁵

8. The Tosafot were a collection of approximately 40 French medieval commentators who wrote an extensive, highly analytical work on the Talmud which is printed on the outside margins of the Talmud. Because this work was an addition to the famous commentary of Rashi, it was called in Hebrew *Tosafot*, which means "addition".

9. Mishnah Bava Kama 2:5.

10. Commentary of Nachmanides on Bava Metzia 82b.

11. Obviously, a lack of causation is always a defense.

12. Tosafot, commenting on Bava Metzia 82b starting with the word *ve-savar*.

13. *Id.* The Tosafot rely on *Deuteronomy* 22:26 which states that a betrothed woman who is raped is not in violation of the adultery laws because she was blameless.

14. Jewish law had special rules of liability for damage caused by animate object under one's control. These rules were analytically distinct from general tort law. See Shulchan Aruch, Choshen Mishpat, 305.

15. Commentary of Nachmanides on Bava Metzia 82b. Even those commentators who believe generally in strict liability limit the damages in cases in which there is no fault to concrete demonstrable damages, *i.e.*, loss of work, permanent disability and medical expenses. They concede that the less concrete forms of damage — pain, suffering and embarrassment — would not be assessed in faultless cases. Talmudic law, like American law, accepted the concept that non-economic damages are less concrete, and require a higher showing of fault in

Thus, many commentators base the Jewish tort system on negligence and even those who base it on strict liability make exceptions.

A second dispute in Jewish tort law, as in American law,¹⁶ regards causation. Nachmanides holds that a person who indirectly caused (*garmi*) damage is biblically obligated to pay, even when he did so accidentally.¹⁷ The Tosafot, however, hold that indirect causation renders the person only rabbinically obligated.¹⁸ This theoretical distinction has significant practical impact on Jewish tort law because a person who is only rabbinically obligated to pay need only do so if he intended to cause the damage or was grossly negligent.¹⁹ Thus, under the Tosafot's system, a greater number of people who cause damage would not be required to compensate their victims. The effects of this in the medical malpractice area are significant, as will be shown below.²⁰

In sum, as a general rule, people are liable for any intentional and negligent damage that they cause, although what constitutes causation is in dispute. According to some views, people are liable for accidental damage as well. One caveat must be kept in mind with respect to liability of professionals.²¹ Even when the obligation to pay in non-intentional cases otherwise exists, it only applies when the person is working for a fee.²² This exception is based on the rationale of presumed waiver; by asking a professional to work gratuitously, the injured party is assumed to have excused him from unintentional liability.²³ The significance of this exception, as it applies to medical malpractice, is discussed below in Section Four.

C. Assessment of Damages

Jewish law developed a system of assessment of damages completely

different from that of the classical common law,²⁴ and very similar to the more "modern" system of special verdicts.²⁵ It did not allow for "general" verdicts but required a specific monetary amount to be awarded for each component of damages.²⁶ All damages awarded had to be assessed under one of five categories of damages, each intended to cover a different aspect of compensation.²⁷ An injured party could collect for as many or as few of the categories as were actually caused.²⁸

The first category of compensation, called "loss" or "damages" (in Hebrew, *nezek*), correlates to loss of income.²⁹ In the time of the Talmud, this was assessed by the victim's decreased market value in the slave market, which was the most accurate method available to determine the market value of a laborer.³⁰ Today, assessment methods similar to those in American law are used.³¹ This award is intended to compensate the victim for the long-term decrease in his market value as a worker, and not for his loss of income while healing or his pain and suffering.

The second type of damage awarded is medical expenses (in Hebrew, *ripui*). This assessment of damages is intended to compensate only for medical expenses necessary to heal the victim.³² It encompasses the medical expenses actually incurred and those expected to be incurred in order to cure the victim or, if a cure is not possible, to return him as

24. The common law allowed the jury virtually unfettered discretion to evaluate injuries and award damages; see R. Epstein, C. Gregory & H. Halven, *Cases and Materials on Torts* (4th Ed 1984) p. 741-745.

25. See, e.g., CPLR Article 41.

26. J. Caro, *Shulchan Aruch*, Choshen Mishpat 420:3-10 (hereinafter cited as J. Caro, Choshen Mishpat).

27. J. Caro, *Choshen Mishpat* 420:7 Furthermore, there was no right to a trial by a jury; Quint & Hecht, 2 *Jewish Jurisprudence*, 24 (1986). All actions were tried by a panel of three judges or three lay people. They were not jurors since they decided both fact and law, but were, rather, closer to arbitrators. *Id.* at p. 35.

28. There is no explicit statement in the Talmud to this effect. It is, however, clear from the examples given that that is the case; see J. Caro, Choshen Mishpat, 420:3-6.

Like American law, Jewish law assessed damages prospectively. Once damages were assessed by the court, their accuracy was not subject to review in light of changes in the parties' condition. Babylonian Talmud, *Bava Kama* 91a. After final judgment, neither party could request that the amount of the award be adjusted to reflect the plaintiff's speedy or slow recovery. *Id.* The reason for this rule is disputed, however. Some believe it was instituted to provide the tortfeasor with repose. Maimonides, *Sefer Nezikin, Hilchot Chovel u'Mazek*, 2:16 According to these commentators, if the defendant would rather pay the expenses as they arise, he may do so. *Id.* Others maintain that the rule is to benefit the victim as well as the tortfeasor, to enable him to be fully compensated immediately so that he need not worry about the future. Rabbis Alfasi, Asher and Yitzchaki commenting on Babylonian Talmud, *Bava Kama* 91a. According to this theory, a departure from the rule of immediate payment must be sponsored by both parties. *Id.*

29. Babylonian Talmud, *Bava Kama* 83b; J. Caro, Choshen Mishpat, 420:3-6.

30. Babylonian Talmud, *id.*

31. J. Caro, *Choshen Mishpat*, 420:1-6 and commentaries *ad locum*.

32. Babylonian Talmud, *Bava Kama*, 83b-84b.

closely as possible to his pre-injury state.³³ There is some debate as to whether this category includes expenses associated with psychological rehabilitation.³⁴ Some commentators maintain that this type of compensation is covered in categories other than medical.³⁵

The third category, which in Hebrew is called *shevet*,³⁶ is the victim's estimated loss of earnings during the time of his illness and recovery.³⁷ *Shevet* was used to assess loss of work in the short-term, *i.e.* that period during which the injured party could not work because he was recovering.³⁸ This was distinct from the first category (*nezek*) which was permanent disability, *i.e.*, compensation for skills one would never recover. While *nezek* was assessed from the moment the injury reached its permanent or close to permanent stage, *shevet* was assessed for loss of income during the recovery process. *Shevet* was a far more precise assessment, since court proceedings typically occurred after the short-term injury could be assessed.³⁹

The last two damages categories are the focus of this article. The first, which in Hebrew is called, *tza'ar* (pain) is analogous to short-term pain and suffering, *i.e.*, pain suffered at the time of the injury and its immediate consequence rather than long-term pain associated with permanent injury.⁴⁰ The second category, *boshet* ("embarrassment"), reflects long-term pain and suffering such as permanent disfigurement. It was designed to compensate the victim for living with the injury's result. Awards for embarrassment were also used as compensation for torts, such as the infliction of emotional distress, which did not cause physical injury.

As will be demonstrated,⁴¹ Jewish law developed a relatively easy analytic method for assessing short-term pain and suffering, but has struggled for more than a millennium with the difficult task of assessing damages for embarrassment, both in calculating the award and in deciding on its propriety when no other damage is assessed.

Jewish law limited the assessment of these more subjective damages, pain and suffering and embarrassment, to cases of willful, intentional, or

33. J. Caro, *Choshen Mishpat*, 420:18, 23. If no medical treatment is possible, then no damage award is made under this category.

34. A. Gulak, 2 *Principles of Jewish Law*, 214-215 (1922) (frequently reprinted).

35. If one views these types of damages as not real, as was very common until recently, then they were most appropriately awarded under the category of embarrassment or pain.

36. The word literally means rest, and its etymology is the same as that for the word "sabbath".

37. Babylonian Talmud, *Bava Kama*, 83b

38. J. Caro, *Choshen Mishpat*, 420:17.

39. J. Caro, *Choshen Mishpat*, 420:28; Babylonian Talmud, *Bava Kama*, 85a.

40. J. Caro, *Choshen Mishpat*, 420:16. Pain (*tza'ar*) was assessed for that time period where loss of income was still categorized as *shevet* rather than damages (*nezek*).

41. See part II.

grossly negligent infliction of harm.⁴² Thus, there was no liability for the *unintentional* infliction of emotional distress beyond the direct actual economic damage caused.⁴³

II. PAIN AND SUFFERING

Jewish law devised an analytically simple method of assessing pain and suffering. The Talmud recounts that these damages will be assessed according to the answer to the following question: What would a person injured in a manner similar to the plaintiff be prepared to pay for a pain-killing drug in order to avoid the pain resulting from the injury?⁴⁴ This formulation assumed that the damage would still occur, but that the short-term pain and suffering associated with the injury would be avoided.⁴⁵

In assessing pain and suffering, Jewish law acknowledged the individuality of each award.⁴⁶ The Talmud stated, and it was accepted by all of the codifiers, that the money paid for pain and suffering depended on the personality and disposition of the injured party.⁴⁷ This, of course, required evidence and testimony regarding the injured party's personality. It was not, as embarrassment sometimes was understood to be,⁴⁸ a fixed amount based on objective criteria.⁴⁹

42. Rashi commenting on Babylonian Talmud, *Bava Kama*, 26a and further commentaries *ad locum*.

43. *See infra*.

44. Babylonian Talmud, *Bava Kama* 85a. For another way to formulate the question, see J. Caro, *Choshen Mishpat*, 420:16 ("The king has decreed that your arm is to be cut off, however, you may purchase a narcotic if you wish. How much would you pay?").

45. This formulation of the legal standard for awarding pain and suffering assumes that the plaintiff will survive the experience and be able to use his money after the injury. In the context of accidents leading to death, however, virtually no formulation works. Leebron, *Final Moments: Damages For Pain and Suffering Prior to Death*, 64 N.Y.U. Law. Rev. 256 (1989). This limitation did not affect the law because unlike most American jurisdictions (*see Morgne v. State Marines Lines*, 398 U.S. 375 (1970)), and like the classical common law, (*see Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808); but *see Lord Campbell's Act of 1846*, 9 & 10 Vict. c.93 (1846)), Jewish law did not have an action for wrongful death or pain suffered prior to death. The Bible states that in the case of murder it is impermissible to accept money in lieu of punishment. *Numbers* 35:31. This prohibits wrongful death actions in any case in which the criminal law is called into effect, including manslaughter. *See Minchat Chinuch*, commandment 34. Jewish law was not identical to the classic common law, however. Jewish law had survivor laws which enabled the estate to continue actions instituted before the death of the decedent providing that the cause of action is not what caused the death. This was not true in common law. Prosser, *Law of Torts* (4th ed. 1971) at 898-901. This is not explicitly supported, and can only be proven by the examples given. *See Shulchan Aruch, Choshen Mishpat*, 398, 405, 410. However, Jewish law did not allow the decedent's survivors to sue for loss of support or loss of consortium. *Shulchan Aruch, Choshen Mishpat*, 405.

46. Babylonian Talmud, *Ketubot* 40a; *Bava Kama* 83b.

47. J. Caro, *Choshen Mishpat*, 420:24; Maimonides, *Mishneh Torah, Sefer Nezikin, Hilchot Chovel Umazek*, 3:1.

48. *See infra*.

49. Other significant limitations on pain and suffering awards will be discussed in part IV as part of the limitations on the tort of embarrassment. *See infra* text accompanying notes 122-124.

III. EMBARRASSMENT⁵⁰

A. Generally

Unlike pain and suffering, the analytic method of assessing damages for embarrassment was a source of great controversy, both analytically and practically. The Talmud recounts that one who embarrasses another is obligated to pay for the resulting damage.⁵¹ This form of damage was one of the fundamental causes of action in Jewish law.⁵²

The Talmud further states that causes of action for embarrassment can be maintained either together or separately from a general action for damages.⁵³ Thus, one who injures another person by cutting off his arm and deliberately feeding it to farm animals as a form of embarrassment, is liable for embarrassment as well as for the physical harm.⁵⁴ Moreover, one who intentionally spits at a human being, is liable for the embarrassment damage despite the lack of damage in any other of the categories.⁵⁵

The cause of action for embarrassment alone ("intentional infliction of emotional distress") does, however, have certain limitations. The embarrassment cannot be purely personal, *i.e.*, the victim's esteem must be lowered in the eyes of his peers and not only in his own eyes. One is not liable for damages for embarrassment if he embarrasses another purely in private, and it is the plaintiff's recounting of the incident which causes the embarrassment.⁵⁶ The general rule is that the action which resulted in the embarrassment must be committed in front of a group of people who would remember the incident and discount the victim's

50. The discussion in this section relates only to the assessment of long-term embarrassment because short-term embarrassment is compensated under the rubric of pain. Tosafot commenting on Babylonian Talmud, *Bava Kama* 86a (beginning with the words "Ke'elo").

51. *Bava Kama* 83b; Maimonides, *Sefer Nezikin*, *Hilchot Chovel Umazek*, 1:1.

52. Tosefta commenting on *Bava Kama*, Chapter 9. Indeed, biblical verses are cited to support the award for damages. Deuteronomy 25:11-12. See Sifre on *id.* ("From this we learn that one who embarrasses another is obligated to compensate.") Others derive this cause of action from Leviticus 24:19.

While the Talmud explicitly labels the cause of action for embarrassment as *DeOrita* (biblical), and thus on the highest level in Jewish law, a number of later commentators did not understand the Talmud literally on this issue; See Rabbi Abraham ben David commenting on Sifre, Leviticus 24:19. They argue that the Talmud was being rhetorical, and that the verses quoted do not support the assessment of embarrassment as a fundamental cause of action. These commentators maintained that the cause of action for embarrassment is either rabbinic, which roughly corresponds to legislative in our system, or a rabbinic ordinance derived from biblical sources, a category somewhere between classic rabbinic rules and biblical rules. See generally M. Elon, *Hamishpat Haivri* 194-208 (1978).

53. Babylonian Talmud, *Bava Kama* 83a; Maimonides, *Sefer Nezikin*, *Hilchot Chovel U'Mazek*, 2:2. Rabbi Abraham ben David, quoted in *Shita Mekubetzet*, *Bava Kama*, at 92a, maintains that embarrassment is not actionable by itself, but is only a tool of assessing damages for substantive torts.

54. Babylonian Talmud, *Bava Kama* 85a.

55. Palestinian Talmud, *Bava Kama*, 8:1; see also Tosefta *Bava Kama* Chapter 9.

56. This is true in American law as well. See Restatement (Second) of Torts § 577.

esteem.⁵⁷ This includes private actions with public results⁵⁸ such as committing an act in private which causes another's hair to fall out.⁵⁹ A minority opinion disagrees, holding that a cause of action for embarrassment is maintainable even when the damage is purely to the victim's self-esteem because the cause of action for embarrassment is introspective and evaluates how one's own self-worth has changed.⁶⁰ This position, while advocated by a significant authority, is not followed.⁶¹

One interesting dispute discussed in the Talmud, reflects to a great extent the attitude of Jewish Law toward the tort of embarrassment. The dispute addressed the question of whether a cause of action accrues when the victim never realizes he is embarrassed because he died before the embarrassment becomes apparent.⁶² Two rationales for deciding this case are given. One authority maintains that the critical question is whether the tort of embarrassment is allowed because people are themselves embarrassed or because they are debased in the eyes of third parties.⁶³ Many of the later commentators feel that the issue cannot be legally resolved, and since the burden of proof is on the plaintiff, no award is given unless both reasons are satisfied.⁶⁴ Other commentators hold that embarrassment only requires self-knowledge of the embarrassment suffered.⁶⁵

One is liable for the tort of embarrassment if he embarrasses a person, such as a mildly retarded person or a child, who does not clearly perceive the embarrassment, but others understand that he was embarrassed.⁶⁶ A minority opinion holds to the contrary, but its position has not been accepted.⁶⁷ One who is legally insane has no cause of action for embarrassment because the law presumes that he is already embarrassed to the point where no further embarrassment will reduce his dignity.⁶⁸

57. Maimonides, *Sefer Nezikin*, Hilchot Chovel U'Mazek, 8:7. See also Shita Mekubetzet, *Bava Kama*, 65b.

58. J. Caro, *Choshen Mishpat*, 420:7.

59. J. Caro, *Choshen Mishpat*, 420:12.

60. Tosafot commenting on Babylonian Talmud, *Ketubot* 65b.

61. See J. Caro, *Choshen Mishpat*, 420:7, 20-22 and commentaries *ad locum*.

62. Babylonian Talmud, *Bava Kama* 86. The Talmud creates the case by hypothesizing that one embarrasses a sleeping person who never awakens from his sleep.

63. Another opinion is that the key issue in dispute is whether or not this cause of action can be inherited. *Id.*

64. J. Caro, *Choshen Mishpat*, 420:35. The rules for resolving disputes in which there is a doubt in the law are of immense difficulty in Jewish jurisprudence, and cannot be summarized here. The first rule is that the one with possession is ahead in the game. See J. Caro, *Choshen Mishpat*, 25.

65. J. Caro, *Choshen Mishpat*, 420:35 ("in the name of those who say").

66. Maimonides, *Sefer Nezikin*, Hilchot Nizkei Mamon, 3:4. J. Caro, *Choshen Mishpat*, 420:37; see *Sefer Meirat Einayim id.* note 4b.

67. Tosefta, *Bava Kama* Chapter 9.

68. Tosafot commenting on *Bava Kama*, Chapter 9. Apparently this is an irrefutable assumption, although it is not clear why that should be so.

One who embarrasses another by causing him to behave in a manner in which he would normally only behave for pay (for example, one who forcefully strips a professional stripper) is obligated to pay for embarrassment.⁶⁹ Furthermore, the damages for that act may — and according to talmudic law, almost always will — exceed what it would have cost to pay the person to voluntarily do the same act himself. This conforms to Rabbi Akiva's maxim that one who normally will embarrass himself for a certain sum of money will not for the same sum of money consent to be involuntarily embarrassed.⁷⁰

B. *Limitations*

From the earliest of times, both substantive and procedural limitations were placed on embarrassment either as an independent tort or as one of several categories of damages in a broader cause of action.⁷¹ The earliest and most significant limitation was the requirement that some form of physical contact must have occurred. Thus, the Talmud states that one who spits at another person and misses, is not biblically obligated and perhaps not obligated at all, to pay for his action through the tort of embarrassment.⁷² The same is true for purely verbal embarrassment,⁷³ although the Rabbis created ordinances to regulate the embarrassment of another through words, realizing that if such conduct were not prohibited, the most serious type of embarrassment would go unpunished.⁷⁴

The rules of causation were also slightly changed to reflect increased sensitivity to the potential liability for embarrassment. Unlike in other actions in Jewish law, indirectly injured parties lacked standing to sue. For example, if A injured B, thereby indirectly affecting C, C would normally have a cause of action against A. This is not true in actions for embarrassment; only the one actually embarrassed has a cause of action.⁷⁵ Some authorities provide for one major exception: the embar-

69. Babylonian Talmud, *Bava Kama* 90b.

70. *Id.* Thus, consent plays the critical role.

71. Babylonian Talmud, *Bava Kama* 90a.

72. Babylonian Talmud, *Bava Kama* 91a. See also, Shita Mekubetzet commenting on *Ketubot* 65a.

73. *Id.*

74. See text accompanying notes 136 to 143. Many commentators discussed whether there could ever be an award for pain (not embarrassment) for purely verbal non-physical activity. A number of them tried to argue that the short-term embarrassment felt upon public humiliation is more analogous to pain than embarrassment and should be awarded as such. See commentary of Rashi, *Bava Kama* 92a, Rabbi Abraham ben David, quoted in Shita Mekubetzet, *Ketubot* 65a.

They also dealt with the question of whether a public apology could be ordered by a court as a method of compensation or be freely given as a voluntary action by a defendant to reduce damages. See Maimonides, *Sefer Nezikin*, *Hilchot Chovel U'Mazek*, 5:9.

75. Palestinian Talmud, *Bava Kama*, 8:9. Thus, the chain of causation ends at the embarrassed plaintiff.

assessment of one's spouse entitles the uninjured partner to a cause of action for embarrassment, because marriage creates a single entity for many purposes in Jewish law.⁷⁶

There was another limitation on causation in the tort of embarrassment. If a person only prevents the stopping of embarrassment, or even causes embarrassment by preventing the delivery of needed goods, the injured person does not have a cause of action against him.⁷⁷ For example, if one intentionally prevents a caterer from delivering food to a person hosting a party, thereby causing the host great embarrassment, there is insufficient causation for the tort of embarrassment because the defendant was not the actual and immediate cause of the embarrassment.⁷⁸ He merely prevented the victim from getting what he needed to avoid embarrassment.⁷⁹ It is worth noting that many communities devised regulations to bypass this aspect of causation, because they felt it led to unjust results.⁸⁰

C. Intent

Unlike the other four types of damage, one is not obligated to pay for embarrassment caused absent intent. This is true even if the damage is predictable, so long as it is not intentional.⁸¹ The Talmud derived this rule from a biblical source.⁸² However, the definition of "intent" is subject to some dispute. Some commentators maintain that a very high level of intent is required — one must actually intend to commit a tort although not necessarily embarrassment.⁸³ The majority rule, and the one followed in practice, is that one must intend to do an improper — although not necessarily tortious — act, but he need not know that the

76. Babylonian Talmud, *Ketubot* 65b.

77. Babylonian Talmud, *Bava Batra* 93b. Rabbi Shlomo ben Meir and Rabbi Nissim commenting *ad locum*.

78. Babylonian Talmud, *Bava Kama* 93b.

79. Rabbi Shlomo ben Meir on *id.* In any other action in tort, such conduct would be grounds for maintaining an action. For example, if in the identical circumstances one needed a doctor, preventing the doctor from arriving is equivalent to actually causing the injury.

80. This tradition was already recorded in talmudic times, *Tosefta*, *Berachot*, Chapter 4, but it was not in accordance with the technical rules of tort law. See *Minchat Bikurim* commenting *ad locum*.

Another limitation was the placing of statutes of limitations for actions in which the sole monetary relief sought was for embarrassment. Babylonian Talmud, *Bava Kama* 91a; Meiri commenting on *id.* Such limitations do not exist in the rest of Jewish tort law. 12 *Encyclopedia Talmudit* 758, Injurer ("Chovel"). The limitations were not statutorily fixed and, hence, could vary depending on time and place. However, that claims had to be brought as promptly as reasonably could be expected. In Israel today the statute of limitations in the Rabbinical Courts is two years. See *Laws of the State of Israel, The Prohibition of Defamation of 1965* (as amended in 1967).

81. Rashi, commenting on Babylonian Talmud, *Bava Kama* 27a.

82. See discussion in footnote 50 and 52 as to the particular verses.

83. Meiri commenting on Babylonian Talmud, *Bava Kama* 92b-93a.

act will also lead to embarrassment.⁸⁴ Thus, in most general damage actions, if embarrassment also occurred, it is actionable. However, in a case where no other damage is done, and the sole cause of action is the tort for embarrassment, one must demonstrate that the defendant intended to do an improper act.⁸⁵ If the defendant intended to cause only a small amount of embarrassment, but actually caused a large amount, he is obligated for the amount of damage actually caused. It is no defense that the victim is unique and that the defendant did not intend to cause damage of such magnitude.⁸⁶

It is disputed whether liability for embarrassment requires that the defendant know specifically who he is embarrassing. This dispute parallels an identical dispute in criminal law — whether liability for the highest degree of murder requires intent to injure a specific person.⁸⁷ The dispute in criminal law has not yet been resolved,⁸⁸ although the majority opinion is that specific intent is not needed.⁸⁹ A majority of commentators maintain that specific intent is not required in embarrassment either, but they disagree on the reasons. Some maintain that just like specificity is not required to be convicted of murder, it is not required for the tort of embarrassment.⁹⁰ Others maintain that even if specificity is required for murder, the tort of embarrassment, which requires merely monetary damages, does not require such a high level of intent.⁹¹

D. Immunity, Exemption and Waiver in Embarrassment

In addition to limitations, the tort of embarrassment has many exceptions. The first is governmental immunity. A government official is not liable for embarrassment if, in the course of properly exercising his duties, he embarrasses another.⁹² This is true even if his action was not the sole method of accomplishing his goal, but merely the most expeditious.⁹³ The second exception and the more significant for our purpose, is for one engaged in commendable or life-saving activity. One who saves another person in a manner which incidentally causes embarrassment to either a third party or the party saved, is immune from the general tort

84. Jacob ben Asher, Tur, *Choshen Mishpat* 421, J. Caro, *Choshen Mishpat* 421. The third position, requiring intent to specifically embarrass, can be found in the name of Rabbi Abraham ben David quoted in the Shita Mekubetzet on Babylonian Talmud, *Bava Kama* 92a-b.

85. See J. Caro, *Choshen Mishpat* 421 and *supra* note 91.

86. J. Caro, *Choshen Mishpat*, 420:33.

87. Babylonian Talmud, *Bava Kama* 86a.

88. Compare Or Zaru'a on *Bava Kama*, #335 (specific intent needed) with Rabbis Asher and Alfasi, quoted in Yam Shel Shlomo, *Bava Kama*, 8:17 (only intent to murder needed).

89. J. Caro, *Choshen Mishpat*, 421.

90. See sources cited above.

91. Lechem Mishneh commenting on Maimonides, *Sefer Nezikin*, Hilchot Rotzeach, 1:14.

92. Rashi commenting on Babylonian Talmud, *Bava Kama* 28a.

93. Palestinian Talmud, *Bava Kama*, Chapter 8:3.

rules.⁹⁴

E. *Evaluations of Causes of Action for Embarrassment*

The key rule is that awards for embarrassment are evaluated according to criteria which vary depending upon who is the embarrassed and who is the embarrassedor.⁹⁵ Each of the factors vary depending on the events occurring in the tort. As the Talmud recounts, one who embarrasses a slave does not pay as much as one who embarrasses a free person.⁹⁶ Jewish law maintains that the distance in social standing between the plaintiff and the defendant is one of the factors to evaluate in deciding compensation.⁹⁷ It was also generally maintained that it was more embarrassing to be humiliated by one's peers than by the social strata either above or below oneself.⁹⁸ Thus, the Talmud recounts (although these assessments are not binding - they are merely advisory) that only a rich person can actually embarrass another rich person.⁹⁹ One talmudic opinion maintains that in causes of action for embarrassment the law is egalitarian and does not look at the social stature of the parties but, "rather we evaluate each of them as if they are free men who are impoverished, because all are children of Abraham, Isaac, and Jacob, because God does not evaluate poor by their poor and rich by their rich."¹⁰⁰ The law, however, does not follow this opinion.¹⁰¹

Judges have no concrete rule or formula to evaluate the damages for embarrassment.¹⁰² Various analytic methods have been advocated.

94. This is simply an application of the general rules of saving people. See Babylonian Talmud, *Sanhedrin* 73a-73b. See also J. Caro, *Choshen Mishpat*, 424, 425. That the person saved does not have a cause of action against his saviour flows logically from the fact that the saviour could have chosen to do nothing, allowing the victim to die. That would have been legally wrong, but understandable; see J. Caro, *Choshen Mishpat*, 425:1 - 2. The rule that even third parties have no cause of action was enacted to encourage Good Samaritan conduct. See *id.* Additionally, one who consents to be embarrassed waives his cause of action for embarrassment. Rabbis Asher be Yechiel (Rosh) and Alfasi commenting on Babylonian Talmud, *Ketubot*, chapter 3. Indeed, one who consents to any tort, even if he does not foresee that along with the tort there will be embarrassment, waives his cause of action for the resulting embarrassment. *Id.* The same is true if one consents to any activity not realizing that it will cause embarrassment. If the embarrassment was foreseeable, consent waives all causes of action. Nevertheless, one who embarrasses another, even in a manner for which the law does not award financial penalties or allow a cause of action to proceed, violates Jewish law and opens himself up to criminal liability. See Part II, section G for further discussions of the criminal actions. Rabbis Asher ben Yechiel (Rosh) and Alfasi commenting on Babylonian Talmud, *Ketubot*, Chapter 3.

95. Babylonian Talmud, *Ketubot* 40a; J. Caro, *Shulchan Aruch*, *Choshen Mishpat* 420:24

96. Jerusalem Talmud, *Ketubot*, 3:8.

97. Babylonian Talmud, *Bava Kama* 83b and commentary of Rashi *ad locum*.

98. *Shita Mekubetzet* on *Ketubot* 65.

99. Babylonian Talmud, *Bava Kama* 86a.

100. *Id.*

101. One commentator argues that all that this position maintains is that one does not look solely at wealth, but at general social stature of which wealth is but one indicator. See commentary of *Meiri* on *id.*

102. J. Caro, *Choshen Mishpat*, 420:32

Some assess how much one would pay to undergo the identical activity in private where there is no embarrassment.¹⁰³ Others ask how much would one pay to undergo the identical activity with no permanent embarrassment. Others also evaluate the wealth of the community — how much would others in the community pay to undergo this activity. Thus, the assessment of damages is imprecise.¹⁰⁴

This type of system leads to the uncomfortable situation of varying awards for embarrassment. One of the solutions applied in talmudic and medieval times to the variations in such awards was to fix the amount of embarrassment awards for certain types of common embarrassments, particularly those unaccompanied by any of the four other damage assessments.¹⁰⁵ Among the causes of action with fixed awards for embarrassment were seduction¹⁰⁶, the uncovering of body parts which are normally covered,¹⁰⁷ making a person bald,¹⁰⁸ and spitting on a person.¹⁰⁹ The penalties for these types of embarrassments, which were literally fixed in a weight of silver, were actually understood to reflect an award equal to a percentage of a person's wages.¹¹⁰ Thus, they could be easily calculated at different times or in different communities despite vast cultural disparities. For example, it was established that one who removes the clothes of a person in public shall have to pay 400 *zuz*, an amount of money reflecting two year's support.¹¹¹ One who falsely accuses another of infidelity should have to pay one hundred *zuz*, or one-half of a year's support.¹¹²

As the latter commentators have noted, these numbers themselves, either as percentages or as fixed amounts, are not legally binding but are only recommendations to the judge.¹¹³ In modern times, Jewish courts have discarded the monetary amounts in favor of more flexible awards.¹¹⁴ Many maintain that the fixed amount of money awarded in these actions included not only embarrassment but also all other possible awards, such as medical expenses or loss of income, which were associ-

103. M. Isserlas (Rema) quoted in Shita Mekubetzet commenting on *Bava Kama* 86a.

104. *Id.* This is similar to the lack of precision of the "egg shell" plaintiff rule.

105. Babylonian Talmud, *Bava Kama* 90a.

106. Yam Shel Shlomo on *Bava Kama*, 9:38.

107. Babylonian Talmud, *Bava Kama* 90b.

108. *Id.*

109. *Id.*

110. M. Feinstein, *Iggrot Moshe*, 4 Even Haezer 91.

111. Historically, 200 *zuz* was equal to one year's support for an unmarried woman, which a major American decisor maintains is approximately \$25,000. See *id.*

112. Some early authorities maintained that these financial awards were fixed and not sociologically changeable. See Collection of the Writing of the Geonim, *Bava Kama*, Responsa 312. Most authorities did not agree with this position. See Rabbi Abraham ban David, quoted in Shita Mekubetzet commenting on *Bava Kama*, 91b.

113. Yam Shel Shlomo, *Bava Kama* #35 (in the name of all commentators).

114. Aruch Hashulchan, Choshen Mishpat, 420:57-58.

ated with public embarrassment.¹¹⁵ They argue that these awards were instituted for the sake of efficiency and to minimize very subjective court hearings. Therefore, it makes no sense to minimize the court hearings for embarrassment if there are going to be equally subjective court hearings for other categories of damages.

Although many of the parameters of the cause of action for embarrassment limit its use, the *Amoraim* in talmudic times decreed that it is within the power of communities to prohibit certain types of embarrassment¹¹⁶ which are otherwise technically permitted. These were not in a technical sense tort actions, but rather criminal actions in which the fine went to the victim.¹¹⁷ Thus, the tradition arose (which after eight or nine hundred years of existence can hardly be called a tradition), that the law awarded damages for purely verbal embarrassment even if no physical contact occurred. The tradition argues that verbal embarrassment is the worst kind.¹¹⁸ It was customary in Europe in the 12th through 15th centuries to subject a verbal embarrassor to corporal punishment as well as monetary fines.¹¹⁹ Furthermore, as noted previously, the embarrassor was in technical violation of Jewish criminal law.¹²⁰

One who libels another was also considered to be within the province of the tort of embarrassment. Thus, it was typical for such a person to be sued in these pseudo-criminal actions in which the fine went to the victim, as well as to be subject to the more classical criminal punishment. Where the libel resulted in the concrete assessment of damages, such as commercial libel (allegations of bankruptcy or nonpayment of debts), Jewish law mandated that the fine mirror the damage actually done.¹²¹

IV. *Medical Malpractice*

Medical malpractice has always been a quagmire for tort law. The law is forced to balance many more concerns, such as the supply of and need for physicians, than it must in many other fields. The loss of medical care resulting from high tort judgments naturally tends to limit the

115. Rashi commenting on *Bava Kama* 27b.

116. Maimonides, *Sefer Nezikin*, *Hilchot Chovel U'Mazek*, 3:5.

117. This was the typical practice in Jewish law.

118. Rabbi Asher ben Yechiel (Rosh), *Responsa* 101:1.

119. Mordecai ben Hillel Ha-Cohen, *Mordecai*; Chapter 4 commenting on *Bava Metzia*, and M. Isserlas (Rema) commenting on *Choshen Mishpat*, 420:38.

120. Corporal punishment was occasionally used. See *id.*

121. J. Caro, *Shulchan Aruch*, *Yoreh Deah* 334:43. An exception to the verbal embarrassment rule occurred when one verbally embarrassed another in retaliation for the other's tortious or criminal activity. Thus, if X attacks Y, and Y in retaliation libels X, X does not have an action for libel against Y, while Y has an action for assault against X. X may not even use the libel claim to offset Y damages. *Responsa of Maharam of Lebu*, Chapter 176. Libel was always excused when it was in proximity to the tortious activity which caused it. However, this was only true when the libelous activity was a heat-of-the-moment reply to improper conduct. One could not, months or years after the tort, engage in libel as a form of retaliation. Yam Shel Shlomo commenting on *Bava Kama*, chapter 8, Note 42.

amount of damage awards.¹²² On the other hand, the most egregious forms of negligence, as well as extreme pain, suffering and embarrassment, are frequently present in medical malpractice. Medicine is different from other professions, such as painting, accounting, or advocating because healing is considered to be a *mitzvah*, and doctors are given an explicit biblical obligation to heal.¹²³ Indeed, the Shulchan Aruch says that a doctor who stands by and does not try to heal a person is a murderer.¹²⁴ Thus, medical malpractice is an excellent example of balancing what should go into assessing damages in tort, and for this reason we will focus on it to elucidate Jewish law's approach.

The basic text dealing with doctors' liability is *Tosefta Bava Kama* 6:17 which says that when a doctor practicing with court (*beit din*) authorization injures a patient, he is exempt, according to human law, from paying damages. His judgment is handed over to heaven ("*dino masur lashamayim*"). Three basic questions arise from this statement. First, what does court authorization ("*reshut beit din*") entail? Second, if there were no court authorization, under what circumstances would doctors be liable and what kinds of payments would they be obligated to make? Finally, if human law does not obligate them to pay, what does *dino masur lashamayim* mean?

A. Court Authorization

Two explanations of the term *reshut beit din* are advanced. The first, offered by Nachmanides, says that authorization is not required in order to practice medicine; it is sufficient that the doctor have the necessary expertise. Rather, the authorization is needed in order to exempt the doctor from liability.¹²⁵ Without it, the doctor is just like any other professional working for a fee and is covered by the general rules of tort. The second explanation, offered by the Aruch Ha-Shulchan,¹²⁶ says that authorization is required in order for a doctor to practice and that, normally, practicing doctors are so authorized.

The desire to exempt doctors from liability is based on the concern that, without such an exemption, people would be discouraged from

122. This phenomena has been well documented in many different circumstances. See, e.g., Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and its Potential Solutions*, 37 Am. U.L. Rev. 285 (1988); Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 Colum. L. Rev. 1385 (1987).

123. J. Caro, Shulchan Aruch, *Yoreh Deah* 336:1. Many commentators maintain that, without this permission by the Torah, a doctor would be prohibited from healing. See Lamm, *Is It a Mitzvah to Administer Medical Therapy?* 8 Journal of Halacha & Contemporary Society 5 (1984).

124. J. Caro, Shulchan Aruch, *Yoreh Deah* 336:1.

125. Nachmanides, *Torat Ha-Adam* 41-42. Jacob ben Asher and J. Caro agree with this view, see *Yoreh Deah*, Chapter 336, and Rabbi Eliezer Waldenburg says it is the correct one. *Ramat Rachel* § 22.

126. Aruch Ha-Shulchan, *Yoreh Deah* 336:2.

becoming doctors.¹²⁷ Moreover, it may put those already practicing in a no-win situation when they do practice. On one hand, if they do nothing, they would be running the risk of being murderers.¹²⁸ On the other hand, if they take action, they may be exposing themselves to financial liability.¹²⁹ Thus, public policy, at least when there is a shortage of doctors, allows — or perhaps dictates — that doctors be exempt from liability.¹³⁰ Accepting the view of Nachmanides, as most do,¹³¹ leads one to conclude that courts may immunize doctors from liability, but not that they must do so. The factors used by courts would mimic that of any legislative body. It would weigh the public needs as well as the costs of immunizing doctors from liability to maximize justice and efficiency and to minimize cost.

B. *When Would Doctors Be Obligated to Pay and What Does Their Obligation Cover?*

Given the categories of fault described in Section One, under what situation would doctors, in the absence of *Beit Din* exemption,¹³² be obligated to pay? Superficially, it would seem that according to Nachmanides' methodology, doctors would be obligated to pay not only if they acted negligently, but also if they injured the patient accidentally. On the other hand, according to the Tosafot, the doctors' liability would depend on whether they caused the harm directly or indirectly. If they caused damage indirectly, they would not be liable unless they acted intentionally. If they caused it directly, they would be liable only if they acted at least negligently. It is unclear, however, whether the distinction between the Tosafot and Nachmanides applies in medical malpractice cases. Some believe that this distinction does not apply when the action undertaken was a *mitzvah*.¹³³ According to this view, an error committed

127. Tosefta Gittin 4:6.

128. J. Caro, Shulchan Aruch, *Yoreh Deah*, 336:1. See supra note 142 and accompanying text.

129. *Id.*; Tosefta Gittin 4:6.

130. *Id.* According to Rabbi Eliezer Waldenburg, *Reshut Beit Din* today means whatever the government says; it is the government which licenses doctors to practice medicine and which makes the policy as to liability. Ramat Rachel § 22. This means that an action before a Jewish court would require the court to apply secular law in deciding whether the doctor is liable. *Id.*; see Schachter *Medical Malpractice in Jewish Law and Current Legal Problems* (N. Rakover, ed.) 217, 220-21 (1983) (secular law controls) [this article will hereinafter be referred to as *Medical Malpractice*]. It should be noted, however, that it is up to the Beit Din to decide what kind of damages the doctor must pay. Thus, the Beit Din decides whether the doctor should pay only *nezek* or other damages as well. For further discussion on the interaction between secular law and Jewish courts, see Schachter, "*Dina De'Malchusa Dina*": *Secular Law as Religious Obligation*, 1 *Journal of Halacha and Contemporary Society* 103, 110-12 (No. 1 1981).

131. See Fn. 147

132. We assume, as do all others who have addressed this issue, that there is not Beit Din exemption in the present time, and that the Aruch HaShulchan, see notes 148-152, is incorrect.

133. Tosafot, commenting on Babylonian Talmud, *Sanhedrin*, 33b (starting with the word *she'irvan*); Rabbeinu Yonah, commenting on Mishnah Avot 4:12. The Tosafot deal only with

when performing a *mitzvah* is considered intentional even if it actually was not; if it causes damage, the injurer is liable.¹³⁴ Since healing is a *mitzvah*, a doctor's error is considered to have been caused intentionally. Thus, doctors would be liable whether the damage was caused directly or indirectly. They would not benefit from the Tosafot's distinction.

If they are liable, what are doctors required to pay? A person who intentionally injures another is normally required to make all five payments described in Section One: decrease in earning power, pain, medical expenses, lost wages, and embarrassment.¹³⁵ *Tza'ar* (pain); *ripui* (medical expenses) and *shevet* (lost wages) are paid only when the injurer was at least negligent, according to some authorities.¹³⁶ Hence, a non-negligent doctor would not be required to pay these. Moreover, according to some authorities,¹³⁷ as demonstrated in Section Two, only a person who intends to injure or embarrass must pay *boshet*, and a doctor clearly has no such intention. Thus, if we accept these two views, a non-negligent doctor, one who injures completely by accident,¹³⁸ must only pay *nezek* (decrease in earning power).¹³⁹ A negligent doctor would be required to pay four of the five payments but not embarrassment.

The obligations of doctors to pay, unlike that of other professionals,¹⁴⁰ is not dependent on whether they are working for a fee. Indeed, since they are performing a *mitzvah*, doctors are not allowed to charge a fee for their expertise. They may only charge "*sechar battalah*" (cost of idleness) — compensation for the time that they are giving up when they could be pursuing other occupations.¹⁴¹

a person teaching Torah. The rationale of treating these errors as intentional is that a teacher must be very careful when instructing people in the law; treating errors as intentional will encourage teachers to be careful. Rabbeinu Yonah extends this rationale to *mitzvot*, generally although the mishnah itself only discusses the teaching of Torah. Thus, since healing is a *mitzvah*, Rabbeinu Yonah appears to apply it to the errors committed in the process of healing. Rabbi Schachter believes this is the proper interpretation. Schachter, *Medical Malpractice*, *supra* note 146, at 223.

134. See previous footnote.

135. Mishnah *Bava Kamma* 8:1.

136. See e.g., Rif 11a-b, commenting on *Bava Kama*.

137. See Rif, 11a, commenting on *Bava Kama*.

138. It is probably hard to find a doctor who injures a patient completely by accident. One example is a doctor who, while performing surgery on a patient, has a heart attack, and as a result, his scalpel moves and injures the patient.

139. It is not clear how this squares with the notion that a person who injures another while performing a *mitzvah* is considered to be an intentional violator, since if we followed that logic through, he should be required to pay for all five types of damages.

140. See *supra* note 141 and accompanying text.

141. Jacob ben Asher, Tur, *Yoreh Deah* 336:10. Charges for overhead expenses such as rent or equipment payments are also not considered to be a fee. It is unclear what working for only *sechar battalah* means. Some hold that *sechar battalah* means that a doctor can only be paid as much as a rabbi teaching Torah, since the two are in the same category — both are performing a *mitzvah* and, therefore, may not charge a fee for their work. Schachter, *Medical Malpractice*, *supra* note 146, at 45. Rabbi Schachter appears to rely on indirect proof from the Siftei Cohen on *Yoreh Deah* 336:2 and on *Yoreh Deah* 246:5. A contrary view suggests that, in

But, the question arises, if doctors do not work for a fee, why must they pay? Why should there be a distinction between doctors and other professionals? One answer is that doctors are in fact working for a fee — they are working in order to receive a divine reward for their good deeds.¹⁴² Thus, like a ritual slaughterer who is working for a fee,¹⁴³ they can be charged for the damage they do.¹⁴⁴ Another view suggests that a doctor is inherently different from other professionals because the damage doctors cause is physical while the damage the others cause is only monetary. According to Jewish law, people cannot agree to be injured,¹⁴⁵ although they can decide to accept a monetary loss. Thus, Nachmanides' rationale¹⁴⁶ — that a professional working gratuitously is exempt from liability because of the injured party's waiver — does not apply when a doctor causes damage. Therefore, it makes no difference whether or not the doctor is charging a fee.

D. *Dino Masur Lashamayim*

If a *beit din* does exempt a doctor from making payment, what does the statement "*dino masur lashamayim*" mean? Does it mean that he is, in fact, obligated to pay or does it mean that it would be commendable if he did, but it would be above and beyond the call of duty? Conflicting explanations are offered. The Shulchan Aruch¹⁴⁷ says that, according to the laws of heaven, the doctor is obligated to pay in all cases. On the other hand, the Magen Avraham, in his commentary to the Tosefta,¹⁴⁸ says that a doctor who unintentionally injures a patient is exempt even according to the laws of heaven.¹⁴⁹ Nachmanides¹⁵⁰ analogizes a doctor

our society, a doctor may charge whatever he would charge a non-Jew since, if he were not treating Jews, he would treat non-Jews and receive a full fee.

142. Rabbi Schachter advocates this view. Schachter, *Medical Malpractice*, *supra* note 146, at 223.

143. See Babylonian Talmud, *Bava Kama*, 99b.

144. Again, they are liable even if they caused the damage indirectly, and thus, under the rationale of the Tosafot, would normally be liable if they caused the damage intentionally. This is because a person who causes damage while doing a *mitzvah* is treated as an intentional violator. See *supra* text accompanying notes 147-48.

145. Babylonian Talmud *Bava Kama*, 93a.

146. Nachmanides, commenting on Babylonian Talmud, *Ketubot*, 34. See *supra* note 10 and accompanying text.

147. Jacob ben Asher, Tur, *Yoreh Deah* 336:7.

148. *Bava Kama*, Chap 6, commentary § 14.

149. It is unclear what the Magen Avraham means when he says "a person who injures without intention to do so." Presumably, when he uses the word "intention" (*cavanah*) he is not referring to someone who actually wants the patient to get injured. Rather, intention means something akin to gross negligence or recklessness. Doctors who act in such a manner are not exempt. Only those who truly act negligently (*i.e.* "shogeg") are exempt. Rabbi Mordechai Willig, *supra* note 32.

It is surprising that such a well-followed authority does not agree with the Shulchan Aruch. Perhaps part of the answer lies in the fact that this statement was in his commentary on the Tosefta and not on the Shulchan Aruch.

150. Nachmanides, *Torat Ha-Adam* 41.

to a judge who, if he acts to his best ability, but nevertheless makes a mistake, is totally exempt from liability if he never realizes his error.¹⁵¹ If a *beit din* discovers his error, he is obligated to pay, but he is exempt if he practices with the authorization of the court. Following this analogy, a doctor is completely exempt if his error was not discovered.¹⁵² The Tur agrees with this position.¹⁵³ The Tashbez distinguishes between two kinds of doctors, a *rofe chaburot* (surgeon) and a *rofe mashkim* (internist)¹⁵⁴ and holds the former, but not the latter, liable, even in the hand of heaven, if he did not intend to cause the injury.¹⁵⁵ On the other hand, Rabbenu Nissim ("RaN") holds that the doctor should not be liable at all.¹⁵⁶ The RaN, who was dealing with a situation in which the treatment itself could have been harmful or ineffective, as opposed to a situation where the doctor did not pay attention and administered the wrong medicine, reasoned that a doctor's error almost must be accidental rather than negligent. Thus, since Jewish law gives doctors explicit permission to heal, they should not be held liable in such situations. According to Rabbi Waldenburg, the RaN's methodology is the one accepted today. He reasons that since today no person may practice medicine unless he is properly trained and licensed by the government, doctors are not liable in such circumstances.¹⁵⁷ This conclusion is puzzling, considering the state of malpractice law in both the United States and Israel.

In sum, while still recognizing the rights of both the patient to be properly healed and the doctor to be fairly and adequately compensated for his worth, Jewish law mandates a different balance from American common law with respect to physician malpractice. Jewish law grants the licensed doctor immunity from liability in many circumstances — but imposes upon him the obligation to serve the public as a healer of the sick.

CONCLUSION

A survey of Jewish law on the assessment of damages leads one to a number of practical conclusions that differ sharply from the current practice in the United States. Jewish Law, while recognizing the need to award monetary compensation for non-economic damages — pain, suffering and embarrassment — insists that these awards bear a clear rela-

151. Following the principle of "*ein la-dayan ella ma she-einav ro'ot.*" See *id.*

152. *Id.*

153. Jacob ben Asher, Tur, *Yoreh Deah* ch. 336.

154. Tashbez, cited in Tziz Eliezer 4:13.

155. Rabbi Waldenburg argues that the distinction of the Tashbez makes little sense in our day and age. Tziz Eliezer 4:13.

156. Rabbeinu Nissim, commenting on Babylonian Talmud, *Sanhedrin* 84b.

157. Ramat Rachel § 23. Rabbi Waldenburg makes it clear that we are not dealing here with a person who gives the wrong medicine due to lack of attention. Such a doctor is not acting in accordance with the *mitzvah* of healing, since doctors normally examine the medicine carefully before they administer it. Therefore, such a doctor would be liable. *Id.*

tionship to the harm done. In particular, the assessment of these damages are controlled through the requirement that a higher level of fault be present before they can be awarded. The tort of "the intentional infliction of emotional distress," while judicially recognized, was greatly limited in its application.

The viability of these rules can be best demonstrated in the field of medical malpractice where Jewish law, from its most ancient times, realized that the limiting of malpractice awards was critical to establishing a functioning, economically viable health care system. Among the tools used to limit the size of malpractice awards were partial immunity and the declining to assess non-economic damages in almost all cases. In return for applying this standard to medicine, Jewish law treated the obligation to heal as an imperative and not a choice, and required doctors to use their skills for the betterment of all. This type of balance is one that American law may do well to consider.