TALMUDIC AND AMERICAN TORT LIABILITY — A COMPARATIVE ANALYSIS*

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The rabbis have taught: "Those who study only Scripture are scholars of degree but not of high degree. Those who study also the *Mishnah* are scholars of high degree. Those who study [the] *Talmud* also are scholars of the highest degree."[1] What is this writing which is held in the highest regard by the rabbis and has stimulated the minds and hearts of the Jewish people throughout the ages? Essentially, the *Talmud* is a compilation of laws and traditions which have evolved from the *Torah*.[2] Because the laws of the *Torah* were enunciatory in nature and required a great deal of interpretation by the rabbis, a large body of oral interpretive teachings developed. The first attempt to organize and compile these teachings was begun by Hillel in the first century before Christ.[3] This effort culminated four hundred years later with the *Mishnah*,[4] a compilation similar to a restatement of the law.

> The comprehensive commentary on the Mishnah that forms the second and far larger portion of the Talmud is called the Gemara. The Gemara, which word came to denote 'teaching,' explains the terms and subject-matter of the Mishnah; [and] seeks to elucidate difficulties and harmonise discrepant statements . . . .[5]

One of the most surprising things about the *Talmud* is that, although it antedated by two thousand years the legal codes of the great twentieth century civilizations, many of the concepts contained therein are strikingly similar to modern law. Some disgruntled jurisprudents would undoubtedly find in this proof that our modern law is hopelessly archaic;

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[1] THE TALMUDIC ANTHOLOGY 467 (L. Newman ed. 1945); *quoting from Baba Metzia* 206, in 1 SEDER NEZIKIN (I. Epstein ed. 1935) (An order of THE BABYLONIAN TALMUD).

[2] The *Torah* consists of the first five books of the OLD TESTAMENT: *Genesis, Exodus, Leviticus, Numbers* and *Deuteronomy.*

[3] Hillel, a Hebrew scholar, is renowned for his enunciation of the Golden Rule. "Whatsoever is hateful unto thee, do it not to thy fellow; this is the whole *Torah*, the rest is but commentary." I SEDER NEZIKIN, XV (I. Epstein ed. 1935).

[4] The *Mishnah* consists of six Orders: Zeraim, dealing with agricultural laws; Moed, laws concerning festivals and fast days; Nashim, concerning women and family life; Nezikin, civil and criminal jurisprudence; Kodashim, dealing with the sanctuary and food laws; and Toharoth, laws of clean and unclean. The entire MISHNAH has been compiled in one work. H. DANBY, THE MISHNAH (1933).

[5] 1 SEDER NEZIKIN, XVII (I. Epstein ed. 1935).

others would marvel at the brilliance of the Talmudic theorists, who, they would say, fashioned a system so broad in scope and fundamentally valid in principle that it applies as well to the world today as it did to the pre-Christian era.[6]

This comment advocates neither of the above positions but is intended merely to apprise the reader of some of the similarities between Talmudic and American law and to provide a basis for comparative analysis of the two legal systems. Due to the broad scope of the *Talmud,* this analysis is limited to treatment of selected segments of three areas of tort law: (1) strict liability, (2) negligence, and (3) the measure of damages for personal injury.

STRICT LIABILITY

The "goring ox" is a term of art used in the *Talmud* to designate an animal which, while under an individual's control, causes harm to another's person or property.[7] The *Talmud* provides for varying degrees of liability depending upon the animal's propensity to do harm and whether the owner was aware of this propensity. An animal is referred to as *mu'ad,* "forewarned," with respect to acts which it normally does and *tam,* "innocuous," with respect to acts abnormal to members of its species.[8] If, however, an animal, having acted abnormally once, con-

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[6] *See* Auerbach, *The Talmud — A Gateway to the Common Law,* 3 W. RES. L. REV. 5 (1951).

[7] *Baba Kamma* 1, in 1 SEDER NEZIKIN (I. Epstein ed. 1935) (an order of THE BABYLONIAN TALMUD) [Hereinafter cited as *Baba Kamma*]. The *Talmud* also included three other damage causing chattels; the "grazing animal," "fire," and the "pit." Liability for damage caused by a "grazing animal" was based on the owner's knowledge of his animal's eating propensities. For a further discussion of liability for a "grazing animal" *see* 11 CODE OF MAIMONIDES ch. 3, § 1, at 12 (1954). Liability for "fire" in the *Talmud* was based upon the care required of a man in lighting and guarding a fire. If the fire was not an adequate distance away from another person's land so as to prevent the spreading of the fire to his neighbor's land the owner of the fire was liable. If, however, the fire spread, notwithstanding proper care, this was deemed an act of God and the owner was relieved of liability. *See also* 11 CODE OF MAIMONIDES ch. 14, § 2, at 54 (1954). Dean Prosser states the liabiilty for fire as follows: "The American courts . . . have held, in the absence of legislation, that there is no liability for the escape of fire where the defendant was not negligent." W. PROSSER, LAW OF TORTS § 76, at 518 (3rd ed. 1964). The "pit" is a Talmudic symbol which represents any dangerous obstacle or condition that is fairly immobile. Under this concept, once an owner of a tangible object discovers that it has become a public obstacle, he has a duty to remove it and, if he fails to do so, he is liable for any harm caused thereby. In Simonsen v. Thorin, 120 Neb. 684, 686, 234 N.W. 628, 629 (1931) the Supreme Court of Nebraska expressed this rule in modern terms:

> [W]hen one engaged in the lawful use of the highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said obstruction is calculated to do injury to travelers upon said highway. *The negligence in such a case consists of having placed an obstruction upon the street and leaving it in such a manner as will be dangerous to others using the street* (emphasis added).

Thus, under both legal systems to avoid being held negligent a person must act as a reasonable man under the circumstances.

[8] 11 CODE OF MAIMONIDES ch. 1, § 4, at 4 (1954). There are five species of animals that are deemed *mu'ad* with respect to all damage they may cause, even

tinues to do so, it becomes *mu'ad* with respect to that particular action.[9]

> The basic doctrine underlying the principle of 'mu'ad' is scienter. Since the owner is not required to anticipate completely the vicious acts of a domesticated animal, his full liability for such of its acts can arise only if it has been declared vicious and its owner has been forewarned.[10]

The *Restatement (Second) of Torts* discloses a strong resemblance between Talmudic and American law in this regard.

> The actor as a reasonable man is both entitled to assume and required to expect that domestic animals will act in accordance with the nature of such animals as a class, unless he knows or should know of some circumstances which should warn him that the particular animal is likely to act in a different manner.[11]

When a *tam* animal causes harm, the owner is liable for only half of the damage, and only to the extent of the value of the animal's hide; while, if a *mu'ad* animal causes harm, the owner is liable for the full damage done, and all his assets are subject to such liability.[12] In either case, the owner's liability is predicated upon the fact of ownership. This approach is not unlike modern concepts of strict liability in tort for harm caused by animals. Dean Prosser, in his treatise on torts, distinguishes between animals which, by reason of their species are inherently dangerous, and those which are normally harmless. Lions, tigers, wolves, and other so-called "wild" animals are never treated as harmless, even if domesticated[13] and liability for damage caused by these animals arises from ownership rather than from any experience the owner might have had with the animal. The class of animals usually considered harmless includes such domesticated animals as cattle, horses, and dogs. "As to these, in order for liability to arise, it must be shown that the defendant knew, or had reason to know, of a dangerous propensity of the animal in question."[14]

Thus, under both legal systems, an owner is liable for acts of an inherently dangerous animal and for abnormal acts, which the owner has reason to anticipate, of an otherwise harmless animal. In fact, other than variations in the measure of damages, the only significant

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when tamed; they are the wolf, the lion, the bear, the panther and the leopard. 11 CODE OF MAIMONIDES ch. 1, § 6, at 5 (1954).

[9] *Id.* § 4, at 5.

[10] Auerbach, *The Talmud — A Gateway to the Common Law*, 3 W. RES. L. REV. 5, 34 (1951). The animal must be declared *mu'ad* by a court of judges to constitute due warning to the owner of the animal's dangerous propensities. Only if the animal repeated the same vicious act three times and caused harm each time could a court adjudge the animal *mu'ad*.

[11] RESTATEMENT (SECOND) OF TORTS § 302 (1965).

[12] If a *tam* animal caused $200.00 damage the owner owed $100.00. If however, the animal was only worth $50.00 that was the extent of the owner's liability. *Baba Kamma* 73; 11 CODE OF MAIMONIDES ch. 1, § 7, at 5 (1954).

[13] W. PROSSER, LAW OF TORTS § 75, at 514 (3rd ed. 1964). *See also* note 8 *supra*.

[14] *Id.*

difference between the systems is that under Talmudic law an owner was strictly liable for the act of a *tam* animal, while today, an owner of such an animal remains free from liability until he knows or has reason to know of the animal's abnormally dangerous propensity.

NEGLIGENCE

Standard of Care

The *Talmud,* in a colorful example, illustrates rather than defines negligence:

> If a man brings sheep into a shed and locks the door in front of them properly, but the sheep [nevertheless] get out and do damage, he is not liable. If, however, he does not lock the door in front of them properly, he is liable.[15]

The question of the shepherd's liability hinges upon the *Gemara's* interpretation of the word "properly." The example continues, and points out that

> [i]f the door was able to stand against a normal wind, it would be 'properly,' but if the door could not stand against a normal wind, that would be 'not properly.'[16]

This is similar to our modern day attempt to measure the standard below which conduct must not fall if it is to avoid being negligent. This standard is defined by reference to what the reasonable and prudent person would do under the same or similar circumstances.[17] The sages recognized the need for establishing a standard of conduct that would be binding upon everyone, and rather than develop vague standards, they attempted to accomplish their purpose through the use of simple, yet lucid hypotheticals, illustrating the manner of conduct in specific situations.

Causation

Although the *Talmud* does not expressly undertake to examine the theory of causation, it portrays through one of its illustrations the equivalent of today's doctrine of the "unforeseeable intervening cause." Thus, in the *Talmud's* example in which the shepherd had improperly locked the shed, he would not be liable if robbers had subsequently broken into the shed, permitting the sheep to escape and cause damage.[18]

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[15] *Baba Kamma* 322.
[16] *Baba Kamma* 323.
[17] RESTATEMENT (SECOND) OF TORTS § 283 (1965).
[18] *Baba Kamma* 322. The precise language used is:

> If [the wall] broke down at night, or if robbers broke in, and they [the sheep] got out and did damage, he would not be liable. If [however] robbers took them out [from the shed and left them at large and they

As recently as 1965, the Fifth Circuit Court of Appeals expressed the modern counterpart of this rule as follows:

> [W]here there has intervened between the defendant's negligent act and the injury an independent illegal act of a third person, producing the injury, and without which it would not have happened, the latter is properly held the proximate cause of the injury.[19]

Is it not remarkable how the somewhat sophisticated rule of causation so closely resembles a Talmudic principle developed thousands of years ago?

Contributory Negligence

The doctrine of contributory negligence also had a counterpart in Talmudic law. Again, by way of illustration the question is raised in the *Gemara* as to whether the owner of an ox is liable for injuries sustained by children who provoke the animal to attack them. The sages conclude that the owner should not be held liable since the children, by tormenting the animal, contributed to their own injuries.[20] Another vivid example presented in the *Gemara* involves an individual who is bitten by a dog he has provoked. In such a case, Talmudic law permits the dog's owner to inquire of the injured party by way of defense: "What is your hand doing in the mouth of my dog?"[21] The theory underlying the availability of this defense is stated as follows:

> [I]f the incited dog turns upon the inciter, the owner is free on the ground that where the plaintiff himself has acted wrongly, the defendant who follows suit and equally acts wrongly could not be made liable.[22]

One of the clearer definitions of today's doctrine of contributory negligence is set forth in the *Restatement (Second) of Torts.* Section 463 defines contributory negligence as:

> [C]onduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.[23]

Recovery under modern "dog-bite" legislation[24] is usually defeated by proof that the injured person provoked the attack.[25]

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did damage] the robbers would be liable [for the damage]. (brackets original).

[19] United States v. Shirely, 345 F.2d 294, 296 (5th Cir. 1965), *cert. denied,* 382 U.S. 883 (1965).

[20] *Baba Kamma* 124.

[21] *Baba Kamma* 117.

[22] *Baba Kamma* 124.

[23] RESTATEMENT (SECOND) OF TORTS § 463 (1965).

[24] *See, e.g.,* ARIZ. REV. STAT. ANN. § 24-521 (1956).

[25] *See, e.g.,* ARIZ. REV. STAT. ANN. § 24-523 (1956).

There has been a great deal of speculation concerning the rationale underlying the defense of contributory negligence. Some say that the defense has a punitive purpose in that the plaintiff should be denied recovery to punish him for his own misfeasance.[26] Others contend, as does the *Talmud,* that the doctrine is founded upon the equitable maxim requiring the plaintiff to come into court with "clean hands."[27] Perhaps the most prevalent explanation is that the plaintiff's negligence constitutes an independent intervening act which breaks the causal chain.[28] Regardless of which theory is adopted, however, it is interesting to note that modern courts tend to look upon the defense of contributory negligence with increasing disfavor in view of humanitarian desires to compensate injuries.[29]

PERSONAL INJURY: MEASURE OF DAMAGES

The first obstacle confronting the sages composing the Talmudic law of personal injury was that of justifying the theory of pecuniary compensation. To one unacquainted with the *Torah* this may appear to have been an easy task; however, students of the *Torah* realize that it is extremely difficult to reconcile certain of its statements with the concept of money damages. Since the dictates of the *Torah* largely determined the substance of the Talmudic rules, the Jewish draftsmen looked to *Exodus,* one of the books of the *Torah,* for guidance.

> [I]f men strive together, . . . and any harm follow, then thou shalt give life for life, eye for eye, tooth for tooth, . . . burning for burning, wound for wound, stripe for stripe.[30]

The logical inference from this statement is that actual retaliation for personal injury received is preferable to pecuniary remuneration. Yet, elsewhere in *Exodus* it is written:

> [I]f men contend, and one smite the other with a stone, or with his fist, and he die not, . . . he shall pay for the loss of his time, and shall cause him to be thoroughly healed.[31]

This passage apparently advocates money damages when the plaintiff does not expire.

The Talmudic writers approached this conflict by searching the *Torah* itself to find other scripture which would help explain the apparent conflict between the two preceding passages. In *Leviticus* it is

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[26] W. PROSSER, LAW OF TORTS § 64, at 427 (3rd ed. 1964).

[27] *Id.*

[28] *Id.*

[29] *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

[30] *Exodus* 21:22-25.

[31] *Exodus* 21:18-19.

said: "ye shall have one manner of law . . . ."[32] Considering these excerpts together the sages reasoned:

> *'Eye for eye'* means pecuniary compensation. You say pecuniary compensation, but perhaps it is not so, but actual retaliation [by putting out an eye] is meant? What then will you say where a blind man put out the eye of another, or where a cripple cut off the hand of another, or where a lame person broke the leg of another? How can I carry out in this case [the principle of retaliation of] *'eye for eye,'* seeing that the Torah says, *Ye shall have one manner of law,* implying that the manner of law should be the same in all cases?[33]

Thus, in a logical yet indirect manner, the Talmudic writers arrived at a policy of pecuniary damages for personal injuries.

The *Talmud* discusses five items of recovery for personal injury: (1) depreciation, (2) pain, (3) medical treatment, (4) loss of time, and (5) humiliation or degradation.[34] Within each of these categories of compensation the sages have set forth precise guidelines for measuring the damage suffered.

Depreciation

Depreciation, the equivalent of today's recovery for loss of future earning capacity, was awarded only for permanent injuries and was computed by means of a "before and after" test. Under this method of assessing damages, the injured party was considered a slave for sale in the market place. The damages recoverable were the difference between the plaintiff's worth as a slave in his former occupation, and the price he would command as a slave with the permanent injury.[35] In other words, if the accident, in no way permanently hindered the injured party in pursuing his prior vocation, he could not recover for depreciation.

In discussing today's counterpart to depreciation, McCormick, in his work on damages, points out that "[w]here the injury is a lasting one, which will cause a loss or lessening of future earning power, a recovery may be had for the probable loss of future earnings."[36] The difference between the plaintiff's capacity before and after the injury is the amount recoverable.[37] Yet, in assessing damages for loss of earning

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[32] *Leviticus* 24:22.
[33] *Baba Kamma* 477.
[34] *Baba Kamma* 473.
[35] *Baba Kamma* 473. Precisely stated:
> If he put out his eye, cut off his arm or broke his leg, the injured person is considered as if he were a slave being sold in the market place, and a valuation is made as to how much he was worth [previously], and how much he is worth [now]. (brackets original).

[36] C. McCormick, Law of Damages § 86, at 299 (1935).
[37] Bernhard, *Damages for Personal Injury, The Law in Oregon,* 44 Ore. L. Rev. 95, 99 (1965). *See also* Smith v. Jacobsen, 224 Ore. 627, 356 P.2d 421 (1960).

capacity, a modern jury is not restricted to a determination of what the injured party would earn in the same occupation, but rather is permitted to consider the very real possibility of one's ambitions.[38] However, the possible speculation by the jury on the plaintiffs potential earning capacity may explain the notoriously high personal injury verdicts awarded in recent years.

Pain

The measure of damages for pain, as set forth in the *Mishnah*, is "[h]ow much a man of equal standing would require to be paid to undergo such pain."[39] This rule, however, was beset from it's inception with interpretive difficulties — the sages pondered whether the rule should be construed literally or whether a better index would be the amount a person would be willing to pay *not to endure such pain.* This distinction is illustrated by a hypothetical posed in the *Gemara* involving a man who was ordered by state decree to have his arm amputated. A literal application of the rule, as stated in the *Mishnah*, would set the recovery at the amount the man would agree to accept to have his arm cut off by a sword without the benefit of sedation. The scholars, however, rejected this view, reasoning that in some instances the pain suffered is so severe that no man could be induced to endure it. Therefore, the sages concluded that the proper measure of recovery where a person is ordered to undergo amputation by the sword is the amount which he would pay to be placed under sedation.[40]

Modern courts have not applied rigid guidelines in assessing damages for pain; rather, today's jurors are left without objective criteria to determine what amount would justly compensate the injured party for the pain he has suffered.[41] The wisdom of this procedure is somewhat questionable since juries are left virtually unhindered to award damages on whatever basis they see fit, including sympathy or other emotional considerations. However, the Talmudic formula is equally susceptible to criticism; it attempts to reduce an inherently complex item of recovery to a single inflexible formula. As is often the case

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[38] C. MCCORMICK, LAW OF DAMAGES § 86, at 300 (1935).

[39] *Baba Kamma* 473.

[40] *Baba Kamma* 486. By the same token, if a given pain is so severe that no man would submit to it for any price, then no man, it seems, would refuse to pay any price to avoid it. Therefore the reasoning behind the distinction is perhaps specious, yet the point is, the *Gemara* scholars had two alternatives to select from, while today we really have no rule at all concerning the measure of pain and suffering.

[41] One who sustains bodily injury may recover damages for past and future physical pain and serious mental suffering accompanying such injury or produced thereby . . . . The law has no standard by which to measure pain and suffering in money. This must be done by the jury in their discretion, subject to review by trial and appellate courts, only in cases of obviously unreasonably awards. C. MCCORMICK, LAW OF DAMAGES § 88, at 315 (1935).

in seeking to evaluate two divergent solutions to the same problem, the ideal, and perhaps unattainable solution, lies somewhere in between.

Medical Expenses

The *Talmud* states the rule of recovery for medical expenses as follows:

> If he has struck him, he is under obligation to pay medical expenses. Should ulcers [meanwhile] arise on his body, if as a result of the wound, the offender would be liable, but if not as a result of the wound, he would be exempt.[42]

There seems to be little difference between this statement and today's rule permitting recovery for the cost of necessary medical treatment.[43]

In discussing an injured party's right to recover medical expenses incurred, the philosophers posed the following hypotheticals: If the offender tells the injured party that he will bring a doctor who will heal him for nothing, the injured party could object by stating: "A physician who heals for nothing is worth nothing."[44] On the other hand, if the injured party instructs the offender to give him the money and tells him that he will personally heal himself, the sages permitted the offender to reply: "You might neglect yourself and thus get from me too much."[45] Thus, it can be said that the Talmudic scholars in an effort to develop a true theory of compensation rejected what would be the equivalent of today's collateral sources rule.[46]

Loss of Time

Talmudic compensation for loss of time was measured by computing the amount which the injured party would have earned had he been able to continue working. However, this computation was based not upon the wages he would have earned in his former occupation, but rather upon the wages of a watchman of cucumber fields.[47] In reply to contentions that compensation should correspond to loss of earnings in

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[42] *Baba Kamma* 473.

[43] The modern rule is stated succinctly by McCormick:
> The measure of damages for personal injury includes the reasonable cost of the care, services, and attention made necessary by the injury, such as the attendance of doctors and nurses, hospital care, as well as medicine and appliances . . . . The expense must be traceable to the injury as its producing cause. C. McCormick, Law of Damages § 90, at 323 (1935).

See also Dimmick v. Alvarez, 16 Cal. Rptr. 358, 196 Cal. App. 2d 211 (1961).

[44] *Baba Kamma* 489.

[45] *Id.*

[46] The collateral sources rule allows the plaintiff to recover the reasonable cost of expenses even though they are rendered for him at no cost. *See* Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 Minn. L. Rev. 669 (1962). The argument against this theory is that the payment is not true compenstation, but rather a windfall for the plaintiff, and requiring the tortfeasor to pay under such circumstances, results in punitive damages.

[47] *Baba Kamma* 473.

the injured party's own trade, the scholars answered that such a measure would in effect permit double recovery since compensation for depreciation considers the injured party's inability to continue his previous employment.[48]

Our courts have also been faced with the question as to whether an injured party's recovery should be based upon wages lost during his disability, or whether the basis of his claim should be the value of his time, *i.e.*, what his services would have brought in the labor market. The general rule is that an injured party is entitled to recover the value of his lost time.[49] As a practical matter, wages lost are presumptive evidence of that amount.[50] Yet, there are situations in which it would be unjust to limit an injured party's recovery to an actual loss of wages (*e.g.*, where plaintiff's employer continues to pay him during his disability or where plaintiff is unemployed at the time of injury). Consequently, some jurisdictions permit an injured party to choose either theory.[51]

Humiliation or Degradation

Talmudic law permitted recovery for humiliation and degradation only when they were the result of an intentional tort.[52] Interestingly, the amount recoverable varied according to the status of both the injured party and the tortfeasor.[53] The rule was based upon the theory that a person of high stature in society was more likely to suffer humiliation when injured than was the average individual. The general rule today is that an injured party can recover for embarrassment and humiliation in cases involving disfigurement or mutilation.[54] This rule provides a broader base for recovery than does the *Talmud* since recovery is allowed for harm caused by negligence as well as intentional torts. It is also interesting to note that in determining the amount of recovery in a defamation suit, the jury is permitted to consider the plaintiff's social and financial standing, as well as his reputation as a professional or business man.[55]

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[48] *Baba Kamma* 491.

[49] Note, *Developments in the Law — Damages — 1935-1947*, 61 HARV. L. REV. 113, 163 (1947).

[50] Scarberry v. Ohio River Co., 217 F. Supp. 189 (S.D. W.Va. 1963); Phillips v. United States, 182 F. Supp. 312 (E.D. Va. 1960); Sevinger v. Bell, 373 S.W.2d 30 (Mo. 1963). *See also* Note, *Developments in the Law — Damages — 1935-1947*, 61 Harv. L. Rev. 113, 163 (1947).

[51] C. MCCORMICK, LAW OF DAMAGES § 84, at 310-311 (1935).

[52] *Baba Kamma* 497.

[53] *Baba Kamma* 474.

[54] C. MCCORMICK, LAW OF DAMAGES § 88, at 317 (1935).

[55] *Id.* § 117, at 425.

Conclusion

This comparative analysis of Talmudic and modern law has been an attempt to introduce the reader to a fascinating body of legal thought — fascinating not so much for any intellectual profundity or logical brilliance it may contain, but rather because it's twenty volumes represent an almost unbelievable literary undertaking at a time in history when illiteracy was virtually universal.

The remarkable resemblance between Talmudic and modern law indicates that the quality of the Talmudic writings may well equal their quantity. Hopefully the readers interest in the *Talmud* has been sufficiently aroused to induce him to explore the subject in greater depth. If this results, the comment is successful.