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Monetary Compensation for Bodily Injury:
A Comparison of Talmudic Law and Modern Tort Reform

Jeffrey S. Wildstein

Thesis submitted in partial fulfillment of the requirements
for Ordination

Hebrew Union College – Jewish Institute of Religion
Cincinnati, Ohio
March 1, 2001

Referee, Professor Jonathan Cohen

Digest

The normal course of people living together in society means that occasionally one person will inflict a bodily injury upon another. One of the functions of law is to fashion the proper response to such occurrences to maintain peace, order, and a sense of justice among the society's members. Both Jewish Law and American law provide monetary compensation as the remedy for these injuries. In recent years, a group of scholars and businessmen called "Tort Reformers" have criticized aspects of the American compensation system.

This thesis examines the views of the Rabbis of the Talmud and the Tort Reformers concerning the use of money as the remedy for bodily injury. Both groups of legal authority write during periods of transition in the law. The Rabbis interpret Scripture to understand verses seeming to require talion as actually imposing monetary compensation. The Tort Reformers seek to curtail what they see as expansive liability.

This thesis describes the views of these two groups of legal scholars. It compares their opinions about the appropriateness of

using money as the remedy, the interests protected by the system, and the means of calculating the monetary damages. It argues that Jewish Law conflicts with some Tort Reform proposals in the former's emphasis of moral and ethical behavior as the purpose of compensation instead of the latter's focus upon economics. Additionally, it contrasts Jewish Law's provision of payment for non-economic damages with the Tort Reformer's efforts to curtail or abolish these recoveries.

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Chapter I

Introduction

Sometimes, the law is affected by monumental changes in civilization. The forces of history alter the foundation of societal rules. On the other hand, the most ordinary events sometimes become crucial in the formulation of law. For example, events like the following lead to two moments of transition in law separated by two thousand years:

David was walking along the side of the street. Suddenly, Jonathan came along and caused David to fall. David was injured. He suffered pain, and could not work for an extended period of time. He had to pay physicians to aid his healing. He was embarrassed by his infirmity.

These events spawn many questions for the law. Should the law respond to these incidents? If so, how? What are the rights of the injureds? What are the duties of the injurers to the injureds? How does the law deal with the interests of the individual parties

while also protecting the interests of society?

A. The Rabbinic Period: Uneasiness with Scripture

Incidents like David's injury create great difficulty for the Rabbis living at the dawn of the Common Era. The Rabbis were compiling new written legal documents to supplement the Torah. Perhaps they were merely organizing and memorializing on paper oral traditions which had long governed conduct within their communities, creating a legal textbook for study.¹ Perhaps they were composing new law, possibly reacting to dramatically changed circumstances including the destruction of the Temple and the disbandment of the Jewish high court known as the Sanhedrin.²

In either case, the interaction between David and Jonathan presents a quandary for the Rabbis. The Torah seems to offer a description of what should happen to Jonathan through cases in

¹ Barry W. Holtz, ed., *Back to the Sources* (New York: Simon & Schuster, 1984), 156.

² Gershom Scholem, *The Messianic Idea in Judaism and Other Essays on Jewish Spirituality* (New York: Schocken Books, 1971), 283-88.

Exodus 21. Exodus 21:18-19 says:

"[18] If men fight, and one strikes his fellow with a stone or fist, and he does not die but falls to his bed, [19] then when he rises and walks about outside on his staff, then the one who struck him shall not be liable (for capital punishment), only he shall pay for his wages and he shall surely be healed."

These verses clearly seem to require that the injurer pay the injured's medical expenses and lost income. But, the Rabbis also see another case involving the legal ramifications of bodily injuries detailed in Exodus 21:22-25:

"[22] If men fight and injure a pregnant woman so that she gives birth prematurely, and yet no harm follows, he shall surely be fined as much as the woman's husband demands and the judges allow. [23] But if any harm follows, then you shall take life for a life, [24] eye for an eye, tooth for a tooth, hand for a hand, foot for a foot, [25] burning for burning, wound for wound, and bruise for bruise."

This case describes a very confusing event involving a fight, a harmed pregnant woman, and a premature birth. Judges assess a fine with some kind of input from the woman's husband. The Law then qualifies its statement by requiring the taking of body organ

for body organ "if any harm follows." The text does not clearly indicate precisely which person suffers the harm, and the exact extent of the harm needed to invoke this provision. Commentators have struggled to answer these questions, failing to reach a consensus on the precise meaning of the verses.

Nevertheless, seeing relevance in these verses to all bodily injuries, the Rabbis ignore the issues involving the pregnancy and the unborn child. Instead, they focus on the last phrases in the section which speak of taking "eye for eye" and so on. The Rabbi believe that these words seem to require physical retaliation for the infliction of bodily injury upon another. More specifically, the Divine Scripture appears to require that the injurer endure the precise physical injury he caused the other to suffer. In this way, the needs of justice are served. Scripture seems to repeat this requirement in Leviticus 24:19-20:

[19] If a man gives a blemish to his fellow, then as he has done, thus will be done to him; [20] fracture for fracture, eye for eye, tooth for tooth, as he has given a blemish to a man, so shall be given to him."

This law of equal retaliation upon the party causing the injury is called "lex talionis."³

The Rabbis are troubled by the ramifications of lex talionis. While it is difficult to state what the Rabbis think beyond their recordings in their texts, it may be surmised from the theme of the preservation of life in Jewish Law that at least some of the Rabbis feel uncomfortable with the idea of inflicting an injury upon a healthy person. Moreover, the practical challenges for the proper implementation of lex talionis appear daunting. Each individual case requires an accurate understanding of the loss sustained by the injured party, and the subsequent infliction of that exact loss upon the party causing the injury. The system therefore requires a precision in the estimation and infliction of physical injuries which seems beyond the abilities of human beings.

Yet, the Rabbis cannot simply discard the idea of lex talionis. This would call for the Rabbis to reject words of Torah. Torah is the foundation of the law the Rabbis seek to reconstitute for the Jewish people, especially in light of the loss of the Temple. If the Rabbis

³ *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Publishing Co., 1979), 822.

summarily disregard the Torah's apparent institution of *lex talionis*, they would entirely subvert their authority for their work. The Rabbis do not question that the words of Torah are Divine ordinances. While precepts in Scripture could be interpreted and clarified through the Oral Law, the Rabbis cannot discard toraitic dictates such as *lex talionis* out of hand.⁴

Moreover, the failure to respond to Jonathan's injuring of David would yield harmful societal results. The absence of an available response to a wrongfully caused injury would indicate a society which cares little about providing justice. People likely would leave a society which did not even attempt to provide a degree of fairness and protection. David or his relatives might even attempt to inflict their own measure of revenge upon the party causing the injury, beginning a cycle of violence and retaliation. These events would disrupt the ordered society the Rabbis hope to

⁴ See Walter Gilbert Peiser, "The Rabbinical Law of Torts as Compared with the American and English Common Law" (Rabbinical Thesis, Hebrew Union College - Jewish Institute of Religion, Cincinnati, Ohio, 1924), 65: "The fact that [the move from physical talion to monetary compensation] was not no easily accomplished is seen by the fact that many of the rabbis were with the opposition." See *Ibid.* at 5 ("The truth is that all people must have rules of conduct. No matter how backward, no matter how savage they are they cannot live in anarchy.")

create.⁵

Jonathan's infliction of injury upon David therefore presents a serious problem for the Rabbis. They are caught between an authoritative law which seems to require the response of *lex talionis*, and their observation of the flaws in such retaliation. They cannot simply reject the Divine ordinances which form the basis of their authority, and they cannot allow the response of *lex talionis* to continue to harm their society. The Rabbis need to find a way to preserve the authority of Scripture, while rejecting *lex talionis* and providing another remedy for injured people like David.

They find this remedy in the provision of monetary damages commensurate with the severity of the injury suffered by the injured party. They require the injurer to pay for "the five heads of damages:"

- The injury itself, generally calculated by loss of future earning capacity;
- Pain, as determined by the amount a person would take to endure pain for a physical punishment he must accept;
- Healing, as determined by the costs of medical treatment;
- Loss of income, constituting wages and income lost due to the injury prior to the assessment of the damages;

- Embarrassment, as sustained a person of the injured's statute because of the injury.⁶

The Rabbis draw these heads of damages and means of calculation from Scripture, at times through interpretation of the verses which otherwise would indicate the imposition of physical talion. The Rabbis therefore resolve the problem of the determination of the remedy for bodily injury.

B. The Modern American Period: Expanding Liability

Today, in the latter half of the twentieth century of the Common Era, the law regarding bodily injuries in the United States faces different problems. American law embraces a scheme of monetary compensation for these losses. Elaborate systems of substantive and procedural law allow some of those hurt by others to recover the monetary value of the losses. States maintain large

⁶ Yehuda Kahane, Nathan Munk, and Menachem Slae, "Estimating Bodily Damages According to Jewish Law: A

civil court systems which provide the apparatus for obtaining compensation, including the dispositive procedures of a jury trial. A professional cadre of attorneys helps injured people receive their compensation, as does another seeking to protect the interests of parties causing the injuries. The large insurance industry, which supplies mandatory insurance for some activities such as driving an automobile, provides large pools of funds available for compensation.

When David is injured in twentieth century America, he may enter a highly complex legal and economic institution designed to resolve his dispute with Jonathan, evaluate his losses, and provide him compensation. The law allows David to recover all of the losses he proves as outlined in the example above, but only if he also proves that Jonathan wrongfully caused the injuries he suffered. Absent this showing of fault and a direct causal link between Jonathan's wrong and the injuries, David can recover nothing.

Beginning largely in the nineteen sixties, some legal scholars and businessmen began to see problems with the system of compensation in modern American injury law. They see these

Comparative Legal Study," edited by B. S. Jackson, *Jewish Law*

problems arising largely from two factors:

- The legal system had greatly expanded the types of causes of action and the scope of the available damages.
- The courts had to deal with thousands upon thousands of injury cases in addition to increased criminal, contract and family disputes.

These factors greatly increase the costs of resolving cases. Lawyers representing both parties in the disputes seek to take advantage of every available claim or defense in the law. Each side looks for more persuasive ways to present evidence, adding to the expense of each case. The gross overhead costs and fees paid to litigate cases increases.

The number of cases also affects the cost of the system. As injureds file a greater number of cases, the strain upon the insurance system increases. Insurance companies create large bureaucracies to handle claims. Insurance becomes very expensive, and many cannot afford the premiums. But, people also cannot act in society without insurance for fear of losing everything they have in a large judgment of liability against them.

The expansion of the available damages and number of cases has other ramifications. Some critical scholars and businessmen argue that these factors cause the delay in resolution of disputes. Injureds do not receive needed payments for years following the injury, and injury cases overwhelm the courts.

Finally, the complexity of the system leads to a haphazardness in the evaluation of damages. The scholars and businessmen argue that many seriously injured receive only a fraction of their loss, while many slightly injured people receive extravagant awards. Worse, the large amounts of money available in the system tempt some to exaggerate injuries, or even to make entirely fraudulent claims.⁷

These problems prompt many to call for a transformation in the law:

"Injuries resulting from medical malpractice, defective products and automobile accidents can lead to dramatic courtroom battles as exciting and confrontational as criminal trials. But such litigation, to say nothing of the personal trauma involved, also leads to wild fluctuations in insurance payments, huge legal

⁷ Jeffrey O'Connell, *The Injury Industry and the Remedy of No-Fault Insurance* (New York: Commerce Clearing House, Inc., 1971), 2-3.

costs, and long delays before settlements or verdicts are reached. The whole system is blamed for skyrocketing insurance costs. The result is widespread alarm and cries for reform of tort law throughout the United States."⁸

C. This Study - The Two Periods Compared

The societies dealing with these two periods of transition could not be more different. Some of these differences include the role of religion in the societies and the nature of their economic systems. Yet, despite these differences, it is remarkable that the simple event posed at the beginning of this chapter leads to similar questions in both societies. Both face difficulties in crafting the proper *remedy* for a bodily injury caused by another. A remedy is a legal term for "the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated."⁹ Moreover, each society struggles with the appropriateness, fairness and quantification of a particular type of remedy called

⁸ Jeffrey O'Connell and C. Brian Kelly, *The Blame Game: Injuries, Insurance and Injustice* (Lexington, Massachusetts: Lexington Books, 1987), xi.

⁹ *Black's Law Dictionary* at 1163.

compensatory damages. Compensatory damages are "such [money] as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury."¹⁰

This study compares the questioning and determination of the proper remedy for bodily injury during these two periods of transition in the law. It seeks to determine the advantages and disadvantages seen in the respective remedial systems, and the rationale for proposed changes. More particularly, this study examines each group's views on the use of money as the appropriate remedy for losses resulting from bodily injury. Do the scholars believe money can and should compensate the injured? Why or why not? What party's interests are the lawmakers and theorists attempting to protect? What are the individual elements of damages the authors promote as necessary for compensation? Finally, the study compares the two transitions, seeking similarities and differences which may broaden the understanding of both Jewish and American law.

This study is limited in its scope to an examination of the

¹⁰ *Ibid.* at 352.

provision of monetary compensation for bodily and concurrent mental injuries caused by another human being. Other texts and ideas will be discussed only insofar as they relate to this subject. This restriction means the exclusion of important topics in both Jewish Law and American Law from this study. For Jewish Law, this restriction excludes discussions about injuries to property, and injuries caused by the much examined "goring ox." For American Law, this restriction precludes an extensive discussion of the role of fault and the claimed desirability of a "no-fault" compensation system which has such a major role in the current legal debate. A comparison of Jewish Law and modern American Tort Law in these areas would provide a useful study, and it is hoped that this work will encourage further examinations into these areas. However, these topics must be excluded in this study to present a fair and manageable discussion of the use of money as the remedy for bodily injury.

D. Selection of Texts

1. Jewish Legal Texts

This study analyzes both Scripture and the writings of the religious leaders who are, for convenience sake, referred to as "the Rabbis." From approximately 120 through 499 C.E., these men write and compile the texts which became the expansion and foundation of Jewish Law beyond the Torah itself. The earliest document the Rabbis produce is the *Mishnah*, a terse collection of law which likely represents an attempt to reduce traditions called the Oral Torah to an official compilation or code. The Rabbis likely complete the *Mishnah* between 120 and 200 C.E.¹¹ Surviving early material not included in the *Mishnah*, but providing relevant information on this subject, is found in a body of work called the *Tosefta*.¹² The Rabbis who compose the *Mishnah* and the *Tosefta* are called the *Tanna'im*. The *Tanna'im* are the first to confront the problem of the text's apparent approval of physical talion, and to reinterpret the verses to mean monetary compensation.

The later Rabbis, called the *Amora'im*, greatly expand upon the *Mishnah* in a larger text called the *Talmud*. There are two

¹¹ Holtz at 131, 135.

variations of the Talmud: the Jerusalem or Palestinian Talmud (*Talmud Yirushalmi*) compiled in the first half of the fifth century; and the longer Babylonian Talmud (*Talmud Bavli*) completed a century or two later. The Amora'im develop the boundaries of the law of personal injury compensation in the section, or tractate, of the Talmud called *Baba Kamma*. Although the Talmud contains later commentary, this study concentrates upon the section of the Talmud called the *Gemara*. Thus, this limits this study to the long period of transition faced by the Rabbis ending with the final completion of the *gemara* in approximately 499 C.E.¹³

This study also examines a collection of *midrashim*, or interpretive literature of the law, called the *Mekilta d'Rabbi Ishmael*, which provides useful insight into the problems of compensation.¹⁴

The selection of relevant texts began with an examination of the weekly portion of the Torah called *Mishpatim*. This section runs from Exodus 21:1 through 24:18, and is well known for containing the talionic formulae. Relevant passages were identified by whether

¹² *Ibid.* at 137.

¹³ *Encyclopaedia Judaica* s. v. "Talmud; Talmud, Babylonian; Talmud, Jerusalem."

¹⁴ For a discussion of the rationale for the limitations upon sources, see section I(D) below.

they explicitly or implicitly comment upon the remedy for bodily injury caused by human beings.

The selection of relevant texts continued by examining the fourth of the six large orders, or major divisions, of the Mishnah. This order is called *Nizikin*, or "Damages." Again, relevant passages were identified by whether they explicitly or implicitly comment upon the remedy for bodily injury caused by human beings. Most relevant passages occur in chapter eight of *Baba Kamma*, one of the tractates of the Talmud. The explanatory gemara for this Mishnah was found in Talmud Bavli's Tractate *Baba Kamma* at 83b through 93b. Corresponding sections were found in Talmud Yirushalmi's Tractate *Baba Kamma* in chapter eight, and the Tosefta in *Baba Kamma* chapter 9.

Additional relevant Scriptural texts were located through their inclusion in the Rabbinic writings. These verses were then examined in a source called *Torah Temimah*. This source contains references to all citations of the Scriptural verses in the Talmud. Any Talmudic passages not examined to this point were analyzed to determine whether they explicitly or implicated commented upon the subject matter of this study.

The Mekilta d'Rabbi Ishmael provides verse by verse commentary of selections from the Torah. Consequently, the portions from the Mekilta were located by turning to the Torah verses mentioned in the other sources. Surrounding sections were scanned for additional relevant material.

Once the relevant texts were located, they were divided into sections forming coherent points or arguments. The derivation of these sections were based upon changes in subject, rhetorical style, or the name of the proponent of the argument. These sections became the basis for determining the Rabbis' interpretation of the proper remedy.

2. Modern American Legal Texts

This study also examines writings from modern scholars and politicians who seek to change the law of compensation in current American society. The movement for this change is called "Tort Reform." Hundreds of Tort Reform books, articles, statutes and proposals have been written in recent years. A close analysis of all

these materials as presented in this study would be impossible. Consequently, this study focuses upon selections of Tort Reform writings as representative of the movement.

Robert E. Keeton and Jeffrey O'Connell are known as the fathers of the concept of no-fault automobile insurance, and provide many of the early ideas for changes in the tort system and the provision of monetary damages for bodily injury. Professor O'Connell particularly has written about these ideas through the past few decades. Their writings were selected as typical of the scholarly analysis of Tort Reform.

Later documents were chosen for their description of one of the strongest attempts to enact Tort Reform ideas into federal law. *The Contract with America* presented Tort Reform as one of the ten most pressing issues facing the United States in the 1990's. *The Agenda for Civil Justice Reform in America* and *The Common Sense Product Liability Legal Reform Act of 1996*¹⁵ would have effectuated many of the *Contract's* ideas but for a narrow failure to override a veto by President Clinton. These works embody major ideas and

¹⁵ *Common Sense Product Liability Legal Reform Act of 1996* (CIS Congressional Universe, July 12, 2000) [henceforth referred to as the "Act"].

philosophies of Tort Reform, providing a comprehensive yet succinct basis for comparison with Jewish Law.

The American legal texts provide similar conceptual challenges as the Jewish law texts for this study. The selected texts generally consider the entire tort system as a whole. Sometimes, they directly address the topic of the use of money as the remedy for bodily injury. At other times, these texts focus upon the role of insurance, lawyers, fault or other systemic concerns. Even when not directly concerned with the subject of this study, these texts sometimes contain important implications and ramifications for the role of money as the remedy for bodily injury, and the practical result of what compensation an injured party ultimately can receive for his loss. Therefore, the specific texts were selected specifically if they explicitly or implicitly commented on the use of money as the proper legal remedy. Texts concerned with other aspects of the tort system were excluded from the study.

E. Methodology

1. Procedure

The texts chosen for this study present multiple challenges for an examination of monetary damages as compensation for personal injury, and a comparison between the two systems. The texts span hundreds of years, and originate from highly divergent social problems and contexts. Some of the texts focus upon other issues than monetary damages, even as they directly or indirectly comment upon this important issue. These challenges require a strict approach for the consideration of the texts.

a. Jewish Legal Texts

Each section of the selected Jewish texts was read for its plain meaning, or *p'shat*. Each section provides a specific situation, explanation or problem, which it then either resolves or leaves as an open issue. The determination of the plain meaning of the text relies upon a reading of the individual section within the context of the entire passage, and, more particularly for gemara passages,

within the meaning of the mishnah.

Each text was then examined for comments about the use of monetary damages as compensation for personal injury. Sometimes, the text openly addresses the problem of the use of monetary damages and the calculation of the compensation. Regardless of whether the text specifically addresses monetary damages, each text was read for likely or possible implications for the issues this study considers.

More specifically, the following questions were asked while examining each section of Jewish text:

1. What is the plain meaning, or p'shat, of the text?

2. Does the text comment upon the appropriateness or inappropriateness of money as the remedy for bodily injury? If so, what does the text say or imply about the use of money?

3. Does the text seem to protect the injured, the

injurer, or society in general? Does the text seem concerned with a combination of these interests? How does the text protect or impose upon a particular party's interests?

4. How does the text's philosophy of justice and the use of money as a remedy provide a foundation for the protection of, or imposition upon, a given party's interests?

b. American Legal Texts

Similarly to the Jewish Law texts, each selected American legal text was read for its comments about the existing tort system. General and specific criticisms of the existing compensation scheme were isolated, along with proposed changes for improvement. Special attention was given to whether the criticisms and proposals directly or indirectly addressed the role of damages and money in the system. Greater weight was given to direct comments upon the

issues of this study, although the implications about and ramifications for the use of monetary damages embodied in discussions of other subjects provided very useful insight as well.

The texts then were analyzed for their precise comments and implications regarding the use of monetary compensation as the remedy for bodily injury. Each specific comment was considered within the context of the entire argument presented. For the legal treatises, this meant considering the statements and implications about monetary damages in light of the overriding themes found in the work. For the statutes, this meant considering the proposed legislation in light of the legislative history and political documents, including works like *The Contract with America*, which gave evidence of the intent of the provisions.

More specifically, the author asked the following questions while examining each section of American legal text, which were quite similar to those asked of the Jewish law texts:

1. Does the text explicitly or implicitly comment upon the remedy provided for bodily injury? If so, what

is the text's attitude toward the current compensation system? Does it approve of the current system, or does it describe a problem or detail a change? What specific aspects of the system merit approval or disapproval? What benefits do the proponents of the text perceive within any proposed changes?

2. Does the text comment upon the appropriateness or inappropriateness of money as the remedy for all aspects of bodily injury? If so, what does the text say or imply about the use of money? How does the text confront possible criticism of the legal system it promotes? What values underlie the decisions embodied in the text about using money as a remedy?

3. How does the text balance systemic concerns and individual needs in the prescribed system? Does the text seem to protect the injured, the injurer, or society in general? Does the text seem concerned with a combination of these interests? How does the text

protect or impose upon a particular party's interests?

4. How does the use of money as a remedy provide a foundation for the protection of or imposition upon a given party's interests? What role does economics play in the proposals and criticisms in the text?

2. Other Methodological Issues

Other methodological issues affect the course of the study. There are a number of differences between the worlds of the Rabbis and that of modern America which need to be kept in mind through this work. These differences include the societies' religious, technological and economic structures. For example, the American legal texts present a more explicit concern with the effect of compensation upon insurance than the Jewish Law texts. These differences suggest a danger in that the societies may be too dissimilar to offer a useful basis for comparison. Nevertheless, enough similarity exists in the consideration of monetary

compensation to provide a basis for this comparison.

Issues of time affect not only the comparisons between the two societies, but within the texts from each period as well. The selected Jewish texts are written over approximately four or five centuries. Similarly, the Tort Reform texts span thirty or forty years. The span of time for each of these corpuses of works means that they will embody changing opinions over time, which may conflict with earlier ideas.¹⁶ While this study treats each corpus of materials as a unified body, it will present different opinions and uncertainties resulting from the later emendation and criticism of earlier ideas.

Another methodological issue lies in imputing values into the texts. Often, the texts comment upon a specific argument or offer a defined proposal. They do not directly express an ideal vision of social justice, detail the precise reasons for their choices, or outline the values leading to a result which benefits one interest over another. Nevertheless, an analysis of these values and motivations is necessary to provide a full understanding of each system and a basis of comparison with the other. This study considers

¹⁶ Peiser at 21.

implications, assumptions and ramifications found within the texts, although direct and explicit statements are deemed more weighty evidence of values embodied in the texts.

A further issue involves the reliance upon documents from the Tort Reformers. A reader familiar with the debate will observe the citation of arguments and statistics which support Tort Reform, and the absence of arguments and statistics disputing them. A large amount of documentation challenges the assumptions and conclusions of Tort Reform proposals, including those drawn by reform-minded governmental authorities.¹⁷ However, the purpose of this study is to compare Tort Reform with the Rabbinic Law regarding the use of money for compensation of injury in order to gain a broader understanding of the values underlying both positions. Challenges to the Tort Reformers' statements, while potentially persuasive, do not bear upon this study. This study will assume the statements and conclusions of the Tort Reformers as

¹⁷ For example, Ralph Nader alleged that the supporters of the Act used "dubious anecdotes, questionable research, concocted statistics, factual and legal misstatements, and willful disregard of contradictory evidence" to support the legislation. *Capital Hill Hearing Testimony of Ralph Nader*, (CIS Congressional Universe, February 15, 1993), 4.

largely accurate to allow a critical examination of Tort Reform according to its own terms.

A final note about the sources of Jewish Law is warranted. This study relies upon the Hebrew and Aramaic texts of the Bible, Talmud, and other sources. However, the existence of translations into English provides a useful tool for a study such as this. It would be unreasonable to ignore the efforts of experts who have translated thousands of pages while attempting a close reading of legal texts. At the same time, any translation certainly carries some of the biases and limitations of knowledge of the translator. Consequently, this study presents original English translations of the Jewish texts which are informed by the various translations listed in the bibliography.

F. Terminology

The differing legal and societal contexts of the works already mentioned, and the potential unfamiliarity some may have with the language of personal injury law, requires a discussion of the terminology this study employs.

This study considers a particular legal remedy known as *damages*. A modern definition of damages reads:

"A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another."¹⁸

This definition, while summarizing a modern definition of damages, presents a few minor difficulties. First, the Rabbinic texts do not explicitly require that the injury result from a "tort," or a private or civil wrong.¹⁹ Additionally, this study does not consider injuries to property and rights alone, but examines only bodily injuries to human beings. Therefore, this study refers to damages as the monetary value of compensation paid or due to be paid for bodily injury.

¹⁸ *Black's Law Dictionary* at 351-52.

Damages may be divided into two categories. The first is *economic damages or losses*. Economic damages are losses of money the injured has to pay or fails to receive as a result of his injury. In the example set forth at the beginning of this chapter, David's economic damages are the wages he does not receive due to his inability to work, and the sums David has to pay for healers and medicines to make himself well. *Non-economic damages or losses* are any losses not ordinarily considered in monetary terms, or not representing an "out-of-pocket" loss of money. The Act defines non-economic loss as:

" . . . [s]ubjective, nonmonetary loss resulting from harm, including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation."²⁰

David's non-economic damages include the injury itself and the embarrassment he suffered. David also sustained a particular type of non-economic loss called *pain and suffering*. O'Connell defines pain and suffering as physical pain and mental suffering

¹⁹ *Ibid.* at 1335.

²⁰ *Act*, sec. 101(12).

including nervousness and disturbance of the nervous system, neuroses, and more recently, the "inability to pursue avocations and pleasures."²¹ Pain and suffering damages are the most controversial elements of damages in this study.²²

²¹ Jeffrey O'Connell and Rita James Simon, *Payment for Pain and Suffering: Who Wants What, When & Why?* ([Santa Monica, California: Insurers Press, 1972]), 2.

²² See section IV(B)(2) for differences between the understandings of pain and suffering in Jewish and American law.

Chapter II

The Use of Money as the Appropriate Remedy

Once Jonathan inflicts a bodily injury upon David, society requires a legal response. The law must provide David some remedy which gives him something in return for his losses. If the law does not address David's loss, he has no reason to continue to abide peacefully by the society's rules. Both Jewish Law and modern American law find this remedy in the provision of monetary compensation.

This chapter will discuss why these legal systems use money as the appropriate remedy for bodily injuries. Why use money as opposed to some other remedy? How does money provide a reasonable means to address the harm? How does money fail to adequately compensate for the injury?

Both the Rabbis and the Tort Reformers provide answers to these questions in their writings. For Jewish Law, this chapter predominantly examines the Rabbinic explanations in the Mishnah and Gemara, expanding how they rely on Biblical verses to support

their understandings on the use of money as the remedy.¹ For modern American law, this chapter considers the Tort Reformers' difficulties with using the monetary remedy. This chapter thus describes the basic premises and attitudes of the Rabbis and the Tort Reformers regarding the appropriateness of the monetary remedy.

A. Jewish Law: Comfort with the Monetary Remedy

Any examination of differences in the Law between Scripture and Rabbinic writings confronts serious difficulty. The paucity of sources describing the events and state of the Law over the centuries leaves open numerous important questions. We cannot know for certain when the Law changed, or precisely how the process occurred. There is even some degree of unreliability relating to the

¹ This is not to say that this chapter will not also rely on the other Rabbinic texts, particularly the Mekilta d'Rabbi Ishmael. The Mekilta actually pre-dates the Talmuds, and provided many of the arguments included in the Gemara. However, this chapter will use the Talmud Bavli as its primary text to most clearly present the Rabbinic material.

identity of the men of whom we call "the Rabbis," and to the nature and extent of their authority.

We can say for certain that a difference exists between the implications of Scripture and the understandings of the Rabbis. The language in Exodus 21:22-25² gives reason to think that the proper remedy may be physical talion. These verses mention a payment of money, but also apparently describe the imposition of the same physical injury to the injurer as he gave to the injured:

"[22] If men fight and injure a pregnant woman so that she gives birth prematurely, and yet no harm follows, he shall surely be fined as much as the woman's husband demands and the judges allow. [23] But if any harm follows, then you shall take life for a life, [24] eye for an eye, tooth for a tooth, hand for a hand, foot for a foot, [25] burning for burning, wound for wound, and bruise for bruise."³

² Exodus 21:18-19 provides a monetary remedy only, and will be discussed herein. Other verses in the chapter, such as Exodus 21:20-21, outline monetary remedies for injuries involving servants. These verses mix concepts of property and compensatory law, and largely are not discussed by the Rabbis in the Gemara considered in this work. Therefore, while the laws regarding remedies for servants would provide an interesting exercise, they fall beyond the scope of this study.

³ Exodus 21:22-25.

The earlier Rabbis, known as the Tanna'im, supply a different understanding of the remedy. The Mishnah contains a description of the monetary payment, but does not mention anything which even implies the availability of physical talion:

"One who injures his fellow is liable to him for five categories of things: for damage, for pain, for healing, for loss of time, and for humiliation"⁴

This difference has led to great debate among scholars about the details of the interaction between lex talionis and monetary compensation in Israelite and other ancient Near Eastern law codes. Some say physical talion existed before monetary remedies, as the fact that Scripture pre-dates the Mishnah implies.⁵ Others believe monetary compensation preceded talion, and that the emerging government adopted the latter when it recognized state interest in

⁴ M. BK 8:1; TB BK 83b; Jacob Neusner, trans., *The Talmud of Babylonia: An American Translation*, vol. XX.C, *Tractate Baba Qamma* (Atlanta: Scholars Press, 1992), 13 [henceforth "Neusner, *The Talmud of Babylonia*].

⁵ See, e. g., Godfrey Rolles Driver and John C. Miles, *The Babylonian Laws*, part I (Oxford: Oxford University Press, 1952), 408, 502.

disputes about bodily injury.⁶ A third position concludes that the remedies were offered simultaneously, and were determined in a particular case either by the injured's choice or the circumstances of the injury.⁷ These scholars also differ on precisely when changes in the law occurred.⁸

Regardless of the precise timing and nature of the change in the Law, the fact remains that Scripture seems to require physical retaliation, and the Mishnah requires monetary compensation. The later Rabbis of the Talmudic period, known as the Amora'im,⁹ immediately raise this apparent conflict in the first words of the Gemara explaining Mishnah 8:1:

"Why should this [payment of compensation] be so? [Scripture says] "an eye for an eye" (Ex. 21:24). [Is it not] really an eye?"¹⁰

⁶ See, e. g., A. S. Diamond, "An Eye for an Eye," *Iraq* 19 (1957): 154; Bernard S. Jackson, "The Problem of Exod. XXI 22-5 (*Ius Talionis*)," *Vetus Testamentum* 23, no. 3 (July 1973): 273-304.

⁷ See, e. g., David Daube, *Studies in Biblical Law* (New York: Ktav Publishing House, Inc., 1969), 102-54; Raymond Westbrook, *Studies in Biblical and Cuneiform Law*, Cahiers de la Revue Biblique 26 (Paris: J. Gabalda et Cie., 1988).

⁸ The details of this controversy in Biblical ancient Near Eastern scholarship are beyond the scope of this study.

⁹ Holt at 154.

¹⁰ TB BK 83b; Neusner, *The Talmud of Babylonia* at 14.

The Amora'im thus face the problem of deriving consistency in the Law between the Scriptural and Mishnaic descriptions of the remedy. Throughout the Gemara, these Rabbis use standard methods of interpretation to harmonize the texts. As demonstrated in the following discussion, the Rabbis understand the Biblical text to require monetary compensation, and not talion. This analysis reflects the Rabbis' comfort with using money as the remedy for bodily injury. Money serves as the appropriate and "just" means to resolve disputes between injureds and injurers.

1. The Rejection of Talion

The Amora'im approach the apparent conflict between Scripture and the Mishnah by immediately rejecting the suggestion that the former requires talion. They assert that the Tanna'im provide the proper understanding of Scripture as dictating monetary compensation as the remedy for bodily injury:

"Really you must not think [that talion is the remedy]! According to the Tannaic teaching: One could

[say if] one blinded his eye, it (the court) should blind his eye, if he cut off his hand, it should cut off his hand, if he broke his leg, it should break his leg. [But] Scripture states: [If] one strikes a man . . . [if] one strikes a beast. Just as there are indemnities for striking a beast, so too are there indemnities for striking a man."¹¹

By presenting the argument in these terms, the Amora'im reinforce their view of the primacy of Scripture. They deny any inconsistency between God's written word and the Mishnaic interpretation. Simultaneously, they clarify that the proper response to bodily injury is that explicitly stated in the Mishnah: monetary compensation. This expresses the Rabbis' comfort with the efficacy of this remedy.

Moreover, the tone of this text reflects the vehemence of the Rabbis' rejection of the remedy of physical retaliation. The Gemara uses the phrase, "ממש לא מסקא דעתך" to begin its discussion. This phrase indicates a sharp rejection of a proposition.¹² One translator reads the phrase as, "Perish the thought!"¹³ The suggestion that a rabbinical court would order the maiming of a litigant seems highly inappropriate after this strong rejection.

¹¹ TB BK 83b; Neusner, *The Talmud of Babylonia* at 14.

¹² Yitzhak Frank, *The Practical Talmud Dictionary* (Jerusalem: Ariel United Israel Institutes, 1994), 33.

¹³ Neusner, *The Talmud of Babylonia* at 14.

Therefore, the Rabbis resolve questions about the proper remedy for bodily injury in favor of monetary compensation, and against physical retaliation. The text continues to present the Rabbis' arguments which explain the harmonization of Scripture and the Mishnah, and express the Rabbis' acceptance of money as the remedy.

a. Linguistic Arguments

i. Arguments from מכה

The Rabbis' interpretation focuses upon the word "מכה," which means "he strikes." The Gemara notes that Leviticus 24:18, which uses this word, establishes that a man must pay compensation for an ox which he strikes and kills. The Gemara further notes that Leviticus 24:19-20 states that, "if a man injures his fellow, just as he has done so shall be done to him, [20] fracture for fracture, eye for eye, tooth for tooth, as he has given a man so shall be given to him." While this language, like the text in Exodus 21:22-24, appears to

require talion, the Gemara emphasizes that this verse is connected to Leviticus 24:18. Consequently, just as Leviticus 24:18 requires monetary compensation when a man strikes an ox, Leviticus 24:19 requires monetary compensation when a man strikes a man.

Moreover, Exodus 21:18 directly involves a situation where a man strikes another, using a form of the verb "מכה." In that situation, the injurer must pay monetary compensation. The Rabbis deem that the similarities among the circumstances where a man strikes a living creature and causes a bodily injury govern the determination of the proper remedy. Therefore, the Rabbis read the language of Exodus 21:22-24 to require the remedy of monetary compensation, and not talion.¹⁴

The Gemara immediately addresses a problem with this argument. Leviticus 24:19, like Exodus 21:22-24, does not explicitly use the word "מכה." However, the Rabbis explain that the verses involve circumstances involving a man striking either another man or a beast. The Rabbis understand this similarity of context to require them to read the verses with a consistent meaning, even without the explicit use of the same words. Since they understand

¹⁴ TB BK 83b; Neusner, *The Talmud of Babylonia* at 14; Peiser at 64-65 n.285.

Leviticus 24:18 to require monetary compensation for a striking, the other verses involving strikings also require the monetary remedy.¹⁵

This conclusion seems especially problematic because the Talmud seems to disregard that Leviticus 24:17 states that, "if a man strikes ("יכה") another man mortally, he shall be put to death." This verse seems a better comparison because it does use a form of the word "מכה," and seems to indicate that physical retaliation is required whenever a man strikes another man.

The Talmud Bavli text states the problem and resolves it:

But isn't it written: If a man strike any soul he shall surely die? (Lev. 24:17) [This speaks] of monetary payments. From where is your proof that this is about monetary payments? Really it may be about death. Really it is not. Don't really think it was. First of all, because it was compared [with the text]: If one strikes a beast, he shall make good. And furthermore, it is written afterward: As he has given a blemish so shall be done to him (Lev. 24:19). Infer from this [that it refers to] monetary compensation.¹⁶

The Rabbis resolve the problem by looking at Leviticus 24:17 in context. The verse seems to speak about murder and capital

¹⁵ TB BK 83b; Neusner, *The Talmud of Babylonia* at 14.

¹⁶ TB BK 83b; Neusner, *The Talmud of Babylonia* at 14.

punishment.¹⁷ However, the verses around this line refer to lesser injuries and monetary compensation. The Rabbis heavily rely on their interpretation of Leviticus 24:19, in which they have already determined that a man who strikes another and causes a blemish must pay compensation, and not endure an equal injury. The Rabbis conclude that the connection between Leviticus 24:17 and the following verses which require compensation means that the former verse must speak about compensation, and not death. While this reading stretches the plain meaning of Leviticus 24:17 by setting aside the words "he shall surely die," it preserves the Rabbis' understanding of the section as referring to monetary compensation, and not physical retaliation.¹⁸

Another potential problem with the Rabbis' analysis arises from the comparison of the striking of a beast with the striking of a

¹⁷ See section II(A)2 below for a discussion of the Rabbis' primary reasons for separating murder cases from those involving lesser bodily injuries.

¹⁸ The *Mekilta d'Rabbi Ishmael* contains a similar argument. Rabbi Ishmael cites Leviticus 24:21, which says a man who kills ("מכה") another shall be put to death. However, Rabbi Ishmael uses this verse only to establish the connection between injuries to oxen and injuries to men, which sets aside understandings of the verse as providing the remedy of physical retaliation. Jacob Z. Lauterbach, trans., *Mekilta de-Rabbi Ishmael*, vol. three, *Tractate Nezikin*, (Philadelphia: The Jewish Publication Society of America, 1935), 67 [henceforth, "Lauterbach, *Mekilta de-Rabbi Ishmael*"].

man. The text questions whether it would be better to draw the remedy for striking a man from the Law involving men, and not the Law involving animals. This would mean that the remedy would not be the monetary compensation in Leviticus 24:18, but the physical retaliation in Leviticus 24:17. The Rabbis respond that the type of case provides a better factor for comparison than the type of entity injured. The Rabbis are satisfied with using the verses involving payment for injuring a beast as the source of the Law for the remedy for bodily injuries.¹⁹

Therefore, the Rabbis argue that the verses using "מכה" should be read together in context to reject the notion that the proper remedy for the infliction of bodily injury is physical retaliation. Instead, the Rabbis accept these verses as requiring the payment of monetary compensation whenever a man "strikes" a beast or another man.

¹⁹ TB BK 83b; Neusner, *The Talmud of Babylonia* at 14-15. Moreover, the text provides another rationale for monetary compensation in Numbers 35:31 which does involve the conduct of man. See section II(A)(2)(a) below. Therefore, the text asserts that the Rabbis do draw the Law from situations men and not beasts, resolving the objection. *Ibid.*

ii. Arguments from תחת

One of the Amora'im, Rav Ashi, provides a similar argument to that involving "מכה" by applying an interpretive device known as a *gezera shava* to the word "תחת." A *gezera shava* is a rule of Biblical interpretation which compares identical words or expressions in two separate verses. The rule states that the word or expression will have the same meaning in both verses. Therefore, if the meaning of the word or expression is unclear in one verse and clear in the second, the reader may apply the accepted meaning from the latter in the former. The reader may also apply the halakha, or statement of the Law, from one verse to another when identical words or expressions are used.²⁰

Rav Ashi's *gezera shava* observes that both Exodus 21:23-24 and Leviticus 24:18 uses the word "תחת." Just as "eye for (תחת) eye" in the latter verse indicates monetary compensation, so too does the word mean monetary compensation in the former verse. Again, the similarity of contexts supports the comparison, since both involve

²⁰ Frank at 60.

"striking" even if only the Leviticus passage uses "מכה,"²¹ Rav Ashi's argument therefore further ties the Rabbis' initial citation of Exodus 21:22-24 to the monetary compensation found in Leviticus.²²

b. Substantive Argument

The Rabbis complete the rejection of talion by specifying that an injured may not choose among remedies. The connection between striking a beast and striking a man requires the same remedy: monetary compensation.²³ Moreover, Leviticus 24:22 states

²¹ TB BK 84a; Neusner, *The Talmud of Babylonia* at 17-18.

²² The use of "eye for eye" in this *gezera shava* raises a potential problem in that the first of the talionic formulae in Exodus 21:24-24 is not "eye for eye," but "life for life." The latter supports a literal reading of physical talion more than the former, considering the Toraitic laws of murder and capital punishment. Rav Ashi rejects this reading, drawing a second comparison for "חיי" with Deuteronomy 22:29. Deuteronomy 22:29 not only uses "חיי," but also clearly involves monetary compensation for damages done to a human being. Rav Ashi therefore disputes the idea that the *gezera shava* draws meaning from cases involving murder and capital punishment. TB BK 84a; Neusner, *The Talmud of Babylonia* at 17-18. See section II(A)(2) below regarding the distinction of murder from bodily injury cases.

²³ TB BK 83b; Neusner, *The Talmud of Babylonia* at 15.

that the people "shall have one Law."²⁴ The Rabbis understand this verse to mean that similar cases must result in the same remedy.²⁵ An injured therefore cannot choose between monetary compensation and talion. The Rabbis reject the availability of the latter remedy, favoring the use of money as the remedy.

The Rabbis therefore draw a parallel between a man striking a beast and a man inflicting a physical injury upon a person. Just as the former involves a monetary remedy, so does the latter. Further, the Law requires the availability of only one remedy for all, precluding the possibility that an injured may choose the remedy of talion. These arguments demonstrate the Rabbis' acceptance of monetary compensation as the proper remedy for bodily injuries inflicted by one person upon another.

However, the Rabbis cannot make the analogy between injuries to beasts and men without raising another problem. Leviticus 24:18 indicates that man not only struck the beast, but killed it. The verse uses the words, "ומכה נפש-בהמה," meaning literally,

²⁴ Leviticus 24:22.

²⁵ TB BK 83b; Neusner, *The Talmud of Babylonia* at 15.

"[I]f a man strikes the life of a beast."²⁶ Additionally, the first talionic formula of Exodus 21:22 speaks of "life for life," implying murder and not a lesser bodily injury.²⁷ The Rabbis' arguments therefore require them to address murder, and to distinguish the taking of life from the infliction of bodily injury, in order to preserve their acceptance of monetary compensation as the remedy for the latter.

2. Separation of the Punishment for Murder

a. Talmud Bavli and Numbers 35:31

The Rabbis' problem in this regard arises because the Torah contains numerous references to capital punishment for all kinds of violations of the Law, including murder. If an injurer could pay

²⁶ The remedy for killing a beast involves a question of property law. Similarly, the remedy for harming a servant involves aspects of property law. Scriptural verses involving injuries to servants may constitute a bridge between cases involving injuries to beasts and murder. However, the strength of this connection lies beyond the scope of this study. See footnote 2 above.

²⁷ See also footnote 22 above.

monetary compensation instead of suffering the death penalty for murder, then it is arguable that other violators of the Law could pay damages for their transgressions. Those who could not afford to pay the fine theoretically would still have to suffer capital punishment, violating the aforementioned rule of Leviticus 24:22 that there shall be one Law for all similar cases. Additionally, Numbers 35:31 explicitly prohibits the taking of such a fine or ransom for the life of a murder. Consequently, the inclusion of murder within the system of monetary compensation creates great difficulties which the Rabbis cannot effectively resolve. The Rabbis therefore read the text to exclude murder from the system of monetary compensation, preserving the remedy for cases involving lesser bodily injuries.

The Rabbis draw upon an analysis of Numbers 35:31 to reach this result. Cleverly, their reading not only excludes murder from the injuries for which monetary compensation is available, but further supports their assertion that the Law requires payment for the injuries. The Gemara reads:

"And if you desire a different proof [than the connection between Leviticus 24:18 and 24:19-20], see

that Scripture says: Do not take a ransom for the life of a murderer, for he is guilty to die (Num. 35:31). For the life of a murderer you shall take no ransom, but you shall take a ransom for the primary limbs which will not return²⁸

In this Gemara, the Rabbis draw an inference from an omission. Numbers 35:31 prohibits the taking of a payment, or ransom, for a murder. However, it does *not* prohibit the taking of a payment for a lesser injury, even if this injury is as serious as the permanent destruction of an arm or leg. The verse therefore implies that the proper remedy for a bodily injury less than murder is monetary compensation.

The Gemara rejects other possible reasons for this omission. The Gemara asks whether the purpose for this omission is not to permit monetary compensation for non-fatal injuries, but merely to state that the Law does not impose two penalties for one crime. Under this reasoning, Numbers 35:31 would mean that the Law does not require the injurer to pay compensation and then suffer the death penalty. The Gemara rejects this reasoning, saying that the proposition of only one penalty per transgression comes from Deuteronomy 25:2, which metes out sanctions "according to his

²⁸ TB BK 83b; Neusner, *The Talmud of Babylonia* at 14.

crime." Numbers 35:31 therefore is interpreted to have a different purpose, which the Rabbis hold to be the imposition of a monetary remedy for the infliction of non-fatal bodily injuries.²⁹

The Gemara addresses the additional objection that Numbers 35:31 could be read to say only that money should not be taken from one liable for death and then release him, saying nothing about cases of non-fatal bodily injuries. The Rabbis respond that, if that were an accurate reading, the verse should speak about all persons liable for capital punishment, and not just murderers. Instead, the specification of murder raises the implication that the verse's prohibition of taking a ransom does not apply to lesser injuries.³⁰

²⁹ TB BK 83b; Neusner, *The Talmud of Babylonia* at 15; Peiser at 65.

³⁰ TB BK 83b; Neusner, *The Talmud of Babylonia* at 15. Similarly, the Tosefta explicitly holds that murder requires the remedy of the death penalty, not monetary compensation. Further, the Tosefta states that non-fatal injuries require monetary payments, and not the death penalty. Saul Lieberman, commentator, *The Tosefta According to Codex Vienna, with Variations from Codex Efrut, Ms. Schocken and Editio Princeps* (Venice 1521), vol. 4, Baba Kamma 9:5 (New York: The Jewish Theological Seminary of America, 1988), at 43 [henceforth, "Tos. BK"]; Jacob Neusner, trans., *The Tosefta Translated from the Hebrew*, vol. 4, *Nezikin* (New York: Ktav Publishing House, Inc., 1981), 51.

b. Additional Arguments in the Mekilta
d'Rabbi Ishmael

The Mekilta d'Rabbi Ishmael contains similar provisions separating murder and the death penalty from non-fatal bodily injuries and monetary compensation. The rabbi is cited as absolving anyone liable for the death penalty from paying monetary compensation.³¹ Later, the source understands "life for life" to mean either one who gives his life for murder and does not pay compensation,³² or alternatively that the murderer cannot be held liable for both the death penalty and monetary compensation.³³ In either of these cases, the Mekilta d'Rabbi Ishmael separates capital offenses from offenses requiring the remedy of monetary compensation.³⁴

The Mekilta de-Rabbi Ishmael finds another textual reason to distinguish between murder and non-fatal injury cases. The text

³¹ Lauterbach, *Mekilta de-Rabbi Ishmael* at 63.

³² *Ibid.* at 67.

³³ *Ibid.*

³⁴ However, the Mekilta also contains a minority interpretation which equates "life for life" with monetary compensation. This is done by observing that Exodus 21:30-31 requires an adjudicated payment "as is laid upon him" Exodus 21:22 also speaks of such an adjudicated payment, permitting a monetary payment "life for life" under this interpretation. This opinion is more the exception than the rule. *Ibid.*

observes that Exodus 21:22 imposes a fine upon the person who injures a woman's unborn child during a conflict. The text then asks whether the proper punishment for the injurer is the death penalty. A *gezera shava* refutes this proposition. The *Mekilta* looks to Deuteronomy 22:19, which uses a verb with the root "ו.י.ש" to refer to a fine. Since Exodus 21:22 also uses verbs with this root to impose the punishment, the text concludes that the proper remedy for a non-fatal injury is monetary compensation, not capital punishment.³⁵

**c. Uncertainty of Injury and Assessment:
Bodily Injury and Homicide, Compensation
and Capital Punishment**

The texts wrestle with a particular scenario created by their method of adjudicating cases. These difficulties raised by the Rabbis' judicial procedure gives further reason to distinguish between murder and non-fatal injury cases. This distinction, in turn, supports the justification for providing different remedies for the two classes of cases.

³⁵ *Ibid.* at 65.

The difficulties arise because the Rabbis in their judicial capacity generally would try a case involving an injury only once. Moreover, the court may resolve the matter fairly quickly. This procedure means that the court may not know for certain whether the injured would live or die at the time of adjudication. The court would have to make an assessment of the matter to resolve the case. What would happen if the court made the wrong assessment? The differences in sanctions between fatal and non-fatal injuries raise numerous questions. Should the court require the injurer to pay compensation if they believe the injured will live, then impose the death penalty if the injured dies? What if the court determines that the injured will die, and he actually lives?

The Talmud Bavli answers these questions by generally maintaining the distinction between fatal and non-fatal injury cases.³⁶ If the court decides that the injured will die, and the injured eventually lives, then the injurer is exempt from the death penalty but must pay monetary damages. The problem arises when (1) the court decides that the injured will die, (2) the injured gets a little better and the court assesses damages, and (3) the injured

³⁶ See discussion below.

ultimately worsens and dies as a result of the injurer's actions.³⁷ The Talmud holds that, in this case, the injurer is liable for the death penalty. The Talmud departs from the strict separation of fatal and non-fatal injury cases only to absolve an injurer of capital punishment if the court initially declares the injuries to be non-fatal, but the injured dies.³⁸

The Tosefta reflects a disagreement with part of this holding. Like the Talmud, the Tosefta would impose monetary compensation if the court wrongly assessed at the first adjudication that the injured would die. However, the Tosefta goes further to specify that if the court initially assessed that the injured would live, and the injured dies as a result of the injurer's actions, then the injurer pays the damages to the injured's heirs.³⁹ Additionally, the Tosefta also considers the case of the injured who is declared fatally hurt, improves, then dies. Departing from the Talmud, the Tosefta holds that the court must determine whether the injured died because of the act of the injurer, or if something else was the cause-in-fact of the death. The injurer is liable for capital punishment in the former

³⁷ Consequently, the injurer is the cause-in-fact of the injured's death. Note that fault plays no role in this analysis.

³⁸ TB Sanhedrin 78b.

³⁹ Tos. BK 9:5; Neusner, *The Tosefta* at 51.

case, but not the latter.⁴⁰ The mixing of the two categories of cases therefore causes additional significant problems in the Tosefta.

Rabbi Nehemiah considers a different aspect of the uncertainty of the injury which relates to the time of assessment. Rabbi Nehemiah's opinion takes into account that Jewish Law holds a murderer liable for capital punishment even if the victim does not die immediately after the murderer's attack. He refuses to consider the difficulty of monetary compensation for an injured who improves and then worsens, absolving the injurer from further payments once the injured begins to improve. He cautions that the constant re-evaluation of the matter creates the possibility that the injured will recover his health after the injurer is put to death, preferring to end judicial inquiry into the entire matter for either compensation or capital punishment once the injured begins to improve.⁴¹ It is for this reason that the Mekilta and the Talmud Bavli delay payment of any monetary damages until it is clear

⁴⁰ Tos. BK 9:6; Neusner, *The Tosefta* at 51.

⁴¹ Tos. BK 9:6-7; Neusner, *The Tosefta* at 51.

whether the injured will live or die as a result of the injurer's actions.⁴²

The difficulties in the Tosefta and Rabbi Nehemiah's opinions show the danger of mixing the remedies for fatal and non-fatal injuries. The Talmud Bavli avoids these difficulties by maintaining the remedy categorization of monetary damages if the injured lives, and capital punishment if the injured dies, adjusting the outcome only by absolving the injurer from the death sentence if the injured does not die. The relative clarity of the Talmud Bavli's holding compared with the Tosefta supports keeping the two classes of cases and remedies separate.

3. Proof in Use of "נָפֵק"

The Rabbis have interpreted the text to reject the remedy of talion for monetary payments. They have separated the cases of fatal injuries requiring the remedy of capital punishment from the discussion. The Rabbis also find support for the imposition of the

⁴² Lauterbach, *Mekilta de-Rabbi Ishmael* at 53-54; TB Sanhedrin 78b.

remedy of monetary compensation for bodily injuries in independent readings of the text.

The Rabbis draw this conclusion from the use of the verb "נתן," meaning "to give." The Talmud states that this verb means monetary compensation according to an authority from the school of Rabbi Ishmael. The Rabbis describe how this authority's analysis of Leviticus 24:19-20 leads to this outcome:

"[19] If a man gives [יָדוֹ] a blemish to his fellow, then as he has done, thus will be done to him: [20] fracture for fracture, eye for eye, tooth for tooth, as he has given [יָדוֹ] a blemish to a man, so shall be given [יִנָּתֵן] to him."⁴³

The authority from the School of Rabbi Ishmael reaches his conclusion by noting that the verses seem to contain redundant language. Leviticus 24:19 states that, "as [the injurer] has done, so shall be done to him." Leviticus 24:20 states, "as he has given a blemish to a man, so shall be given to him." These phrases seem to say the same thing, making the second phrase superfluous. However, a rabbinic maxim of Scriptural interpretation states that each word in the Torah has a purpose, and no words are

⁴³ Leviticus 24:19-20.

superfluous. The final phrase in verse twenty must have a meaning. The authority from the school of Rabbi Ishmael finds that purpose in the new inclusion of the verb *נָתַן*. This word means something must be given, which he understands to mean the payment (or giving) of money. The text completes the analysis by explaining the use of similar verbal forms for "giving a blemish" as necessary to lay the groundwork for using the verb in the final phrase.⁴⁴

The Rabbis also find a reason for interpreting the talionic language to require monetary compensation in an analysis of Deuteronomy 19:18-21. Although these verses do not address physical injuries, the similarity of the language allows the Rabbis to use them to interpret Exodus 21:22-24:

"[18] . . . and here now, if the witness is a false witness, and has testified falsely against his brother, [19] then you shall do to him as he had devised to do to his brother, so shall you exterminate the evil from being about you. [20] Then the remaining people will hear, then they will fear, and they will not continue to do again like this evil thing among you. [21] And your eye shall not pity; soul for soul, eye for eye, tooth for tooth, hand for hand, foot for foot."

⁴⁴ TB BK 84a; Neusner, *The Talmud of Babylonia* at 16; Peiser at 64-65 n.285. The Talmud also uses this verbal root to specify that the remedy for intentional injuries is monetary compensation. TB Sanhedrin 78b - 79a.

This language is very similar to Exodus 21:22-24 in that it says the court should do to the injurer what the injurer did, and that the description of remedy speaks of some kind of equal exchange of body parts.⁴⁵ Similar to the previous analysis, the authority from the school of Rabbi Hiyya finds the language of "hand for hand" superfluous, because the text has already specified in Deuteronomy 19:19 that what the injurer has done should be done to him. The interpretation concludes that the phrase "hand for hand" should be read here as "hand *to* hand," meaning that the remedy is something which passes from one person to another. That something must be a medium of exchange or value, which the interpretation reasonably determines is monetary compensation.

The text raises one last question about why "foot for foot" is also mentioned, implying that the thing exchanged may be something passed "foot to foot" under the school of Rabbi Hiyya's reasoning. The authority rebuffs this objection, saying that the text includes the language of "foot for foot" as a poetic balance for "hand to hand."⁴⁶

⁴⁵ Although the latter phrases uses the preposition "ב" instead of "חֲחֹחִי."

⁴⁶ TB BK 84a; Neusner, *The Talmud of Babylonia* at 16-17.

The Rabbis therefore find independent sources in the text to support the provision of monetary compensation. They use the standard interpretive tool of explaining seemingly superfluous language to affirm monetary payments as the proper remedy. The text shows the consistency of monetary compensation with Biblical Law.

4. Money as Providing a Remedy

The Rabbis use their rules of interpreting text to establish monetary compensation as the proper remedy for non-fatal bodily injuries. They show how monetary compensation provides a better reading of the text than talion. They distinguish the problematic cases of murder and capital punishment. Their rules concerning the understanding of seemingly superfluous language provides further justification for using monetary compensation as the remedy.

However, the assertion of money as the proper remedy is more than an acceptable or more logical reading of the text for the Rabbis. Money also is more than just a better remedy than talion.

The Rabbis imply that monetary compensation provides a just remedy in these cases, and that they have greater comfort with this remedy than talion.

The Mishnah demonstrates this comfort in the remedy by the manner in which it independently lists the five categories of damages. Each of the categories - injury, pain, healing, lost income and embarrassment - is paid independently.⁴⁷ The Talmud specifies that the injured receives any of the latter four damages he suffers regardless of whether he sustained a substantial permanent injury, providing explicit examples of how this may occur.⁴⁸ This demonstrates the Rabbis' acceptance that money provides an effective and useful remedy for economic and non-economic damages regardless of the severity of the physical injury.

The Rabbis' extend this acceptance of monetary remedies even to cases for which money may seem most problematic. The Rabbis assert that money provides the remedy for embarrassment, even though this may be the hardest of the non-economic damages to connect to the injury. The text asks whether an injured recovers for

⁴⁷ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13.

⁴⁸ TB BK 85b; Neusner, *The Talmud of Babylonia* at 25.

embarrassment if he incurs the injury while asleep, or if the injured is a minor, a deaf-mute or one who suffers mental infirmities. The Rabbis confirm that almost any insulted person suffers a loss. If the injured does not appreciate the loss at the time of the injury because he is asleep or a minor, he still suffers that injury when others remind him of the insult and he can appreciate it. Only one who suffers mental infirmities does not sustain the damages because the insult does not worsen his position in society. In the other examples, the Talmud affirms that the injured has suffered a loss, despite the problems connecting the humiliation to the injury. That loss is remedied with money.⁴⁹

The Jerusalem Talmud confronts a similar question concerning the appropriateness of a monetary remedy. The text asks whether monetary compensation is the remedy for intentionally caused injuries. This text understands Exodus 21:23 to refer to unintentionally caused injuries, but not necessarily intentionally caused harms. While the text does not provide details, the differences between these two categories of injuries raises the possibility that money does not provide the remedy for

⁴⁹ TB BK, 86b; Neusner, *The Talmud of Babylonia* at 30.

intentionally caused injuries. The text rejects this idea, stating that it is unreasonable to require monetary payments for unintentionally caused injuries, and then absolve injurers who intend their harms from the payments. The Rabbis therefore deem money an appropriate remedy for intentionally caused injuries.⁵⁰

The use of money as the remedy for bodily injuries has significant meaning for the Rabbis. The payment of the compensation is important enough that the Tosefta requires the payment whether the injured makes the claim or not.⁵¹ Further, in the context of paying lost earnings and medical expenses, the Mekilta states that the purpose of Scripture is to teach proper conduct based on the Divine Law. The fact that, in the end, monetary payment is the remedy demonstrates the Rabbis' opinion that this remedy for bodily injuries fulfills that important purpose.⁵²

The texts reflect the Rabbis' acknowledgement of some limitations to the monetary remedy. Monetary payments do not fulfill every need in the religious system. The injurer must still seek

⁵⁰ TJ BK 49 (Zhitomer, 1865); Jacob Neusner, trans., *The Talmud of the Land of Israel*, volume 28, *Baba Qamma* (Chicago: The University of Chicago Press, 1982), 170.

⁵¹ Tos. BK 9:28; Neusner, *The Tosefta* at 57.

⁵² Lauterbach, *Mekilta de-Rabbi Ishmael* at 55-56.

forgiveness from the injured before he will be forgiven for his actions.⁵³ Moreover, some hesitancy to using the monetary remedy remains. The Talmud describes a case where a father refuses to accept the payments for an injury to his child because he views the means of evaluating the damages as embarrassing.⁵⁴

Nevertheless, the overriding message of the Rabbis is that monetary compensation is the proper remedy for bodily injuries. They read the Scriptural text to impose this remedy consistently through its use of "מכרה," "תחת," and "נתן." Money rights the wrong of the economic and non-economic losses suffered by the injured. The imposition of this remedy teaches proper conduct, and establishes justice in the society. The Rabbis leave talion behind, satisfied that monetary compensation provides the appropriate remedy in accordance with Toraitic Law.

⁵³ M. BK 8:7; TB BK 92a; Tos. BK 9:29-30; Neusner, *The Tosefta* at 57-58.

⁵⁴ TB BK 84a; Neusner, *The Talmud of Babylonia* at 18-19. The father objected to the evaluation of his child as if he were a slave. See section IV(B)(1) below.

B. Tort Reform: Move toward Skepticism

The Rabbis' support for the monetary remedy differs from the view of the Tort Reformers. The Tort Reformers inherit a complex system of monetary remedies for bodily injuries. Unlike the Rabbis, who approve of the rejection the entire remedial scheme of physical retaliation in favor of compensation, the Tort Reformers do not argue for the wholesale replacement of the existing monetary remedy. However, the Tort Reformers see a serious flaw in the use of monetary compensation in that they question whether money can provide a remedy for non-economic damages under any circumstances. Consequently, while the rabbinic texts demonstrate movement toward comfort in using money as the remedy, the Tort Reformers' comments reflect a growing skepticism for the compensation system.

1. Questioning of Money as the Remedy for Non-Economic Damages

The Tort Reformers question the premise that money can effectively remedy non-economic damages as the system intends. Their skepticism arises from the nature of non-economic damages such as pain and suffering, and the insurmountable difficulties they see in attempting to calculate these damages.

a. The Nature of Non-Economic Damages

The nature of non-economic damages raises questions for the Tort Reformers. These damages are intangible, nebulous harms. Money cannot undo embarrassment or pain and suffering. It cannot turn back the clock so that the injured does not suffer the injury and its permanent ramifications, except insofar as it provides the economic means to pay for medical treatment. The Tort Reformers therefore argue that the nature of these damages precludes money from serving as their appropriate remedy.

The Tort Reformers reject arguments supporting money as the

best possible remedy for non-economic damages. Obviously, money cannot undo an injury. It cannot purchase a new arm or back to replace the parts of the injured that the injurer permanently damaged. Money cannot pay for the cessation of every pain, due to limitations of medical science. Yet, proponents of compensatory remedies argue that money provides the best possible way of securing justice for the injured. They observe that money gives injureds the ability to purchase goods and services which allow them to live more easily with the injuries. For example, the injured may use the money to pay for extra help maintaining his home. This would not be considered an element of economic damages if the injured could still care for his home as he did before, albeit with more difficulty, because in these circumstances the injurer did not directly cause the injured an economic loss. Rather, money here allows the injured to cope better with his pain.

Alternatively, proponents of the current system argue that money for non-economic damages allows the injured to purchase something equivalent as compensation for the damages. Money may not have the ability to take away an injury or its pain. However, benefits and enjoyments that money can provide may

make the damages easier to live with. So, the proponents argue that the injured may live with pain for the rest of his life. However, the funds to relieve the worries of paying for a child's college education, or to give a family a nicer home, provide a benefit in another area of life balancing the harm which the injurer caused. The proponents argue that the compensation for non-economic damages restores justice considering all the circumstances.

The Tort Reformers dispute this argument. They doubt money can compensate for non-economic losses. Suzelle M. Smith, a trial lawyer, testified before the Senate Judiciary Committee that "efforts to provide 'full' compensation for non-economic damages are inherently doomed to failure. Non-economic losses can never be fully covered by compensation in any amount."⁵⁵ Similarly, O'Connell questions the usefulness of money as compensation for non-economic damages. He writes that, "the worse the suffering, the more sadly inadequate monetary compensation of any kind seems" as a remedy.⁵⁶ The Tort Reformers simply disagree that a seriously injured person receives compensation for pain and

⁵⁵ *Testimony of Suzelle M. Smith, Partner [of] Howarth & Smith, before the Senate Judiciary Committee (CIS Congressional Universe, March 15, 1994), 5.*

⁵⁶ O'Connell and Kelly, *The Blame Game* at 119.

suffering with a check.

The Tort Reformers see the failure of money to compensate for non-economic damages especially when comparing how money provides compensation for economic damages. They see money as an effective economic remedy because it directly erases debts caused by the injury. These are the "real needs" for which O'Connell would use the limited funds in the injury compensation system.⁵⁷ In contrast, money does not provide enough of a remedy for non-economic damages to justify spending large sums to support their unlimited availability in the compensatory system:

"Of course, psychic (meaning, non-economic) loss after an accident can be very real. Attempts by the law to recognize and redeem that suffering have much to recommend them. But at least arguably, the problems of such reimbursement - in addition to the expense of doing so - are increasingly reaching crisis proportions."⁵⁸

O'Connell concedes that lawsuits may be a way for a parties to fight a civilized war over the just and proper result of an injury. However, he and Keeton warn that some wars are not worth fighting because their price is too high and their outcomes are too wasteful

⁵⁷ O'Connell, *The Injury Industry* at 100.

⁵⁸ O'Connell and Simon, *Payment for Pain and Suffering* at 5.

and disastrous.⁵⁹ In other words, any benefits of using money as the remedy for non-economic damages are not worth their costs.

The Tort Reformers therefore question the use of money to remedy non-economic damages due to the nature of the harm. Non-economic damages are intangible harms. In contrast, money is a tangible remedy which the Tort Reformers see best suited to compensate debts and expenses. Consequently, the Tort Reformers are skeptical that money can provide an adequate remedy for non-economic damages.

b. Inability to Assess Non-Economic Damages in Money

Even assuming non-economic damages could be remedied by money, the Tort Reformers see great practical difficulties with the compensation system's attempt to translate pain and suffering into

⁵⁹ Robert E. Keeton and Jeffrey O'Connell, *After Cars Crash* (Homewood, Illinois: Dow Jones-Irwin, Inc., 1967), 43; O'Connell, *The Injury Industry* at 154.

dollars.⁶⁰ These concerns further their skepticism of the appropriateness of money as a remedy for non-economic damages.

The Tort Reformers doubt that anyone can really determine the "price" for pain, or what it is "worth" in any meaningful fashion. There is no market for pain and suffering which would provide an indication of its economic value.⁶¹ They see no valid way to determine how much money provides adequate compensation for harms.⁶²

In contrast, the Tort Reforms observe evidence of the random valuation of the non-economic damages in highly varied outcomes for almost identical cases. For example, two cases involved premature babies who became blind due to alleged malpractice. Both cases settled during trials. One case settled for \$165,000, while the other settled for \$500,000. Conversations with jurors revealed that the jury in the former case would have assessed the damages at \$900,000, but the jury in the latter case would not have

⁶⁰ O'Connell, *The Injury Industry* at 3; O'Connell and Kelly, *The Blame Game* at ix.

⁶¹ Keeton and O'Connell, *After Cars Crash* at 23; Peter A. Bell and Jeffrey O'Connell, *Accidental Justice* (New Haven, Connecticut: Yale University Press, 1997), 64.

⁶² Bell and O'Connell, *Accidental Justice* at 53.

awarded anything.⁶³ The Tort Reformers suggest that this wide discrepancy in possible results proves that money is ill-suited as a medium to quantify non-economic damages.

The Tort Reformers explain these variations in part due to process issues including playing emotional tricks on juries, such as removing glass eyes or sticking pins in numb limbs. Both parties in litigation use scientific methods to select favorable juries. Psychological studies instruct attorneys on the advantages of speaking first or last. Prejudices such as attractiveness of the parties, race and gender sometimes affect the amount of money that juries award. The Tort Reformers consider that the effect of these factors means that people do not assess pain and suffering damages on the basis of suffering, but more as a result of trial tactics and societal prejudices.⁶⁴

Further, the Tort Reformers accuse injureds' lawyers of abusing non-economic damages. They note that contingency fee arrangements given lawyers incentive to inflate damage awards as much as possible to increase their fees. Economic damages have

⁶³ O'Connell and Kelly, *The Blame Game* at 14-15

⁶⁴ Keeton and O'Connell, *After Cars Crash* at 24; Bell and O'Connell, *The Blame Game* at 23-24, 31.

natural limits in that they are equal to costs actually incurred in medical expenses, lost wages, and other fixed expenses. However, non-economic damages like pain and suffering are elastic, and may be expanded "to an almost unlimited degree."⁶⁵ The commentators therefore conclude that contingency fee arrangements are "unseemly," and contribute to an excessive inflation of non-economic damages.⁶⁶

Another factor which contributes to the inflation of non-economic damages is the procedure many insurance companies and lawyers use to determine the monetary value of the damages. The money necessary to compensate for economic damages is relatively easy to determine. An interested party merely sums all the costs the injured has incurred or will incur. In contrast, it is difficult to set a value of non-economic damages for the aforementioned reason that there is no market where a person can go to determine the precise amount of the loss in monetary terms. Insurance companies and lawyers often circumvent this problem by taking the known amount of economic damages, and multiplying that figure by a factor of

⁶⁵ O'Connell, *The Injury Industry* at 39-40; O'Connell and Kelly, *The Blame Game* at ix.

⁶⁶ O'Connell and Simon, *Payment for Pain and Suffering* at 4-5.

three to ten to determine the amount of non-economic damages.⁶⁷ O'Connell criticizes this method, even though it provides a convenient and quick method of deriving a figure for non-economic damages. O'Connell doubts that these payments have connection to the damages suffered by the injured. He says that such payments "supposedly are for [the injured's] pain and suffering," but that they are "really a new way of coining money."⁶⁸

The factors lead to ironic outcomes. O'Connell argues that injureds can inflate small claims so that they are overpaid for pain and suffering. However, he notes that it is difficult to inflate large claims because the economic expenses already are so high. Moreover, injureds with large injuries often desperately need the money, and cannot afford to wait long for the one-time payment the system provides. Injurers and insurers can take advantage of this need and settle the case for a lower figure, underpaying for pain and suffering.⁶⁹ In either case, the money the injured receives does not accurately reflect the damages suffered.

⁶⁷ O'Connell, *The Injury Industry* at 30-31.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 131; Bell and O'Connell, *Accidental Justice* at 65-66. O'Connell is more willing to accept the underpayment than the overpayment, supporting the availability of pain and suffering for

The Tort Reformers therefore see little correspondence between the harm suffered and the amounts of money actually received by injureds for non-economic damages. The system appears random in its assessment, and too easily influenced by psychological and sociological pressures. Without a means of accurate assessment, the Tort Reformers doubt that that money accurately compensates for intangible, non-economic damages.

2. Questioning the Use of Money as the Remedy for All Damages

The Tort Reformers find the use of money as a remedy appropriate as a remedy for economic damages. Economic damages create expenses and debts which payments by the injurer aptly rectify. However, the Tort Reformers still find problems with the use of money as a remedy even for these damages.

These issues involve the question of whether the injured actually uses the payments made by the injurer as compensation for real damages. The Tort Reformers conclude that all too often the

large claims, but not for small, "nuisance" claims. O'Connell, *The Injury Industry* at 40.

injurer's remittance does not serve any remedial purpose. Instead, the money pays for litigation costs, or the injured squanders the money on frivolous items instead of using it to remedy the damages. Worse, the Tort Reformers allege that many cases injureds exaggerate their injuries, or attain recovery through outright fraud. In such cases, the money cannot be said to have been used as a remedy.⁷⁰

Moreover, the Tort Reformers examine the entire system of compensation, including the insurance establishment which has risen over the past decades to indemnify bodily injury losses. The Tort Reformers argue that payments made for liability insurance are intended to remedy the liability claims which may occur. However, they conclude that insurance industry costs and practices redirect these funds to pay for overhead and fees, and cause the overpayment of numerous claims. Again, the money intended to compensate injureds becomes diverted to other uses.⁷¹

The Tort Reformers therefore question the appropriateness of the money as a remedy for bodily injury. They do not totally reject

⁷⁰ See the discussion of the Tort Reformers' positions in section III(A)(2)(b)(i) detailing their view of how this occurs.

⁷¹ *Ibid.*

using money as the remedy. However, they reject the use of money to remedy non-economic damages, and question whether the funds actually serve the remedial purposes intended for them. Therefore, the Tort Reformers are skeptical about some aspects of money as the remedy for bodily injury.

* * * * *

The Rabbis and Tort Reformers move in different directions regarding the appropriateness of money as the remedy for bodily injury. The Rabbis demonstrate a comfort with using the remedy, while the Tort Reformers are more skeptical about it. However, they both agree that the system should protect the interests of the parties involved with the injury. These interests are the subject of the next chapter.

Chapter III

Measure for Measure: Fairness to the Injurer, the Injured, and Society

The law of remedies for bodily injuries seeks to strike a balance between the interests of the parties. If the injured Davids believe that they do not receive enough compensation for their injuries, they may turn from legal processes to their own self-help for their remedy. If the injuring Jonathans believe the law forces them to give too much to the Davids, they may resist orders to provide the remedy. In either case, the resistance of the disgruntled parties threatens the order the law tries to implement. The law of compensation therefore provides a remedy which is "measure for measure" - something taken from the injurer and given to the injured which is equivalent to the injured's loss.

Society adopts this standard for the law of compensation so that injureds and injurers, as well as others in the society who may become injureds or injurers, accept the remedy as fair. Fairness does not mean that each person will be satisfied with the result of any one particular case. However, individuals will trust the system if it

provides relatively consistent results and allows equal opportunity for everyone to present his position. Predictability and efficiency build confidence in the compensation system. If the society's members observe these qualities in the compensation system, they will accept the law as just.

The concept of measure for measure sounds simple. However, legal systems have enormous difficulty effectuating this standard. A set of rules for determining the remedy may seem well suited to provide consistently fair results, but actually may be unfair to some people. A standard which seems ideal may not always work in practice.

Moreover, the problems in establishing measure for measure remedies become even more acute when the law tries to translate physical injuries into the medium of money. The fact that physical injuries and money are very different things leads to difficulties in the conversion of one into the other. Reasonable minds certainly can differ on the fairest criteria for this transformation.

The systems therefore closely define the interests of the parties they seek to protect. They distinguish between interests the law will protect, and interests which will be compromised in favor of

stronger needs of the other party. The judgment of how the system makes, or should make, these compromises determines the society's idea of fairness and justice.

This chapter discusses these parties and their interests. It considers the interests of the three main parties involved with the injury – the injurer, the injured and society in general – and how the Rabbis and Tort Reformers view their system as protecting or failing to protect these interests. The Rabbis' and Tort Reformers' views of fairness and unfairness of remedies are discussed, providing further insight into the values held by these legal interpreters and commentators.

A. The Interests of the Injurer

1. Jewish Law: The Rejection of Talion as Unequal

As explained above, the Rabbis reject talion's appropriateness as the remedy for bodily injury.¹ However, the sages in the Talmud also criticize physical retaliation as impossible to apply "measure for

measure" in all cases as required by Scripture. This observation furthers their interpretation favoring money as the proper remedy. This view also demonstrates their understanding of the Law's protection of injurers from physical harm.

The Rabbis understand that fairness requires the injurer to know that the loss the court requires him to sustain is equivalent to the harm he has inflicted upon the injured. The sages determine that "eye for eye" is an arbitrary standard which does not necessarily provide a measure for measure remedy. The "eye for eye" standard fails because each person has eyes or other body parts of different qualities, and a direct exchange of body part for body part is not equal. The Rabbis therefore abandon talion, returning to a remedy which they believe provides the equivalency Scripture requires: monetary compensation.

The Rabbis present this argument with several cases in which the court cannot inflict the same injury on the injurer as he caused the injured to suffer. For example, the Rabbis consider an injury to an eye.² They observe that eyes can be of different sizes, meaning

¹ See section II(A)(1).

² The Rabbis likely consider eye injuries because these are the first listed in the series of talionic formulae. However, the same logic

different qualities. Some see very well, while others see poorly. The difference in the quality of eyes makes it quite possible that the injured and injurer have unequal vision. Therefore, taking the injurer's eye for the injured's will not be equal retribution.³

The Talmud raises several objections to this argument. First, it questions whether the text means to apply talion except when the relevant organs are unequal. Money would be used as the remedy only in the latter cases. The Rabbis reject this argument because they understand Leviticus 24:22 to require the application of the same remedy in all cases.⁴

In another case, the Rabbis consider the problem of applying talion when the injurer already has lost the organ which would be the object of the punishment. For example, if a blind person causes harm to another's eye, equal physical retaliation is impossible. The court cannot harm the blind injurer's eye to the same extent as he harmed the injured. This applies for every injury, including when a person without hands injures another's hand, or a lame person

applies to any injury, demonstrating the impossibility of applying talion measure for measure.

³ TB BK 83b; Neusner, *The Talmud of Babylonia* at 15.

⁴ TB BK 83b; Neusner, *The Talmud of Babylonia* at 15.

injures another's leg. The inability of physical retaliation to provide a "measure for measure" remedy in these circumstances leads the Rabbis to conclude that money provides the better option, protecting the injurer from enduring physical injuries.⁵

The text again sees a small difficulty with this reasoning. It notes that a person with a terminal illness is not liable for capital punishment under Jewish Law. This reasoning argues that just as the Law cannot punish a dying man by putting him to death, so too the Law cannot hold an injurer liable "eye for eye" if the injurer has no eyes. This observation leaves open some possibility that physical retaliation remains the proper course for the injurer unless it is impossible to apply.⁶

Nevertheless, the Rabbis offer additional proof that the application of talion is unfair to the injurer. Abaye, one of the rabbinic sages, argues that the taking of an injurer's eye may lead to the taking of his life. This position takes into account the state of medical knowledge of the time, under which a serious injury such as removing an eye would even more likely cause death than today.

⁵ TB BK 84a; Neusner, *The Talmud of Babylonia* at 16; TJ BK 50; Neusner, *The Talmud of the Land of Israel* at 170-71; Peiser at 64-65 n.285.

The text once again raises the possibility of applying talion if it seems the injurer can endure it. However, the text states the realistic possibility that physical talion will disproportionately harm the injurer by causing him to incur both the injury and death.⁷ This further supports the Rabbis' view of the unfairness of physical talion.

The Rabbis find more proof for the unfairness of physical talion in the nature of pain. Rav Zebid perceives a problem in the need to compensate for pain as well as the actual injury:

Rav Zebid in the name of Raba said: Scripture said: Wound for a wound. (Ex. 21:25) One must pay compensation for pain as well as damage. And if you would think that this literally means talion, then just as he (the injured) suffered pain, then also there is pain [for the injurer].⁸

Rav Zebid sees a conflict in the text if it means physical retaliation. He understands "פצע דחח פצע," or "wound for wound," to mean compensation for pain. The injurer also feels pain when the court inflicts the penalty. Therefore, under a talionic system, the

⁶ TB BK 84a; Neusner, *The Talmud of Babylonia* at 16.

⁷ TB BK 84a; Neusner, *The Talmud of Babylonia* at 17.

⁸ TB BK 84a.

injured and injurer both suffer the same injury and the same pain. However, according to Rav Zebid's reading, the injured receives compensation for his pain, and the injurer receives nothing. This is unequal, for physical retaliation does not allow a "measure for measure" response according to this reasoning. The immediately following text challenges Rav Zebid's premise, reserving compensation only if the parties subjectively experience differences in pain.⁹ But, accepting Rabbi Zebid's reading of "wound for wound" as accurate, the Talmud again demonstrates an inequality in the application of physical talion.

Finally, the Talmud discusses an inequality in physical retaliation caused by the requirement in Exodus 21:19 for the injurer to pay the injured's medical expenses. Rav Pappa argues that both parties will suffer injuries under physical talion, and both will incur medical expenses. The injured will receive payments for these expenses according to Exodus 21:19, but the injurer will not. Therefore, if the Law is read to require talion, it will leave the parties in different positions following the incident. The injurer actually will be in a worse position than the injured because no one

⁹ TB BK 84a; Neusner, *The Talmud of Babylonia* at 17.

pays for his medical expenses. This contradicts the idea of equalizing the parties' positions with a "measure for measure" remedy. Consequently, Rav Pappa argues that the remedy should be compensation, and not physical retaliation, so that the injurer does not suffer a sanction disproportionate to the injury. The Talmud immediately suggests that Exodus 21:19 might mean only that the party having less treatment should pay the difference in medical expenses to the other, preserving equality in physical talion.¹⁰ However, this is a tenuous textual reading at best.

The Talmud therefore presents a series of examples showing the unfairness of physical talion to the injurer. It does preserve arguments attempting to rehabilitate the viability of the remedy. However, these arguments do not overcome the pervading understanding in the text that physical retaliation is an unequal remedy. This demonstrates not only the Rabbis' position that monetary compensation provides the proper remedy, but also their understanding of the text as protecting the injurer from receiving a disproportionate sanction, and from receiving physical injury himself.

¹⁰ TB BK 84a; Neusner, *The Talmud of Babylonia* at 17.

2. Tort Reform: The Rejection of "Crushing Liability"

The Tort Reformers also are greatly concerned with protecting the interests of injurers. They view the tort system as imposing liabilities upon injurers which are greatly disproportionate to the injuries. Moreover, they believe that the gross amount of damages and costs injurers must pay prevents them from pursuing their reasonable economic activities. Therefore, the Tort Reformers see the current system as unfair to injurers in its imposition of "crushing liability."¹¹

a. Unfair Impositions of Liability

The Tort Reformers see the most persuasive evidence of the compensation's system's unfairness to injurers in the practical effects of the costs and liabilities. They criticize the current compensation

¹¹ The Tort Reformers address these claimed unfairnesses in large part through their ideas of what damages are available to injureds and how they are calculated. This is the subject of the Chapter IV. See that chapter for descriptions of the changes the Tort Reformers propose to cure this unfairness in the system.

system for imposing such great costs upon injurers that they cannot engage in useful economic activity. The Tort Reformers view the system to be out of control, more noteworthy for its economic destruction of injurers than its compensation of injureds.

Congress emphasized these harms in its finding supporting the passage of the Common Sense Product Liability Reform Act of 1996:

"The Congress finds that . . . [e]xcessive, unpredictable, and often arbitrary damage awards and unfair allocations of liability jeopardize the financial well-being of many individuals as well as entire industries, particularly the nation's small business and adversely affects government and taxpayers."¹²

While alleging that expansive liability affects everyone, O'Connell specifies some of the people and businesses harmed by this crushing liability. He notes that damage awards destroy entire companies. Ministers stop visiting their congregants at home for fear of lawsuits against them. Towns and schools cut services either because they cannot afford the insurance or the potentially large damage awards. Day-care centers experience similar problems.¹³

¹² Act, section 2(a)(5).

¹³ O'Connell and Kelly, *The Blame Game* at 73-81. The Tort Reformers recognize that the fear of high judgments and the high

O'Connell finds the danger of financial ruin especially high for industries serving large amounts of people or working with high-tech materials. These companies offer products or services which provide new products which benefit almost everyone.¹⁴ However, the wide use of a product or service, or the high risk of serious injury from it, means that the product or service almost inevitably will cause a significant number of people substantial harm. These industries that injure suffer a greater liability risk, especially through class action lawsuits, in which thousands of people may allege the companies injured them. O'Connell sees class action lawsuits as particularly harmful to companies dealing with radioactive and toxic materials., threatening the continued viability of these companies.¹⁵

O'Connell finds the compensation system especially unfair to injurers because often it examines only the injured, and not the benefits provided by the injurer. The system only considers the times when a product or service failed, and not the potentially many times it benefited or saved others. Even the injured may have

cost of insurance often have the same effect as an actual judgment. Crushing liability therefore affects both injurers and potential injurers.

¹⁴ *Ibid.* at 100 (citing the benefits and necessity of asbestos).

¹⁵ *Ibid.* at 73-81.

received some benefit from the product or service. O'Connell argues that the current law does not properly acknowledge these benefits. Instead, it imposes liability based upon whether the product or service was fit for its intended purpose in the particular case before the court. However, fitness for purpose has nothing to do with the cost/benefit analysis O'Connell sees as the basis for liability. Consequently, fitness for purpose provides an arbitrary and unfair standard which is tilted in favor of the injured.¹⁶

The Tort Reformers consider the compensation system to be unfair to injurers.¹⁷ From their perspective, the systemic problems with the assessment of injuries and payment of damages interact with the substantive law, unfairly causing the insolvency of injurers. The Tort Reformers believe that any system which so pervasively destroys the viability of one set of the parties does not provide a "measure for measure" remedy. Instead, according to their view, the system has lost control of its priorities, and needs to be reformed to be a just system of compensation.

¹⁶ *Ibid.* at 100-01

¹⁷ The Tort Reformers suggest that similar reasons infringe upon the interests of society. See section III(C)(2) below.

b. Reasons for "Crushing Liability"

The Tort Reformers' arguments about unfairness to injurers necessarily goes farther than just the fact that injurers endure crushing liability. If the only complaint were that injurers sustained high liabilities, injureds could argue that this is just because they have suffered great amounts of losses. However, the Tort Reformers refute this argument by stating that the liabilities imposed upon injurers do not reflect the damages injureds actually suffered. Instead, the Tort Reformers claim that the liabilities represent more than the injureds' damages because systemic problems interfere with the administration of justice and the determination of the true value of the injured's loss in monetary terms. The Tort Reformers argue that these systemic problems lead to injureds recovering more than an accurate measure for measure accounting of their injuries would provide, creating substantial unfairness for injurers.

i. Exaggeration and Fabrication of Injuries

The total amount individuals and businesses pay for insurance makes available a large pool of money for compensation for injuries. The Tort Reformers observe that this provides a great temptation to inflate cases by exaggerating injuries, or even manufacture false claims to defraud alleged injurers. As a result, the Tort Reformers argue that a significant portion of the money paid by injurers does not provide compensation for damages, but becomes a wrongfully acquired windfall for the supposed injured. This unfairly creates or inflates the amounts the injurer pays beyond a "measure for measure" remedy.

A. Exaggeration of Economic Damages

One factor which contributes to the temptation to exaggerate injuries besides the great amount of money available is that an injured generally receives his compensation in one lump sum. The injured and injurer, most often through his insurer, may "settle" the

case for an agreed amount representing the total compensation for all elements of the injured's damages. If the parties do not settle the case, the damages are determined through a trial or other judicial process.¹⁸ At that time, a jury or legal authority decides whether the injurer is liable to the injured under the law and, if so, the amount of damages which the injurer must pay. In either of these circumstances, the process determines the amount of the damages the injured has suffered in the past and will suffer in the future. The injured does not have an opportunity to revive the case if he actually suffers more damages than estimated at the time of the resolution of the case.¹⁹

O'Connell argues that this situation compels doctors to exaggerate the extent of the injuries at the time of the determination of damages. If the injured's doctor or expert underestimates the extent of the injury, the injured will not be able to obtain additional

¹⁸ Such as arbitration or other alternative means of dispute resolution.

¹⁹ The parties may agree to a "structured settlement" in which the injured pays certain amounts over a period of time. In these cases, the total amount and payment schedule is usually set at the case's resolution. Even in structured settlements, it is extremely rare for the parties to leave any element of damages open for future determination, such as payment of future medical expenses as they are incurred.

compensation when the severity of the damage becomes apparent. The physician therefore may present the injury's worst possible outcome to ensure that the injured recovers enough compensation to cover all future expenses. The physician may do this even if the injured likely will not ever need these funds, and regardless of whether the injured ever actually sustains the damages. O'Connell states that it would be better to pay these expenses as they occur, but claims that the lawyers' interest in collecting one large lump sum to facilitate their collection of their contingency fees prevents this.²⁰

B. Exaggeration of Non-Economic Damages

Another systemic problem which Tort Reformers claim contributes to the exaggeration of injuries is the method many use to estimate non-economic damages. Lawyers and insurance companies frequently multiply the total economic damages by a factor of anywhere from three to ten to derive the amount of non-economic damages. Beyond the difficulties presented by any attempt to assess

²⁰ O'Connell, *The Injury Industry* at 16-18.

non-economic damages in monetary terms,²¹ the system creates an incentive for doctors and injureds to spend as much on medical expenses as possible to geometrically increase the total damages.²² For example, assume an insurance company uses a multiplying factor of three to estimate the amount of non-economic damages. If the injured spends \$100 in medical expenses, the company will estimate the non-economic damages as \$300. However, if the injured spends \$500 in medical expenses, the company will estimate the non-economic damages as \$1,500. The injured's total recovery becomes dependent upon the amount of his economic damages, and increases in the economic damages will produce even greater increases in the payments for non-economic damages.

O'Connell sees this method as fertile ground for exaggeration or neglect of injuries. He claims that some injureds will seek unnecessary medical treatment merely to inflate their total claims. Lawyers send these injureds to favorable physicians who provide excessive treatment solely to increase the amount of the total

²¹ See section II(B)(1).

²² This argument also applies to other economic damages such as lost wages, creating an incentive to inflate these damages by staying out of work as long as possible.

claim.²³ Other injureds employ different reasoning. O'Connell observes that, if the case goes to trial, the jury determines the injured's damages based upon what they see and hear at that time. Some injureds realize that they will receive a lesser award if they appear more healed at trial. O'Connell alleges that these injureds delay medical treatment and returning to work to maximize their damages at trial.²⁴ O'Connell argues that these are not real damages, but litigation strategies. The money does not compensate the injured, but rewards the dishonest.

C. Fabrication of Damages

These arguments mostly involve exaggeration of injuries, possibly resulting from a real concern to protect the injured from an unknown future. However, the Tort Reformers argue that the large amount of money available for recoveries and fees encourages too

²³ O'Connell and Simon, *Payment for Pain and Suffering* at 6; O'Connell, *The Injury Industry* at 31-32; O'Connell and Kelly, *The Blame Game* at 58-59, 65-66; Bell and O'Connell, *Accidental Justice* at 164-65.

many to fabricate injuries and claims. "Chasers" and "runners" compete to get to potential clients for attorneys first and produce profitable cases, even if the claims they find are not legitimate. Some stage accidents or concoct cases, with or without the knowledge of the attorney. The Tort Reformers also claim that greedy litigants fake injuries to receive unmerited damage awards.²⁵

The money paid for these exaggerated and fabricated claims does not provide compensation according to the Tort Reformers. Instead, it provides a means to defraud injurers and insurers, creating significant unfairness for them in the compensation system.

ii. Excessive Liability for Small Cases

The Tort Reformers consider cases with relatively minor injuries as a persuasive example of the compensation system's unfairness to injurers. O'Connell believes that these "trivially

²⁴ Keeton and O'Connell, *After Cars Crash* at 16-17; O'Connell, *The Injury Industry* at 17.

²⁵ O'Connell, *The Injury Industry* at 59-60; O'Connell and Kelly, *The Blame Game* at 57, 60-63; Bell and O'Connell, *Accidental Justice* at 163-64.

injured" people receive overgenerous payments which exceed the true value of their losses.²⁶ According to this argument, injurers in these cases do not pay "measure for measure," but suffer from unfair and disproportionate impositions of liability.

The Tort Reformers believe that the practice of multiplying economic damages to derive the amount of non-economic damages becomes a greater problem in smaller cases than larger cases. The need for great medical expenses and long periods away from work for rehabilitation is obvious in cases involving serious injuries. However, it is more difficult to assess the precise amount of medical care needed for less serious injuries. The need for an additional test or doctor's visit, or an extra week or two of time from work, becomes uncertain. Consequently, the injured can "pad" his economic expenses without fear of detection. Moreover, the injured has an economic incentive to increase these damages because they result in a geometrically increased payment for non-economic damages. O'Connell therefore believes that smaller cases become overvalued

²⁶ O'Connell, *The Injury Industry* at 2-3.

through exaggeration or fraud, and the injurers eventually pay more than necessary for their fair compensation.²⁷

Injureds with smaller cases also may take advantage of systemic pressures arising from the costs of defense. Costs of litigation in trial expenses and attorney fees are so high that they greatly increase the gross amounts the injurer must eventually pay. The injured therefore may settle the case with the injured for an amount exceeding fair and reasonable compensation. This allows the injurer to avoid paying the litigation expenses which otherwise would increase the gross amount necessary to discharge the liability.²⁸ However, this means the injurer pays more than a "measure for measure" amount for damages, which the Tort Reformers consider unfair.²⁹

Studies of insurance payments support the Tort Reformers' argument that injurers pay unfairly high amounts for less serious injuries. These studies examined cases in the late nineteen sixties

²⁷ O'Connell and Simon, *Payment for Pain and Suffering* at 6.

²⁸ In contrast, cases with more serious injuries already involve large payments of damages. Therefore, the costs of litigation do not cause such a disproportionate increase in the total amount needed to be paid to resolve a larger case, and the injurer has no incentive to pay more than fair and reasonable damages.

²⁹ O'Connell, *The Injury Industry* at 34-35.

and early nineteen seventies. They discovered that injureds with smaller economic losses of less than \$100 received on average over seven times their economic costs in total. In contrast, injureds with between \$2,500 and \$10,000 in economic damages may not even recover their out-of-pocket losses.³⁰

The Tort Reformers therefore consider the compensatory system to treat injurers unfairly in cases involving smaller injuries. The system results in injurers paying more than "measure for measure" damages for these injuries.

iii. Contingency Fees

The Tort Reformers consider injured's attorney fees to increase injurer's liabilities unfairly. The fees create a systemic problem which results in overpayment of compensation beyond appropriate according to the principle of "measure of measure." The Tort Reformers see the overpayments resulting from the common

³⁰ Keeton and O'Connell, *After Cars Crash* at 28, 43-44; O'Connell and Simon, *Payment for Pain and Suffering* at 6-7.

agreement that injured's pay their attorneys through "contingency fees."

A contingency fee is "an arrangement between attorney and client whereby the attorney agrees to represent the client with compensation to be a percentage of the amount recovered."³¹ For example, the contingency fee agreement may give the attorney ten percent of the injured's total recovery. If the injured receives \$1,000, the attorney is paid \$100. If the injured recovers nothing, the attorney receives no payment for his work.

The Tort Reformers are concerned that contingency fees usually amount to one third to one half of the compensatory damages of the injured's recovery.³² O'Connell argues that this arrangement gives the injured's lawyer an incentive to do whatever he can to increase the injured's recovery as much as possible, even beyond a "measure for measure" recovery. These efforts include encouraging the injured to incur extra, unnecessary economic damages. The incentive to increase recoveries also encourages lawyers to devise methods of presenting cases which lead juries to calculate damages

³¹ *Black's Law Dictionary* at 553.

more on emotion or shock, and less on a dispassionate assessment of losses. In all these circumstances, the Tort Reformers consider the injurer to be forced to pay a sum greater than needed for compensation due to the lawyer's interest in his contingency fee.³³

The Tort Reformers therefore view the current compensation system as unfair to injurers. It imposes great liability upon injurers which threaten their continued economic viability. Moreover, aspects of the system such as exaggeration of injuries and fraud, contingency fees, and the treatment of small cases compel injurers to pay more than a "measure for measure" assessment of damages. The Tort Reformers thus see the system as failing to protect the economic interests of injurers.

3. Jewish Law Revisited: Economic Protections

Jewish Law also has concern for the economic protections of injurers. Some scholars believe that fairness to the injurer in Jewish

³² Keeton and O'Connell, *After Cars Crash* at 30-32; O'Connell, *The Injury Industry* at 39; Ed Gillespie and Bob Schellhas, eds., *Contract with America* (New York: Times Books, 1994), 148.

Law means more than just abandonment of retaliatory physical injury. Arguably, the Rabbis understand the Law to impose fairness in requiring the injurer to remit compensation, but also imposing some procedures and limits to preserve his financial well-being.

For example, the Mekilta does not allow the injured to set the amount of damages, despite a possible reading of Exodus 21:22 which would permit this. Instead, the Midrash gives impartial judges the authority to determine the extent of the damages.³⁴ This protects the injurer from an inflated award spawned not from the actual damages which the injured suffered, but from the injured's greed or anger at the injurer.

The economic protections of the injurer largely involve issues involving whether the injurer was the cause-in-fact of the injury and the problems determining this at the time of assessment, and the effect of the injured's conduct upon the injury.

³³ O'Connell and Simon, *Payment for Pain and Suffering* at 4-5.

a. Causation and Time of Assessment

At the most basic level, the Rabbis understand the injurer to be liable only for damages he causes the injured to suffer.³⁵ The Talmud finds textual support for this in Exodus 21:18-19:

[18] If men fight, and one strikes his fellow with a stone or fist, and he does not die but falls to his bed, [19] then when he rises and walks about outside on his staff, then the one who struck him shall not be liable (for capital punishment), only he shall pay for his wages and he shall surely be healed.

The Rabbis understand the word "רק" in verse nineteen, meaning "only," to limit the payment for medical expenses and lost wages "only" to those caused by the injurer.³⁶ Ideally, then, the Rabbis in their judicial role at a single hearing determine the damages which the injurer caused. If the injurer has caused the damages, he pays for the injured's medical expenses, lost income and other losses resulting from the injury as outlined in the texts. The

³⁴ Lauterbach, *Mekilta de-Rabbi Ishmael* at 66.

³⁵ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13; Tos. BK 9:4; Neusner, *The Tosefta* at 51; Lauterbach, *Mekilta de-Rabbi Ishmael* at 54.

³⁶ TB BK 85a; Neusner, *The Talmud of Babylonia* at 23-24.

injured receives medical treatment until he recovers. The injurer pays for this treatment.³⁷ Consequently, the Law protects the injurer, closing his liability with the healing of the injured and the determination of the damages at the assessment. The Tosefta goes so far as to prohibit the reopening of the assessment to provide the injured additional damages if the injury proves worse than determined at the time of the court hearing, even if this means an underevaluation of the injured's damages.³⁸

Nevertheless, the actual events in a case may not follow this clear path. The Mishnah acknowledges that the injured's wound may heal somewhat, but then worsen. This cycle may repeat several times. The Mishnah states that the injurer is liable for the expenses incurred to heal these injuries.³⁹ However, the Gemara text raises the issue of when this continued liability ends, which the Mishnah does not address. The problem arises due to the uncertainty of whether the reopening of the wound or the appearance later developing ulcers resulted from the original injury. Rabbi Yose bar Judah and others would not hold the injurer liable for such ulcers

³⁷ M. BK 8:1; TB BK 83b.

³⁸ Tos. BK 9:3; Neusner, *The Tosefta* at 50.

³⁹ TB BK 84a; Neusner, *The Talmud of Babylonia* at 17.

due to this uncertainty, even if they arose because of the original injury. Some Rabbis would hold the injurer liable for medical bills under these circumstances, but not for further lost income.⁴⁰ These Rabbis perceive that the injurer will be held responsible for unending expenses, and express a concern to protect the injurer from this expansive liability.

The Law therefore imposes limits on the injurer's liability by restricting the damages he must pay to those he actually caused, and by formally setting liability at the court's assessment.

b. Protection from Increased Damages Due to Injured's Behavior

The Rabbis see additional protections for the injurer in the Law's consideration of the injured's conduct. They realize that the injured may behave in a manner which needlessly causes or increases the damages he suffers. The Rabbis find it unfair to require the injurer to pay for such expenses, and do not find the Law to hold him liable for them.

⁴⁰ TB BK 85a; Neusner, *The Talmud of Babylonia* at 23.

For example, the Tosefta considers the possibility that the injury need not have been sustained at all. The Tosefta mentions cases where the injured asks the injurer to inflict the damages, envisioning a medical need to amputate a harmful bodily organ. The Tosefta finds the injurer exempt from liability in such cases.⁴¹

Other texts consider cases in which the injured ignores medical advice, and does something to exacerbate the injury. The Talmud Bavli specifically mentions the possibility that the injured will eat sweet foods that doctors of the time understood to retard healing. In such a case, the injurer cannot be said to have caused the injured's damages, and the Law releases the injurer from further liability for medical expenses.⁴²

The Rabbis also acknowledge that the injured may misuse payments made by the injurer for medical expenses. The injured may neglect his care, using the money for other purposes.⁴³ Others may see that the injured has not been healed, and presume that the

⁴¹ Tos. BK 9:32; Neusner, *The Tosefta* at 58.

⁴² TB BK 85a; Neusner, *The Talmud of Babylonia* at 23-24; TJ BK 50-51; Neusner, *The Talmud of the Land of Israel* at 173.

⁴³ The Tort Reformers express a similar concern that injureds will not know how to use their large recoveries properly, and will spend the funds on frivolous luxuries like fancy cars and televisions

injurer never made the payments, harming the injurer's reputation. It is also feasible that the injured then may attempt to elicit additional payments for his later medical expenses. Therefore, the Rabbis protect the injurer by having him only make payment directly to physicians, and not to the injured personally.⁴⁴

The Rabbis therefore demonstrate an understanding that the conduct of the injurer may unnecessarily increase the injured's damages. Rather than holding the injurer liable for these higher damages, the Law protects the injurer by either exempting him from liability or making the payments directly to the medical caregivers. Similarly to the requirement of an impartial assessor of the damages and the closing of the injured's liability to damages he actually caused, the Law is read here to protect the injurer from an unfair imposition of liability.

However, the Law's protection of injurers has limits. The Rabbis still read the Law to require the injurer to pay for all the damages he actually causes. The Rabbis provide no indication that Jewish law departs from this principle, even if the Law imposes a

instead of to remedy their damages. Keeton and O'Connell, *After Cars Crash* at 17, 54; O'Connell, *The Injury Industry* at 18.

⁴⁴ TB BK 85a; Neusner, *The Talmud of Babylonia* at 24.

large judgment upon the injurer which taxes or exceeds his own wealth. The Law tempers the protection of injurers with the need to compensate injureds.

B. The Interests of the Injured

1. Jewish Law: Requirement of Full Damages

The Tanna'im interpret the Scriptural verses to require injurers to pay compensation to the injureds for the damages they cause. The Amora'im further develop the compensatory system, explaining how the system assesses the damages. Through this process, these rabbinic writings demonstrate a consistent theme of protecting injureds by ensuring that they recover their full damages as recognized by the Law. The Rabbis therefore establish a system which is fair to injureds.

The Tanna'im set forth the requirement of paying full damages early in Tractate Baba Kamma:

"Man is always an attested danger, whether [he acts] by mistake or intentionally, whether he is awake or asleep. If he blinded the eye of his fellow or broke his vessels, *he pays the full value of the damage he has caused.*"⁴⁵

This text lays down the basic premise for the Law of compensation for bodily injury.⁴⁶ The Rabbis' vision of fairness to the injured requires an assessment of his damages and corresponding payment by the injurer to restore his losses.

The Talmud Bavli specifies what this means later in the tractate. The Rabbis, acting in their judicial capacity, assess the loss to the injured in each of the five heads of damages. The injurer pays for these damages immediately, unless they determine that the injured has not fully recovered. In such a case, they pay the non-economic damages immediately, but delay a final assessment of the medical expenses and lost income until the injured has fully recovered.⁴⁷ If the injured eventually recovers more than the

⁴⁵ M. BK 2:6; TB BK 26a; Neusner, *The Talmud of Babylonia*, vol. XX.A at 109 (emphasis added).

⁴⁶ This Mishnah also speaks of property damage and the possible distinction between intentional and negligent actions. However, these issues are beyond the scope of this study.

⁴⁷ The Tosefta also requires immediate payment of damages based upon the assessment, and imposes liability until the injured returns to health. Tos. BK 9:3; Neusner, *The Tosefta* at 50.

assessor thought he would at the assessment, meaning that the injured suffers less damages than assessed, the injured still retains all the payments made by the injurer. Consequently, the Law operates to compensate the injured for his damages fully and quickly, unless the time needs to be extended to benefit the injurer. Moreover, if the assessment proves overly generous to the injured, the injured still keeps the entire payment. The Law gives every possible consideration to the injured to ensure he receives compensation for his losses.⁴⁸

Moreover, the Law actively prohibits the injurer from finding ways to circumvent liability for medical expenses. The injurer cannot serve as the injured's physician, or choose the injured's doctor. He cannot bring his own physician from far away. All these actions may save the injurer money. However, they may also mean that the injured is not fully healed since the injurer and his chosen doctor may have greater concern for the injurer's interests than the injured's. The Rabbis seek to protect the injured's interests by

⁴⁸ TB BK 91a; Neusner, *The Talmud of Babylonia* at 48.

having the injured choose his own physician and care for his own healing, holding the injurer responsible for the payments.⁴⁹

The Talmud text contains a challenge to the requirement of the payment of full damages. Rav Judah considers the word "רק" in Exodus 21:19 to mean that the injured has liability only for medical expenses, and not lost income, if the wound reopens.⁵⁰ He draws this conclusion because the verse insists that the injured "shall surely be healed," and does not contain the same words of emphasis for lost income. He also reads "רק" as meaning "only" medical expenses.⁵¹ The Rabbis disagree with Rav Judah, determining that Scripture treats lost income the same as medical bills. Moreover, they read "רק" as applying not to the clause about medical expenses, but to specify that the injurer pays only for damage he actually caused. The Rabbis therefore reject Rav Judah's argument in favor of an

⁴⁹ TB BK 85a; Neusner, *The Talmud of Babylonia* at 24.

⁵⁰ See section III(A)(3)(a) for a full discussion of the Rabbis' understanding of this verse.

⁵¹ The Mekilta de-Rabbi Ishmael contains the same argument. Lauterbach, *Mekilta de-Rabbi Ishmael* at 54. The Tosefta also preserves Rav Judah's conclusion. Tos. BK 9:4; Neusner, *The Tosefta* at 51.

interpretation which provides compensation of full damages to the injured.⁵²

Some of the texts also explicitly protect the injured by clarifying who may be held liable for the damages. The Mekilta d'Rabbi Ishmael specifies that female injurers have the same liability as male injurers. This is important because Jewish Law imposes different obligations upon men and women in other areas. The Mekilta's statement settles potential questions about whether gender differences alter the determination of liability.⁵³ The Tosefta even requires the injurer's heirs to pay the damages if the injurer dies.⁵⁴ These interpretations demonstrate further protection for injureds, as these Rabbis seek to ensure that they receive their full damages.

The Rabbis therefore interpret the Law to contain a strong theme favoring the compensation of injuries. The Law requires injurers to pay for the full damages he has caused the injured. This principle allows injureds to view the system as fair, because they can expect that they will recover their losses caused by the injurers.

⁵² TB BK 85a; Neusner, *The Talmud of Babylonia* at 22-23.

⁵³ Lauterbach, *Mekilta de-Rabbi Ishmael* at 51.

⁵⁴ Tos. BK 9:28; Neusner, *The Tosefta* at 57.

2. Tort Reform: Desire to Protect Injureds

The Tort Reformers also are concerned that injureds receive compensation for their injuries. However, unlike the Rabbis, they view the system as unfair in that injureds cannot expect to recover their full losses. O'Connell observes that the law generally allows the injured to recover only if he proves the injurer caused the injury through his fault. This means the injured must prove that injurer breached a duty owed to him by doing something he should not have, or not doing something that he should have. If the injured cannot prove the fault of the injurer according to the legal standard, or the injury occurred without any fault, then the injured receives no compensation for his injuries. Since many injureds cannot demonstrate the injurer's fault, O'Connell questions a system which fails to provide what he sees as needed compensation for their losses.

a. Failure to Provide Any Compensation

The Tort Reformers question how much protection the American compensation system provides to the interests of the injured. O'Connell states that the system should spread loss "efficiently, effectively, and with at least a measure of courtesy and compassion." In his view, the system fails to do this. He claims that almost all Americans become involved in automobile collisions within a twenty year period, but very few receive any compensation.⁵⁵ As many as seventy-five percent of those injureds making medical malpractice or products liability claims lose their cases and recover no compensation at all.⁵⁶ Further, only forty-seven percent of those "significantly injured" in automobile collisions recover anything from injurers.⁵⁷

O'Connell views the system especially troubling in that it fails to compensate many injureds' economic damages. Insurance industry figures from the late nineteen sixties and early nineteen seventies reveal that most injureds with \$2,500 to \$10,000 in

⁵⁵ O'Connell, *The Injury Industry* at 2.

⁵⁶ O'Connell and Kelly, *The Blame Game* at 52.

⁵⁷ O'Connell and Simon, *Payment for Pain and Suffering* at 9.

medical expenses and lost wages do not recover their economic losses.⁵⁸ Moreover, O'Connell claims that the system spends so much time and resources paying for pain and suffering that it fails to adequately compensate many injureds for some or all of their economic losses.⁵⁹

One reason that this observation of the dynamic between payment for economic and non-economic damages troubles O'Connell so is that he believes people do not really care about the recovery of non-economic damages. O'Connell draws this conclusion from a survey conducted in the early 1970's. He observes that seventy percent of injureds in automobile collisions did not even know they could receive payments for pain and suffering at the time of the collision.⁶⁰ More recent events and publicity about personal injury lawsuits may have changed this figure. However, O'Connell also claims that few people want to pay for insurance to cover their own non-economic losses. If people do not wish to pay for the protection, O'Connell concludes that the damages hold little importance for

⁵⁸ *Ibid.* at 6-7.

⁵⁹ *Ibid.* at 5.

⁶⁰ *Ibid.* at 19; O'Connell, *The Injury Industry* at 64.

them.⁶¹ O'Connell questions the fairness of a system which does not provide the economic damage compensation people feel they need, but spends so much effort and resources addressing less bothersome non-economic losses.

b. Undercompensation

Even if the injured recovers some money, the Tort Reformers question whether injureds ultimately recover full compensation. The haphazardness of awards for similar cases indicates that some injureds receive less compensation than they should.⁶² Moreover, a sizeable percentage of an injured's recovery must pay for costs and legal fees.⁶³ Consequently, the money that the injurer receives often

⁶¹ O'Connell, *The Injury Industry* at 104-05; Bell and O'Connell, *Accidental Justice* at 44-45.

⁶² *Statement of the Honorable Henry J. Hyde*, House Judiciary Committee (CIS Congressional Universe, February 13, 1995), 2; Act, section 2(a)(7); O'Connell and Kelly, *The Blame Game* at 99. See section II(B)(1)(b).

⁶³ O'Connell and Simon, *Payment for Pain and Suffering* at 4-5; O'Connell, *The Injury Industry* at 2-3. Contingency fees become a particular source of concern for the Tort Reformers because they fear that lawyers receive a tremendously disproportionate percentage of the injureds' damages as their fees. This leads the authors of the

either does not provide enough for compensation, or must be used to pay for litigation. In either case, according to the Tort Reformers, the system fails to give the injured a "measure for measure" recovery.

The claims of undercompensation are especially prevalent for cases involving more serious injuries. Just as injured can use the system to recover more than fair compensation in cases involving less serious injuries,⁶⁴ injurers and insurers can take advantage of the process in larger cases. Injurers and insurers know that injured with serious injuries often desperately need money to pay for large medical expenses and to replace income during long periods of disability. However, the injured cannot compel the injurer to pay any money until the final resolution of the case, which may take years. The injurers and insurers therefore try to convince the injured to settle the claim earlier, but for far less than fair compensation for the total damages including pain and suffering.⁶⁵ The Tort Reformers find that injurers and insurers have success

Contract with America to propose that injureds' lawyers keep an account of the time and actions they spend on each case, and reimburse the injured if the fee exceeds the time and value of the work. Gillespie and Schellhas, *Contract with America* at 148-49.

⁶⁴ See section III(A)(2)(a) above.

using this strategy, and injureds do not receive the compensation the law permits.

O'Connell also argues that injurers, through their insurers, prey upon the ignorance of injureds. Insurers handle hundreds of cases and know the full extent of the injured's possible claims. However, many injureds do not know about the existence or extent of the damages they can recover, especially regarding pain and suffering. The insurers therefore try to settle claims quickly, and before injureds see a lawyer. The insurers thus prevent injureds from learning about the full extent of their damages as recognized by the law, and can settle the claim for less. The ability of injurers and insurers to take advantage of injureds' ignorance provides more evidence that the system fails to provide injureds full compensation.⁶⁵

The Tort Reformers therefore see significant unfairness in the modern American compensation system. Many injureds do not recover their full damages, or even any moneys at all. They claim that the system devotes so many resources to payment for pain and

⁶⁵ Keeton and O'Connell, *After Cars Crash* at 28, 43-44; O'Connell, *The Injury Industry* at 34-35, 66-67; O'Connell and Kelly, *The Blame Game* at 54.

suffering that many economic losses remain uncompensated. Injurers and injurers take advantage of the pressing economic needs of the most seriously injured so as to pay them less than their total losses. The Tort Reformers conclude that delays and costs put the compensation system out of the reach of the common American.⁶⁷ They therefore dispute the proposition that the American compensation system adequately protects the interests of injureds and provides them "measure for measure" remedies.

C. The Interests of Society

The injurer and injured obviously are parties with interests needing protection once an injury has occurred. Yet, one also may see society as an independent party with an interest in the dispute. The resolution of the conflict between the injurer and injured can have significant effects upon the peace within the society, as well as its economy. These effects become greater with larger numbers of injuries. Society in general therefore becomes a party with interests

⁶⁶ O'Connell and Simon, *Payment for Pain and Suffering* at 43-5.

which potentially need protection from the law of bodily injury compensation.

1. Jewish Law

From its very beginnings, Jewish Law implies a societal interest in the resolution of disputes over bodily injuries. Exodus 21:22 requires the involvement of the courts in the payment of damages. If the incident were merely a private concern, there would be no need for the intervention of the legal system in this way. However, the active role of the courts demonstrates the recognition of society's interest in the matter.

Nevertheless, the Rabbis do not explicitly address the needs of society as a separate entity in its discussion of the compensation for bodily injury.⁶⁸ The closest the Rabbis come to addressing society's

⁶⁷ Gillespie and Shellhas, *Contract with America* at 143.

⁶⁸ This is not to say that the Rabbis do not consider society's welfare, even though they do not explicitly describe their concerns. For example, Rav Pappa argues that talion is unfair because both the injured and the injurer will sustain medical expenses after the imposition of the remedy. Exodus 21:19 requires the injurer to pay the injured's medical expenses, but the injurer has no one to cover

needs is a comment in the Mekilta that the purpose of the system is to teach people proper conduct.⁶⁹ This implies that society benefits by having people follow the Law as set forth in the texts. Every provision of the compensation law therefore indirectly benefits society by requiring people to behave in the proper manner. However, this does not treat society as a separate entity with its own interests. Rather, it is seen as an incidental beneficiary of statutes predominantly concerned with the interests of the injurer and injured.⁷⁰

2. Tort Reform: Concerns for Harms to Society

In contrast to the Jewish authorities, the Tort Reformers treat society as a distinct and equal party involved in the compensation process. Society has interests which need protection. Indeed,

the costs. See section III(A)(1) above. Rav Pappa's argument may reflect a concern that the society may have to cover the injurer's expenses from charity if the injurer cannot afford them himself. Thus, the abolition of talion protects society from the need to pay these added costs.

⁶⁹ Lauterbach, *Mekilta de-Rabbi Ishmael* at 56.

O'Connell writes that the aim of rehabilitation in the compensation system involves not just the relief of the injured's misery, but also the reduction of the total loss to the injured *and society*.⁷¹ The rules determining how much the injurer has to pay to compensate the injured therefore explicitly take society's interests into account. This raises the possibility that the interests of the injured in full compensation will conflict with the interests of society, and that the Tort Reformers will protect the latter's concerns to the detriment of the injured.

a. Availability of Goods and Services

The Tort Reformers argue that the current compensation system harms society by unduly restricting the availability of goods and services. They claim the system does this by (1) stifling business innovation and growth, (2) causing the removal of goods and services from the market when they do not meet unreasonable

⁷⁰ See Chapter V(B)(1) for a further discussion of the Rabbis' view of the purpose of compensation and how it affects society.

⁷¹ O'Connell, *The Injury Industry* at 19 (emphasis added).

standards, and (3) imposing different standards in different sections of the country.

i. Stifling Innovation and Growth

One characteristic of American society is the wide availability of goods and services. New products improve the standard of living in general, and allow more people to achieve a better standard of living by creating jobs and expanding the economy. The Tort Reformers argue that the compensation system obstructs this interest of society. They propose that society would be better served if the law restricted compensation so that it did not hinder the economy so greatly.

The Tort Reformers allege that the tort system has a severely detrimental effect upon businesses. Manufacturers withdraw products from the market and discontinue product research for fear that their products will cause unforeseen injuries, leading to

expensive lawsuits. The costs of litigation and liability force businesses to cut their workforce and raise their prices.⁷²

Congressmen and businessmen favoring Tort Reform described these detrimental effects upon society and the economy in the debate over the Common Sense Product Liability Legal Reform Act of 1996. Representative Henry Hyde said that product liability litigation "discourages capital investment, dampens job creation, and denies consumers new, safer and less expensive products."⁷³ Peter Chevalier, a representative of a medical technology company, testified that the system "stifles and discourages the ability of medical device manufacturers to innovate" in America.⁷⁴ Paul Huard of the National Association of Manufacturers testified that the system's demands mean less dollars available for wages, research, and new equipment. Additionally, according to Huard, manufacturers delay or fail to bring innovative new products to the market, and discontinue production of useful existing products,

⁷² Gillespie and Shellhas, *Contract with America* at 144-45; *Agenda for Civil Justice Reform in America: A Report from the President's Council on Competitiveness* (Washington, D.C.: The Council, 1991), 3; Act, section 2(a)(2), (4).

⁷³ *Statement of the Honorable Henry J. Hyde* at 2.

because of the high risks of product liability litigation.⁷⁵ These men imply that society in general would benefit if the law tipped the balance of interests more in favor of supporting new products, and less in favor of compensation for injured.⁷⁶

ii. Unreasonable Standards

The Tort Reformers argue that the current standards applied to goods and services unduly restrict the availability of goods and services. For example, the Tort Reformers have particular concern for the effect of medical malpractice lawsuits upon doctors and other health professionals. They claim that the law requires the doctor to perform to an impossibly high standard. Because it is not humanly possible for a doctor to avoid some mistakes, the Tort Reformers

⁷⁴ *Committee Hearing of the House Judiciary Committee, Product Liability and Civil Justice Reform* (CIS Congressional Universe, February 13, 1995), 10.

⁷⁵ *Prepared Testimony of Paul R. Huard before the House Committee on Commerce, Trade and Hazardous Materials Subcommittee* (CIS Congressional Universe, February 21, 1995), 2.

⁷⁶ See also O'Connell and Kelly, *The Blame Game* at 93, 100-01 (claiming litigation hurts businesses and the promotion of needed products such as asbestos).

argue that these standards threaten the economic viability of their practices, especially if they work in a higher risk field like surgery or obstetrics. One mistake can impose such great liability that the doctor is literally put out of business.⁷⁷ This argument may apply to other industries, causing the Tort Reformers to claim that current legal standards impose too great a restriction upon the provision of goods and services.

iii. Different Standards

Another way the litigation system hinders the availability of goods and services according to the Tort Reformers is by imposing different standards in different areas of the country. Some regions are more litigious, or have more severe standards of due care which a product or service must meet. Providers of goods and services have incentive to avoid these areas of the country so that they do not face the higher liabilities found there.

⁷⁷ *Ibid.* at 93.

Once again, the Tort Reformers see this factors especially harmful in the field of medicine. Physicians have incentive to move away from high liability regions or into less risky fields of medicine, leaving regions without sufficient medical resources. O'Connell states that the service of doctors must continue as a "protection of all of society." Rather than leaving regions without needed medical resources or looking for other solutions for the problem, the Tort Reformers argue for protecting society by curtailing litigation.⁷⁸

The large amount of claims by injureds in some areas of the country harms the availability of medical services in another way. O'Connell argues that the current system encourages overuse of medical resources. This occurs when an injured receives needless treatment to pad his claim,⁷⁹ or to earn a "double recovery" for each dollar of medical expenses due to the collateral source rule.⁸⁰ Additionally, doctor feel compelled to practice "defensive medicine," meaning that they prescribe extra, medically unnecessary tests merely to build a potential defense that they provide the most

⁷⁸ *Ibid.* at 93.

⁷⁹ O'Connell, *The Injury Industry* at 98-99.

⁸⁰ Keeton and O'Connell, *After Cars Crash* at 22. See the discussion of the collateral source rule in section III(C)(2)(b)(ii) below.

attentive care possible.⁸¹ These factors contribute to the waste because they divert medical resources from more urgent needs, and subject medical facilities to unnecessary wear and tear. The Tort Reformers argue that society would be better served by halting this misuse of medical resources, preserving their availability for greater needs.

Consequently, the Tort Reformers argue that the compensation harms society by interfering with the availability of goods and services. Fears of liability impede progress in product development and marketing, and cause doctors to move or change their practices. Litigation wastes medical resources according to the Tort Reformers, squandering medical care where it is not really needed. The Tort Reformers believe that the interests of society favor relaxing the burdens of liability so that more goods and services become available, and that less costs are imposed upon the national economy.

⁸¹ O'Connell and Kelly, *The Blame Game* at 88.

b. Costs of the System to Society; Waste

The Tort Reformers argue that the compensation system imposes great costs upon society. These costs make the provision of full compensation to injureds too expensive for society to bear.

i. Cost of the Civil Justice System

The Tort Reformers create a link between the costs associated with compensation for bodily injury and the cost of the civil justice system. They calculate that, as of the early nineteen nineties, the United States spends \$300 billion each year as an indirect cost of the civil justice system.⁸² The Common Sense Product Liability Legal Reform Act of 1996 states that the civil justice system is "sluggish and excessively costly." The Act continues to state that these costs "inflict serious and unnecessary injury on the national economy."⁸³ In other words, the costs of providing the existing system of

⁸² Gillespie and Shellhas, *Contract with America* at 144; *Agenda for Civil Justice Reform in America* at [i].

⁸³ Act, section 2(a)(1).

compensation for injury impose too great a burden upon society. The Tort Reformers determine that they must balance the interest of the injured in receiving full compensation with the interest of society in having a strong and efficient economy.

The balance among the interests drawn by the Tort Reformers relies upon their evaluation of the system's efficiency in meeting its goal of providing compensation. The Tort Reformers assert that injureds do not receive most of the money paid into the compensatory system. Instead, a significant portion of the total dollars paid for insurance covers insurance company overhead, litigation expenses and lawyers' fees.⁸⁴ Representative Henry Hyde says that fifty to seventy percent of every dollar spent in liability litigation does not go to injureds, but to legal fees and transactional costs.⁸⁵ The Tort Reformers argue that, even allowing for reasonable costs, these figures demonstrate a large amount of waste in the

⁸⁴ *Prepared Statement of Richard J. Willard before the Committee on the Judiciary, U. S. House of Representatives, Concerning H.R. 10 - "Common Sense Legal Reforms Act of 1995,"* (CIS Congressional Universe, February 13, 1995), 2; Keeton and O'Connell, *After Cars Crash* at 30; O'Connell, *The Injury Industry* at 7; Bell and O'Connell, *Accidental Justice* at 67.

⁸⁵ *Statement of the Honorable Henry J. Hyde* at 2.

system, as most of the money intended for compensation never reaches injureds.

The Tort Reformers particularly criticize lawyers for this waste, claiming that their participation in the system unreasonably takes money intended for compensation from the injureds. Injurers' lawyers, who are paid by the hour, delay payments and increase their fees. Worse to the Tort Reformers, injureds' lawyers are paid by contingency fees. The Tort Reformers acknowledge that this arrangement allows poorer people to hire lawyers, since they do not have to pay any fees before they recover their damages. Moreover, contingency fees involve some risk to the attorneys because injureds pay no legal fees if they do not recover damages, which could happen for a variety of legal reasons. However, the Tort Reformers are more concerned that these fees take one third to one half of the compensatory damages out of the hands of injureds.⁸⁶ O'Connell therefore says that lawyers are "notorious for being dilatory and extravagant operators." He questions the large role they play in the compensation system, saying that any business which gives itself to

⁸⁶ Keeton and O'Connell, *After Cars Crash* at 30-32; O'Connell, *The Injury Industry* at 39; Gillespie and Schellhas, *Contract with America* at 148.

lawyers is in "big trouble."⁸⁷ The Tort Reformers thus argue that society is harmed by supporting lawyers and their allegedly wasteful practices instead of spending scarce resources on more necessary benefits, including actual compensation itself.

The high price of ordinary litigation expenses also troubles the Tort Reformers. Many cases require parties to offer testimony from expert witnesses to explain complicated technical or medical issues. Some cases involve obscure events or devices, requiring particularly specialized and skilled experts. Even routine cases often need expert testimony. These experts cost a great deal of money, creating another expense which is paid from the funds given to the injured for compensation.⁸⁸

ii. Collateral Source Rule

The Tort Reformers consider another long-standing rule in the legal system to create waste. Assume that a seriously hurt injured has medical and disability insurance which pays for the damages

⁸⁷ O'Connell, *Injury Industry* at 7.

before the parties resolve the case. Should the injurer then have to pay these damages to the injured? The system generally says that the injurer still must pay the injured for these damages, even though the insurer often does not have the right of reimbursement for its payments. The law insists on the payments from the injurer because (1) the injured has paid for the insurance, and (2) it judges that the injurer should not be released from liability because of payments the wronged injured previously had made. This is called the collateral source rule.

The Tort Reformers argue that the collateral source rule leads to a systemic problem in that it creates a double recovery of some damages. They deem that insurance has already paid for medical expenses and lost income. When the injurer later pays these damages to the injured, the injured simply keeps the money and uses it for other purposes. The Tort Reformers contend that the collateral source rule demonstrates the system's greater concern for retribution against the injurer than providing actual compensation to the injured. They see the payment for these damages as not really

⁸⁸ O'Connell and Kelly, *The Blame Game* at 33-35.

serving as a remedy, but as extraneous and wasteful, imposing harm upon society.⁸⁹

The Tort Reformers therefore balance the interest of the injured in receiving full compensation with the interest of society in maintaining a strong and efficient economy. They conclude that the high cost and wastefulness of the system, alongside its perceived failure to provide full compensation, argue in favor of giving society's interests greater protection, even if this means restricting some of the remedies the injured has under the pre-Tort Reform law.

The Rabbis and Tort Reformers both consider the interests of the injurer, the injured and society. They try to protect these oftentimes competing interests in a manner that provides a fair, "measure for measure" remedy. These protections become apparent in the methods of calculating recoverable damages which they support.

⁸⁹ Keeton and O'Connell, *After Cars Crash* at 22; O'Connell, *The Injury Industry* at 29; O'Connell and Simon, *Payment for Pain and Suffering* at 6.

Chapter IV

Elements of Recoverable Damages

When David and Jonathan come before the court, they and the judicial authorities look to the law for guidance on the amount of compensation. The law describes each element of recoverable damage, or each definable part of the injured's losses which the injurer must pay. It also may outline losses which the injured may not recover from the injurer.

The law details the loss for which each element provides compensation, and how to measure or calculate the amount of damages. The sum of the elements of recoverable damages represents the injurer's total liability to the insured. Payment of this sum discharges the injurer's obligation to the injured, restores the injured to his condition before the injury as far as the law and the remedy allows, and peacefully ends the dispute between the parties.

The composition of the elements of damages depends upon the philosophical ideas discussed in the previous two chapters. The system uses money to compensate the injured only insofar as it

deems appropriate. It will not provide monetary damages if it views that money cannot remedy the losses. But, it will provide monetary damages as necessary to compensate the injured if it considers money appropriate for a given element of damage. Moreover, the system will take into account its concerns for the interests of the injurer, the injured and society in the calculation of the elements of damages. The identification and calculation of elements of recoverable damages therefore represents the practical effectuation of the system's views on using money as the remedy and protecting the various interests.

This chapter will describe how the Rabbis and the Tort Reformers identify and calculate the elements of recoverable damages for bodily injury caused by human beings.¹ It will outline the elements for which their systems provide compensation, and in some cases refer to damages which the systems deem unrecoverable.

¹ As noted in previous chapters, the standing of the two groups is somewhat different. The Rabbis describe a system they understand as given by God through Scripture, which they interpret to determine proper halakhic rules. The Tort Reformers do not describe specific details of each element of damages because they primarily suggest changes to the existing American law. When this chapter speaks about either of these groups "identifying" or "calculating" elements of damages, it does so with the understanding that each group acts in its own particular historical and legal context.

It will describe how each element of the damages is calculated. Finally, it will examine how the determination of the amount of damages is affected by the idea of using money as the remedy and the desire to protect specific interests.

A. General Structure of Recoverable Damages

Both the Rabbis and the Tort Reformers discuss general principles about damages for bodily injury. These principles establish which elements of damages the injured may recover, and provide the underlying reasoning for how these elements are calculated.

1. Jewish Law: Independent Categories of Damages

The compensatory system which the Rabbis describe reflects their comfort with the use of money as a remedy, and the Law's value of providing complete compensation to the injured. This

system's list of elements of damages, while small in number, contains a variety of economic and non-economic losses that the injured may recover. Moreover, the Law makes each of these elements available to the injured under fairly broad circumstances.

The Mishnah names five elements of damages for bodily injury: the injury itself, pain, costs of healing, loss of income, and embarrassment.² Commonly known as the five "heads of damages," these elements cover most of the losses a typical injured sustains. The text makes no distinction between economic and non-economic damages. These provisions allow the injured to obtain an expansive recovery in terms of the types of damages he may recover.

The Law also generally provides each element of damages to the injured independently. This means that the injured does not have to suffer one type of loss to recover another, but that the court assesses each element on its own merit. The Jerusalem Talmud and the Tosefta contain the clearest expression of this rule:

² M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13; TJ BK 49; Neusner, *The Talmud of the Land of Israel* at 169. These elements are also listed with other categories of damages in Tos. BK 9.1; Neusner, *The Tosefta* at 50.

"If [the injured] has inflicted five [of the five elements of damages] on him (the injured), then he pays him for the five. If he has inflicted only four, he pays him for four. If he has inflicted only three, he pays him for three. If he has inflicted only two, he pays him for two. If he has inflicted only one, he pays him for one."³

The Talmud Bavli presents the Scriptural source of this rule. Rav Zebid observes that Exodus 21:25 lists "wound for wound" distinctly from other phrases requiring payment "injury for injury." Rav Zebid understands "wound for wound" to require payment for pain, and not injury.⁴ The separate listing of the phrase requiring payment for pain from those requiring payment for injury means that pain and injury represent independent elements of damage. The injured must pay one regardless of whether he has liability for the other.⁵ This reasoning may be extrapolated to the other elements of damages.

The Jerusalem Talmud explicitly describes cases in which an injured sustains some elements of damage, but not others. The text states that if an injurer cuts off an injured's hand, the injured recovers all five elements of damages. If the injurer hits the injured

³ TJ BK 49; Neusner, *The Talmud of the Land of Israel* at 169; Tos. BK 9:1; Neusner, *The Tosefta* at 50.

⁴ See section IV(B)(2)(a) below.

⁵ TB BK 84b; Neusner, *The Talmud of Babylonia* at 24.

on the hand and it swells, the injurer pays only for pain, costs of healing, lost income and embarrassment. If the injurer hits the injured in the head and the head swells, the injurer must pay only for pain, costs of healing and loss of income. A blow to a body part not normally visible in public results in liability only for pain and costs of healing. An injurer who merely knocks a book from the injured's hand pays only for embarrassment. While this text does not explain precisely why the injured suffers only the listed elements of damage, it demonstrates that the injurer is liable for each of the damages he does cause.⁶

The independence of the elements of damage becomes particularly important when considering the severity of injuries. Some injuries are "permanent," leaving the injured disfigured, limited in abilities, or in pain for the rest of his life. Other injuries heal within a short period of time, and the injured does not suffer any permanent harm. The lesser injuries may not seem to warrant payment for some of the elements of damage. For example, some people may hesitate to support compensation for the pain from a completely healed injury because the injured no longer suffers any

⁶ TJ BK 49; Neusner, *The Talmud of the Land of Israel* at 170.

pain. However, the independence of the elements of damages requires the injured to pay for whatever damages he caused, whether the injury is permanent or not. The Mishnah therefore specifies that the injurer has liability for pain, even for burns to a fingernail which do not leave a permanent injury.⁷

Similarly, the Gemara includes an interpretation of Exodus 21:19 which requires the payment of costs of healing even without a permanent injury. The verse states that if two men fight and one takes to bed, and later recovers enough to walk about, the injurer shall pay the injured's lost income and "surely shall cause him to be healed ('ורפא ירפא')." Rav Pappa, in the name of Raba, rejects notions that the verse merely gives the physician the right to heal his patient. If this were so, the verse would read, "Let the physician

⁷ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13. The Gemara considers the source of the Tannaic authority for this statement, presenting a dispute in the interpretation of statements by Ben Azzai and Rabbi. The substantial discussion involves an exploration of the hermeneutical rules for when Scripture contains a generalized example and a particular example which falls within the generalization but does not immediately follow the generalization in the Scriptural text. This discussion does not change the substantive rule, because in both interpretations of Ben Azzai's and Rabbi's statements presented in the Gemara, the injurer is liable for pain even without a permanent injury. TB BK 84b - 85a; Neusner, *The Talmud of Babylonia* at 20-21.

heal him." Rav Pappa also rejects the argument that the verse only serves the purpose of requiring the injurer to pay all the costs of healing he in fact caused the injured to incur. If this were so, the verse would have the same grammatical form for both words for healing, which would indicate only that the injurer had a continuing duty to heal the injured when the latter's injuries improved, but then worsened.⁸ Instead, the words have different grammatical forms, indicating that they have an additional meaning. Rav Pappa, in the name of Raba, finds that meaning to be the requirement for the injurer to pay for costs of healing even without a permanent injury.⁹

The Gemara also specifies that the injurer must pay lost income even without a permanent injury. The Gemara cites Mishnah Baba Kamma 8:3 as the source for this, because it imposes liability for all the injured's damages upon one who strikes his father or mother but does not leave a mark on him or her. The Gemara presents two conflicting opinions about whether the injurer must pay for the injury itself in such circumstances. However, all

⁸ See above.

⁹ TB BK 85b; Neusner, *The Talmud of Babylonia* at 24-25.

opinions agree that the injurer must pay for the lost income, even without a permanent injury.¹⁰

The Rabbis therefore describe a system of compensation which provides five different categories of damages to the injured. The system does not distinguish between economic and non-economic damages, and allows the injured to recover for any of the losses whether or not he also suffers the others. This relatively open availability of damages reflects the Rabbis comfort with the use of money as a remedy for bodily injury, and their understanding of the system as providing full compensation to the injured. However, as discussed previously, Jewish Law also seeks to protect the economic interests of the injurer.¹¹ As will be seen, the Law tempers the liability's burden on the injurer by setting forth modest methods of calculating the damages.¹²

¹⁰ TB BK 85b - 86a; Neusner, *The Talmud of Babylonia* at 26-27.

¹¹ See section II(A)(3) above.

¹² Steven F. Friedell, "Some Observations on the Talmudic Law of Torts," *Rutgers Law Journal* 15, no. 4 (Summer 1984): 904-06.

2. Tort Reform: Non-Economic Damages Restricted

The Tort Reformers similarly design the compensation systems and reforms they suggest in light of their views on the appropriateness of using money as a remedy for bodily injuries and the balancing of the interests of injureds, injurers, and society. While desiring to protect injureds, especially from economic losses, the perceived flaws with using money as a remedy, and the interests of injurers and society, prompt the Tort Reformers to advocate restricting the non-economic damages currently available in the American tort system.

The Tort Reformers offer a variety of proposals which curb this availability of compensation for non-economic damages. Some propose a fixed limit upon the total amount of non-economic damages an injured may recover. Others suggest restricting only pain and suffering, usually the largest of the non-economic damages. These "caps" on non-economic damages usually range from \$100,000 to \$250,000.¹³ The Act presents one of its purposes

¹³ Willard *Statement* at 2; O'Connell and Kelly, *The Blame Game* at 107; James A. Henderson, Jr., and Richard N. Pearson, *The*

as placing "reasonable limits on damages over and above the actual damages¹⁴ suffered by a claimant."¹⁵

Another proposal by the Tort Reformers abolishes joint and several liability for non-economic damages in product liability cases. The joint and several liability rule considers cases where two or more injurers combine to cause the injury. If the injured cannot recover from one injurer for legal reasons or because the injurer has no money, the injured can recover his entire loss from the others under joint and several liability. The Tort Reformers suggest changing this rule so that joint and several liability would apply only for economic damages. Therefore, if two injurers were determined equal causes of the injury, and the injured could recover from only one of the injurers, the injured could recover only half of his non-economic damages.¹⁶

Keeton and O'Connell suggest one of the most comprehensive of the reforms through their idea of "no-fault" automobile

Torts Process, 3rd ed. (Boston: Little, Brown and Company, 1988), 244-45.

¹⁴ Meaning, economic damages.

¹⁵ *Act*, section 2(b)(2). This goal includes restriction of punitive damages, which are not considered in this study.

¹⁶ Gillespie and Schellhas at 147; *Act*, section 110. The Talmud does not impose joint and several liability either. Friedell at 905.

insurance. This proposal¹⁷ restructures the compensation system for injuries sustained in automobile collisions. In the no-fault system, an injured does not recover his economic losses from the injurer. Instead, the injured receives compensation for his medical expenses, lost income and other economic losses from his own automobile insurance. The insurer must pay these expenses regardless of any fault of the drivers, extending compensation for economic losses to a wider number of injureds than under the traditional fault-based American tort law. In return, the injured may not recover any non-economic damages if his economic losses do not exceed \$10,000 and his non-economic damages do not exceed \$5,000.¹⁸ If the economic losses do exceed these amounts, the injured may recover his non-economic losses under the traditional tort laws. The injured may also recover his non-economic damages if he had purchased special insurance coverage for the losses prior to the collision.¹⁹ O'Connell later suggests

¹⁷ Several states have adopted this proposal, with varying modifications.

¹⁸ These figures are in 1967 dollars.

¹⁹ Keeton and O'Connell, *After Cars Crash* at 38, 61, 137-40; O'Connell, *The Injury Industry* at 115.

extending no-fault to injuries in other contexts than automobile collisions as well.²⁰

O'Connell later suggests some modifications to the no-fault system. Under what O'Connell calls "neo-no-fault," the injurer may offer to pay all the injured's economic losses within one hundred eighty days.²¹ If the injurer makes this offer, the injured must accept, and cannot make a claim for his non-economic damages. In a variation of this proposal, the injured could reject the injurer's offer, but must accept a cap on his total recovery for all damages.²²

These proposals attempt to address the Tort Reformers' concerns about the compensation system. They still provide compensation to injureds for most economic losses, satisfying their concern to protect injureds. Indeed, the no-fault proposal extends compensation for economic losses to a greater number of injureds, since some do not recover anything under the current system because they cannot prove the fault of the injurer.

²⁰ O'Connell, *The Injury Industry* at 144-46; Jeffrey O'Connell, *Ending Insult to Injury* (Chicago: University of Illinois Press, 1975).

²¹ It is unclear whether the injurer must make this offer within one hundred eighty days of the collision, notice of the injured's claim, filing of a lawsuit, or at any time.

²² O'Connell and Kelly, *The Blame Game* at 130-35.

However, the Tort Reformers' proposals also reflect their skepticism of the appropriateness of money as the remedy for non-economic damages. The Tort Reformers reason that, if money does not properly remedy non-economic damages, then the law should not make such a remedy available for these damages.

This argument becomes especially persuasive to the Tort Reformers when they consider the interests of injurers and society. By restricting or barring recovery of non-economic damages, injurers do not face the burden of crushing liability. Consequently, the injurers may provide their products and services for the good of society. The Tort Reformers also argue that the reduction in available remedies and the shift from a litigation system to an insurance system lowers the number of cases and wasteful overhead in the system. Society therefore benefits from a less costly and more efficient system of compensation.

The Tort Reformers do not only suggest the restriction of non-economic damages. They also support having the loser of litigation pay the difference in the parties' costs to the winner if he paid more to prevail. They argue that this procedure offers a disincentive to bring non-meritorious cases, further saving the injurer and society

from unnecessary costs.²³ Further, the Tort Reformers do not suggest a total abrogation of all non-economic damages. O'Connell recognizes the need to keep these damages in some cases where the economic losses are low, but the psychic harm is great.²⁴ Moreover, O'Connell does not support precluding all claims for non-economic damages because some represent large losses which American society has never sufficiently addressed.²⁵

Despite these statements, the marked characteristic of the changes the Tort Reformers suggest is the restriction of non-economic damages. The injureds still receive compensation for economic losses, satisfying the Tort Reformers' desire to protect their interests with compensation. But, skeptical that money can remedy non-economic losses, and seeing harm to injurers and society in such significant levies of liability, the Tort Reformers argue for scaling back the availability of compensation for non-economic losses.

²³ Gillespie and Schellhas, *Contract with America* at 145-46; *Agenda for Civil Justice Reform in America* at 8-9, 24-25.

²⁴ O'Connell, *The Injury Industry* at 118-19.

²⁵ *Ibid.* at 118, 127; O'Connell and Kelly, *The Blame Game* at 108.

B. Specific Elements of Damages

The five elements of damages which the Mishnah establishes provides a sufficient basis of discussion of both Jewish Law and Tort Reform. Modern American tort law provides broader damages than that detailed by the Rabbis. Moreover, the Tort Reformers do not discuss each element in depth, for they write mostly about the specific areas they wish to change.²⁶ Nevertheless, categorization into the five elements of damages describes the losses contemplated by both systems sufficiently to allow their use for examining the scope of the specific monetary remedies.

²⁶ Modern American tort law describes each element of recoverable damages with great detail, with variations among jurisdictions. An analysis of these detail lies far beyond the scope of this study. This chapter will provide the basic tenets of the law only insofar as necessary to discuss the Tort Reformers' proposals.

1. The Injury Itself

a. Jewish Law

The first element of damage for which Jewish Law provides compensation is the injury itself. The Law recognizes that an injury's occurrence itself represents a loss to the injured.²⁷ The formula requiring an exchange of "eye for eye," or injury for injury, provides the Scriptural authority for this element of damage.²⁸ The problem becomes how to measure such a loss without a market for whole and damaged body parts to provide information about their relative value.

The Rabbis rely upon the closest institution to such a "body part market" that they have for the solution to this problem. They turn to the slave market, evaluating the value of the injury by estimating the injured's value as a slave before and after the injury. The difference in value represents the amount of loss that the

²⁷ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13.

²⁸ Kahane, Munk and Slae at 105 n.7.

injured has sustained.²⁹ For example, a craftsman may sustain an injury to his hand, limiting his ability to practice his trade. The court would estimate his value as a slave with such skills before the injury, and compare that to his value as a slave after the injury. The skill of the injured therefore becomes a significant factor in the evaluation of this element of damages.³⁰ In modern terms, this element therefore represents the loss of the injured's earning capacity.³¹

This definition and means of calculating damages for the injury itself reflects the Law's concern with protecting the injurer's economic interests. The Gemara's discussion implies that an injury which causes no loss of earning capacity, including those inflicted

²⁹ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13; TJ BK 49; Neusner, *The Talmud of the Land of Israel* at 169; Jed W. Jurkowitz, "Talmudic and American Tort Liability - A Comparative Analysis," *Arizona Law Review* 10, no. 2 (Fall 1968): 479

³⁰ See TB BK 85b; Neusner, *The Talmud of Babylonia* at 25 (finding the skill of the injured relevant to calculating the damages for the injury itself, but not lost wages. See section IV(B)(4)(a) below).

³¹ Kahane, Munk and Slae at 105. This understanding creates a problem for the Jewish halakhic authorities following the Gemara, such as Rashi and Rema, who consider real injuries which do not cause losses in the injured's ability to pursue his occupation, and injureds who have no profession such as children and women. *Ibid.* at 111-13.

on most women and children, receives no compensation.³² Moreover, the casting of an injured as a slave may diminish the amount of the damages, since society may see a slave as lower in value than a free man with equivalent skills. The method of calculating the damages places definitional limitations on the amount the injured receives.

The envisioning of injureds as slaves draws particular criticism in the Gemara. Rav Eliezer seems to revert to talion, claiming that the Scripture's statement of "eye for eye" must be taken literally. In light of the overwhelming Tannaitic authority against physical retaliation, Raba explains Rav Eliezer's position as saying that an injured free man cannot be considered like a slave. However, this argument creates another problem in that the Rabbis cannot find a way to ascertain a monetary value for a free man. Rav Ashi attempts to reconcile the conflict by explaining that the assessment of the injury relies upon the value of the injurer, and not the injured. Rav Ashi's explanation remains a minority opinion, likely because it retains the difficulties of assessing the value of a free man, and creates potential unfairness in that the injurer's earning

³² Indeed, later halakhic authorities, such as Rashi and Rema, consider these problems and refute the implication. *Ibid.* at 111-13.

capacity may be less than either that of the injured or a slave in the market. Nevertheless, these arguments demonstrate the Rabbis' uneasiness with evaluating free injureds as slaves.

An incident described in the Gemara also criticizes the method of evaluating the monetary worth of an injury. A case comes before Rav Pappa bar Samuel involving a donkey that bit off a child's hand. Rav Pappa tells Raba to evaluate the injury for the *four* elements of damages. Raba corrects Rav Pappa, reminding him that there are five elements. Rav Pappa says that he meant the four elements in addition to the injury itself. However, Rav Pappa's apparent initial exclusion of payment for the child's injury may represent a subtle criticism of the Law's consideration of this element for injureds without any current earning capacity. This seems especially possible because Abaye then reminds Rav Pappa that injureds harmed by animals such as this donkey receive *only* compensation for the injury itself. Later, the child's father refuses to accept the compensation, claiming that the evaluation of his child as a slave is too humiliating. The Gemara therefore reflects some of the Rabbis

discomfort with the method of evaluating the damages for the injury.³³

Nevertheless, the Talmud contains no further emendation of the method for calculating these damages. It recognizes the injury itself as a recoverable element of damages. It prescribes the calculation of this element as the difference in the value of an equivalent slave before and after the injury, which may be understood in modern terms as the loss of the injured's earning capacity. This definition places moderate restrictions on the injurer's liability by looking to the value of slaves and not free men, and essentially providing no compensation for injureds with no earning capacity. However, the Law does offer significant protection for many injureds by providing them a significant, and potentially sizable, monetary remedy for this loss.

³³ BK 84a; Neusner, *The Talmud of Babylonia* at 18-19.

b. Tort Reform

The Tort Reformers support compensation for the injury itself as measured by the loss of earning capacity. Although not discussing this element of damages to any great extent, O'Connell supports payment of out of pocket losses when there is "no needless difficulty and variability about being paid."³⁴ O'Connell therefore has no-fault insurance pay for lost earnings as the injured incurs the losses. However, the restriction on the provision of non-economic damages presumably would prevent any payment for damage to the affected body part without economic effects.

³⁴ O'Connell, *The Injury Industry* at 67.

2. Pain and Suffering

a. Jewish Law

The Mishnah imposes liability for the injured's pain upon the injurer.³⁵ The descriptions of this element of damages in the texts indicates that "pain" includes only the physical agony or discomfort caused by the injury. It does not include mental suffering or the inability to pursue avocations encompassed by the modern notion of "pain and suffering."³⁶ It would be unreasonable to draw too many conclusions from this omission, since the inclusion of suffering in this element largely occurs after the period of the Rabbis. However, it may be noted that the Rabbis' definition of pain provides a more limited view of the scope of this element, modestly curbing the injured's liability.

The texts contain a slight disagreement about the Scriptural source of this requirement. The Gemara includes an opinion by Rav Zebid in the name of Raba finding the authority in Exodus 21:25's

³⁵ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13.

³⁶ Kahane, Munk and Slae at 116, 118-19.

listing of "wound for wound."³⁷ This agrees with the earlier statement in the Mekilta d'Rabbi Ishmael that "wound for wound" includes the element of pain. However, the Mekilta also finds authority for imposing liability for pain in the listing of "burning for burning." This phrase calls for payment for pain even if the injurer did not inflict a permanent injury or a visible mark upon the injured. The Mekilta describes how this may occur. The injurer may burn the injured on the foot without leaving a mark, pile stones upon the injured, or freeze the injured with snow.³⁸ Consequently, the Rabbis use different phrases in the verse to similar ends. Pain is an independent element of the injured's damages.

The calculation of these damages into money provides the Rabbis a significant challenge. The Mishnah first states the rule that the Rabbinic judges assess how much a man of the injured's status would accept to endure the pain from the injury.³⁹ The Jerusalem Talmud exposes some of the problems with the practical enactment of this assessment. Rav Zeira states that the judges ask another man

³⁷ TB BK 84a; Neusner, *The Talmud of Babylonia* at 17.

³⁸ Lauterbach, *Mekilta de-Rabbi Ishmael* at 69. The Jerusalem Talmud preserves the substance of this opinion as well. TJ BK 50; Neusner, *The Talmud of the Land of Israel* at 171.

³⁹ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13; TJ BK 49; Neusner, *The Talmud of the Land of Israel* at 169.

of the injured's status how much he would give so that others would not inflict the pain upon him. The injurer then gives that sum to the injured. Mar Uqba disagrees with this formulation, based on the Mishnah's use of the word "take" rather than "give." He states that they ask the man of the injured's status how much he would take so that others could inflict the pain upon him. The Jerusalem Talmud does not resolve this conflict in the methods of evaluating the damages for pain.⁴⁰

The Rabbis in the Talmud Bavli approach the problem by working through a series of ways to assess pain. They repair flaws in each statement of the remedy as they go, reformulating the method of assessing the pain's value until they reach a test that they allow to stand. The first formulation requires the judges to assess how much one would accept to incur the injury, using the example of removal of the man's hand. The anonymous and authoritative voice of the Gemara rejects this formulation as involving all five elements of damage, and not just pain. Additionally, the Gemara rejects the idea of assessing damages based on the standard of men who would take money to have their hands removed. The text calls

⁴⁰ TJ BK 50; Neusner, *The Talmud of the Land of Israel* at 171.

such men "שוֹפְטֵנִי," meaning idiots. The Rabbis cannot leave the important issue of compensation in the hands of such unreasonable men.

The Gemara then proposes calculating the damages by determining how much a man would take to have a mutilated arm removed. Again, the text uses a particular injury as an example for any injury. The Gemara also rejects this method of calculating the damages for pain, because the question is too intertwined with the other elements of damage, including humiliation.

The text then suggests assessing the damages for pain by determining how much a man will take to have his hand removed by a sword when the government has ordered it removed by a drug. Presumably, the drug does not cause the pain which the sword inflicts. This method of calculation removes some of the previous hesitancy about asking a man to take money for the injury, because the government's order requires the removal of the hand regardless of the man's decision. However, the Gemara argues that this method will not work because no reasonable man would take any sum to endure such pain.

The Gemara slightly amends this formulation. It suggests assessing the damages as how much a man would take to have his hand painfully removed by a sword when the government order allows its removal by either the sword or the painless drug. This test still retains some of the problems of inherent in a rational man taking money to experience significant pain. Therefore, the text reverses the test, finally settling on an assessment of how much such a man would pay to have his hand removed by the painless drug instead of the painful sword. This again raises the issue of the Mishnah's use of the word "take" instead of "pay." However, Rav Huna bar Rav Joshua finds no difference between "taking" and "being paid" by the injurer the amount the man would have given for the drug instead of the sword.⁴¹

The Gemara therefore finds a way to assess the damages for pain with a formulation involving "rational men" and a situation consistent with the social structures of the time. The Rabbis provide the injured a reasonable amount of compensation for the pain, demonstrating their acceptance of using money for this purpose and the Law's desire to protect the interests of injureds. However, by

⁴¹ TB BK 85a; Neusner, *The Talmud of Babylonia* at 21-22.

rejecting more expansive methods of calculating the damages, such as the amount a person would take to have a body part removed, the Rabbis restrict the liability to a more modest sum. This protects the interests of the injurer as well as the injured.

b. Tort Reform

The Tort Reformers focus most of their concerns regarding specific elements of damages upon pain and suffering. Their view of money as an inappropriate remedy for these damages, and their concern for the interests of injurers and society, cause them to urge the restriction or removal of the availability of these damages.

Pain and suffering has a broader meaning under modern American law than the physical pain described in Jewish Law. Pain and suffering includes the mental anguish and anxiety which accompany a physical injury. The damages include "various forms of neurosis," and the inability to pursue pleasures, avocations, and usual family activities.⁴²

⁴² O'Connell and Simon, *Payment for Pain and Suffering* at 2.

O'Connell argues that the scope and character of these damages makes them impossible to measure. He cannot find a way to translate the loss into money, and criticizes American law for preventing juries from asking the questions similar to those suggested by the Rabbis:

"How do you measure pain and suffering? How do you translate physical discomfiture or agony into an insurance claim made up of dollars and cents? Value is defined in the law as: What a buyer, willing but not obligated to buy, would pay to a seller, willing but not obligated to sell. Not a bad definition, when you think about it. At least it works when one is talking about a piece of real estate, or a used car, or even a plumber's services. But it fails completely when one is talking about pain and suffering because the unalterable fact is that there is no market for pain and suffering. It is not for sale. How can you decide, then, what my aching arm is worth? Actually, the jury is forbidden the one yardstick that perhaps most naturally suggests itself: "What would I charge to suffer this pain myself?"⁴³ But, any way the question of how to value pain and suffering is formulated reveals how unanswerable it is."⁴⁴

O'Connell's descriptions of pain and suffering damages reflect his discomfort with provision of money for what is perceived to be

⁴³ Many jurisdictions do not permit juries to ask this question of themselves for the same reason the Rabbis reject it. No reasonable person would take any amount to receive such pain, or else he would set the value unreasonable high.

⁴⁴ O'Connell, *The Injury Industry* at 30.

an immeasurable loss. He criticizes what he calls the "blackboard" method of evaluating the loss, in which the injured's attorney suggests a small amount for each small period of time the injured suffers pain. The small sum itself does not seem unreasonable, but when multiplied by the number of hours or days of pain, the amount can become quite large.⁴⁵ O'Connell considers such methods deceptive, leading to "astronomical" assessments of pain and suffering.⁴⁶ Therefore, O'Connell calls pain and suffering damages "elastic"⁴⁷ and "lavish."⁴⁸

The Tort Reformers' criticisms of pain and suffering also result from their view of the relatively recent expansion of payment for them. O'Connell states that the Common Law initially gave very little recognition to pain and suffering. He alleges that they grew in importance only due to the efforts of injureds' attorneys and the growing affluence of the United States.⁴⁹ Richard K. Willard, the former chair of President Reagan's Tort Policy Working Group, says

⁴⁵ For example, one dollar for every day of pain may seem like a small sum. However, an injured with an expected life span of forty years suffering daily pain would recover \$14,600 for pain and suffering using this formula.

⁴⁶ O'Connell, *The Injury Industry* at 41-42.

⁴⁷ *Ibid.* at 39-40.

⁴⁸ *Ibid.* at 110.

⁴⁹ O'Connell and Simon, *Payment for Pain and Suffering* at 3-5.

that Tort Reform is needed due to "the extensive growth in tort lawsuits, particularly in regard to non-economic awards such as pain and suffering"⁵⁰

The Tort Reformers therefore advocate the restriction or elimination of pain and suffering damages. Some proposals place caps on the amount of these damages an injured may recover in a claim.⁵¹ O'Connell would completely bar their recovery in automobile collisions if the insured's economic losses are below \$10,000 and the non-economic losses are below \$5,000.⁵² O'Connell does not advocate the elimination of pain and suffering damage recoveries in larger cases because this would impose too much of the cost upon injureds. Injureds with economic damages exceeding \$10,000 still must try to obtain damages from the injurer, and the elimination of pain and suffering damages from the dispute would place the injured at too much of a disadvantage.⁵³ Instead, O'Connell limits the restriction of pain and suffering damages in

⁵⁰ Willard Statement at 2.

⁵¹ See section III(A)(2) above.

⁵² O'Connell, *The Injury Industry* at 115; O'Connell and Simon, *Payment for Pain and Suffering* at 5.

⁵³ O'Connell and Simon, *Payment for Pain and Suffering* at 10.

smaller cases because that is where he sees the most waste and unfairness to injurers.⁵⁴

O'Connell later retreats from a total elimination of pain and suffering damages in smaller cases, finding that people care more about the possibility of recovering these damages than he originally believed.⁵⁵ He suggests permitting the purchase of optional insurance coverage for pain and suffering which he calls "inconvenience coverage." If an injured had purchased this coverage before the collision, he could collect additional sums from his own insurer during any period of total disability. If the injured

⁵⁴ O'Connell, *The Injury Industry* at 118.

⁵⁵ O'Connell originally argues that injureds do not understand the idea of pain and suffering damages. He claims most injureds never learn about it, and after the resolution of their disputes cannot accurately say whether or not they received money for these damages. Further, he concludes that payment for these damages makes little or no difference in their attitude toward their pain, their feelings about being involved in a collision, or their feelings toward the injurer. O'Connell and Simon, *Payment for Pain and Suffering* at 19. Based upon these findings, O'Connell argues that no one would purchase insurance for these damages if it were offered. O'Connell, *The Injury Industry* at 104-04. However, he eventually discovers that a significant number of people would choose to purchase the insurance for pain and suffering damages if it were offered, causing him to support its availability. O'Connell and Simon, *Payment for Pain and Suffering* at 34.

only had a partial disability, he could claim a proportion of the benefits.⁵⁶

The limitation of pain and suffering damages satisfies many of the Tort Reformers' concerns with the remedy. Injureds with smaller injuries lose their ability to obtain disproportionate recoveries from injurers due to the "multiplying factor."⁵⁷ While each injured with smaller injuries recovers less, the Tort Reformers see a great impact on society. They argue that less liability means lower prices for needed goods and services, especially if states extend no-fault to other contexts besides automobile collisions. Those who deal in risky occupations or with dangerous materials especially enjoy the benefits of this change, as the Tort Reformers argue that they may pursue their tasks without fear of crushing liability. Moreover, each case which does not require an assessment of pain and suffering in dollars eases the Tort Reformer's discomfort with using money as the remedy for non-economic damages. Indeed, O'Connell hopes that future medicines will alleviate all pain,

⁵⁶ O'Connell and Simon, *Payment for Pain and Suffering* at 49. Keeton and O'Connell also suggest a variation of this insurance which does not depend upon disability. Keeton and O'Connell, *After Cars Crash* at 41-42.

⁵⁷ See section IV(A)(2)(b)(i)(B) above.

so that injureds will not need compensation for pain and suffering. Instead, an injured would receive payment for drugs which would eliminate pain and suffering.⁵⁸

The Tort Reformers therefore seek to restrict pain and suffering damages. Their skepticism about using money for non-economic damages, and their concern for injurers and society, cause them to suggest capping or eliminating the damages in many cases. However, the Tort Reformers' concern for fairness to injureds prevents the total elimination of recoveries for pain and suffering, leaving part of the remedy intact in the compensation system.

3. Costs of Healing

a. Jewish Law

Jewish Law requires the injurer to pay the costs of healing the injured.⁵⁹ The Mekilta d'Rabbi Ishmael and the Gemara both

⁵⁸ O'Connell and Simon, *Payment for Pain and Suffering* at 52-53.

identify Exodus 21:19 as the source of this liability.⁶⁰ That verse imposes the costs on the injurer after the parties have fought, and the injured recovers from an injury which caused him to take to his bed.

The assessment of these damages requires little discussion from the Rabbis, as it is easy to sum the costs of healing to derive the proper amount due. The most troublesome question in this process is the determination of whether the injurer was the cause-in-fact of the injury. If his action caused the injury, he must pay the medical expenses. But, if something else caused the injury, he has no liability for the costs incurred for their healing.⁶¹ This particularly becomes an issue when the injury begins to heal, but then worsens, or when the injury reappears.⁶²

The concerns over whether the injurer was the cause-in-fact of the injury reflects the Rabbis concern with balancing the interests of the parties. They hold the injurer responsible for any damages he

⁵⁹ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13; TJ BK 50; Neusner, *The Talmud of the Land of Israel* at 172; Kahane, Munk and Slae at 120

⁶⁰ Lauterbach, *Mekilta de-Rabbi Ishmael* at 51; TB BK 84a; Neusner, *The Talmud of Babylonia* at 17.

⁶¹ M. BK 8:1; TB BK 83b, 85a; Neusner, *The Talmud of Babylonia* at 13, 22; Lauterbach, *Mekilta de-Rabbi Ishmael* at 55.

⁶² See the discussion in section III(A)(3)(a).

actually caused, protecting the interest of the injured in full compensation. However, they closely examine injuries with uncertain causes, holding the injurer liable only if he was the cause-in-fact of the damage. This protects the interest of the injurer in protection from unfair or overwhelming impositions of liability.

The method of payment outlined in the Gemara also demonstrates a balancing of the parties' interests. The Rabbis suspect that the injurer will attempt to reduce his liability to the detriment of the injured's healing. Therefore, they prohibit the injurer from trying to heal the injured himself. The injurer cannot choose the injured's doctor or bring one from far away, because while such a physician may save the injurer money, the Rabbis question how effective a cheap or distant healer will be. The Rabbis also impose restrictions upon the injured, forbidding payment of the expenses directly to the injured for fear that he will waste the funds. The regulated payments therefore serve the interests of both parties.⁶³

⁶³ TB BK 85a; Neusner, *The Talmud of Babylonia* at 24. See section III(A)(3)(b).

b. Tort Reform

Unlike pain and suffering, the Tort Reformers view money as an appropriate remedy for the costs of healing. O'Connell approves of payment for these economic losses "subject to [their] being reasonable."⁶⁴ While definitively stating a concern for the interests of the injurer and society, neither the Act nor the Contract with America suggests any reforms affecting the payment of medical expenses except efforts to prevent fabricated claims.

While O'Connell supports payment for the costs of healing, he recommends some reforms. O'Connell believes that the optimal compensation system "facilitates settlements of most claims by prompt, periodic payment of the injured party's actual loss."⁶⁵ Such a system avoids the huge costs and delays associated with evaluating claims, aiding society by lowering the costs of litigation. O'Connell therefore advocates replacing the one-time assessment of damages with payment of medical expenses as the injured incurs them. The proposed no-fault system allows this because the injured recovers these losses from his own insurer, and not the injurer.

⁶⁴ O'Connell, *The Injury Industry* at 16.

⁶⁵ O'Connell and Kelly, *The Blame Game* at [ix].

Ideally, the injured works with a more cooperative entity than a litigation adversary, permitting quick payment of the expenses.⁶⁶

O'Connell also suggests changes to prevent the double payment of medical expenses. No-fault would pay for the costs of healing only if the injured has no other coverage to pay the bills. An injured first looks to his medical or disability insurance for payment of the expenses.⁶⁷ This essentially abrogates the collateral source rule.⁶⁸

O'Connell's proposed reforms reflect the Tort Reformers' concerns for balancing the interests of all parties involved with the injury. The injured receives payment for his economic loss, providing an appropriate monetary remedy. He receives these payments faster than previously due to the change from the one-time assessment of the loss to payments as the charges accrue. The injurer pays only for reasonable expenses. Society benefits from a more efficient system, and the elimination of duplicate payments

⁶⁶ O'Connell, *The Injury Industry* at 16.

⁶⁷ *Ibid.* at 100, 103; O'Connell and Kelly, *The Blame Game* at 115.

⁶⁸ See section III(C)(2)(b)(ii) above concerning the collateral source rule. O'Connell does not require the injurer or insurer to pay the premium dollars that the injured spent to obtain the collateral sources. This is simply a benefit to the injurer or insurer.

for a single loss. O'Connell and the Tort Reformers do not challenge the payment of medical expenses, but suggest refining the system to better serve the interests of all parties.

4. Loss of Income

a. Jewish Law

Another element of economic damage provided by Jewish law is loss of income.⁶⁹ Like costs of healing, the Rabbis find the Scriptural authority for imposing liability for these damages in Exodus 21:19.⁷⁰ The Rabbis therefore find a relationship between the costs of healing and the loss of income, understanding the law to hold the same person liable for both.⁷¹ This is not surprising,

⁶⁹ M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 13.

⁷⁰ TB BK 85a; Neusner, *The Talmud of Babylonia* at 22; Lauterbach, *Mekilta de-Rabbi Ishmael* at 51.

⁷¹ TB BK 85a; Neusner, *The Talmud of Babylonia* at 22; Lauterbach, *Mekilta de-Rabbi Ishmael* at 55; TJ BK 51; Neusner, *The Talmud of the Land of Israel* at 173.

considering that these two elements comprise the complete set of recoverable past economic damages under Jewish law.

However, Rav Judah argues against this relationship, observing that Scripture uses the intensive form of the verb for healing, emphasizing that the injured "shall surely be healed." In contrast, Exodus 21:19 uses only the imperfect form of the verb requiring payment of the loss of income. Moreover, Rav Judah sees the limiting word "רק," meaning "only," as requiring that the injurer pay only the lost wages. The Rabbis reject Rav Judah's opinion, understanding the use of the intensive form of the verb for healing to emphasize that the injurer must pay for medical expenses *in addition* to loss of income. Moreover, the word "רק" serves to limit the injurer's liability to cases where he was the cause-in-fact of the injury.⁷² The Rabbis do not find this word to limit the injurer's liability to costs of healing.⁷³ Consequently, the Rabbis preserve the relationship between the economic damages despite Rav Judah's objections.

The Rabbis do provide a restriction in the method of calculating the lost income. They understand the Law to provide

⁷² See section III(A)(3)(a) above.

⁷³ TB BK 85a; Neusner, *The Talmud of Babylonia* at 22-23.

payments for the lost time at work corresponding to the wages of a watcher of a cucumber field. This standard represents the Rabbis' version of modern day minimum wage earnings. The injured receives payments based upon this measure regardless of his usual income, even if he usually earns far more in his occupation. The Rabbis deem this fair compensation because the skill and specific earnings of the injured already have been evaluated and compensated by the payment for the injury itself.⁷⁴

Some Rabbis express dissatisfaction with this measurement of the loss. Raba suggests in a minority opinion that injuries to different parts of the body require different standards for measuring lost income. In this view, the removal of a hand would cause the calculation of the loss of income as if the injured were a watcher of a cucumber field. The loss of a leg would cause calculation for these damages as if he were a doorkeeper, and an eye as if he were a grinder in a mill. Raba does not explain why he believes these standards represent more appropriate measures of

⁷⁴ M. BK 8:1; TB BK 83b, 85b; Neusner, *The Talmud of Babylonia* at 13, 25; TJ BK 51; Neusner, *The Talmud of the Land of Israel* at 173; Tos. BK 9.2; Neusner, *The Tosefta* at 50; Jurkowitz at 481-82; Kahane, Munk and Slae at 121-22.

the loss, and the Rabbis do not accept his opinion. However, the argument demonstrates some dissention from the general rule.⁷⁵

The Jerusalem Talmud also preserves some evidence of dissatisfaction with the measurement of the lost income. This text agrees that if the injurer removes the body part, rendering it completely useless, the injured receives lost income measured as if he were the watcher of a cucumber field. However, if the injurer merely damages the body part, it will heal and the injured suffers no diminishing of his earning capacity. In such a case, the skill of the injured makes no difference in the calculation of the damages for the injury itself. The Jerusalem Talmud would compensate the injured for his actual lost income in such a case.⁷⁶

Despite these expressions of dissatisfaction, the method outlined by the majority of the Rabbis in the Talmud Bavli perseveres. The restriction of loss of income damages to a "minimum wage" reflects their understanding of the Law's protection of both the injured and the injurer. The injured receives compensation for an element of damage as required by Scripture

⁷⁵ TB BK 85b; Neusner, *The Talmud of Babylonia* at 25.

⁷⁶ TJ BK 51; Neusner, *The Talmud of the Land of Israel* at 174. The Tosefta also preserves these two standards. Tos. 9:2-3; Neusner, *The Tosefta* at 50.

according to the Rabbis' reading. However, the conservative measurement again insulates the injurer from potentially crushing liability. Moreover, the Rabbis in the Talmud Bavli support their understanding of the requirement of a "measure for measure" remedy by protecting the injurer from making a double payment for the injured's damaged skill. Once they accept that the damages for the injury itself considers and compensates for the diminishing of the injured's skill, they cannot include that factor again in the measurement of the loss of income. Despite the potentially valid observations in the Jerusalem Talmud, the Rabbis of the Talmud Bavli effectuate their understanding of Scripture as providing only a measure for measure remedy.

b. Tort Reform

Like costs of healing, the Tort Reformers would provide for the recovery of lost income. However, Keeton and O'Connell do suggest some limits to payments for these damages made under no-fault. No-fault benefits would deduct fifteen percent from an

injured's monthly earnings to reflect the fact that such payments are not taxable. Additionally, the benefits would deduct another ten percent to deter the injured from malingering. Further, the standard plan would cover salaries only as much as \$1,000 a month, meaning payment of \$750 per month considering deductibles.⁷⁷ An injured could recover more if he had purchased extra income insurance prior to the collision. Finally, no-fault benefits would not provide a double recovery for wages paid by other collateral sources.⁷⁸

These limitations mean that an injured will not recover his entire loss, especially if he has a high income.⁷⁹ Keeton and O'Connell justify this with the need to protect injurers and insurers from those who would use the injury as an opportunity to stay home from work. They also need to limit the payments for high wages to make the system affordable to society. No-fault therefore

⁷⁷ These figures are in 1967 dollars.

⁷⁸ Keeton and O'Connell, *After Cars Crash* at 48-53; O'Connell and Kelly, *The Blame Game* at 115.

⁷⁹ The restriction of wage payments seems parallel to the Rabbis' limitation of lost earnings to the wages of a watcher of a cucumber field. However, the Rabbis consider the skill of the injured in payments for the injury itself. No-fault contains no such consideration. Consequently, the provisions are not equivalent.

provides the majority of injureds the majority of their wages, but leaves some of these losses uncompensated.

5. Embarrassment

a. Jewish Law

The final element of damages outlined in the Mishnah is embarrassment or humiliation caused by the injury. The Rabbis largely draw this element of damages from Deuteronomy 25:11, which imposes a penalty when a woman attempts to stop a fight between her husband and another man by taking hold of the latter's private parts.⁸⁰

The Rabbis require a payment for embarrassment only if the injurer actually touches the injured. Insulting words alone do not create the same kind of damage which the Rabbis deem capable of

⁸⁰ M. BK 8.1; TB BK 83b; Neusner, *The Babylonian Talmud* at 13, 29.

remedy through money.⁸¹ The provision of a more expansive remedy when the embarrassment accompanies a physical injury demonstrates the Rabbis' understanding of the Law to require a complete measure for measure recovery for injured. However, the Rabbis also limit the provision of these damages to circumstances where the injurer intended to embarrass the injured, reflecting a concern to protect injurers as well.⁸²

The Mishnah provides little guidance for the calculation of damages for embarrassment in the initial description of the elements of damages. It states only that the amount of the damages depends upon the status of both parties.⁸³

This lack of specificity accounts for confusion in the Talmud Bavli regarding the proper method of assessing these damages. Rav

⁸¹ TB BK 91a; Neusner, *The Babylonian Talmud* at 49; TJ BK 55; Neusner, *The Talmud of the Land of Israel* at 181. The Talmuds do differ slightly on what constitutes a physical injury in this regard. The Jerusalem Talmud deems an injurer who spits on the clothing of the injured as inflicting a physical injury requiring compensation. The Talmud Bavli considers the spitting a physical injury only if it touches the injured's body.

⁸² M. BK 8:1; TB BK 83b; Neusner, *The Talmud of Babylonia* at 29. Other differences between negligence and intention falls beyond the scope of this study.

⁸³ M. BK 8:1; Neusner, *The Talmud of Babylonia* at 14; TJ BK 51, 55; Neusner, *The Talmud of the Land of Israel* at 173, 180; Jurkowitz at 482; Kahane, Munk and Slac at 124.

Meir argues that the Law views all injureds as free people who have lost their money. Rav Judah disagrees, understanding the Mishnah as treating the rich as rich, and the poor as poor. Rav Simeon adopts an approach between these two, viewing the rich as free men who have lost their money, and the poor as the least of the poor. These standards make a great difference, because the Law regards the amount of embarrassment an injured suffers as directly related to his standing in the community.⁸⁴ The Talmud Bavli finally settles on Rav Simeon's standard. Rav Meir's standard treats all people as the same, contrary to the Mishnah's requirement. Rav Judah also contradicts the Mishnah, impermissibly finding a distinction between a blind man receiving an insult and a blind man giving an insult. Therefore, the text accepts Rav Simeon's formulation as the proper means of assessing damages for embarrassment.⁸⁵

By accepting this method of calculation, the Rabbis repeat their pattern of balancing the interests of the injured and the injurer. They provide a means for the injured to receive compensation for the embarrassment. They consider the context of the injury and the status of injured, which the Law must take into

⁸⁴ See Tos. 9:12; Neusner, *The Tosefta* at 52-53.

⁸⁵ TB BK 86a; Neusner, *The Talmud of Babylonia* at 27.

account to afford the injured a "measure for measure" recovery. However, Rav Simeon's standard curbs the liability by adopting the least expensive possible assessment for the rich and poor. The Gemara text even explicitly states that the purpose of the standard is to make the payments lighter. The Rabbis therefore seek to balance the economic interests of the injurer with the interest of the injured in compensation for these damages.⁸⁶

The Mishnah does provide some specific sums for some injuries. An injurer who cuffs the ear of an injured pays a sela according to the majority, and a maneh according to Rav Judah speaking in the name of Rav Yose the Galilean. A harder strike raises the damages to two hundred zuz, and a strike with the back of the hand merits four hundred zuz. Other insulting attacks such as pulling hair, spitting, tearing at an ear, and pulling off a cloak also cause damages of four hundred zuz according to the Mishnah.⁸⁷

⁸⁶ TB BK 86a, 91a; Neusner, *The Talmud of Babylonia* at 27, 49.

⁸⁷ TB BK 90a; Neusner, *The Talmud of Babylonia* at 44; TJ BK 55; Neusner, *The Talmud of the Land of Israel* at 179-80. The Tosefta contains the same four hundred zuz standard for striking with the back of a hand or other objects. Tos. 9:31; Neusner, *The Tosefta* at 58. The Jerusalem Talmud sets forth additional sums of one sela for kicking, three sela for kneeling, and fifteen sela for a hard punch. It also records a case of damages of one litra in gold

This is one of the few places in the texts where the Rabbis suggest specific sums for the damages for bodily injury, suggesting that they view the assessment of damages for embarrassment as especially difficult.

Despite these challenges, the Rabbis understand embarrassment as a real element of the injured's damages for which Scripture requires compensation. They consider the identity of the parties and the context of the injury to derive a "measure for measure" recovery for the injured. They also protect the interests of the injurer with standards using the least expensive measurements for the rich and poor which are possible within the need to consider the status of the parties. Damages for embarrassment therefore follow a similar pattern as the other four elements of damage.

for someone losing his temper with a sage. TJ BK 55; Neusner, *The Talmud of the Land of Israel* at 181.

b. Tort Reform

The Tort Reformers spend almost no time specifically considering damages for embarrassment. This reflects the incorporation of embarrassment in the mental aspect of modern pain and suffering damages. The limitations that Tort Reform suggests for non-economic damages like pain and suffering therefore also apply to damages for humiliation.

Both Jewish Law and Tort Reform calculate damages according to their perspectives on the use of money as a remedy and the interests protected by the system. Jewish Law provides the injured money for economic and non-economic damages. The injurer also receives consideration under Jewish Law in that the means of calculating the injured's damages provide moderate recoveries. Tort Reform favors the provision of economic damages over non-economic damages, although it suggests some restrictions even for the out-of-pocket losses. Tort Reform therefore reflects a greater

concern for injurers and society in general because of the perception of spiraling liability. Seeing how these different legal systems react to the occurrence of bodily injuries, the question becomes whether the older system provides any insight for confronting the current challenges addressed by the current American law.

Chapter V

Evaluation: The Lessons of the Rabbis Applied to Tort Reform

The centuries have seen countless Davids and Jonathans and their disputes over the imposition of bodily injuries. Legal systems have risen, changed, and sometimes fallen with the passing of the civilizations which adhered to their rules. The American tort system is only another response to the problem of one person inflicting a bodily injury upon another. Yet, it is the governing civil law for this country, which provides the remedies available to one of the two largest communities of world Jewry. It is also a civil law which the Tort Reformers claim is in crisis, requiring immediate alterations for the good of society.

The question is whether the Jewish Law as described by the Rabbis provides insight into the changes outlined by the Tort Reformers. Do the teachings of the Rabbis inform the modern American Jew about the advisability and ethics of Tort Reform proposals? How may modern American Jews take the lessons of long

respected Jewish Law and apply them to the current situation in American tort law?

This chapter first explores some of the similarities and differences between Jewish Law and the Tort Reformers. It will then discuss how the lessons of the Rabbis may inform a Jewish ethical response to the problems of American civil law and the proposals of the Tort Reformers.

A. Similarities between Jewish Law and Tort Reform

Despite very different historical and social backgrounds, Jewish Law and Tort Reform share some similar characteristics. These similarities provide a basis for comparing the values forwarded by the two systems.

1. Monetary Compensation as the Remedy

Both Jewish Law and Tort Reform accept money as the remedy for bodily injuries. An incident concludes under both systems when the trier of fact determines that the injurer is liable to the injured according to the substantive law, and the injurer pays the injured or his doctors a certain sum of money.

Jewish Law accepts the use of money as the remedy with the rejection of talion. The Mishnah explicitly diverges from a literal reading of Scripture which would truly take the injurer's eye for the injured's. The Tanna'im support this interpretation by the Amora'im, demonstrating the consistency between Scripture and the Mishnah. By the end of the Talmudic period, the Rabbis have put any question about talion behind them. An injured receives a monetary remedy for his loss.¹

The Tort Reformers offer more of a tacit approval of the use of money as the remedy. Unlike the Rabbis, they do not have to consider the possibility of talion as the remedy for bodily injuries. Yet the Tort Reformers do not suggest a remedy for these injuries

¹ See section II(A)(1) above.

other than monetary compensation. They could have proposed the imposition of fines, community service and other sanctions for injurers. A new government program could have distributed the losses of all injureds throughout society. However, the Tort Reformers do not propose such a radical change.

The Tort Reformers also could have proposed the total elimination of monetary compensation. None of the Tort Reform proposals completely discard monetary compensation for pain and suffering, despite the skepticism of the efficacy of money as the remedy for these damages. The proposals cap the amount of damages, or reserve the recoveries for larger cases, but never completely abrogate the remedy. Similarly, the Tort Reformers could have left the recovery of economic losses entirely in the realm of normal health and disability insurance. However, they do not go that far, apparently accepting the need for a special compensatory system to cover losses caused by bodily injuries.²

Both systems therefore accept monetary compensation as the remedy for bodily injury. The Rabbis and Tort Reformers similarly struggle to determine the best way for money to provide that

² See section II(B) above.

remedy, but eventually accept some structure embodying payments to injureds by injurers.

2. Protection of Injureds

The acceptance of monetary compensation coincides with both systems' goal of protecting the interests of injureds. Both the Rabbis and the Tort Reformers recognize that injureds suffer losses because of the actions of injurers. The legal authorities recognize that the requirements of justice and peace within society require the law to address these losses.³

Jewish Law provides the injured the five "heads" of damages as compensation for the losses caused by the actions of the injurer.⁴ Tort Reform leaves intact many of the damages available under traditional American tort law, especially in the areas of economic losses. Keeton and O'Connell's system even attempts to permit more

³ See section III(B) above.

⁴ See section IV(A)(1) above.

injureds to obtain a recovery by removing the injurer's fault as a prerequisite for compensation.⁵

The Tort Reformers and Rabbis both do not want to leave injureds without a viable remedy. They do not want them to feel victimized twice: once by the injurers, and once by a legal system which does not provide a fair opportunity to have their losses addressed. The Rabbis and Tort Reformers do not consider it necessary to provide a system which grants the maximum compensation for every claimed violation of each injured's interests. Nor do they require each injured's complete satisfaction with the outcome of his particular case. However, they both do intend the legal system to provide considerable protection to injured's interests through the availability of monetary compensation.

3. Protection of Injurers

Though concerned with the interest of injureds in compensation, both the Rabbis and the Tort Reformers are aware

⁵ See section IV(A)(2) above.

that the money comes from the pockets of injurers. They acknowledge that unbridled liability poses a danger to injurers. The provision of expansive damages may threaten the continued economic viability of injurers or potential injurers. The leaders of both legal communities therefore protect the interests of injurers by curbing liability which otherwise could grow to unreasonable burdens.

Jewish Law gives this protection to injurers through the methods of calculating the injureds' damages. The Rabbis usually outline an assessment formula which provides a moderate amount of compensation to the injured. The Law counts the injury itself by looking at the injured as if he were a slave at market, and not as a presumably more valuable free man.⁶ It calculates loss of income by using the lowest wages possible.⁷ Embarrassment damages have the standard of the least fortunate people for the poor, and a free man who has lost all his wealth for the rich.⁸ The Rabbis take care to

⁶ See section IV(B)(1)(a) above.

⁷ See section IV(B)(4)(a) above.

⁸ See section IV(B)(5)(a) above.

clarify that the injurer pays damages only for medical expenses incurred as a result of the injury.⁹

Professor of Law Steven F. Friedell notes:

"One of the most striking features of Talmudic tort law is the limitation of liability. In personal injury, this is done by limitations on measurement . . . The overall impression conveyed by Talmudic tort law is that one is not liable for many types of damage and that when one is liable, the damages are measured in a manner favorable to the [injurer]. The rabbis do not explain why this is so, although it appears that the rabbis do not want to impose what they consider to be an unreasonable burden on the [injurers].¹⁰

The Tort Reformers state their concern for injurers more explicitly. O'Connell criticizes the American tort system for imposing great liabilities upon injurers, but failing to consider the good they and their products and services provide. The Tort Reformers fear that liability imposed by the tort system crushes legitimate economic activity, irreparably harming injurers. They seek to limit this liability, primarily by restricting or eliminating recovery for non-economic damages such as pain and suffering.¹¹

⁹ See section III(A)(3)(a) above.

¹⁰ Friedell at 904-06.

¹¹ See section IV(A)(2) above.

The leaders of both legal communities therefore seek to protect the interests of injurers. They do not advocate that injurers enjoy complete freedom from liability. But, they find ways to prevent the obligation to remit damages from becoming too onerous through either the assessment or restriction of the damages.

4. Time of Assessment

The procedure used to determine the damages troubles both the Rabbis and the Tort Reformers. Both systems envision a single hearing to decide whether the injurer is liable, and if so, how much he must pay to the injured as compensation for damages. The Rabbis and the Tort Reformers both express dissatisfaction with this one-time assessment.

The Rabbis find problems with this procedure in the uncertainty of the injury's outcome. They observe that an injury may not heal completely, or may reopen after seeming to heal. They cannot properly assess the damages without knowing precisely how the injury will resolve. The Rabbis confront even greater

problems because sometimes they cannot know with certainty at the time of the assessment whether the injury will cause the injured's death. Jewish Law makes a significant distinction between murder and injury cases, imposing capital punishment for the former and compensation for the latter. The Rabbis acknowledge that they may need to assess whether the injured will live or die too soon, and that they may predict the wrong outcome. This creates issues concerning how to shift from one sanction to the other, and threatens the efficacy of the entire system.¹²

The Tort Reformers have a different problem with the one-time assessment of damages. They argue that the procedure lengthens the time necessary to resolve cases, which increases the overhead costs of the system. Moreover, the uncertainty of the injury's long-term effects at the assessment leads to either underpayment or overpayment of damages in most disputes. Doctors and injureds present worst case scenarios, or intentionally exaggerate injuries, to ensure the availability of funds if the injured needs them in the future.¹³

¹² See section II(A)(2)(c) above.

¹³ See section III(A)(2)(b)(i)(A) above.

Both the Rabbis and the Tort Reformers see serious problems with the one-time assessment of damages, even though they view different detrimental effects of the procedure. Both seem to prefer payment of some damages as they occur, particularly for economic losses.

B. Differences between Jewish Law and Tort Reform

Numerous differences exist between Jewish Law and Tort Reform. The calculation of recoverable damages provides several detailed nuances which separate the systems. For example, Tort Reform considers the salary of the specific injured while calculating lost wages, while Jewish Law accounts for the skill of the injured within payments for the injury itself. Modern American tort law embodies a broader understanding of "pain and suffering" which includes mental anguish and the inability to pursue avocations, than Jewish Law's compensation for physical pain. Despite their importance, these details do not provide insight into the more

significant distinctions between the two systems. A broader analysis of Jewish Law and Tort Reform reveals two systems with fundamental differences concerning the purpose and fairness of compensatory law.

1. Purposes of Systems: Religious Ethics v. Economics

Both the Rabbis and the Tort Reformers describe systems which offers compensation to injureds. However, they disagree about the precise reasons why it is so important for the law to provide such a remedy. The Rabbis find the purpose of the remedy in the prescription of ethical religious behavior, while the Tort Reformers rely upon economics as the core value of the system they describe.

The Rabbis emphasize the ethical nature of the religious Law when speaking about compensation. The Mekilta d'Rabbi Ishmael states that a Scriptural verse concerning the law of compensation provides the authoritative source for learning proper conduct.¹⁴

¹⁴ Lauterbach, *Mekilta de-Rabbi Ishmael* at 55-56.

The Talmud Bavli preserves Rabbi Judah's opinion that "he who wishes to be pious must fulfill the law of *Nezikin*," naming the Talmudic tractate containing the laws of damages and compensation.¹⁵ The Talmud Bavli also refers to judges who decide cases correctly as God's partners in the creation of the world.¹⁶ The Rabbis see the fulfillment of the Laws of compensation as more than the transfer of economic losses from one party to another. They recognize these Laws as *mitzvot*, or commandments from God explaining the proper and ethical way to behave.

Modern commentators acknowledge this feature of Rabbinic Law. Ben Zion Bergman, Professor of Rabbinic Literature at the University of Judaism, notes in reference to the law of torts that there is always the assumption that the Law is the expression of God's will.¹⁷ Rabbi Walter Peiser agrees that the Law of compensation is "always, invariably traced back to the Bible and thence to Divine origin."¹⁸ He contrasts Jewish Law with the

¹⁵ TB BK 30a; Neusner, *The Talmud of Babylonia* Volume XX.A at 125.

¹⁶ TB Sabbath 10a; Neusner, *The Talmud of Babylonia*, vol. II.A at 36.

¹⁷ Ben Zion Bergman, "Torah and Torts: A Reply to Professor Kader," *Journal of Law and Religion* 4, no. 1. (1986): 177.

¹⁸ Peiser at 5-6.

Common Law in that the former deals with religious precepts, ethical injunctions and ritual commandments, while the latter involves "civil obligations with their corresponding fines and punishments."¹⁹ The Jewish Law of compensation revolves around enacting the word of God to determine moral and ethical behavior.

The Tort Reformers take the economic aspects of the Common Law even further, rejecting notions that the compensation system should center upon moral and ethical foundations. O'Connell characterizes the actions of defenders of the current American tort system as attempts to preserve a moral and ethical system. He questions the appropriateness of such a system, since many aspects of American insurance and law do not rely upon fault or wrong. O'Connell implies that the law of compensation also should not make such moral judgments, claiming that the wrong in a negligence case is not really a wrong requiring a moral or ethical sanction.²⁰ He ties ideas of holding injurers liable with outdated notions of vengeance. Quoting Justice Holmes famous observation that "even a dog distinguishes between being stumbled over and

¹⁹ Peiser at 1.

²⁰ O'Connell, *The Injury Industry* at 124-26.

being kicked," O'Connell argues against assessing blame and making moral judgments part of the compensation system.²¹

O'Connell replaces the moral and ethical aspect of compensatory law with economic analysis. He notes that all drivers are careful or careless at one time or another. According to this view, the better way to handle loss is not to hold each individual injurer liable, but to distribute the loss among all drivers in the most efficient manner possible.²² The problem of compensation becomes a matter of the economic allocation of costs, rather than a matter of ethical and moral conduct. O'Connell concludes that it is "myopic to hark back to inapplicable morality and in refusing to recognize the broader implications of insurance."²³

Although much of this argument focuses upon the use of fault as the means of holding an injurer liable, O'Connell connects morality's influence on the system with the damages the system provides. He cites another study which claims that the "existing system of automobile injury reparation is based on rules of tort law which are only a few degrees removed from the primitive passion of

²¹ O'Connell and Simon, *Payment for Pain and Suffering* at 46-47.

²² O'Connell and Simon, *Payment for Pain and Suffering* at 10.

²³ O'Connell, *The Injury Industry* at 127.

revenge, garnished with the Biblical concept of punishment for sin." This study claims that the system should reflect the values of the lowest possible expense and the "utmost benefit to human beings."²⁴ The economic foundation of the Tort Reformers' system, replacing moral and ethical guidelines, yields the payment of the damages which constitute this "utmost benefit." The remedy becomes a matter of the affordable and the economically advisable, and not a matter of the right and morally just.

The Rabbi and the Tort Reformers therefore adopt different foundational premises for the systems they describe. The Rabbis rely upon moral and ethical rules derived from a Divine religious authority. The Tort Reformers explicitly reject this foundation, opting instead to base their system on economic values and cost-benefit analyses. These represent two extremely divergent goals for compensation which shape the damages each system actually provides.

²⁴ O'Connell and Simon, *Payment for Pain and Suffering* at 53-54, citing A. Conard, J. Morgan, R. Pratt, C. Voltz and R. Bombaugh, *Automobile Accident Costs and Payment*, 1964 at 9.

2. Non-Economic Damages

Another major area of difference between Jewish Law and Tort Reform is the treatment of non-economic damages. Jewish Law considers non-economic damages on an equal basis as economic damages. The Tort Reformers at most dispute the veracity of non-economic damages. At the very least, the Tort Reformers question the ability of money to compensate for these losses.

Jewish Law expresses some reservations about aspects of monetary compensation, including non-economic damages. The Rabbis differ on how to calculate damages for pain.²⁵ The text subtly criticizes damages for the injury itself through Rav Pappa bar Samuel's exclusion of this element, and the father's rejection of the assessment of his child as a slave as too humiliating.²⁶ Nevertheless, these reservations do not reach the point of challenging the basic structure of the remedy. The Law provides five elements of damages, each payable independently and measure for measure as defined by the Rabbis. An injured recovers non-economic damages

²⁵ TB BK 85a; Neusner, *The Talmud of Babylonia* at 21-22.

²⁶ TB BK 84a; Neusner, *The Talmud of Babylonia* at 18-19. See section IV(B)(1)(a) above.

under these provisions in the same manner as economic damages. The Law makes no significant distinction between damages of the two categories.

The Rabbis do not explain why they view non-economic damages on the same level as economic damages. They also do not explicitly discuss why they believe money can provide compensation for these losses. It is possible that money seemed such an improvement over talion that they felt no need to consider these questions. Others have argued that money may not directly undo non-economic losses such as pain, but it adds other things to an injured's life to make up for the loss.²⁷ The Rabbis also may have adopted such a view. While attribution of such thoughts to the Rabbis cannot be deemed much more than speculation, the Sages apparently view payment of money for non-economic damages as essential for justice as payment for economic damages.

²⁷ Statement of Lucinda M. Finley, Professor of Law, State Univ. of New York at Buffalo School of Law, before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary of the United States Senate on S. 687 - The Products Liability Fairness Act (CIS Congressional Universe, March 15, 1997): 12.

In contrast, the Tort Reformers draw critical distinctions between economic and non-economic damages.²⁸ Keeton and O'Connell emphasize their view that money can provide compensation for economic damages, but not non-economic damages like pain and suffering. They ask rhetorically:

"Is it not wiser and fairer to use the available dollars to pay for dollars lost, rather than trying to pay for something you can't really equate with dollars, like pain and suffering?"²⁹

O'Connell casts further doubt upon payments for pain and suffering by observing that these damages never had a primary role in the Common Law, but came to prominence only due to injureds' attorneys and the affluence of the United States.³⁰

O'Connell's view of pain and suffering reflects a deeper view of non-economic damages held by the Tort Reformers. The Tort Reformers question whether non-economic damages constitute real injuries. One critic of Tort Reform observes that the Act seems to rely upon an assumption that economic losses are "more real or

²⁸ See section II(B) above.

²⁹ Keeton and O'Connell, *After Cars Crash* at 44.

³⁰ O'Connell and Simon, *Payment for Pain and Suffering* at 3-5.

serious" than non-economic losses because they can be objectively measured in money.³¹ Keeton and O'Connell distinguish between the need for having insurance coverage for economic and non-economic damages:

"The optional pain and inconvenience coverage is a very good thing to have if you've had an accident, *but it's really not essential*, as basic protection insurance itself is."³²

The "optional pain and inconvenience coverage" compensates for non-economic damages. Keeton and O'Connell say that this coverage is not necessary, unlike the basic protection insurance which provides compensation for economic losses. They not only place a higher regard for economic damages over non-economic damages with this statement. They also state that non-economic damages are so unimportant that there is no need to require either coverage or compensation for them. Even if the law considers non-economic losses as injuries, they are not significant enough to warrant much attention or compensation.

³¹ *Finley Statement* at 11.

³² Keeton and O'Connell, *After Cars Crash* at 42 (emphasis added).

The Tort Reformers' proposals reflect their lack of regard for non-economic damages. The Act rejects joint and several liability for non-economic damages, but retains it for economic damages. Several reports had indicated that the abrogation of joint and several liability for economic damages would have too severe an impact on injurers obtaining a full recovery. While the Tort Reformers accept this conclusion for economic damages, they are content to propose a system which precludes full recovery for non-economic damages.³³ O'Connell seeks to reduce payments in smaller injury cases to small economic losses, with no payment for non-economic loss.³⁴ In other words, he hopes to make "smaller" injuries into legal non-events with little compensation for injureds, even if they suffer appreciable non-economic injury as well.

The Tort Reformers' view of non-economic damages becomes particularly apparent when comparing different proposals. The Act confronts a products liability system which provides for strict liability. This means that a manufacturer which provides a defective product is liable for damages whether he acts negligently or not. The Act proposes to change this to a system which imposes

³³ Act, sec. 110; *Finley Testimony* at 3.
³⁴ O'Connell, *The Injury Industry* at 143.

liability if the manufacturer acts negligently.³⁵ Keeton and O'Connell confront a system which provides damages only if the injurer is negligent. They propose switching to a system with liability regardless of the injurer's negligence. The proposals therefore offer diametrically opposed reforms regarding the substantive law of liability. However, both proposals offer the same solution regarding non-economic damages. The Tort Reformers seek to restrict or eliminate them, whether through complete abolition of the damages, caps, thresholds to pass before allowing their recovery, or the abrogation of joint and several liability.

The Rabbis and the Tort Reformers therefore hold very different views of non-economic loss. Jewish Law considers non-economic loss as a real injury requiring compensation as equal elements of damages as economic losses. The Tort Reformers question whether non-economic losses constitute real injuries requiring compensation, and propose methods to curtail recoveries for them. This difference in perspectives on non-economic injuries represents a fundamental difference between Jewish Law and Tort Reform.

³⁵ Act, sec. 103(a)(1)(II).

3. One Law for All?

A third major distinction between Jewish Law and Tort Reform involves the equal application of the same law to all cases. The Rabbis strictly require the application of one law for all injureds, while the Tort Reformers accept differences based upon injuries, injureds, and insurance coverage.

The Rabbis interpret the Law using a stringent understanding of Leviticus 24:22. That verse specifies that one law applies to all Israelites and any strangers living among them. The Rabbis understand this verse to mean that similar cases must result in the same remedy. As a result, an injured cannot choose between monetary compensation and talion.³⁶ The Rabbis reject the proposal to apply talion except when the injurer's and injured's body parts in question are unequal, because this would lead to different outcomes in similar cases.³⁷ Monetary compensation cannot provide the remedy for capital cases because those who could afford the payments would live, while those who could not would suffer capital

³⁶ See section II(A)(1) above.

³⁷ See section III(A)(1) above.

punishment.³⁸ Instead, the Rabbis interpret the Law to provide the same type of remedy in similar cases. For bodily injury cases, this means compensation of the five elements of damages.

Tort Reform generally does not share this concern for providing the same remedy in similar cases. Instead, the Tort Reformers accept different, and sometimes arbitrary, outcomes among like bodily injury cases. For example, some Tort Reform proposals suggest placing a cap on pain and suffering damages, such as \$100,000 or \$250,000. This proposal allows unequal outcomes in that an injured deemed to have sustained under the cap receives his full damages, while an injured with greater damages than the cap receives only partial compensation. Similarly, the Act's proposal to partially eliminate joint and several liability means that injureds who can hold all joint injurers liable can recover all their damages, while those who cannot have injuries uncompensated.

The most notable example of the Tort Reformers' acceptance of different outcomes for similar cases involves Keeton and O'Connell's no-fault proposals. Under no-fault, an injured with \$9,999 of economic damages cannot recover non-economic losses.

³⁸ See section II(A)(2)(a) above.

However, an injured with \$10,001 of medical expenses and lost wages has the remedy for non-economic losses available. Keeton and O'Connell establish an arbitrary line which governs whether an injured may have a remedy available in essentially identical circumstances.

Moreover, Keeton and O'Connell accept significant differences in the provision of the compensatory remedy by allowing the purchase of optional pain and inconvenience insurance. Such insurance allows those in American society who can afford the premiums to choose the possibility of compensation of non-economic damages. However, the less wealthy injureds in society who cannot afford this insurance cannot hope to receive this remedy. Keeton and O'Connell thus accept differences in the available remedies based upon an injured's economic status and whether he has purchased the right to claim the damages.

The Rabbis and the Tort Reformer display significant differences regarding the idea of offering a single remedy for all people in society. The Rabbis interpret the Law to require the same remedy in all cases. The Tort Reformers accept differences depending upon the injurers, the amount of damages, and the

economic status of the injured. The Rabbis support one law for everyone, while the Tort Reformers permit the availability of different remedies in different situations.

4. Role of Society

A final significant different between Jewish Law and Tort Reform involves the way each views the interests of society. Both the Rabbis and the Tort Reformers have a concern for the welfare of society. However, they differ about how their systems protect society's interests.

The Rabbis view a bodily injury matter primarily as a dispute between the injured and the injurer. The Law provides the proper monetary remedy which the injurer pays compensation to the injured. When the injurer follows the Law and remits the compensation, the society automatically benefits through the resolution of the matter. Moreover, the Rabbis unequivocally accept God as the source of the Law's authority. As a result, it may be said that the society continues in peace as a result of the enactment of

the expression of God's will and the fulfillment of the Law detailing how to resolve these disputes.³⁹

The Tort Reformers approach the problem of compensation very differently. The Tort Reformers not only place the law in a non-religious context, but they see a different role for society. The society has an independent position in Tort Reform. Society has needs and interests in bodily injury matters requiring the law's attention and consideration. The Tort Reformers see more than two parties in each dispute. They see three - the injured, the injurer, and society. The Tort Reformers therefore shape their proposals to protect the society's interest in providing goods and services to its members. Unlike Jewish Law, the society does not benefit as a coincidence to the resolution of the dispute between the injurer and the injured. Tort Reform consciously accounts for society's interests, and makes proposals specifically designed to protect these interests even if at the expense of the injurer or injured.⁴⁰

The differing view of the role of society distinguishes Tort Reform from Jewish Law. The Tort Reformers also differ from the Rabbis in their opinion of the purpose of the compensation system,

³⁹ See section III(C)(1) above.

⁴⁰ See section III(C)(2) above.

the merit of compensating non-economic losses, and the provision of one law for all society. Yet, Jewish Law and Tort Reform generally agree on issues such as using money as the remedy for bodily injury, protection of injureds and injurers, and problems with the single opportunity to assess damages. The question which remains is how these similarities and differences provide lessons for modern American Jews in their approach to the current tort system.

C. Proposal: A Jewish View of Tort Reform

American Jews confront many problems of modern society equally with non-Jews. However, modern Jews have the unique privilege of drawing upon the wisdom of the rich legal tradition of the Rabbis. The Rabbis' teachings can instruct modern Jews not only about religious matters, but about proper conduct and outcomes in secular law and societal issues. This study has revealed the Rabbis' warning, from a Jewish perspective, about some of the major aspects of Tort Reform regarding its views on the monetary remedy for bodily injury.

The initial question involves whether monetary compensation serves as the proper remedy for bodily injury. Both the Tort Reformers and the Rabbis express reservations about the use of money for this purpose. The Tort Reformers question whether money can compensate for non-economic damages, and even criticize payments for some economic damages. The Rabbis moderate the amount of liability through strict means of calculating the injured's damages. Yet, the Rabbis affirm their comfort with using money as a remedy for all the heads of damages under Jewish Law.

Nevertheless, the difference in the two legal authorities' attitude toward the monetary remedy is extremely important. The Tort Reformers approach the law of remedies for bodily injury as an economic system. They are concerned with the allocation of loss, and the availability of goods and services. Tort Reform seeks to restrict the provision of non-economic injuries like pain and suffering precisely because of the difficulty defining these losses in economic terms. Without a market for these losses, the damages do not seem real in economic terms. The Tort Reformers also seek to protect the three parties to injuries in economic terms. The injured

must recover his out-of-pocket losses because failure to do so would cause him economic harm. The injurer cannot endure large liabilities because such threatens his economic existence. Society must receive protection so that it may provide needed goods and services. The Tort Reformers look at the current tort system and see its economic problems. They offer proposals mostly concerned with curing these financial ills.

But, the Rabbis teach us that, from a Jewish perspective, the compensation system is more than a matter of efficient distribution of loss. Compensation for bodily injury in Judaism is a moral and ethical issue. Injureds and injurers are more than mere economic actors. They are people attempting not only to cope with out-of-pocket losses, but the feelings which accompany either suffering or inflicting a bodily injury on a human being. Justice means more to the Rabbis than paying for the costs of an injury. It means resolving a dispute so that both sides feel satisfied that all their interests have received adequate consideration by the Law as God intends.

Consequently, non-economic damages are just as important in Jewish Law as economic losses. In a moral and ethical system informed by the teachings of Jewish Law, non-economic damages

are as real as economic costs. An injured will not believe that he has received justice unless the Law contemplates his physical losses and the pain he has suffered as well as his expenses. An injured may feel fortunate if he does not have to pay compensation for non-economic losses. However, morality and conscience require even the injurer to admit the need to address the pain he has caused. Jewish Law calls for the enactment of moral and ethical behaviors in each person's treatment of others, even if this involves added economic costs to some individuals and to society.

A Jewish view of Tort Reform therefore requires treatment of compensation for bodily injuries as an ethical imperative to address all the injuries caused by the injurer, especially the injured's pain and loss of physical abilities. The Jewish view rejects efforts to delegitimize these non-economic damages through abolishing or restricting their compensation. Arbitrary limits which preclude full recovery of these damages for economic reasons fail this ethical standard. The Jewish view rejects monetary caps on pain and suffering damages, and the denial of these recoveries to many injureds under Keeton and O'Connell's no-fault system.

The ethical imperative is especially important regarding the provision of one law for all. How can an injured feel that he has received justice when the law does not address his pain, but compensates his neighbor's? How can an injurer feel that he has received justice when he must pay heavily for the injury he caused, but his neighbor has no liability for a loss he has inflicted. The Rabbis recognize that justice requires equal treatment for all. A Jewish view of Tort Reform therefore rejects the provision of remedies to some, but not others. It especially discards a system which gives easier access to remedies to the rich than the poor, as offered by Keeton and O'Connell's "optional pain and inconvenience insurance."

This is not to say that economic considerations play no role in the Jewish view of Tort Reform. The Rabbis acknowledge the need to consider the economic restraints upon injurers and society alongside the moral imperative for justice. The Rabbis do this through the imposition of moderate means of calculating the injured's damages. It may be possible to redefine the formulae for the assessment of damages so that the injured receives sufficient compensation for all his injuries, but the total amount of liability

becomes more manageable. The collateral source rule can be adjusted in accordance with the Jewish view if the injurer pays for the premiums, deductibles and other costs of the injured's insurance. Other reforms designed to ease the cost of resolving cases, such as alternative dispute resolution and "fast track" litigation procedures for routine cases, can be implemented consistently with the Jewish ethical view. Additionally, first party medical and disability coverage can be made available with automobile insurance to allow more injureds to recover their economic losses than under the current system.⁴¹

The Rabbis' teachings allow these and other reforms to address the economic problems of the compensation system. But, these reforms cannot come at the expense of the ethical and moral functions of the remedy. Even if the Tort Reformers present an accurate analysis of the current tort system, which some would dispute, the Jewish view opposes many of their proposals as failing to consider the ethical ramifications of leaving injuries unaddressed.

⁴¹ O'Connell rejects this idea, claiming it is too expensive without restrictions on the recovery of economic damages. O'Connell, *The Injury Industry* at 127.

The issue comes down to what will happen in every case where a Jonathan injures a David. Will David, Jonathan and "society" feel that the law has treated them justly? They will if the law considers more than the economic needs of each party. The consideration of moral and ethical concerns alongside economics is the true tort reform which the Rabbis teach us to include in our remedy for bodily injuries.

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