ESTIMATING BODILY DAMAGES ACCORDING TO JEWISH LAW A COMPARATIVE LEGAL STUDY[1]

PROF. YEHUDA KAHANE [2]
NATHAN MUNK [3]
RABBI MENACHEM SLAE [4]

Reprinted from:
M. Slae: Insurance In The Halachah
The Israeli Insurance Association, Tel Aviv 1982

1 This research was funded jointly by the Erhard Center of Insurance Research at the Faculty of Administration. Tel Aviv University, and the Responsa Project, Bar-Ilan University. The authors would like to thank Professor Theodore Lang for his very helpful comments and suggestions.
2 Associate Professor and Academic Director, Erhard Insurance Center, Tel Aviv University.
3 Research Assistant, Responsa Project.
4 Judaica Research Director, Responsa Project.

CONTENTS

INTRODUCTION

Estimating damages for bodily injuries (other than manslaughter situations) has busied legislators, lawyers, and claim adjusters in many countries. The subject is of much interest also to insurers, since bodily injury damages are usually covered by various liability and personal injury insurance programs. Liability insurance is specially designed financially to protect tortfeasors who must by law pay compensation for bodily damages. The obligation to pay damages to the injured person may derive from various laws which are associated with the laws of torts, such as special laws regarding compensation of victims of traffic accidents, injuries at work, professional malpractice, or of injuries stemming from defective products. Personal accident policies and disability insurance also deal with the financial consequences of bodily injuries, but in such cases, the compensation is paid to the injured party by power of the contract between himself and an insuring body. In these cases the compensation is usually based on a predetermined agreed value and therefore the problem of estimating the damage is of far less importance in these types of insurance cases.

The issue of estimating bodily damage has again come under study in many countries during recent years. It is quite plausible that this issue has arisen through the development of modern technology which creates new dangers, such as increased use of automobiles, sophistication and complexity of industry, and the use of sophisticated products. Today, bodily damage has become on acute social problem to an extent which was unknown in the past. The increased frequency of claims has also been followed by a strong tendency for plaintiffs to claim large liability compensation payments. The higher frequency and severity of claims raises the cost of insurance. This leads to the well known problem, often termed the "liability crisis", which is felt in the increasing difficulty of

acquiring certain types of insurance coverage. The cost of insurance can be so great that it can often affect the willingness of doctors to offer certain medical services, cause stoppage of production of certain products suspected of being dangerous, or prevent importing of certain goods (e.g. drugs), etc. Such problems led often to revisions of legislation in many countries, and affected even international conventions (such as in the areas of product and nuclear liability). The Israeli examples of the Compensation for Traffic Accident Victims Act (1975), or the Defective Product Liability Act (1980) simply reflect the international tendency in this area.

Any legislation dealing with torts and liability rules must deal, in general, with two questions: (1) Upon whom should the financial burden of responsibility be placed, and under what conditions? (2) What is the amount of payment for the damage and how are we to estimate it? This study focuses on the second question and tries to untangle its complexities: What does the damage payment include? How should it be estimated? How should non-pecuniary damages be handled? Answers to such questions vary from country to country, and are generally influenced by the historical development of legislation and court decisions in each country.

The goal of this study is to review the discussion and the solutions for bodily damage estimation found in Jewish law (halachah), or in particular its *Mishpat Ivri* subdivisions, and to compare them with the modern legal system in Israel.* This comparative study shows that at times these classical halachah concepts are almost identical to those of today, and often they provide a basic concept of law far simpler and far clearer than those in contemporary use. Modern theories use concepts which are at times arbitrary and ill-defined in operation. For example, how much should one be compensated for loss of a hobby, such as not being able to play a sport any longer?

The material will be reviewed by order of each of the five payments.

* Periodically we shall refer the reader to the excellent description of the Israeli legislation in this area by Tedesky, Englerod, Barak and Chesen, *Dinei HaNezikin — Torat HaNezikin HaKlalit* (Magnes, Jerusalem, 1977), for additional background material (Hebrew).

Chapter I

BODILY DAMAGES — THE FIVE PAYMENTS

Introduction

One who bodily damages another is obligated according to Biblical law to five types of payments, each one compensating for a given aspect of the damage. These categories of payments are found in scattered sources in the Bible, and their definitions and details are found in various discussions and decisions throughout Rabbinic literature. The laws were deduced from the Bible by the Rabbis through the use of legal interpretive tools called "The Thirteen Principles of Interpreting the Bible";[1] other laws stem from logic and from precedents taken from earlier Rabbinic enactment.

The payments are:

1) Body damage (*nezek*)[2] is the compensation for financial loss as a result of the economic loss of ability to earn a livelihood (either partial or total), that is, loss of earning capacity.

1 The thirteen principles through which the Torah is interpreted are found in the introduction to the Midrash, *Sifra Debei Rav*, or *Torat Cohanim*, in the *Beraita of Rabbi Yishmael*. See M. Elon, *HaMishpat Halvri*, part II, chapter 9, especially p. 270 and following, for explanation and illustration; for further bibliography, see Rackover, *Otzar HaMishpat*, p. 16–21.

2 *Note*: The italicized parts of the following citations from the Bible are the exact sources of the various payments. The order of the various payments follows the order of the payments as listed in the Mishna and not the order of these payments as found dispersed in the Pentateuch. The variants between the two orders is explained by Rabbi David Pardo in his commentary to the Mishna, *Shoshanim LeDavid*, to *Baba Kama*, Chapter eight, Mishna one. The first payment in the list is the damage, because "this is the main one", i.e., the largest of the payments. Afterwards we list the pain because pain is integrally tied up with the damage. Next follow the healing process because healing is equated to the loss of work-time in the Talmud. (and *shevet* is also comparable to the damage, see anon in text — M.S.). Shame is left for the end, as it is the least prevalent, due to the necessity of intent for obligation.

2) Pain (*tzaar*)[3] is the compensation for the physical pain caused by the injury.
3) Healing (*ripui*)[4] is the payment for the doctor, drugs, tests, hospitalization, etc.
4) Loss of work-time during the healing process (*shevet*),[4] that is, temporary loss of income, resulting from the injury (loss of work days due to the injury and the healing period).
5) Shame (*boshet*) [5] is the compensation for the shame and embarassment suffered by the injured party by reason of the damage.

These concepts will be defined and discussed below. In contradistinction to modern practices in many countries of the world, the tortfeasor makes all these payments to the injured party alone (i.e. according to "civil law" concept only). We do not find punitive payments such as a fine paid to the government, or in cases where the tortfeasor is sued or punished according to criminal law, though such possibilities (e.g. imprisonment) exist within the framework of halachah.

Bodily damage — Levit. 24:19,20: "When one causes a damage to his neighbor, as he has done so shall be done to him: a fracture for a fracture, *an eye for an eye*, a tooth for a tooth. As one causes a damage to his fellow man, so shall be done to him".

3 *Pain* — Exod. 21:22–25: "When men shall strive and they shall push a pregnant woman and her children shall be born, and there will be no disaster (to the woman), he (the tortfeasor) shall surely be punished, as the husband of the woman shall place upon him, and he shall pay in equity. And if there will be a disaster (to the woman), they shall pay a soul for a soul, an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, *a burn for a burn*, a wound for a wound, a bleeding wound for a bleeding wound".

4 *Healing* and *loss of work-time* — Exod. 21:18-19: "When men shall strive, and a man shall strike his friend with a stone or a fist, and he shall not die but fall to sickbed, if he gets up and walks about outside on his cane, the striker shall be free, *only the loss of his work time he shall give and heal shall he heal*".

5 *Shame* — Deut. 25:11–12: "When men shall strive together, a man and his brother, and a wife of one shall draw near to save her husband from the hands of his assailants, and she shall send forth her hand and grasp his privy parts, *you shall cut off her hand*, you shall not have pity".

A Comparison with Modern Legal Systems

In this section, we shall briefly survey the classical halachic system, in comparison to modern systems, but the full treatment is reserved for later. The division into the five types of payments found in Jewish law does not exactly coincide with the "classes of damage" (*avot haNezek*) found in the Israeli legal system and also the British, from which it was taken. The Israeli system of today differentiates between types of compensation by the following types of loss:

a. Pecuniary loss, which can be further subdivided into:
   (1) loss of ability to earn, and
   (2) loss which results from the act of damage itself.
b. Non-pecuniary loss, which can be further divided into:
   (1) loss of life expectancy, and
   (2) pain and suffering, and loss of amenities of life.

The division is technical and the court is permitted to recognize other classes of damage, with a goal of fully compensating the injured party for all damages caused by the accident. Even though there is no exact correspondence between the classes of damage and the five payments of Jewish law, nevertheless one can assume that loss of earning which is found in contemporary law parallels the *nezek* (the damage) and the *shevet* (the loss of work-time) in halachic literature. It is interesting to note that in the modern law the fine distinction between various types of loss is often lost. For example, the *nezek* is the loss of future earning ability on a permanent basis, while the *shevet* compensates for loss of income during the period of hospitalization. Modern law creates no such categories.

Actually, a certain fine distinction of this type does exist *specifically* in the Law of National Insurance in Israel (*Bituah Leumi*), which awards the victims of accidents on the job per day lost and a second payment for "temporary disability" which perhaps parallels the *shevet*; in addition to these, N.I. pays a "permanent disability allowance", which are payments (current payment or lump sum) for loss of ability to work. A clear distinction between loss of earnings and loss of earning potential is also found in paragraph 4 of the Compensation for Traffic

Accident Victims Act (1975). These form the exception to the rule, when viewed against the main brunt of legislation and in particular court decisions.

The outlays stemming from the accident awarded in the contemporary courtroom primarily correspond to the payment for the healing process (*ripui*) found in halachic literature.

The non-pecuniary damages awarded in the British and Israeli legal systems can be identified with the pain and the shame awarded in the halachah, but here the modern legal systems expand the payments to the victim by, for example, delving into an estimation of loss of life expectancy and other factors. These factors complicate considerably the appraisal of these damages. For instance, should one evaluate the loss of earning over the period of professional life expectancy, or that of the original life expectancy (see Tedesky, sec. 359)? The halachic approach defines the compensation payments as a sum of all the component factors. The present use of types of losses as a result of injury allows a certain interdependence between types of payments. Therefore, the compensation is not necessarily equal to the arithmetic sum of all the different components, but may be greater or smaller than the arithmetic sum. The judge can ignore one type of loss, minimize it, or maximize it, according to the given circumstances, in an almost arbitrary manner. It is possible that this very flexibility is one of the factors which make it so difficult for the judges to isolate the components of the damage (Tedesky, sec. 358). In a classic example, we allot compensation for loss of amenities of life, what reasons would there be to add a compensation payment for loss of possible future earning rights? Is it not true that the injured party will not be able to benefit from or derive enjoyment from his estimated future salary, and therefore he has already received his compensation in the loss of life amenities payment (see ibid., addition to sec. 359, p. 903).

In a number of countries, such as the United States, a punitive payment is paid to the injured party in addition to the basic damage payment. This additional payment serves as a precautionary penalty against, for example, the continuation of the production of a defective and dangerous product. We have not found any such fine in the halachah

literature, even though imposing fines is entirely within the powers of the Rabbinic court, as an emergency expedient (*hora'at shaah*; see Encyclopedia Talmudit, article of the same name). However, we do find the court levying a contribution to charity as an atonement for the moral and theological aspects of religious sin involved in causing a damage to one's neighbor (see Encyclopedia Talmudit, entry *Chovel*, 691, and bibliography there).

Lump-Sum Compensation

As we shall see, in the halachic approach there is a lump-sum payment in all cases (even if the estimate is made upon the Jewish servant where the payment differs for every six-year period, see below). With a few exceptions, this approach is typical of the legislation in most countries today. One of the exceptions is in the Israeli Compensation for Traffic Accidents Act (1975), by which periodic damage payments linked to the index of consumer costs are possible, instead of a one-time payment. The experience gained in the application of this law in real life situations is meager, but it seems that to date insurance companies abstain from using this possibility. Periodic payments can also be made within the framework of the social legislation for invalids and victims of work accidents of the National Insurance Program in Israel, and in other countries.

Another deviation from the principle of lump-sum payment is found today in the new Israeli court decisions regarding victims of highway accidents. These plaintiffs are entitled to receive an "immediate compensation" for their maintenance and that of their families for the period of hospitalization, until the receipt of full compensation for all the various aspects of the injury. If an insurance company does not make this payment a fine of double the legal interest is placed on it. The purpose of this immediate payment is to strengthen the status of victims of highway accidents in their dealing with the insurance company, so they will not have to come to compromise quickly and therefore receive a smaller compensation than is just, due to the lack of income during convalescence.

The basic approach in the Israeli law (and the British, the prototype of the Israeli) to payment of compensation is very much like the halachic approach. Indeed the modern court tries to set up a lump-sum appraisal of the damage, and no investigation is made afterwards to determine whether the appraisal corresponds to reality. If it appears, for example, that a victim lived a longer life than was estimated at the time of the court decision, the court will not claim for the injured party (or from his estate) the return of that part of the excessive compensation which he has received. Similarly it will not award additional damages if it appears at a later stage that the injured suffered additional, unexpected losses. The compensations are estimated according to the expected value of an uncertain situation, and not according to the true value which is found in real life (realized value; see ibid., sec. 355). The halachic approach coincides with that of the contemporary court, particularly in awarding the damage (*nezek*) and the healing (*ripui*) payments.

The ways of estimating damage payments according to the halachah will become clear after the presentation of the discussions in the Talmud and the commentaries. We shall now deal with each payment separately, and open with the payment of the bodily damage, the *nezek*.

Chapter II

ESTIMATING BODILY DAMAGE ACCORDING TO THE SYSTEM OF THE MISHNA

Introduction

Today there are two distinct approaches to the estimation of damages due to loss of work ability: According to one approach used particularly in social insurance, compensation is a fixed value, or is based on a formula including at most only partial consideration of individual parameters of the victim. In the other approach, used by insurance companies, compensation is based primarily on the personal parameters of the victim. Doubt however often arises in clarifying the nature of the damage.[6] For example, is the damage done to the work ability in a given profession in which the victim had been employed before the injury or to the ability to obtain earnings from other sources?[7] In this chapter we shall show that halachah sets up rules for payment which combine these two approaches. Further, since halachah appraisal of loss of income and its present value is based on an extinct institution, slavery, and as such cannot be applied today, we shall use Mishna principles to suggest a system which can be applied to modern situations.

The various methods for estimating the compensation payments are found in the Mishna, in tractate *Baba Kama* (VIII:1), where we find, "How does one estimate the damage if one blinds the eye of the other, cuts off his hand, breaks his leg? We view the injured party as if he were a slave sold in the market place, and we estimate how much he

6 Tedesky, p. 598.

7 The Israeli National Insurance, for example, sets a few objective principles for loss of limb, which are based on percentage of medical invalidity, or on a given daily compensation. The insurance company also uses such a system in certain insurance policies.

was worth (before the damage) and how much he is worth now" after the damage. The difference between these two figures is the damage payment.

The principle inherent in the words of the Mishna is that the body of a human being has a certain monetary value, stemming from the fact that he works (or can work), supports himself and gains income. This monetary value of the body has been damaged and lessened due to loss of limb, and we must now determine how much damage has been sustained. The index used for this is the value of the body for physical and other labor, before the injury and after. The difference between the two is the loss sustained by the injured party by reason of the bodily damage, which prevents him from earning his former income (see below). In modern terms we could say that Jewish law follows a concept termed "professional disability".

During practically the entire history of the Jewish people, wherever Jews lived, they always found, side by side with their community, a well-developed slave market. This fact is true not only of the ancient world and the Middle Ages, but also of what are considered modern times, up to about a hundred years ago or less. Let us remember that slavery in the American South was one of the causes of the American Civil War of 1861–1865. On the one hand, the Jewish sages deprecated slavery and overtly expressed negative judgements on the institution.[8] On the other hand the prevalency of the institution of slavery in the non-Jewish world which surrounded the Jewish people throughout the Diaspora and in Israel did not allow the possibility of its abolition. Since

8 For example, the Bible legislates the case of a servant who refuses to go out of bondage at the end of his period of slavery; in such cases, the master is to pierce the ear of the servant against the doorpost of the house with an awl, as a sign of eternal bondage, i.e., until the Jubilee year (see Exod. 2:5,6). The Talmud in *Kiddushin* (22b), explaining why one has to pierce the ear of the servant against the doorpost, says, "God says, the door and the doorpost which were witnesses in Egypt at the time when I passed over the lintel and the two doorposts (that is, at the time of the killing of the firstborn, when the Jewish firstborn were saved), and I said, 'The Jews are my servants' — but not servants to servants, and I took them out of bondage to freedom, and this one has gone and acquired a master for himself, let his ear be pierced in front of them (door and doorpost)".

Judaism was not able to abolish this social phenomenon, slaves were constantly found in Jewish households, if not prohibited by the non-Jewish authorities for anti-semitic reasons. The situation of these slaves was far better than that of slaves in non-Jewish households, as the rights and privileges of servants were well-known, protected and anchored in the Jewish Law. The responsibility of morally and spiritually educating the slave within a Jewish household was similarly of prime consideration.[9] Be that as it may, the availability of the slave market which included artisans and craftsmen gave the rabbinic court an effective appraisal mechanism for establishing the monetary value of a human being or part of his body.

Estimating Bodily Damage in the Talmud

The citation from the Mishna presents the general manner for estimating bodily damage occurring through tort. The pure Mishnaic estimate applies only when the injury befalls one whose work parallels that of a slave, and when the damage is done to a limb upon which his livelihood depends; for example, an agricultural worker who has sustained injury to his hand or leg. When, however, the damage was sustained for example by a student, this type of appraisal is unworkable; obstensibly there is no comparable profession in the slave market. This evaluation might also be incorrect when damage to a limb does not prevent the injured person from practising his profession (e.g., loss of a leg by a diamond polisher, or loss of a leg by a teacher). These questions are dealt with by later authorities.

From the words of the Talmud and its commentators to the above Mishna emerge the system for establishing the basic value of a servant, and the values in certain allied situations such as those we have mentioned above. We shall review this material in the following order: (a)

9 See the article by Assaf, "Slavery and slave-trade among the Jews in the Medieval period", in *Be-Ohalei Yaakov*, p. 223–256, and his sources; see also the commentary of Rabbi Samson Raphael Hirsch to Exod. 12:44, to the beginning of the portion of *Mishpatim* and to Levit. 25:39–55. See also next footnote.

evaluating the damage as a slave when the tort has affected his ability to work, i.e., a person whose profession is dependent upon a limb, as in the case of an agricultural worker; (b) evaluating the injured party as a slave where the damage occurred to a limb which has not caused loss of work capability such as loss of a leg by a diamond polisher, or a teacher; (c) evaluating the damage done to a person who has no profession whatsoever, such as a student or a minor (evaluating the damage according to future expectations).

Discussions in Later Rabbinic Sources

A. Which Type of Slave Serves as the Basis for Appraisal

The question now arises: Which type of slave did the Sages have in mind when they set up the policy of appraisal according to the slave value? The Torah distinguishes between a Jewish slave and a non-Jewish slave (*eved ivri* and *eved cana'ani*). A Jewish slave is a member of the Jewish nation who sells himself to another Jew out of poverty, or is sold by the court into slavery in order to pay his debts; the period of his labor is six years.[10] A non-Jewish slave is a gentile who sells himself into bondage to a Jewish master, or a captive who is sold by his captors into slavery; his period of bondage is until manumission or death.[11] There are divergent opinions as to whether the Mishna's statement, "we view him as if he were a slave" refers to a Jewish slave or a non-Jewish slave.

The opinion of Rashi is that evaluation of the bodily damage is based upon the value of the victim viewed as a Jewish servant,[12] while Rosh maintains that the basis of evaluation is a non-Jewish slave. It follows

10 Exod 21:1–10; Rambam, *Avadim*, Chapter 1. The Jewish servant, however, can pay his owner for the sum laid out in the purchase, before the end of the six-year period, and gain his early release. On whether the non-Jewish slave has the same privilege, see responsa *Binyan Tzion* 2:135.

11 Levit. 25:44–46.

12 The text of Rashi in the Mishna, s.v. *Vekama Hu Yafe*: "As he has damaged him and caused him a loss of this sum, if he wanted to, he could sell himself as a Jewish servant"; this is also the opinion of Nimukei Yosef to the Mishna, *ad loc.* Note that the law of the Jewish servant was no longer

that the value of reparation will be lower according to Rosh than to Rashi. Rosh explains this by saying: "But a Jewish servant cannot be evaluated as a lifetime slave, as this would cause him (the tortfeasor) loss by this (system of) appraisal, since, as a Jewish servant he could have sold himself for (only) six years' and after having regained his freedom could have sold himself for another period of six years . . .".

What Rosh means is that evaluation cannot be based upon the victim's value as a Jewish servant, as this would put an unjust financial burden on the tortfeasor. The total work life of a Jewish servant is based upon the accumulated value of the successive sales for short periods which will amount in the long run to a higher sum than a sale for one continuous period of labor.[13] Thus, the opposition of Rosh to Rashi's opinion stems from the fact that evaluating damage on the basis of the value of the injured party as a Jewish servant is not accurate; a Jewish servant, whose period of labor is only six years, cannot serve as the basis for a lump-sum evaluation covering the entire period of income loss from the injury. Combining the basic sums of numerous six-year periods would yield a relatively higher sum. By analogy, one who buys large quantities of a given material in general will benefit from some sort of a reduction in price, as against the cost of one who buys small quantities. Thus use of a non-Jewish slave, whose work life is one unbroken period, would yield a lower sum. This lower sum is the just figure for the appraisal, and this follows a general principle of tort payments: Whenever two systems of appraising exist, the one yielding the lower of the two sums should be used.[14] Hence, since two systems

in practice at the time of the Mishna. Apparently, Rashi does not mean to say that it would be possible to actually use this mechanism, but he does mean that this is the correct way of appraising the true value of the damage (see also below, footnote no. 15).

13 The commentary of Rosh to the Mishna in the chapter of *HaChovel*, *ad loc.*, according to the supercommentary *Pilpula-Chariftah* to Rosh, *ad loc.* Rosh deduces his point that a non-Jewish slave is meant, from the text of the Mishna, "sold in the market place", as a Jewish servant is usually not sold in public; see *Shoshanim LeDavid* to the Mishna, *ad loc.*

14 This principle is learned from the Mishna: "We evaluate it (i.e., a furrow of vegetables eaten by a neighbor's animal) according to another *field*" (*Baba Kama* 58b). This principle teaches us that if an animal has damaged

for evaluation of damage do exist, that of the Jewish slave and that of the non-Jewish slave, we should use the one yielding the lower figure, that of the non-Jewish servant. So reasons the Rosh.

The decisions of the later rabbinic authorities follow the opinion of the Rosh, as does the final decision in the Shulchan Aruch.[15] It is important to emphasize that according to both of these approaches, the Jewish or the non-Jewish servant, the value of the reparation will vary according to the occupation of the injured party. Thus, one who works in a profession which yields a high income will receive compensation according to his high income, just as an expert slave is worth more in the slave market than a simple slave who has no special skills whatsoever. The Rosh, and after him Rema, in his glosses to the Shulchan Aruch, decide that the estimate is not fixed according to the average slave in the market, but is evaluated according to specific occupation in each case. It is quite clear that the hand of one who pierces pearls, for example, is worth far more than the hand of a simple servant.[16]

a furrow in a vegetable patch, payment will be made according to the value of an individual furrow, taken among the many furrows in the field, and not as a unit taken alone. Note that the value of an individual furrow, taken alone, is more than that of a single furrow among many furrows (e.g., the value of one kilogram of tomatoes among a hundred is far less than that of an individual solitary kilogram). Thus, according to this principle, the reparation for any tort will always be fixed according to the lower of various possible values; we will always adopt the lenient stand towards the tort-feasor.

15 *Shulchan Aruch, Choshen Mishpat*, 420:15, according to the Rosh, ibid., no. 4.
In the light, however, of the stiff arguments raised by Rosh, later commentators have tried to explain the opinion of Rashi in such a manner that he too will maintain that evaluation is done according to the price of a non-Jewish servant; Rashi only intended to explain the *nature* of the damage which was caused by the loss of limb, the victim could no longer sell himself as a Jewish servant; see *Yam Shel Shlomo* to *Baba Kama* 8:1, Rabbi S. Hillman in his commentary *Or HaYashar* to *Baba Kama, ad loc.*, and *Shoshanim LeDavid* to the Mishna, ibid.

16 On the other hand, Rabbi Shlomo Luria in his *Yam Shel Shlomo* code maintains that "there is no difference between all men whatsoever", and the evaluation of any damage will always be fixed according to the indicator

B. Damage Which Does not Cause a Loss of Ability to Work in a Given Profession

Above we dealt with the damage done to a person whose source of income was affected by the tort, when the injured party can no longer practice his profession at full capacity. Is this system of evaluation fixed and exclusive, or will it vary for cases in which the profession of the damaged party was not affected as a result of the tort? In other words, if he did not suffer loss of income as a result of the amputation, will he nevertheless receive some basic sum as reparation for the loss of his limb? This question was dealt with by commentators to the Talmud, both early and later, and it was embodied in the concrete examples of one who works as a pearl piercer (comparable to a diamond polisher of the present time) whose leg was injured, or a teacher whose hand was damaged.

The Mishna's system, again, is that the victim is appraised as a slave, and this estimation is performed for each specific case, according to the circumstances. According to this logic, loss of a limb *not* affecting one's occupation, would not grant him any reparation. Nevertheless, the halachah does award a minimal sum for a bodily damage not affecting income, as a damage has been sustained. Under this system, the payment granted to each and every injured party will not be less than the comparable loss in value of the simplest servant capable of working only as an unskilled laborer. The source for this conclusion is found in the statement in the Mishna, "We evaluate him as a slave", from which we may deduce that in each case, we perform some type of evaluation as a slave. From the unqualified construction of this phrase, it may also

of a slave who knows no work or profession whatsoever. However, this opinion was not accepted by the later codifiers, and in particular *Shach* (the author of the *Siftei Cohen* commentary to *Shulchan Aruch, Choshen Mishpat*) rejects his opinion, stating: "Nevertheless there is no reason in his words, because any way you want to look at it, the damage (of a pearl piercer) is far more than that of a servant who knows no profession" (*Shach* to *Choshen Mishpat*, ibid., no. 3). Incidentally, according to this opinion of the *Yam Shel Shlomo*, certain variable factors such as bodily constitution, age, and the like are considered in the estimation (*Yam Shel Shlomo* to *HaChovel*, no. 11).

be deduced that there is a minimum compensation for each limb, even if the livelihood is not dependent upon the damaged limb. Therefore, according to this concept any damage awards reparation, even though use of this evaluation may yield a sum higher than the "real" loss which was caused to the livelihood of the injured party.

The final decision in the halachah is clear: a pearl piercer will receive payment according to the damages sustained in his livelihood, or at the very least the minimal reparation. And so writes Rema:[17] "If he is an artisan, such as a piercer of pearls, and he (the attacker) has cut off his hand, we evaluate damage according to his profession, but if he cuts off his foot, which does not damage him so much, we evaluate his loss as if he were not a craftsman". R.Y. Epstein in his *Aruch HaShulchan* adopts a similar approach as regards a teacher: "But if he has a profession and his profession is such that even after the damage he is still capable of performing it, such as if he is a teacher and he can continue in his profession after loss of an arm or a leg, or similarly if he was a pearl piercer and has broken his leg, and he is still fit for his profession as he was before breaking his leg, we evaluate the loss of work-time (*shevet*) according to his previous profession; nevertheless we pay him bodily damage (*nezek*) as any other person (who has lost work capability), even though no loss was sustained to his income from his profession".[18]

The minimal reparation approach reminds us of an approach accepted today in accident insurance or personal insurance in which the insurance company will pay reparations according to a set table agreed upon in the policy, in which standard sums are fixed for an injury to the various limbs, usually uniform for every case of injury and for every profession.

C. Evaluating the Damage Done to Children or to a Person who has no Profession

Actually the questions of compensation for a child or for a person who has no specific profession depend upon the previous question, and we have already noted that the halachah obligates a minimum payment

17 *Shulchan Aruch Choshen Mishpat* 420:15, and Rema, *ad loc.*

18 *Aruch HaShulchan* to *Choshen Mishpat*, ibid., no. 20.

even in a situation where the damage has not caused any true loss of actual income. However, in the cases under consideration there is an added factor, that of the possible loss of future income of the minor caused through the damage, as the child could have learned a profession or trade, and earned wages and profits in the future. Consequently, due to his damage he will not be able to study or to become an expert at a certain given profession, so that one could claim that a loss has been sustained in future income. Basing himself upon that principle of tort payments wherein we are to adopt the system most lenient to the tort-feasor, Rabbi Shlomo Luria concludes that we do not evaluate any damages on the basis of uncertain future income, "that he will be able to learn, to profit and to gain wages".[19] Rather, all evaluations are to be based upon present status, and since at present a child or a student has no profession, the evaluation of a damage will be according to the system of minimum reparation, as described above.[20]

What about a merchant, who does not work at any type of a livelihood based upon a constant, stable income, but at times has good luck and makes a good profit, and at other time perhaps less fortunate; how would we evaluate the loss of his income?

According to the reasoning of Rabbi Luria, we are not to estimate according to the amounts which he could have earned, because trade is not stable and fixed — today one may make a profit, tomorrow fortune

19 *Yam Shel Shlomo* to *Baba Kama*, Chapter 8, no. 8: "It appears that we do not evaluate any loss of work-time, except for the work at which he is presently engaged; but loss of time in work (also bodily damage, based upon a profession) which he could have earned and profited we will not evaluate; who knows if he will be successful? This is not a clear case of loss". According to this system, the evaluation will be according to the base of the present work and not on the base of the future income; perhaps he will gain more wages in the future than those forming his present income. See also *Yam Shel Shlomo*, ibid., no. 11.

20 We have found no opinion dealing with this question other than that of Rabbi Luria. However, let us remember that the market value will reflect the state of the education possessed by a given slave, as a more learned slave is presumably worth more in the market place than an unlearned slave. Would not a college professor bring a greater sum on the slave market than an uneducated menial servant?

may turn and he may lose; therefore we evaluate the merchant as a simple slave sold in the market. However, in general the opinion of Rabbi Luria is that we do *not* take into consideration the individual differences of the victim in his work or profession. This opinion was not accepted in the halachah; we do evaluate the individual cases, according to the profession of the damaged party. Apparently, according to the final codification in the halachah, a merchant would be compensated according to the market value of a slave who is a good merchant, if his ability to trade has been damaged through the tort, and if not, according to the market value of the simplest slave. A child or student would similarly be compensated.

D. Payment of the Bodily Damages Leading to Loss of Marriage Prospects (Pgam)

Another topic which is dealt with in connection with monetary loss through bodily damage is the loss of the potential to marry sustained by the victim because of the tort. The Mishna deals with this topic in connection with the question of payment due to a virgin who has been raped. This payment is called *impairment* (*pgam*), and it is classified as bodily injury (torts).[21] The index for fixing the monetary payment for loss of virginity, according to the Mishna in *Ketubot*,[22] is also based upon the slave market. A master who wants to please and encourage his slave to serve him well, will take pains to marry off a charming slave girl to this servant. The price of a slave girl varies on the market. A great

21 Rashi to *Ketubot* 40b, s.v. *Pgam*: "Impairment is bodily damage, which is evaluated also as other types of torts". Besides the monetary standard fine fixed for an act of rape — see Deut. 22:28,29, and Exodus 22:16 — the rapist is also obligated to pay part of the other payments normally incurred by a tortfeasor, according to the nature of the damages caused by his act, and these are shame, pain and bodily damage. The bodily damage payment for the loss of virginity is called in the language of the Talmud *pgam;* see *Encyclopedia Talmudit*, article *Ones* (the second). Other bodily damage caused by the attack will be paid according to the criteria of a slave girl sold in the market, as usual, according to the loss in the profession or work capacity.

22 *Ketubot* 40a: "We consider her as if she was a slave girl sold in the market; how much *was* she worth and how much *is* she worth".

difference is found between the value of a virgin slave and between the value of a non-virgin slave. This difference between the market value is the estimate for the loss of virginity due to the attack. And thus writes Rambam:[23] "Impairment — according to her beauty: we view her as if she were a slave girl sold in the market; how much is she now worth as a non-virgin and how much was she worth now as a virgin, as a master would like to buy a virgin slave girl for his servant whom he wants to benefit and do well."

E. Psychological Damage (Chersho)

A much discussed question in modern courtrooms is that of psychological damage resulting from accidents, and fixing a fitting reparation for this "loss". In the halachah we find a parallel to this situation in the law of the deaf-mute (*cheresh eleim*). While deaf-mutism is usually associated with physiological damage, in the halachah we find that the law treats deaf-mutism as equivalent to psychological damage. According to the Talmud, one who causes deaf-mutism to another is obligated to pay him his entire value, i.e., the victim is considered totally unfit for continuing in his profession, in spite of the fact that only two of his senses were impaired.[24] The reason for this is found in Rambam, as he is no longer fit for work, *at all*",[25] and, as Rabbi Menachem HaMeiri explains: "No one will take such a person for any type of labor" [26]. Even if the injured has a profession and is capable of continuing in this profession after deaf-mutism, a certain reparation must be paid to him for the loss of hearing, since "there is no work in the whole world which does not involve speech with other people".[27]

Actually the law of the deaf-mute in the halachah ranks with that of the mentally incompetent (*shoteh*). In general, the deaf-mute mentioned in the halachah is classed with the mentally infirm in all legal cases;

23 Rambam, *Naarah Betulah* 2:6.

24 *Baba Kama* 91a: "If he has made him a deaf-mute, he gives him his entire value".

25 Rambam, *Chovel U'Mazik*, 2:12.

26 Quoted in *Shitah Mekubezet* to *Baba Kama* 85b, s.v. *Chersho*.

27 *Aruch HaShulchan* to *Choshen Mishpat*, ibid., 32.

e.g., he is not liable for all positive commandments found in the Torah, therefore, "he gives him his entire value".[28] On the basis of this law, Rabbi Yaakov Chagiz, the author of the *Halachot Ketanot* responsa collection, concludes that one who causes his fellow man to enter into the state of mental infirmity or insanity, will also pay his entire value, i.e., full damages.[29] Thus, psychological damage is considered in the halachah as a true damage which entitles the damaged party to reparation according to the appraisal mechanism outlined above, i.e., on the basis of partial or total incapacitation in his profession (or to some sort of a minimal payment).

According to this principle, any act which causes a total or partial loss of senses, hampering or negating the functioning of the damaged party in his profession, will obligate the tortfeasor to pay, according to the percentage of disability in following the profession. Similarly, one who

28 See for example *Shulchan Aruch Yoreh Deah* 1:5, where it is stated that the deaf-mute is not allowed to act as a ritual slaughterer (*shochet*), and in the *Pri Megadim* super-commentary *ad loc.* (*Siftei Da'at* 22) we find: "If one cannot hear and cannot speak, he will be classed with the mentally incompetent, and the reason is not because he has no chance to learn (i.e., if he was born a congenital deaf mute), because even one who *was normal* and became a deaf mute will be classified as such".

29 Responsa *Halachot Ketanot* 2:52. On the question of a deaf-mute who has learned to speak and to "understand" in a special school or institution, we can find much material written during the past hundred years or so, and the material is summarized in the article of Rabbi Yechiel Yaacov Weinberg, "A deaf-mute who has learned to speak, as to obligation in commandments", *Shanah ve'Shanah*, 5725, p. 125–128. In the final decision of halachah we find varying opinions. Some grant the deaf-mute who has learned to speak the status of a legal personage, others do not. "Those who do not consider deaf-mutism as a organic disability of the brain . . . feel that the natural incompetence of the deaf-mute is because he has no one from whom to learn. This disability may cause a lack of true knowledge; even if he learns to speak in a school, it is only an arbitrary type of speech; it is only copying movements of normal speech organs. Such type of speech does not take him out of the category of a deaf-mute . . .". There are those who maintain a deaf-mute who has regained speech in a school may be classed as a normal person and thus leave the category of deaf mutism (p. 128). Also see Rabbi J. David Bleich, "Status of the deaf-mute in Jewish law", in The Jewish Law Annual, II (B.S. Jackson, editor), Brill, Lieden, the Netherlands, 1979, p. 187–193.

blinds his fellow man in both his eyes, will most likely be obligated to pay the full value of the person.[30]

Summary of Evaluation of Bodily Damage

We may now summarize the halachah system of evaluating the payments for bodily damage. While the system is based upon the use of a slave as an indicator, we can learn from this system, concepts, principles and implications which can be formulated in terms which are prevalent today. The following are the chief features of the system:

a) The evaluation of the bodily damage is reckoned on a lump-sum basis, which evaluates loss of income to the victim during the period of work expectancy (a slave sold in perpetuity). Reparation is awarded also for psychological damage sustained by the damaged party (*chersho*) and also for a loss in marriage prospects (*pgam*).

b) The amount of the income of the victim will determine the amount of the reparations, based upon his profession.

c) Reparation is mandatory for any loss of limb, even if no true damage was done to the income of the victim, and at very least a certain minimal sum is to be paid (based on the worth of the least desirable servant sold in the marketplace).

d) The halachah adopts a lenient position towards the tortfeasor in any evaluation of torts, and in this vein also Rabbi Shlomo Luria decided that payment be made according to the current situation with no view towards possible future occurrences.

This use of the market value of the victim as if he were a servant, frees us from all the modern evaluation questions, such as the question of the present value of lost cash flows, establishing the basis of reparation for loss according to the gross or net income of the victim, linkage to price or wage index or to stable foreign currency, etc. The market value determines the true value of the damage, and the market value per se includes all these various factors.[31]

30 *Halachot Ketanot*, ibid.

31 The question of cumulative damages, that is damages inflicted on a number of limbs, is not a difficult one, and the *Aruch HaShulchan* summarizes this

Today's judge or legislator, who does not have the market value of the servant available as an indicator, has great difficulty in ascertaining the value of a damage to given limb. The approaches which are in practice today attempt to fix a period for which one has to pay damages on the basis of specific personal factors of the injured party. Alternatively they could base themselves upon statistical averages or actuarial equations (see Tedesky, sect. 363). Among others, reparations today are ascertained according to factors such as the size of the family of the victim, the number of dependents he has and their ages. In the halachah we have found no hint of such factors, and apparently the damages are fixed solely according to the individuals' status.[31*]

The cases found in the Mishna and Talmud reflect an economic situation less complicated than that found today. The modern socialistic milieu leads to a wage figure that includes many more dynamic factors than those included in the past. In the halachah the market value in the slave market solved the vast majority of questions.

question as follows (see *Choshen Mishpat* 420:35): "... However the difference between these is not very great; for both bodily damages and for loss of work-time, there is no difference between a single (total) evaluation, and between an evaluation of each limb individually, as in each evaluation we evaluate how much money has been lost until all the limbs together are added up ... and in bodily damage and in loss of work-time, there is not even a small difference, because eventually we evaluate how much the total value has been depreciated for each individual limb taken by itself", that is, the total sum is equal to the sum of each individual limb taken by itself (his source is the Sema in the name of the Tur, and Rema, ibid., in paragraph 26).

31* Or, the other hand, we find a case wherein one has sent a hired agent on a business venture, and the agent was killed while in the course of the journey, even though the principal of this agent has no liability whatsoever for the death, nevertheless the author of the well-known *Nodah BeYehudah* responsa collection (I, *Orach Chaim* 34) recommends that the principal pay a grant to the orphans as an atonement for the fact that death has occurred to their father, albeit indirectly, by the actions of the principal, as the principal has only appointed the agent, who accepted the appointment of his own free will. This sum however derives from a moral consideration rather than a monetary one according to law. See also *Sha'arei Teshuvah* to *Orach Chaim* 603:1, and *Piskei Uziel BeVaayot HaZeman, Choshen Mishpat* 47. If the family of the victim is poor, while the one who causes the death is

Because of the lack of an objective market value (the slave market), a modern legal system is forced to base itself upon an assorted array of principles of evaluation. It often makes use of an evaluation of the loss of work-potential by estimated disability rate, as ascertained for the victim by doctors. Here many questions are likely to arise as to the relation between the rate of medical disability and the actual rate of loss of earnings. At times, one may be the victim of a slight physiological injury, while its economic repercussions are likely to be quite severe, as may be the case of a white collar worker who has sustained injury at an advanced age (see Tedesky, sect. 361). Modern law accepts at times physical invalidism according to medical standards as an indicator of loss of income, because this is the sole objective basis available, as for example, in evaluating injury done to a child. But through recognition of the difficulties inherent in this indicator, the judge or legislator is often likely to deviate from this base. For example, the National Insurance Law of Israel allows a certain amount of flexibility within a rigid framework based upon the percentage of medical disability (e.g., through a committee empowered to award larger reparations). The law, then, does recognize the unfair consequences that this approach is likely to create.

wealthy, it is possible that we can obligate the tortfeasor to make a payment deriving from the laws of charity, under which the court can force charity payments. "The court used to coerce and administer corporal punishment until he gives that which he has been estimated as capable of giving, they go to his property in his presence, and take from him what is necessary to give" (*Shulchan Aruch, Yoreh Deah* 248:1). See also *Seridei Esh* 3:88.

Chapter III

EVALUATING THE OTHER PAYMENTS

Introduction

As already mentioned, besides the payments for bodily damage (*nezek*), there are four additional payments which compensate for other aspects of the tort, and these are pain, medical expenses, loss of work time, and shame. In the cases of non-pecuniary damages such as shame or pain, devaluation is difficult since no funds have been expended. The trend in the world and in Israel today is to set up fixed standard sums or guidelines which do not take into consideration the individual conditions of each case.[32] We shall investigate these payments in the halachah, one by one.

Pain (Tzaar)

Halachah awards compensation for pain, and this term refers specifically to physiological pain, rather than mental anguish which is also currently referred to as "pain".

32 Evaluating the compensation for non-pecuniary damages such as pain or shame, is a most difficult problem for the legislatures and the courts in many countries. In the United States for example, modern laws, such as insurance for victims of highway accidents through the no-fault approach, try to limit the amount of compensation for this type of damage, or to suggest uniform objective principles. Even modern Israeli legislation, such as the Law for Compensation of Victims of Highway Accidents 1975, tends to set up a compensation according to standard rules. The non-monetary damage will be evaluated only as a function of "percentage of invalidism" and of the number of days of hospitalization. Halachic sources use a far simpler system, tending to award a just payment on the basis of the individual case, as a function of the individual, his way of life, his bodily constitution and his economic condition, rather than an arbitrary system.

The Talmud estimates the payment for pain by the following method: "We estimate how much a man would give to amputate his hand, decreed (to be amputated) by the government, by sword of by a drug".[32*] Thus, we are to ask one who has been sentenced to amputation by the government (e.g., the Roman authorities in Israel, during the Mishnaic period), what sum he would be willing to pay in order to have the amputation performed under anesthesia, painlessly, rather than to carry out the decree without anesthesia. This sum, then, is the payment for pain associated with bodily damage, and represents the translation of physiological pain into monetary terms.[33]

In estimating pain, the Rambam distinguishes between two cases:
a. Pain associated with loss of limb ("pain with bodily damage", *tzaar bimkom nezek*), which is the pain suffered by the injured in consequence of a tort associated with bodily damage such as loss of limb.
b. Pain not associated with loss of limb ("pain without bodily damage", *tzaar shelo bimkom nezek*), which is the pain inflicted upon the damaged party through a blow or the like, where the blow has not led to loss of limb, or to any other permanent injury.

This distinction drawn by the Rambam is learned from the Mishna [34] which deals with pain not associated with inury, "Pain: He has burned him, either with a spit or an iron nail, even on his fingernail, a place which does not cause injury; we estimate how much a similar person wants to receive to undergo such pain".

The Rambam [35] explains this mishna quite simply. The court esti-

32* *Baba Kama* 85a (the Mishna *ad loc.*, VIII:1, does not discuss pain associated with bodily damage).

33 The Sema (= *Sefer Meirat Aniyim*) in *Choshen Mishpat* 420:18, explains that in truth the tortfeasor should have had his hand amputated as punishment for his deed, but the Torah has leniently switched his punishment from corporal to monetary. Therefore the estimate should be made as if the King (in Heaven) has decreed upon him, the tortfeasor, cutting off his arm. How much would he then be willing to pay to switch the decree to one of amputation under anesthesia?

34 *Baba Kama* 83b (VIII:1).

35 Rambam, *Chovel U'Mazik*, II:9: "How much is the pain? It is all according to the victim. There is one who is soft and very delicate and wealthy, and were they to give him much money, he would not undergo (even) a little

mates how much money a similar individual *would request* in order to suffer such a degree of pain. It is quite clear that the value for pain is different for each individual, according to his way of life and his bodily make-up; one person may be indifferent to pain and physical suffering, while another cannot tolerate even a small amount of physical pain. One's financial status also enters into this reckoning. Thus according to the Rambam pain not associated with injury is estimated differently than pain associated with injury. The element of governmental decree is lacking. Pain together with amputation is based upon outlay funds by the damaged, rather than his request for payment.

Rosh[36] disagrees with the Rambam on the question of pain not associated with injury, which according to the Rambam is to be decided purely according to the personal parameters of the injured party such as wealth, bodily structure, way of life, etc., without taking into consideration of the element of duress resulting from a governmental decree. To the Rosh, if we were to use the system of Rambam, it would be impossible to estimate the value of the pain, as "all that a man has he would give for his soul" (Job 2:4; the implication is that one would give all he has to save himself from pain and suffering). Thus, according to Rosh, in order to save one's self from physical pain, one would gladly pay a fortune; but arriving at a just and fitting sum using this concept is impossible. Rosh on the other hand maintains that we should use the very same system which we find for pain in place of bodily damage, that is how much would a person who has been sentenced to undergo burning of his fingernails with a blazing spit be prepared to pay in order not to undergo this pain. The difference between Rosh and Rambam is in the following: According to Rambam the sum is based upon the *income* a person would demand to undergo such pain, while Rosh evaluates the sum according to the *outlay* a man would be

pain. There is also a man who is a worker and strong and poor, and (even) for one zuz would undergo much pain; according to these considerations we estimate and award the payment for pain".

36 Rosh to *Baba Kama,* Chapter VIII, no. 1: "But pain not associated with injury . . . we will never estimate how much a man wants to take to undergo such pain, 'all that a man has he would give for his soul' (Job 2:4), and

prepared to pay in order to prevent undergoing such pain. The sum according to Rambam would be far greater than that of Rosh, as a person would demand much more money in order to undergo pain than the amount he would pay out of his pocket in order to nullify the decree. Rosh therefore is consistent in his opinion, outlined above, in evaluating torts; i.e., we must always choose that system which is most lenient for the tortfeasor. According to Rosh, the principle of evaluating pain is identical under all conditions, whether for pain associated with bodily damage, or pain not associated with bodily damage.[37]

A. Pain of Healing

A second question, in connection with the payment for pain, is dealt with in a later period. Does the payment for pain compensate only for that suffered at the time of the commission of the tort, that is, the pain of that moment and that moment only? Or perhaps should we also include compensation for the pain experienced by the injured party during the healing process, as this pain is also a direct consequence of the act of tort? On this point we find a number of opinions, summarized in the Tur:[38] "... Rabbi Yitzchak (= Ri, the famous Tosafist) explains that when we evaluate pain, we evaluate only the pain at the time of the act of tort, but later continuing pain is not compensated. However, Rabbi Meshulam wrote that we pay all (pain, including that of healing) and this is also the conclusion of my father, Rosh." The decision of the Tur, then, follows his father, Rosh, that extended pain,

there is no value from such an estimate, but we estimate according to one who is under decree by the government to have his nails burned by a (heated) spit, how much he would give not to have this pain performed to him, and this is an easy estimate".

37 Incidentally, according to Rosh the Mishna does deal with the question of pain not in place of damage, within the general framework of pain, as no difference exists between the two categories. The difference was created, in truth, only by Rambam.
In *Tur Choshen Mishpat* 420:17, both opinions are quoted with no decision between the two, while in the *Shulchan Aruch* the system of evaluation is not dealt with at all (ibid., paragraph 9).

38 *Tur,* ibid.

i.e., the pain of the healing process, is to be compensated. We can surmise that the evaluation of this pain will be ascertained according to the very same principles laid down above for pain at the time of the original commission of the tort, either according to Rambam or according to Rosh, each according to his own opinion.

B. Comparison with Modern Law

Modern law deals at times with a distinction between pain and suffering on the one hand, and loss of amenities of life on the other. This includes a larger area than is included in the halachic decisions. First of all, halachah awards compensation only for pain and not for mental suffering or the like and, secondly, halachah does not recognize loss of amenities or the pleasures of life. In Israeli court decisions, loss of amenities is a part of the pain and suffering, but if loss of amenity has occurred without any suffering — for example in a case of permanent loss of consciousness — the court will recognize loss of amenities as a separate category of damages (see Tedesky, sect. 351). British law fixes the non-pecuniary damage according to the loss of ability to maintain a normal form of life, including the ability to enjoy and even to suffer, in various situations. Therefore, even one who has lost consciousness will be entitled to compensation, as will an adult who has begun to act as a child and feels delighted in such a condition (ibid., sect. 368). The compensation according to this approach will be different for each individual according to his specific condition, much as we have found in halachah decisions. However, the basis for reparation in modern law is far broader, greatly expanding the concepts of loss of amenities of life. For example, if in the wake of the damage the injured party will no longer be able to participate in his hobby (a football player who has lost a leg, for example), he will receive a compensation higher than another victim who has not lost his hobby (a chess player who has lost his foot; Tedesky, sect. 367), so that the compensation varies from individual to individual. Modern legislation, then, reflects a trend to extend the right to compensation far more than is found in Jewish law (loss of a hobby is not pain and is not a true damage in the halachah). In doing so, however, modern law quite clearly opens the path for profuse and prolonged litigations and difficulties of evaluations; the modern judge certainly is confused by the manifold difficulties inherent in such an ill-defined system of evaluation.

Israeli law today fluctuates between the approach of British law (according to which loss of the ability to suffer is also awarded compensation), and that of another approach whereby non-pecuniary loss is evaluated according to the loss of happiness and pleasure which has occurred to the victim (Tedesky, sect. 368, p. 614). The second approach reminds us of the approach of the halachah, in which, for example, one who has lost his consciousness has not suffered pain and presumably is not entitled to this compensation under Jewish law.

British and Israeli law today recognize another type of non-pecuniary damage which is close to the halachah concept of pain, i.e., loss of life expectancy. In general, loss of life expectancy is evaluated according to the average life expectancy in the population, though special circumstances may have to be taken into account, for example, a person is in an exceptionally good state of health, or in a very low state of health (Tedesky, sect. 369). This compensation is given in addition to the compensation for loss of income. Halachic sources do not specially treat this type of compensation, as this factor is classified as a monetary loss (*nezek*) and will be automatically compensated for in the market value of a slave. This type of damage payment is liable to create many problems, as it is evaluated together with other types of damages; first, because of a loss of the additive feature in ascertaining the compensation, and second, because of the confusion of concepts in awarding compensation for mental anguish (what distinguishes it from the normal compensation for pain and suffering?). If the compensation comes to prevent recklessness with the life of fellow men, this would create a type of punitive aspect in the compensation which does not belong in the law of torts (Tedesky, sect. 369).

Healing (Ripui)

Evaluating the compensation for healing expenses does not present

any specific problem. The payment is intended to cover doctors' bills, drugs, special diet, tests, various types of treatment, and the like, for which the injured party must lay out funds in the wake of his bodily injury, and this sum is repaid to him by the tortfeasor. However, in the Talmud we find discussion on the question of effecting the payment: Does the court estimate the expected medical costs at the very onset of the healing process, for the entire process, and set up a given sum which the tortfeasor is to pay in a one-time manner at the very beginning of the treatment? Or does the victim have to present the tortfeasor with bills or receipts for each individual medical expense, at the time of its occurrence, so that the payment will be made in stages. In short, is the payment to be according to a normative statistical average table for a given treatment or condition, or according to the actual expenses. In a beraitah quoted in the Talmud[39] we learn: "Five sums are estimated and paid immediately — healing, and loss of work time until he is healed"... etc." Rashi explains: "That is, the court must estimate how long the (victim) will be laid up because of his illness, and obligate this one (the tortfeasor) to pay him immediately for all his healing and loss of work time, and special diet which is necessary for his recovery". That is, the healing costs, like the other four types of payments, are evaluated *a priori* and paid immediately to the victim in a one-time payment, on a normative basis.

According to this system, the court evaluates at the time of damage a sum necessary for curing the victim and this sum will be paid by the tortfeasor to the victim immediately. The final decision in the *Shulchan Aruch*[40] is as follows: "If his (the victim's) illness is prolonged beyond the estimated time, he (the tortfeasor) does not pay anything further. And also if he (the victim) is cured immediately, we do not deduct anything from that which was estimated". Therefore according to the final statement of the halachah, the healing payment is an average which will be paid as above in an *a priori* one-time manner, according to medical norms. This sum is final, and any deviation of the healing process

39 *Baba Kama* 91a.

40 *Choshen Mishpat* 420:18. See also *Encyclopedia Talmudit*, article *Chovel*.

from the norm, whether for good or bad, will not change the amount.

Another point: According to the Talmud, the tortfeasor is obligated to pay whether the claimant suffered permanent bodily damage or whether the damage inflicted created a temporary condition, for example, "he gave him a drug to drink, or he has anointed him with a potent drug" (whereby there is no loss of limb, but a condition requiring healing has been created). Even in these two cases the tortfeasor will pay for the healing.[41]

Compensation for medical expenses is of course recognized today in the Israeli and the English legal systems, both using an approach similar to that of the halachah. The compensation is on the basis of estimating future medical expenses, and is paid as a one-time payment *a priori*. Understandably, the case law found in these areas reflects contemporary economic conditions arising from the present day work situation, and deals with such questions as expenses laid out for altering the housing structure for the needs of an invalid, such as widening the doorway to allow passage of a wheelchair, moving to a house with an elevator, employing domestic help in the house, and so on (see Tedesky, sec. 365). In the halachah, we do not find discussions of these questions and it is not clear if they would be considered part of the concept of bodily damage, as a servant who sits in a wheelchair for example is worth far less in the market due to his limitations and special needs, than a servant who has no such special requirements.

Loss of Work-Time (Shevet)

Loss of work time can be understood as a payment which compensates for those days that the injured party could not work due to his injury, work being understood as any type of work whatsoever. The end of the period of *shevet* is then the date when the victim is capable of returning to any type of work. This definition brings us to the following question:

41 Ibid. Remembering that which was said above regarding psychological damage, we perhaps may conclude that even for psychological damage the tortfeasor will be obligated for payments for psychological or psychiatric treatments, if this will be necessary as part of the healing process.

Does not the definition of *shevet* coincide with the definition of *nezek* (bodily damage), as both the payment for bodily damage and the payment for loss of work time are compensations to the plaintiff for loss of wages resulting from the tort?

The Mishna explicitly deals with this question, as it explains the nature of the *shevet* payments:[42] "*Shevet* — we view him (the injured) as if he were a watchman of a melon patch, as he has already been given the value of his foot and the value of his hand". According to to the explanation of Rashi,[43] the meaning here is that since the funds for the permanent loss of limb have already been paid within the framework of the *nezek* payment, the *shevet* payment compensates for the partial loss of livelihood during the period of healing only. Consequently, this payment will be evaluated according to the income of the simplest type of laborer, i.e., one who guards a melon patch. This is the simplest, least demanding type of labor which existed in the period of the Talmud. It is not payment according to the income of the victim before injury, when he was capable of any type of labor. However, according to this definition, if the injured is capable of returning to his original profession, such as a teacher who sustained an injury to his hand, the *shevet* will be paid according to his wages as a teacher, depending on the actual loss which was sustained during the period of the healing. Indeed this is the decision of Rosh:[44] "... It appears that all this (the evaluation of the *shevet* as if he were a guard in a melon patch) deals with average people who do not have any special profession. But if he had a special skill, we evaluate him according to the work which he is capable of doing after he is healed. For example, if he was a teacher and his hand was amputated or his foot broken, he will still be capable of performing his original livelihood after healing. And similarly, if he was a pearl piercer, he is still fit for his first occupation, and why should

42 See Mishna, *Baba Kama* 83b (VIII:1).

43 Rashi writes: "All the days of his illness, we view him as if he were a garden patch watchman and award him his daily wage, as he is no longer fit for heavy labor even without the illness, as *his hand or foot has been amputated* and he (the tortfeasor) has already given their value".

44 Rosh, Chapter VIII, no. 4, and so in the *Shulchan Aruch*, Rema, ibid., 17.

they then estimate his injury during his period of recuperation as if he were a melon patch watchman?"

In the wake of this system of evaluating the loss of work-time, a basic question arises: Can the plaintiff claim that although he is no longer capable of pursuing his previous profession, he will learn another for which he is fitted, even though handicapped? Must then the tortfeasor pay the work-time loss according to the rate of that occupation, which he will learn in the future, after his recuperation?

Were we to accept this line of reasoning by the plaintiff, we would reach an even more radical conclusion: If the victim had no profession whatsoever, and consequently the compensation is minimal, he would nevertheless have the right to claim that in the wake of his injury he has decided to learn a certain profession, so that now he claims *a priori* for the loss of work according to the "new" profession he will acquire in the future.

R. Shlomo Luria, in his *Yam Shel Shlomo*[45] deals with this question. His opinion is that in evaluating the work loss, we do not take a possible future livelihood into consideration, as there is no certainty that he will actually pursue this livelihood or succeed at it and in cases of doubt no payment is ever made.

Another question: What is the law in the case of loss of work not due to a bodily injury, as for example in the case of Reuven locking Shimeon in a room so that Shimeon could not work? At first thought, Rueven should pay Shimeon according to the accepted rate for the profession in which Shimeon is engaged. This case is quite comparable to loss of work due to bodily injury when the victim can return to his original profession. In such cases the tortfeasor does pay for loss of work according to the going rate before the bodily damage. Nevertheless, in our case this is not true. In practice, the worker does not get his full salary, but is paid an adjusted sum, less than his full salary. The Rambam explains the system as follows:[46] "If he has not caused loss of limb but (the victim) has become ill and has taken to bed, or his

45 *Yam Shel Shlomo, Baba Kama*, Chapter VIII, no. 11.

46 Rambam, *Chovel U'Mazik*, 2:11.

hand has swollen and will eventually return (to its original state, i.e., this is a case of work-time loss not due to loss of limb), the worker will receive payment for work-time loss for each day as an idle laborer in that profession from which he is idled".

According to Rambam's codification of this law, payment will be made according to the rate of an idle laborer. Tur explains the reckoning of this rate as that sum which is obtained after subtracting from the full salary of the laborer, a factor reflecting the fact that the worker has not actually labored, but has enjoyed a "vacation", albeit enforced and perhaps against his will, during the period of convalescence. A worker is presumed to be willing to forgo a part of his salary for a vacation with pay. Thus, says the Tur,[47] one who works at a difficult job for low wages will agree to accept a far smaller compensation for idleness; the benefit of not having to perform a difficult job is worth the loss in income. On the other hand, one whose job is not demanding and whose wages are good, will request a higher sum for his idleness. The rate of pay is therefore relative, varying from job to job; but the worker will never receive the full salary. Justice demands the "vacation" factor be taken into account, and as the proverb would have it: "One who bears a load is not the same as one who is unburdened, nor is one who sits idle, as one who performs work".[48]

Why is *shevet* due to injury evaluated according to the full salary, with no adjustment for vacationing? Why are we more lenient in the estimate of work-loss with no injury than in estimating work-loss with injury?

Here we also find the explanation of R. Shlomo Luria in his *Yam Shel Shlomo*:[49]

Two systems of appraising loss of limb exist within the halachah:

a. How much would one demand *a priori* in return for amputating his limb?
b. How much would the loss of limb effect the value of the victim on the open slave market?

47 *Tur, Choshen Mishpat*, 420:17.
48 *Baba Kama* 85b.
49 Ibid., no. 14.

The first system of appraisal would lead to a higher sum, since one would obviously demand a large sum for willingly sustaining such a damage. The second operates to the disadvantage of the amputee, as this sum, reflecting the market value, is far smaller than that yielded by the first system, that of *a priori* agreement. Since a loss has been sustained by the victim by use of the second ("slave") system — which indeed is the system used in the Mishna — enough detriment has already accrued to the plaintiff, so that no further leniency towards the tortfeasor should be allowed in the evaluation of the work-loss. On the other hand, work-loss not due to permanent injury will be evaluated according to a reduced rate in favor of the tortfeasor, as is usual in the payments of torts (see above). According to this explanation of R. Luria, the estimate of work-loss not due to permanent bodily injury should have adjusted for the vacation factor, but the overriding principle of leniency towards the tortfeasor was followed.

To summarize, work-time loss is estimated at three different rates:

a. Work-loss due to permanent bodily injury, wherein the plaintiff has lost his original profession. This rate is based upon a vegetable patch watchman.
b. Work-loss due to permanent bodily injury which does not cause loss of the original profession of the plaintiff. This rate is according to the full salary (or income) of the original profession.
c. Work-loss not associated with bodily injury. The rate is that of the idle worker, adjusted for the vacation factor.

Shame (Boshet)

Halachah awards compensation for shame associated with bodily injury or for insults. Thus, halachah recognizes the right to compensation not only for bodily injury but also for personal injury. The principle of shame is clear and well defined, but in translating the principle into practice difficulties arise. Consequently, the rabbinic courts and/or the Jewish community enacted standard fines for prevalent acts of insult. The material, opinions and topics involved are profuse; herein we

shall deal with only a small portion; the reader is referred to the Talmudic Encyclopedia article, *Boshet* ("shame"), for the details.

Reckoning the payment for shame is mentioned in the Mishna,[50] which states: "Shame — it is all according to the one who shames and the shamed". Rashi explains that there is no one single rate for the shaming. The estimate is made according to the character and honor of the tortfeasor and the victim, and varies from case to case. However, the Mishna already mentions a number of types of shaming for which a single standard sum has been fixed:[51] "One who yells at his friend, gives him one sela. R. Yehudah in the name of R. Yose HaGalili says: A maneh (100 zuz). If he slaps his face, he gives him 200 zuz. (A slap with) the back of the hand, 400 zuz. If he pulls his ear, pulls his hair, spits and the spittle reaches (the person of the shamed), pulls his garment off him (in public), uncovers the hair of a woman in the market place (modesty demands that a married woman cover her hair),[52] he gives him 400 zuz". Thus, the principle found in the Mishna is that the sages fixed a standard compensation rate for each type of insult or act of shame, with no exceptions. The other incidents of shaming are to be compensated for by the principle of "the shamer and the shamed", as above.[53]

Rashi sets up a scale of payment for shame according to the magnitude of shame involved; on the theory that the shame caused by a simple person is greater than that caused by an honored person. Rambam concurs in this opinion. However, differing opinions exist: "But some of our rabbis have explained that the most extreme shame comes from an average person. A lowly person's shaming is not considered, as his words are not reckoned with, (while) the shame of a person great in Torah or in wealth, or honored among the people, is not so

50 *Baba Kama* 83b (VIII:1).

51 Mishna, *Baba Kama* 90a (VIII:6).

52 Mishna, *Ketubot*, II:1. See also Encyclopedia Talmudit, article *Dat Yehudit*.

53 See *Shulchan Aruch, Choshen Mishpat*, ibid., paragraph 41, and Encyclopedia Talmudit, article *Boshet*, as diverse interpretations exist for this Mishna. These sums are quite high, as according to the accepted figures for the time of the Mishna, 200 zuz is considered a minimal yearly income, and is the line dividing the poor from the middle class — see Mishna, *Peah* VIII:8.

great because at times the opposite is true; from such a person it is worthwhile to receive shame, but from an average person the shame is greater and the words are considered, and are not to his honor".[54]

Do we also find in the case of compensation for shame a distinction between shame with bodily injury and shame without bodily injury? R. Meir Halevi writes:[55] "It is logical that for shame without bodily injury we estimate how much a similar person would want to receive to be so insulted by a person such as the shamer". According to this opinion, there is no difference between the compensation for this shame and that of shame with bodily injury. Apparently, the reason stems from the fact that shame depends purely upon the shamer and the shamed, without reference to resulting bodily damage whatsoever.

It is noteworthy that in the Mishna the examples of shame are almost all physical assaults on the person of the shamed, while in the post-Talmudic halachic literature, the shame is generally of the nature of verbal insults, and the fines are standard sums fixed by the communities.[56]

The statement by Tosafot[57] that for the scar resulting from an assault added funds are to be laid on the tortfeasor is explained by R. Moshe Zakut[58] as follows: For the embarassment caused to one having to bear a scar from the wound, the tortfeasor must compensate with additional funds, according to the law of shame (*boshet*).

54 *Aruch HaShulchan to Choshen Mishpat*, ibid., 29; see also *Tosafot Yom Tov* to *Ketubot* III:7, in the name of the Ran. The citation for the Rambam is *Chovel U'Mazik* 3:1.

55 *Yad Ramah* of R. Meir HaLevi to *Baba Kama* 88a.

56 See Encyclopedia Talmudit, ibid.

57 Tosafot, *Baba Kama* 85a, s.v. *LeDamin Yeteirim*; see the discussion in the Talmud *ad loc.*

58 Ramaz, cited in *Shoshanim LeDavid* to *Baba Kama* VIII:1, s.v. *Tzaar;* differing opinions are also quoted.

Chapter IV

THE SITUATION IN THE POST-MISHNA PERIOD

In the period after the Mishna, we do not have any rabbinic court decisions whatsoever in which bodily damage (*nezek*) was awarded according to the system found in the Mishna, not even one can be referenced! This, in spite of the proliferatioin of sages, academies of learning (*yeshivot*), rabbinic courts, and in general the amazing vitality and development of the halachah, as evidenced by the thousands and tens of thousands of texts produced.

The explanation for this lacuna is found in the Talmud, wherein it is stated: "All (types of payment) that are based upon estimates as slaves are not collected in Babylonia",[58*] i.e., any payment based upon the slave market evaluation is not to be imposed in Babylonia. "Babylonia" actually symbolizes the status of the whole post-Mishnaic period, so that the Talmud really means to say that today we do not judge according to the laws of *nezek* at all.[58**]

Rambam gives us the background for this statement in the Talmud (see his commentary to the Mishna, *Baba Kama* VIII:1): "You should know, that one of the principles of our religion is that we do not collect *fines* in Babylonia, and similarly in all the other lands, except for the Land of Israel alone; as God has said 'to the godly judges shall you draw near' (Exod. 22:8). But we have no judges called 'godly judges' except for the judges ordained in the Land of Israel, as it is explained in the tractate of Sanhedrin. All the judges throughout the (Jewish) world are *agents* of the judges of the Land of Israel; even so they only

58* *Baba Kama* 84b.

58** Other laws are also not in practice today, see below. For more material, see Encyclopedia Talmudit, article *Bet Din*, chapter "In the Diaspora and in the Present Times".

fill their places for matters of frequent occurence, so that the rights of men should not go to ruin. Examples are loans, buying and selling, acquisitions, admissions and denials of debts,... but an animal that has damaged an animal or a man who has damaged a man ... he shall not pay anything, except in a court in the Land of Israel, as these matters occur only infrequently, or cause no out-of-pocket loss ...".

We learn, then, from the words of the Rambam, that the primary authority of the halachah is meant for the Land of Israel, the seat of the Sanhedrin, the supreme council of sages governing the Jewish people together with the king; (see Deut. 16:18–20 and 17:8–13, commentary of Rabbi Samson Raphael Hirsch, *ad loc.*, and Rambam, Laws of Sanhedrin).

Even after the abolition of the Sanhedrin, the sages of the Land of Israel continued to judge according to the monetary and criminal law of the Torah, through the power of ordination (*semichah*) bestowed by a sage of one generation to his successors in the following; the ordination was primarily intended to bestow upon the receiver the right to sit in the Sanhedrin, but it also gave him the right to judge according to the laws found in the Torah. This ordination was abolished during the difficult times in the period of Roman subjugation of the Jewish state. In spite of this, the sages of the Land of Israel did *not* empower the sages of the Diaspora (at that time primarily those of Babylonia, but actually including even those of present-day Israel) to judge according to the laws found in the Pentateuch, excepting only those necessary and basic laws vital for the existence of the society and its economy, and no more.

Actually, Rambam bases himself upon the above-mentioned discussion in *Baba Kama*. Further on in the discussion in the Babylonian Talmud, we find an explanation of this policy. The conclusion is that any litigation dealing with a type of monetary claim which is both common and prevalent, and also involves out-of-pocket loss, can be judged by present-day judges, acting as agents for the ordained of previous generations. Both conditions have to be present for empowering judgment. Since bodily torts resulting in loss of limb are not prevalent, these laws are not to be in use in the present; special problems are

to be solved through communal enactments, or *emergency* powers of the rabbinic court (see below, at length).

Rambam deals with the remaining four payments in present-day rabbinic courts, and decides as follows: [59] "Anything requiring appraisal as a servant, the judges outside of Israel do not collect. Therefore, from one who has caused bodily tort to his friend, the judges of the Diaspora do not collect for bodily damage, the pain and the shame for which he (the tortfeasor) is obligated. But the loss of work-time and the healing expenses we do collect, as these involve an out-of-pocket loss. The Gaonim have laid down this rule, and they have said that in Babylonia there are everyday occurrences of collection for loss of work-time and healing expenses."

Thus, Rambam maintains a tradition stemming from the Babylonian Gaonate, that loss of work-time and healing expenses are to be collected even nowadays, in the post-Sanhedrin period, according to the system found in the Talmud. Rosh[60] and Rashi[61] differ, and feel that work-loss and healing expenses may *not* be collected today according to the Mishnaic system.

In the final codification in the Shulchan Aruch,[62] R. Yosef Karo follows Rambam's opinion, that we do collect work-time loss and healing expenses nowadays, while Rema differs, writing: "I have not seen (judges) practicing meticulously (the estimation of the five payments, including work-time and healing), but they force the tortfeasor to pacify the victim, and *they fine him* according to that which appears to them". According to Rema, then, all bodily torts are judged by the laws of compromise or "pacification" of the injured party, but not according to the exact systems of the Mishna, and all aspects of the tort are included in one lump sum.

As for the total lack of rabbinic court or halachah expert findings

59 Rambam, *Sanhedrin*, 5:10. *Terumat HaDeshen* 2:28 concurs; see also *Terumat HaDeshen* ibid., no. 210, et al.

60 Cited in *Tur Choshen Mishpat* 1:4, apparently according to his commentary to *Baba Kama*, Chapter VIII, no. 2.

61 To *Sanhedrin* 2a, s.v. *HaMevalot*.

62 *Shulchan Aruch, Choshen Mishpat* 1:2, and see *Sema, ad loc.*

according to the system of the Mishna, it would appear that the outstanding rabbis throughout the generations were capable of estimating the loss by use of the slave indicator. However, they did not view themselves as agents empowered by the last generation of Israeli ordained rabbis to decide according to these laws. On the other hand, we have found one opinion[63] which explicitly states that the reason for the lack of decisions in bodily damages on the basis of a slave is because this appraisal requires special expertise, not found today, and thus the system has fallen into disuse. However, the end of the statement clarifies this by saying "because of exercise of power", meaning that since use of the Mishna systems requires experts, we would appear to be using "the great power" reserved for the ordained, no agency was created for such cases. This implies that in practice such experts were available, but were not empowered to judge according to these laws.

One may question the statement of the Talmud, that *nezek* is not prevalent, on the basis of experience: Acts of violence and bodily damage between men are unfortunately all too common. Apparently, the Talmud means to say that while acts of violence unfortunately do occur frequently, loss of limb as a consequence is relatively rare, thus bodily damage is correspondingly rare.[64]

This conclusion raises a second question: May we similarly conclude that in cases of such "infrequent torts", the court simply did not function, that the rule of compromise was applied, and a semi-anarchy was

63 *Perishah* to *Tur Choshen Mishpat* 1, no. 4: "Bodily damage (*nezek*) is different because it requires appraisal as a slave . . . and not everyone is knowledgeable in this evaluation, and it requires great exactitude in evaluation"; see also Ravad, *Tamim Dai'im* 167.

64 *Aruch HaShulchan* to *Choshen Mishpat* 1:3: "Nevertheless, that type of tort which leads to a loss of limb is not frequent, and on this our sages have said that (cases of) man (injuring) man are not collected in Bablyonia as it is not prevalent. Do we not see blows and insults frequently? But causing a permanent bodily damage is not frequent". Today, the situation is different probably due to the technological advancements in industry and transport, which cause accidents. Halachah apparently will not be influenced by this human environmental change; the Israeli ordained sages simply did not empower judgment in such cases. See *Piskei Uziel BeShalot HaZeman, Choshen Mishpat* 47.

found? Was the power of the "present-day" court to administer justice truly lacking? By no means!

In the responsa texts we find many sources dealing with situations involving lack of authority to judge according to the laws of the Pentateuch due to the abolition of the Sanhedrin in the Land of Israel. Among them are the following: Rashba[65] writes about appointing people to the task of punishing anyone who commits a crime or injures: "Not that the halachah says so, but the hour demands it". Any law of the community or of the court enacted for the good of the community or society at that time (*hora'at sha'ah*) is considered "emergency legislation", and the communities are empowered to enact such necessary legislation. And so writes Rosh:[66] "Even though we do not judge laws involving fines (i.e., a fine bearing a fixed sum, either based on the Pentateuch or from Rabbinic enactment, or even *any* type of payment for which the present-day law court has no authority), nevertheless we force him (the culprit) to accept a verdict from the sages of the generation . . . The Torah has handed over the right to judge to the sages, the heads of the generations. It is they who set up legal protections, at times more lenient than the laws of the Talmud and at times more strict, in order to make a fence and a hedge (a protection), for the need of the hour".

In these responsa and others,[67] we see that the sages throughout the generations, in order to prevent communal anarchy and the general breakdown of society, empowered the communal heads or other functionaries to act on the basis of the special power granted the court (or community) for any type of case. This power was used to maintain the general well-being, and not to hamper justice and the public life. The *hora'at sha'ah* policy found expression in the proliferous use of the ban (*nidui*), a type of religious and social excommunication.[68] Thus, in cases of bodily torts the court used the ban as a coercive measure, and banned

65 *Rashba* 7:311.

66 *Rosh* 101:1.

67 *Radvaz* 4:1291 (220), *Maharam MiRutenburg* 4:81, et al. See also Encyclopedia Talmudit, article *Hora'at Sha'ah*.

68 See *Otzar Yisrael*, article *Cherem*.

the tortfeasor until he pacified the plaintiff by "an amount fitting for the latter to receive; only after appeasement, did they remove the ban".[68*]

The "amount fitting for him to receive" is also problematic, since, if there is no expert in estimating, how can such an "amount" be ascertained?

Historically, we find that at the time of the Gaonim the halachah already required the court to estimate a sum of payment for bodily damage ("we estimate a close (approximate) figure"). *However, the court did not publicize* the figures and the amount. The tortfeasor, under the coercion of the ban, had to compensate the plaintiff with a reasonable sum, as a compromise settlement between them. The courts did not intervene, and the amount of their estimated sum was kept secret by them, as a control mechanism over the settlement.

This system was an official enactment of the Gaonim, and the Tur writes as follows: "R. Sherira Gaon has written we have not found the ban (in use in tort cases) in the Talmud, except for forcing (the tortfeasor) to remove his source of damage — the Talmud in *Baba Kama* 15b states that we place the owner of an animal causing damage under the ban until he kills the injuring beast; thus the ban in the Talmudic period was used only for removing the source of damage, but not for enforcing payment for the damage caused. The later day sages and the heads of the academies (i.e., the Gaonim and sages of Babylonia in the period immediately after the Talmudic era) decided, in the light of the great damage resulting from lack of imposing fines, to pass an enactment to ban the tortfeasor until he appeased the victim approximately. It is not the practice to be exact and say so-much and so-much have we fixed upon you to give in such and such a manner; nor have we awarded the complainant so much and so much, as this would be construed as coming under the laws of fines, but we estimate approximately and we do not reveal it. We ban the tortfeasor until he satisfies the plaintiff. Then we see how much he (the tortfeasor) is willing to pay him. If it is close to the secretly estimated sum which is in their heart, but the victim

68* *Shulchan Aruch, Choshen Mishpat* 1:5.

refuses to accept it, we tell him (the plaintiff) that we (the court) have no power to ban (the tortfeasor) any further, and we remove the ban from him. If the (sum) is far from that which is in their minds, they do not remove (the ban) until they approach that sum".[69] Clearly, then some sort of appraisal mechanism was in existence and used for centuries for evaluating monetary loss in case of loss of limb. What was this mechanism?

It appears that the slave market, which existed in proximity to the various Jewish communities throughout the Diaspora, served as the basis for indicating the monetary value of limbs, and despite the fact that the rabbis and rabbinic court judges were capable of using the Mishna system, they did not want to appear of the same caliber as the Israeli ordained "godly" judges of antiquity. The longings for the return to Zion and the re-establishment of the Jewish State in the homeland, Israel, according to the justice and tenets of the Bible, permeated even the dreary daily grind of the Diaspora rabbinic court.

An interesting question, illustrating this situation, is found in the following responsum by the late rabbi of Jerusalem, R. Tzvi Pesach Frank:[70] "A case occurred in which in the midst of a dispute, one person struck his friend and knocked out his teeth. The victim claimed from his friend that he should pay him for the expenses that he will have to pay to a dentist for false teeth, in place of his broken teeth. I have pondered the question of what is the law for these outlays. Is this included in healing expenses which are collected nowadays according to the opinion of the Rambam, or perhaps is it included in bodily damage which is not collected in the present time?"

"I have found in the *Or Zarua* (commentary) to *Baba Metziah* no. 262, that he assumes as a general principle, that any healing which does not automatically return a person to the original state of health, but still requires the outlay of funds for complete healing, is included in

69 *Tur Choshen Mishpat* 1:11, *Shulchan Aruch* 1:5, and *Sema, ad loc.* no. 17, and Encyclopedia Talmudit, article *Bet Din*, Chapter "In the Diaspora and in the Present Time".

70 *Har Tzvi* (commentary) to *Tur, Choshen Mishpat* 58, summarized in *Noam* 4, 5721 (1960), *Sha'ar HaHalachah*, p. 18.

bodily damage and is evaluated as a slave, and therefore is not included in healing. Here we have it explicitly from one of the early sages (*Rishonim*), that his opinion is quite simply that such cases are *not* classified as healing, but are included in evaluating bodily damage, which is not collected at the present time".

Chapter V

THE PROBLEMS CONNECTED WITH EVALUATING BODILY INJURIES AT THE PRESENT TIME

Introduction

During the last two hundred years, we do not find the interesting and prolific decisions in monetary cases that we found during the previous centuries; the reason is simple. With the emancipation of the Jewish populations of Christian Europe from their legally enforced residence in the ghettos, and their entrance into non-Jewish life in the various countries, Jewish litigants preferred to turn to non-Jewish courts, even though recourse to these courts was prohibited by Jewish law. This practice stemmed from two basic phenomena: The first, litigation before non-Jewish courts represented one of the steps towards total assimilation of a part of the Jewish population into the non-Jewish peoples of Europe. The second, the power to enforce court decisions was from this period on found only in the hands of the secular authorities, while the Jewish community lost the power to enforce its legislation and court decisions. The ban, the ancient and powerful enforcement medium within the closed community, lost all significance in an assimilating society. From this period on, then, the rabbinic responsa and court decisions concentrate more and more on topics in "pure" religious law, such as the sabbath, dietary laws, prayer, etc., while monetary law forms but a small percentage of the responsa collections.[70*]

While the abolition of the ghettos is obviously the prime factor, the gradual wane of the slave market is perhaps a secondary factor for the law of torts. At any rate, we do not find in the contemporary rabbinic

70* See Elon, *HaMishpat Halvri*, Pt. I, Chapter 2.

decision, even those of the sovereign State of Israel, even one decision involving evaluation of bodily damages. Apparently, all litigation was handled by the non-Jewish court (in Israel, in the secular civil court). On the other hand, this phenomenon is not really surprising, as in all the post-Mishnaic period we have not found any decisions at all, though faint references and hints to evaluations were found.

Our goal in the remaining part of this work is to suggest a system for appraising bodily damage corresponding to that of the Mishna, adapted to the economic conditions prevailing today. The criteria are those inherent in the Mishnaic system of the sages, but the structure and applications are those of today, without the presence of the slave market. Or, in simpler terms, how would a rabbinic court of the Mishna period award damages according to the 20th century economic structure of society?

As emphasized above, no actual rabbinic decisions are available in this area, but we shall attempt to apply the system of the Mishna, according to present day halachic parallels and the spirit of the law. The main question is the bodily damage, as the other payments can be more or less appraised in the manner of the Mishna, even under present economic conditions, according to the rules outlined earlier. The lack of the slave market affects primarily the evaluation of bodily damage.

Since we do not have explicit decisions in bodily damage cases, we can only suggest what the rabbinic authorities would have found in such cases by analyzing their opinions in corresponding questions. In the following sections, we shall not research these topics in depth and at length as in the previous sections, but we shall cite selected primary sources and/or the final codification of the halachah as it is found in the *Shulchan Aruch*, as well as in later texts or even works of contemporary authors. The reader can research these topics at greater depth, through these sources.

The Factors

A. The Base for Estimating Bodily Damage

As shown above, even though the authority to operate the appraisal

system of the Mishna was gone, an appraisal mechanism was in practice, though the sum remained secret. This strange arrangement was inaugurated to emphasize the total dependence of the Diaspora rabbinic court on its Israeli ordained predecessor; the appraisal system in effect was most likely based upon the slave market as seen above.

Evaluating loss of limb on the basis of the market value of a slave depended on a number of variables, such as the profession and talents of the victim (the difference between a simple slave and a pearl piercer), age, etc. Actually, even today these factors can serve as indicators for fixing a sum for compensating loss of limb. Thus, loss of income for an apprentice learning a given profession is not the same as loss of income for an experienced professional in the field, nor the loss of income of an unskilled laborer as that of an expert. If the expertise and the experience, the qualifications and the age, work to establish the value of a slave, i.e., his "market price", then today, even without the slave market, we can still apply the principles inherent in the slave's value according to the concepts obtained in the present day work market. We could, for example, consider the plaintiff's rank on the wage scale and the statistics for the presumed average rate of advancement in his profession, etc., and from these factors we can obtain the sum of the damage created by the loss of limb. We assume of course that a loss of income was caused by the injury; otherwise the victim will be compensated according to the simplest worker in the economy, at the bottom of the wage scale. We can obtain the expected work life of the injured party from statistical tables, and from this we can estimate the future income during this projected period (factors of uncertainty and present value are involved and these will be discussed below).

We have not found in halachah sources specific discussion of the actual economic factors involved in appraising bodily damage, such as what is the wage base in arriving at the loss. This problem can be quite acute today due to the complicated structure of the wage payment, including the various additional payments (car allowance, special job conditions, etc.). This problem is particularly complex in Israel. Lately it was raised in connection with the wage base for computing pension and handicap allowances for the Histadrut pension funds. In the spirit

of things, the final sum actually paid into the hands of the worker, including all increments and allowances, will be the base sum for estimating loss of income.

B. Gross or Net

According to the system outlined above, we compute the income of the worker for the period of his expected work-life in his field, and this sum is the base for his compensation. However, in view of the income tax systems in vogue today, we must ask: What is the true monthly income of the worker: (1) the gross sum before taxes at the source are deducted, or (2) the net sum finally paid into the hands of the worker?

Can the worker claim that his gross pay is his true salary, and the deductions, e.g., the various tax payments, are his personal matters with the government and the various institutions? If he can make an arrangement with them, this is his personal windfall, and the tortfeasor has no right to hold back these sums from him. On the other hand, the tortfeasor will claim that the true income of the damaged party is that sum which is actually paid into the hands of the employee, and any sum deducted at the source is not considered at all. The real loss sustained by the worker is the sum paid into the hands of the worker, and any deduction at the source effectively is as if that amount was not earned at all. Hence it maybe argued that the real loss caused as a result of the loss of ability to work is the net take-home pay of the worker each month, since this sum is what the worker must live on.

Historically, this question did not arise in halachah literature, as the market value of the slave was a real figure, the loss in market value due to the injury was the true loss, and in general, wages and taxes are a relatively new concept in history. In the past, the practice was to levy property, produce or poll taxes, rather than to tax income directly. Incomes taxes were put into practice for the first time in England in 1798, and in America only as an emergency measure during the Civil War; it was not until 1913 that income taxes were levied in the United States. Thus we can expect to see questions such as gross or net wages only in late contemporary rabbinic literature.

The halachic authorities of the present generation tend to view the

net sum, after taxes, as the true income of the employee, the various deductions at the source not being considered a part of the income. This can be deduced from decisions found in the realm of income tithing for charity (*ma'aser kesafim*).

What is *ma'aser kesafim*? From antiquity, the Jewish people have been accustomed to set aside a tenth of their income for charitable purposes. The prototype for this practice is found in the law of tithing agricultural produce of the Land of Israel for the poor.[70**] Throughout the generations, many different questions on this topic were posed to the rabbis. Among the questions posed to the rabbis of our generation, we find the following, parallel query: Is one to tithe the gross income figure, before the deductions, or the net? R. Moshe Feinstein of New York, the leading halachic authority of America, finds that the net sum is the true figure of the income, the deductions are not included in the income of the worker, since the worker never sees these sums at all.[71]

R. Yitzchak Weiss of Jerusalem concurs with this principle and the reasoning of the true salary figure, though differing in the particular case of the tithe; due to the importance of the precept of charity, one should voluntarily tithe the gross sum as an act of special piety, even though one is not truly obliged to do so by the strict letter of the law.[72]

In view of this, the sum to be paid to the victim should be based on the net income sum, the true figure for his income. The net sum, however, is that sum which remains after income deductions at the source; other taxes, such as city, auto, property and the like, are not included in these deductions, as these are to be classed with all other debts and expenses incurred by the wage earner paid out of his income.[73],[74]

70** Deut. 14:22–29. Much discussion revolves around the question of whether the obligation for the income tithing is of true Biblical nature, of Rabbinic enactment or only a custom of the pious; see *Ahavat Chesed*, Chapter 18, p. 37, and *Ma'aser Kesafim*, Chapter 1, p. 1 and 6.

71 *Igrot Moshe, Yoreh Deah* 143.

72 *Minchat Yitzhak* 5:34:9, cited in *Ma'aser Kesafim*.

73 *Igrot Moshe, Minchat Yitzchak* and *Ma'aser Kesafim*, ibid.

74 Apparently, R. Baruch Rackover, rabbinic court judge in Haifa, would agree to this conclusion. Although he brings points to each side of the *net-gross* question of the *shevet*, these deliberations are specific to *shevet;* see *HaTorah VeHaMedinah*, IX-X, 5718–19, p. 180–184.

The modern legal trend is to award reparations on the basis of the gross income figure, even though this one-time income of the injured will be tax exempt.[75]

C. The Present Value and Uncertainty Problems

Two contemporary economic factors present in evaluating payments over a period of time remain to be discussed. These are the *present value* and the *uncertainty* principles. The present value is the discounted value of a future income or of the sum of the discounted values of a series of future payments. This assumes a stable price level and a stable economy. Or, in simpler terms, what is the present value of future income? *Without* taking into consideration the possible changes in the basic value of the given currency, such as those stemming from inflation, devaluation, etc., is the one-time reparation payment made to the victim equal to the arithmetic sum of the foreseen future sums? In other words, isn't cash money paid into hand today worth more than an equivalent sum due some time in the future? If the victim receives his reparation today, he can invest the money today and receive income from the investment.

Civil law, according to present-day practice, does introduce such a present value factor, by discounting the future expected income.

The second element, uncertainty, will also be illustrated by a question: How are we to calculate the element of risk involved with future wage payments, when these future payments are not at all certain? The base

75 *Dine Nezikin*, sect. 362, p. 606.
In many countries the question of the taxation policy on tort payments has been raised. Logically, it would appear that if the payment made to the victim is based upon his net income, the government should not tax this sum, or the victim will sustain a true loss. If the government should impose a tax, it would stand to reason that the tortfeasor should pay the gross sum, rather than the net. We have not investigated the exemption from taxes of the tortfeasor, which usually depends upon governmental fiscal policy. See Y. Kahane and A. Yoran, "Compensation for Loss of Income and its Taxation — A policy Analysis", National Tax Journal, June, 1979, Washington, Volume 32 (2), p. 117–126.

for calculating the damage is the future expected income of the worker; but is it certain that the worker would continue to earn according to his present-day salary? Is there not present an element of risk, of uncertainly, as to the expected income of a victim over a long period; perhaps he will not live out this expected period, he could lose his job, etc. (a similar reasoning was described above in relation to evaluating the damage of a minor).

The late Prof. Shimshon Breuer of Tel Aviv University has dealt with these questions ,and has even come up with mathematical equations for making the necessary estimates. We shall not deal with the actuarial side of his work, but cite the halachic background from his article as necessary for the topic at hand.[76]

Sources for the present value and uncertainty factors are found in the first Mishna in *Makkot*, which deals with the topic of a certain type of perjuring witnesses (*aidim zomamim*) who testified against Rueven. They then became convicted of perjury by a second group of witnesses who testified that the first set of witnesses "were with us" (*imanu hayitem*) at the very same time that they claimed Reuven has committed his crime (or did not pay his debt). The Biblical punishment for such a class of perjuring witnesses is "you shall do to them as they have schemed to do to their brother (Reuven)", i.e., a type of poetic justice (Deut. 19:19). Thus, if they have schemed to cause a 200 zuz loss to Reuven, they will be fined 200 zuz, etc.

Present Value

First we shall deal with the *present value* consideration, and quote from the first Mishna in the tractate of *Makkot*: "We testify against so-and-so (Reuven), the he owes his friend a maneh (= 1000 zuz), and must pay it thirty days hence, and he (Reuven) says ten years hence; we estimate how much one would want to pay in order to have a thousand zuz in hand, whether (for a period ending) thirty days hence, or ten years hence".

76 S. Breuer, "HaBituach BeEretz Yisrael Lifnai Kom HaMedinah, UbiMei HaTalmud", *Chod HaChetz* 6–7, Elul 5725, September 1965, p. 11–20.

Prof. Breuer: "The Mishna quite clearly states that we estimate the difference between the *present value* of a thousand zuz sum to be repaid within 'thirty days' hence, and the present value of that very same figure to be repaid 'ten years hence'. The theoretical estimate of this difference is quite simple to calculate.

True that the Mishna does not tell us how to calculate this present value. However, even today it is doubtful whether it is possible to sell a claim whose payment date will be in ten years according to an acturial estimate, as the buyer (of such a claim) will make his own calculation, without recourse to an actuary (see anon for methods of estimating).

Rambam codifies this case in *Hilchot Edut* 21:2 'They testified against this one (the borrower) that he owes so-and-so a thousand zuz with stipulated payment in thirty days, and the borrower says 'five years after the thirty days', and they (the witnesses) were found to be perjurers. We estimate how much one would want to give to have a thousand zuz in hand for a five-year period, and they pay this sum to the borrower (as their fine), and so in all similar cases.'

Thus, as we said above, this estimate is not different from the method of estimating that is in common use today".

We shall deal with the actual system of estimating below.

Another source for the concept of present value, not quoted by Prof. Breuer, is in connection with evaluating prepayment of a loan. In *Shulchan Aruch Choshen Mishpat*,[76*] we find a decision in the following case: Reuven has lent money to Shimeon, Reuven claims that Shimeon is obligated to pay the debt today, while Shimeon claims that the payment of the loan will be only in ten days. If Reuven brings one witness who can testify to his side of the case, Shimeon has to take an oath to offset the testimony of the sole witness.[77] Thus, the testimony of a solitary witness has the power to obligate the accused to take an oath, i.e., to

76* *Choshen Mishpat* 73:2.

77 The background: On the verse in Deuteronomy (19:15): "One witness shall not stand against a man for any crime and for any omission, for any transgression which he will transgress, etc.", the sages expound: " 'For any crime and for any omission' — for a punishment he shall not stand, but he shall stand for enjoining an oath' "; see Rambam, *Toain VeNetan* 1:1.

deny the claim of the witness; but does not have enough legal weight to obligate the accused to pay. A minimum of two witnesses is required to cause a verdict of payment.

This oath to deny the testimony of a solitary witness is required of an accused only if he denies a monetary claim (*kefirat mamon*). In the case dealt with in *Shulchan Aruch Choshen Mishpat*, we are speaking only of putting off the date of payment (assuming of course no inflationary or other money changes, as above). In such a case, the borrower does not deny the existence of the debt as testified by the witness; he admits the figure; he only claims that the period of the payment falls at a later date. If so, apparently there is no monetary denial involved to require an oath of Biblical origin. Why, then, does Reuven have to take an oath of Biblical source, according to the decision of the *Shulchan Aruch*?

Two important halachic authorities deal with this question. Maharit maintains that a denial and withholding of true monetary nature are involved, as the money paid today to the lender is of greater value than the very same sum to be paid ten days later. Earlier payment of the monies is literally worth more.[78] A more explicit explanation is found in the responsa of R. Yosef (= HaRi) Ibn MiGash. He classifies this case as a denial of a monetary claim, because the borrower prevents the lender from using these monies during the ten-day period, as the lender could have invested the funds for profit during the ten days. *Prevention of such a profit* is considered a denial of monies for which the borrower is obligated to take oath in the case of a solitary witness.[79]

78 *Maharit* 2:105 (cited in *Ketzot HaChoshen* 73:2): "It appears clear to me that which we have learned in the first chapter of *Makkot*: 'We testify, etc.', we see that this is considered a monetary matter".

79 *HaRi MiGash* 71, writes: "One who had upon him a debt to his friend, and claimed that the time of payment on the certain day has arrived, is obligated to take an oath of Biblical source that the time of payment has not arrived, according to the claim of the lender who has said to him (the borrower), I have money with you now, and the borrower said — you have nothing (coming) from me at the present. This is a denial of a monetary claim. Are we not dealing with a situation wherein a business venture could chance upon him with this very money? If the borrower has not brought it, and keeps him the lender back from buying (the merchandise of his choice)

According to both of these two sources, it appears that prepayment has a certain value which can be ascertained. The logical conclusion is that for a one-time payment, a deduction of some sort must be made for the advance payment of monies, which the victim can now invest and gain profit during this period. As for the exact formula for arriving at this figure, we find two different approaches. The first is that of the Ritva,[80] who evaluates the loss intended by the perjuring witnesses in the following manner: How much of the debt would the lender be willing to forego if the borrower would be willing to pay the debt now, rather than at a later date? The discounted value is the figure to be paid the intended victim of the false witness. This is really an incentive-for-repayment concept.

On the other hand, R. Yosef Karo, the famous author of the *Shulchan Aruch*, in his *Bet Yosef* commentary to the Tur, follows a different system.[81] To his mind,[82] we should estimate how much additional money the borrower would give to the lender for extending the period of the loan, as during this period the borrower could have invested the money. The sum that the borrower is willing to pay for extending the period of the loan, comparable to paying bank interest on loans, is the sum by which the false witnesses have connived to damage their victim, and it is this sum that they are to pay.

and prevents him from making a profit which would come from it, it is a denial of money for that time. Radvaz also explains the discussion in *Makkot* in this vein; see *Radvaz* 1:84.

80 Ritva to *Makkot* 3a: "They should estimate what (part of the loan) the borrower would pay to the lender if he would pay him now, and what the lender would discount to him, and we subtract this sum, and the rest he will pay to him in order to remove the debt, and they will not cause him loss".

81 *Bet Yosef* to *Tur Yoreh Deah* 160.

82 "We estimate how much he would have given to profit with these monies for ten years, and such will pay the witnesses. And since such and such monies they intended to cause him loss, since now they have testified that he has to give him thirty days hence, if he wants to take a thousand zuz loan due ten years hence, or if he would transgress and take (the funds) from a Jew at interest, he would not give it to him for less than such and such funds, (this sum) they have (intended) injuring him, and such they pay him".

Apparently, the end sum of the payment according to the *Bet Yosef* is greater than that of the Ritva, as Ritva's figure is based upon prepayment, while that of *Bet Yosef* depends upon creating the loan *ex nihilo*, and the cost of creation is greater than that of merely delaying the period of repayment.[83]

Uncertainty

A certain element of risk, of uncertainty, exists for any lump sum payment made in advance for expected future income. In simple terms: Who can guarantee that the injured worker would have indeed persisted in his profession until retirement age, except for his injury? Is there not a possibility of death, illness, invalidism or other events, bringing an end to the worker's productivity? Should we not take cognizance of the uncertainty factor in evaluating the bodily damage payment based upon future income?

In a paper delivered before the National Convention of the Israeli Society of Economics in April 1979, R. Tzvi Ilani deals with the economic value of a certain right or possession whose intrinsic value is in doubt.[84] Quoted therein is a responsum of Rosh,[84*] dealing with the value of negotiable instruments forming part of an estate, wherein the question is the value of these promissory notes. There are also the questions of a delayed time of payment and the uncertainty factor of future payment. Rosh concludes that these various factors do play an important part in establishing the true value of the property to be divided among the heirs.

In another decision, Maharsham[84**] deals with the value of a right to claim in court, which the holder of the claim is willing to forego in return for a cash payment (to be more exact, for reducing his rent).

83 See opinions of HaRi MiGash and Radvaz above.

84 T. Ilani, *Mechir Kenisah LeIskah Mutnait Al Pi HaTalmud VeSafrut HaHalachah*, in *Iyunim BeKalkalat Yisrael* 1979, Bank of Israel, Jerusalem, p. 246—261.

84* *Rosh* 98:7.

84** *Maharsham* 3:210.

Maharsham bases his conclusion on the Talmudic discussion in *Bechorot* 28 of a case wherein one unauthorized to decide did give a decision on a given first born of a "clean" animal. He decided that a certain animal was permitted for slaughter by disqualifying defect. Let us explain. The first born of a clean animal (a sheep or cow — see Levit. XI) is to be given to the priest (*cohen*) who sacrifices it in the Sanctuary or the Temple, and then eats its meat in purity (see Num. 18:17–18; see also Encyclopedia Talmudit, article *Bechor Behemah Tehorah*). A first born who has acquired certain physical bodily defects or blemishes is disqualified for the Temple sacrifices, is pronounced a profane animal, and his flesh is permitted to be eaten by anyone, both priest and non-priest, with no limitations as to purity. Today, without the Temple service, the owner of such an animal keeps it at pasture until it acquires such a defect, and then and only then, is he permitted to slaughter it and eat of its meat, as the lack of the Temple effectively prevents any use whatsoever of the live animal or its slaughter. Only truly qualified rabbinic experts can establish whether a given blemish is indeed disqualifying and permits slaughter for eating. If an unqualified person has given a decision to slaughter the animal for its meat, the meat may not be eaten, since the doubt as to whether the defect is truly disqualifying can now never be resolved. This unqualified person has caused a damage, but it is only of questionable culpability; if the animal would have undergone a competent physical inspection, it is possible that the decision would have left it in the forbidden category, and the meat would still be prohibited, so that the decision to slaughter has caused no damage. Since now, after slaughter and dismemberment, the truth can never be ascertained, the damage caused by the slaughter is of doubtful status. Perhaps a duly qualified expert would also have permitted the slaughter, perhaps not. The doubt is even, of the fifty-fifty variety. In such a case, the sages of the Talmud ruled that the damage payment to be made by the unqualiifed person is to be one half of the value of the animal. *Tosafot* (*ad loc., s.v. Revia*) deduces from this Talmudic source that a piece of property is worth half of its probable market value. This assumes an even likelihood existing in the risk or uncertainty situation. Therefore, concludes Maharsham, we must deduct a certain sum to

reflect the uncertainty factor involved (see Ilani, ibid., for the exact details).

Actually, in the same Mishna in *Makkot* quoted above, we learn about the market value of the *ketubah* (marriage contract) which is by its very nature of a uncertain character (the *ketubah* provides for alimony or maintainance to be paid in case of divorce or if the husband predeceases his wife.) Its value is indeed discounted in calculating damage intended by the perjuring witnesses, who might try to evade a Ketubah payment. This is then an additional Talmudic source bearing on this factor.

From these sources it becomes quite clear that a deduction factor has to be introduced in the computation to reflect the elements of doubt and uncertainty acting, for example, to deflate the market value of the *ketubah.* The value of the *ketubah* depends upon a number of variables, such as the ages of the husband and wife, the duration of time until payment, the state of health of both parties, etc. Thus in tort payments, a certain factor will be introduced to reflect the uncertainty of the worker to receive income until the end of his working career. This factor will be set by the statistics of the profession.

The Value of the Currency

It is well known that the "real" value of money changes from time to time. The inflation found today in Israel and in many countries throughout the world makes doubtful the value of money at any time in the future. (a rise in the value of a given currency can also occur). Must we reckon with fluctuations in the value of the currency and with possible official devaluations in tort payments? For example, a salary of 10,000 Shekel today can be 20,000 Shekel within a year or two, though both sums may be equal in their buying power. Which sum does the tortfeasor pay?

It would appear that the halachah would require paying the debt in today's sums and figures, without any attempt to forecast the fluctuations expected during the fuure work years of the laborer, as the victim will use this money according to the conditions of today.

An example of this can be found in the responsa of Rashba[85] who was asked about a case in which the borrower did not have funds available to repay the lender, so that according to the halachah, the lender can now collect his debt by selling part of the real estate of the borrower. The time was one of war, and the price of land had sharply fallen. The borrower's claim was to take the evaluation base according to the market value in peace time, rather than the deflated wartime worth. The lender of course claimed that the value of the fields should be their present-day worth, for better or for worse. The verdict of Rashba was unequivocal: "They have only their place and time; we evaluate them at the present time". Thus the halachah recognizes the present value of the currency, and not their future projected worth.[86] From the spirit of this decision of Rashba we may conclude that the payment of a debt will be according to terms, rates and prices at the time of payment, so that the suggested conclusion for bodily tort payments is that the evaluation of damages will be according to the figures of the income scales of the profession, at the time of evaluation.

The Manner of Payment

Thus far, we have dealt with the elements constituting the payment figure; in this chapter we shall study the manner of payment, and in particular, two problems: The first is the ability of the tortfeasor to pay, and the second, the question of the value of the currency at the time of payment.

A. The Ability of the Tortfeasor to Pay

How are we to deal with a situation wherein the tortfeasor does not have the funds to pay? This question is quite a real and widespread problem, as the sums involved in torts are usually large, more than the

85 *Rashba* 4:159.

86 Rashba, however, does make the point: 'We don't know when the war will cease", and consequently we cannot appraise the fields on the basis of their future price. This implies that if we were to be quite certain that an inflationary trend would continue, it is possible that the court would take this

average wage earner can muster from his sources of income. It is true of course that today an insurance company usually is involved in such cases, but even insurance companies and their agents have been known to go bankrupt.

The procedure in such a case is found in the laws of collection. The halachah regulates the collection of various debts such as loans, and also those stemming from a great variety of court decisions, including torts. For any debtor who has no ready funds to pay his debt, the court will sell his moveable property (*metaltalin*) to cover his debts. If these are insufficient to cover the debts, the court will sell the real estate owned by the debtor. If these are insufficient, the court can even collect from real property sold to third parties after the debt was created. If the debt is still greater than the return from all these sources, the debtor enters a state of bankruptcy or insolvency, whose procedure is quite different from that in vogue today in many of the contemporary legal systems.

The Talmudic principle dealing with the procedure for insolvency is called "appraising for a debtor" (*mesadrin leBa'al chov*). According to this principle, we estimate the basic living requirements of the debtor, the minimal furniture, clothing, tools of his profession, and the like; and the remainder of his possessions is sold for payment. Halachah forbids any type of corporal punishment or imprisonment for failure to pay, a practice widespread among many nations in the past. The main difference between halachah and the contemporary systems lies in the balance of the debt. This remainder will be paid off from all future income of the insolvent, according to the above appraisal concept (*sidur*), wherein any sum earned by the debtor in his future career is subject to the very same technique, that of subtracting the amount necessary for a minimal honorable existence (furniture, clothing, tools, etc.), the remainder going to pay off the debt until the payment of the very last cent.[87]

rise in face value into account. However, Rashba brings this point merely as an additional proof to his decision; his basic rationale is that in payment of debts we have only the time and place of the given properties, at the payment date.

87 See Encyclopedia Talmudit, *Geviat Chov*. If the debtor dies it is possible

Again, today, this situation is usually covered by the insurance companiest, and insolvency in such cases is a rare phenomenon.

B. Linkage to an Index System

How does one preserve the real value of a sum to be paid in the future, in view of the at times extreme fluctuations in the value of the currency? How is a debtor to pay off a sum over a prolonged period of time, in a manner which will not distort the justice involved in paying the true sum incurred in the damage or debt? How is the court to determine a payment so the recipient will not lose?

The State of Israel uses the economic device of linkage of future payments to a given price index or foreign currency. Is this economic "invention" recognized by halachah, as a means for protecting the value of money? Additionally, if linkage has not been explicitly stipulated, may we assume a tacit stipulation of such linkage? Is a given sum appraised by the court to be automatically understood as linked to some common indicator or stable foreign currency?

A broad discussion of this topic can be found in a survey and summary written by R. Shear Yashuv Cohen, the Chief Rabbi of Haifa.[88] Many opinions are cited in connection with this question. R. Cohen deals with the following two situations:

a. *A loan made with no explicit condition.* In such a case, at the time of payment the lender claims reparation for the loss in value of the given currency, or for price rises which have occurred between the date of the loan and the date of payment. Can the lender demand linked payment? If the borrower refuses, is he to be considered withholding funds not really his? How is the compensation for currency fluctuation to be computed? According to the official rate of exchange of the currency, or according to the market value of basic goods, or some combination of the two?

under certain conditions to collect from his estate; see ibid., *Apotropus*, 124. See also *HeChafetz Chaim* 63, by R. Chaim Palagi.

88 Rabbi S.Y. Cohen, *Pichut VeTissuf Matbea*, in *Torah SheBeAl Peh* 19, p. 64–76.

b. *A loan with a linkage-to-the-dollar of some other indexing clause.* Does such a linkage clause infringe on the prohibition of interest, either of a Biblical or of rabbinic nature, or does it create the appearance of an infringement on the law of interest-taking (*avak ribit*)? After all, the borrower will pay back a nominal sum to the lender, larger than that originally lent. Does not such a stipulation constitute an interest clause, prohibited for both borrower and lender?

The main question is of course the second. R. Cohen concludes that there is no interest element in a linkage clause. The additional sum paid is not wages or payment to the lender for the use of his monies, since he forgoes personal use of the funds for the duration of the loan, but is designed to protect the real value of the funds at the time of loan. If so, this additional sum is not of a usurious nature. As proof, if no increase in currency rates occurs, the borrower will not pay the lender more than the original figure. This conclusively demonstrates the non-usurious nature of the loan.

Further, R. Cohen cites many opinions who view commercial custom as a valid alternative to explicit stipulation, so that any devaluation of currency stemming from the civil law, is considered as a tacitly understood clause between the parties, linking the sum to some standard indicator, so that the lender will be protected against losses due to inflation.

R. Cohen recomends: "It is fitting in order to avoid a stumbling block, that the lender and borrower should explicitly contract between themselves as to their agreement in the event of devaluation or increase in the value (of the currency), and link the venture or loan to some stable indicator, as much as possible".

This conclusion is also arrived at by R. Ezra Batzri, a rabbinic court judge in Jerusalem, in his work on monetary halachah, *Dinei Mamonot*.[89] According to this, it is recommended policy that the court

89 Rabbi E. Batzri, *Dine Mamonot* Pt. I, Introduction to Chapter II, pp. 32–33, and p. 35, paragraph 3,4. See also Rabbi Y. Blau, *Brit Yehudah*, Chapter 20, and Y.Z. Kahane, *Shinui Erech HaMatbea BaMishpat Halvri*, in *Mechkarim BeSafrut HaTeshuvot*, p. 300–348; and E. Bashan, *HaMashbeir HaMedini VeHakalkali BeImperiah HaOttomanit Hachel BaShalish HaAcharon Shel HaMeah Ha-XVI LeOr Safrut HaShut*, Sixth World Conference on Jewish Studies, Jerusalem 1974, Proceedings of the Sixth World Congress of Jewish Studies, published by the World Union of Jewish Studies (edited by Avigdor Shinan), Jerusalem 1977, Vol. III, p. 107–115 (English abstract on p. 417).

set up an explicit statement in their verdict, linking payment to some index, and by thus doing to eliminate all of the problems stemming from an inflationary state of the economy; alternatively, a standard procedure could be set up by the courts, whereby any future payment awarded will be automatically understood as being linked.

SUMMARY

In this study, we have attempted to survey the discussions and solutions to the various questions raised in connection with estimating the value of bodily damage in halachic sources. There is a resemblance between the problems and solutions of this topic as found in halachah, and as found in present-day legislation and court decisions in Israel and abroad. The division of the damages into five types of payments reminds us of the principles of torts found today in Israel. The compensations paid for loss of limb remind us of the reparations paid today for loss of earnings. The payment for loss of work-time (*shevet*) parallels the compensation for loss of income during the healing period. The payment for healing expenses (*ripui*), and the payments of the non-monetary damages, pain (*tzar*) and shame (*boshet*), reflect the compensation for affliction, the loss of marriage prospects, etc. Noteworthy also are the fine distinctions drawn between the various types of damages stemming from the combination of various aspects of the damage, for a single act of tort (pain with injury, loss of work-time due to injury, etc.), which compensate fairly and justly for all aspects of the damage.

In the past there was a mechanism for evaluating the loss of limb, far easier in application than present day conditions, due to the use of the slave market value of the plaintiff before and after loss of the limb. The appraisal was on the basis of a one-time, lump-sum payment, even for prolonged recoveries, rather than periodic payments as has

been suggested for certain modern systems. Halachah takes a lenient position towards the tortfeasor in appraising damages, using the lower base of estimation whenever possible. Among other considerations, no future developments are taken into consideration, e.g., a child might have learned a given profession and achieved a high level of income, except for the injury. Loss of amenities of life, a system difficult to appraise accurately and which leads to drawn out litigation, is definitely not a halachic consideration. Compensation is fixed in halachah on the basis of the individual parameters and variables of the victim (in the case of shame, also of the tortfeasor).

After the period of the Mishna, we do not find court cases dealing with appraisal of bodily damages, as the authority to decide in this field of halachah existed only in the Land of Israel, and was not subrogated to the judges of the Diaspora ("no appraisals as a slave are to be collected in Babylonia"), and this according to the criterion of frequency (bodily damages were not frequent). Solving the bodily damage problems which occasionally arose was left to the emergency powers of the community and the court (*hora'at shaah*), who could enact legislation for regulating the communal good. The later court cases followed a policy of enforcing a compromise settlement. The court acted as a control on the situation by evaluating the true figure according to some formula not explicit in the sources, apparently that of the slave market value. We can only surmise what the approach of halachah to this problem would be today, basing these assumptions on parallel and comparable situations. Such is also the case with questions of present value the uncertainty factor, the fluctuation of the currency and questions of taxing. The results of this research demonstrate a wealth of legal thinking and a sensitive and sophisticated legal analysis of the problems, and concepts and ways of apprasial capable of being utilized today, with a certain amount of adaptation, due to the flexible provisions of halachah.