Contributory Negligence in Jewish Law

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I. Introduction

When one party acts negligently,[1] and harms another party as a result, the negligent party must compensate the victim for their damages. Suppose, however, that the victim also acted negligently, and that their own negligence was partly responsible for the harm that they sustained. Should the negligent victim[2] retain a right to compensation in such circumstances? If so, should the negligent victim receive full compensation, or should their damages award be reduced to reflect the partial responsibility that they bear for their own harm?

In the United States, jurisdictions vary on their approach to this issue. Several states have adopted a strict "contributory negligence" rule. Under this rule, a plaintiff's right to recovery is completely barred if they bear any responsibility for the accident which produced their harm. Thus, a plaintiff who is even 5% responsible for an accident will not recover any damages.

Most states, however, have adopted the more lenient "comparative negligence" rule. Under this rule, a plaintiff's right to recovery is merely reduced in proportion to their responsibility for an accident. Thus, a plaintiff who is 5% responsible for an accident will still recover 95% of their damages.

Finally, some states have adopted a middle-of-the-road, "modified comparative negligence rule." Under this rule, a plaintiff's right to recovery is reduced in proportion to their responsibility for an accident, but is barred completely if their negligence rises above a certain threshold—typically around 50%. Thus, for instance, a plaintiff who is 5% responsible for an accident will recover 95% of their damages, but a plaintiff who is 60% responsible will recover nothing.

In Jewish law, meanwhile, the principles governing a victim's right to recover when he negligently contributes to his own harm are less clearly articulated. Our goal in this article is to identify those principles. First, we consider Talmudic case law that supports a halakhic theory of "contributory negligence"—a theory under which a tort victim's recovery would be totally barred on account of their own responsibility for the harm they sustained. Second, we will consider Talmudic case law which might support a halakhic theory of "comparative negligence"—a theory under which a tort victim's recovery would be partially diminished, but not totally barred, on account of their responsibility for the harm they sustained.[3]

II. Contributory Negligence in Halakha

In this section, we examine halakhic sources that provide a basis for completely withholding recovery from a tort victim who bears some responsibility for their injuries. First, we will introduce two overarching theories of tort liability—fault-based liability vs. cause-based liability—and argue that halakhic commentators invoke both general theories of liability as possible grounds for withholding tort recovery from a negligent victim. Second, we will consider, in greater detail, several fault-based rationales for withholding recovery from a negligent victim. Third, and finally, we will consider in greater detail the cause-based rationale for withholding recovery from a negligent victim.

A. Fault-Based Liability (פשע בעצמו) vs. Cause-Based Liability (הם גרמו לו)

1. The Overarching Theories

Tort theory offers two distinct approaches for holding a defendant liable when he unintentionally harms another. The first approach focuses on the defendant's *fault* or *blameworthiness*. Under this approach, if, for instance, the defendant could have reasonably foreseen that their actions might harm the plaintiff, and if the defendant could and ought to have taken reasonable precautions to avoid harming the plaintiff, then they may be at fault for that harm, and would have to compensate the plaintiff for that reason. This is the basic premise underlying negligence liability.

The second approach, by contrast, focuses on the fact that the defendant *caused* harm, irrespective of whether they are at fault. Under this approach, even if, for instance, the defendant could not have reasonably foreseen that their actions might harm the plaintiff, the very fact that their actions caused harm may provide sufficient reason to require compensation. This is the basic premise underlying strict liability.[4]

In Jewish law, a *tortfeasor's* liability for unintentional harms can be either cause-based or fault-based, depending on the context. For instance, harms caused directly by the tortfeasor's direct actions are generally subject to strict liability. The tortfeasor is liable for *causing* harm, regardless of whether his actions are blameworthy.[5] By contrast, certain harms caused by property under one's custodianship generate liability only if the custodian acted negligently. [6]

Given that Jewish law assigns liability to *tortfeasors* on both fault-based and cause-based grounds, the distinction between these two theories of liability may help us evaluate how a tort *victim's* conduct affects his right to recover under Jewish law. Suppose, that is, that Jewish law does bar the recovery of a tort victim who participated in bringing about his or her own injuries. How do we account for this reduction? Is the victim's recovery reduced because they bear some *fault* for their injuries? Or, is the victim's recovery reduced simply because they participated in *causing* their own injuries, irrespective of whether they are at fault?[7] As we will show below, there are authorities in support of either position.[8] Nor is this distinction merely academic; in some cases, as we will see, the legal outcome of a tort case may turn on precisely this distinction.

2. The Authorities

The Talmud includes numerous cases in which a tort victim participates in their own harm and cannot seek recovery against the tortfeasor for that harm. One prominent example ("the walking case") involves a barrel-carrier walking on a public street who comes to a sudden stop, leading the beam-carrier walking behind to collide into him and break his barrel.[9] Another prominent example ("the sleeping case") involves a plaintiff who decides to lie down beside another person who is already sleeping, or to place vessels beside that person. The plaintiff is then injured, or his vessels are then damaged, by that sleeping person, who rolled over in his slumber.[10] In neither case may the victim recover damages for their injuries.

Many authorities explain the victim's bar to recovery in these cases as a function of the victim's *carelessness* or *negligence*. Ramban, for instance, comments that in the sleeping case, "the second one [i.e. the victim] acted negligently/carelessly against himself (משום דשני פשע בעצמו)," and similarly, that in the walking case, "it is because of the victim's negligence/carelessness that they exempt [the defendant] (משום פשיעה דניזק פטרו בהו[11])". Similar formulations, all highlighting the "carelessness/negligence (פשיעה)" of the victim in one or both of these cases, appear in the works of the Rambam, Tur, Shulchan Arukh and Sema.[12] These commentators appear to ground the legal outcome of our cases in a *fault*-based (פשיעה) theory of liability.

By contrast, Tosafot explain the victim's loss of recovery in these cases not in terms of the victim's *carelessness*, but instead, simply as a function of the victim's *causal* role. Commenting on the sleeping case, Tosafot write that the tortfeasor is exempt because "others caused it/him (הם גרמו לו[13])". A clearer formulation appears in the Chiddushei R. Nachum ,

who writes that, according to Tosafot, the tortfeasor is exempt in this case because the victim "is the one who caused the damage (14]".(הוא שגרם להזק] These commentators appear to ground the legal outcomes of our case in a *cause*-based theory of liability.[15]

3. The Practical Difference

Although Ramban and Tosafot's theories both produce the same outcome in our two cases, their theories diverge in several critical respects. Perhaps the best way to appreciate this difference is to recognize the legal problem which prompted their analysis in the first place. As referenced above, tortfeasors who cause harm through their direct actions (אדם המזיק) are generally held strictly liable.[16] Yet the Talmud exempts both the beam-carrier and the sleeper in the cases just considered, forcing commentators to identify why the exceptional feature of these cases—the participation of the victim in producing his own injuries—leads to their anomalous outcomes. Ramban and Tosafot diverge on several key issues as they attempt to explain this anomaly.

First, Ramban and Tosafot diverge on whether the tortfeasors in our cases actually committed cognizable torts. According to Ramban, the tortfeasors did commit cognizable torts—they are merely *exempted from liability* for those torts because of the victim's conduct. According to Tosafot, however, the tortfeasors actually did *not* commit any cognizable tort in the first place—their causal relationship to the harm is completely eclipsed by that of the victim that they actually fail to satisfy the element of causality required to establish even the basic case for tort liability.[17]

Second, and derivatively, Ramban and Tosafot diverge on whether tort victims who participate in their own injuries are subject to any special doctrine in halakhic tort theory. Put another way, Ramban and Tosafot disagree on the fundamental issue at the heart of our inquiry: whether Jewish law recognizes contributory negligence as an independent tort principle. According to Ramban, Jewish law *does* recognize such a principle. After all, for Ramban, the victim's conduct in our cases is the only factor barring their recovery for the otherwise cognizable tort committed against them. Thus, it is specifically because the victim was contributorily negligent that they cannot collect against the tortfeasor. According to Tosafot, by contrast, Jewish law may *not* recognize a principle of contributory negligence. After all, for Tosafot, the victim's conduct in our cases is relevant only insofar as it brings the tortfeasor's causal contribution to their injury below the threshold for cognoscibility. Thus, it is not specifically because the *victim* hurt themselves that they cannot collect against the tortfeasor. Rather, *any* external factor which reduces the tortfeasor's causal contribution to the victim's harm would produce the same result—whether or not that factor was supplied by the victim themselves.

To illustrate these differences practically, let us consider the following hypothetical case. Suppose that Levi places Shimon's vessels beside Reuven, who is sleeping, and Reuven damages those vessels in his sleep. Is Reuven, the sleeper, liable to Shimon? According to Ramban, Reuven is indeed liable: he has committed a cognizable tort, and since Shimon

played no role in his own harm, Ramban's rule would not bar him from recovery.[18] According to Tosafot, by contrast, Reuven is not liable: he has not committed a cognizable tort, because Reuven's causal contribution to Shimon's harm is no greater when a third-party places Shimon's vessel beside him than it is when Shimon places those vessels there himself. As between Shimon and Reuven, then, Tosafot's rule would indeed bar Shimon from recovery.[19]

4. The Specific Theories

In the preceding discussion, we examined two overarching theories of liability that explain why a tort victim who participates in their own harm forfeits their right to be compensated: a fault-based rationale and a cause-based rationale. While this dichotomy does not capture all the possible fine-grained halakhic theories for barring a negligent victim from tort recovery, the cause/fault distinction does provide a helpful framework for organizing those theories. We will therefore use that framework in the next sections as we consider, in closer detail, the different grounds upon which halakhic authorities bar a negligent victim from tort recovery.

First, we will consider fault-based theories: theories under which a negligent victim is barred from recovery because their own conduct is faulty in some way, or because their conduct somehow reduces the fault borne by the tortfeasor for their injuries. Second, we will consider the cause-based theory in greater detail: the theory under which a negligent victim is barred from tort recovery because their conduct vitiates the causal link between the tortfeasor's conduct and their own injuries.

B. Fault-Based Theories: Tort Victim's Harm of Self (פשע ניזק אנפשיה), Tort Victim's Harm to Tortfeasor (השבת אבדה), and Tort Victim's Waiver of Harm (מחילה)

Under a fault-based theory, a negligent victim is barred from recovery because their own conduct is faulty in some way, or because their conduct somehow reduces the fault of the tortfeasor. Commentators appear to offer three distinct explanations for how the victim's participation affects the allocation of fault.

The first possibility is that a negligent victim forfeits recovery because, through their negligence, they have harmed *themselves*. This is perhaps the most straightforward fault-based theory. Under this theory, the tortfeasor still bears fault for harming the victim; however, the victim loses their right to collect because they have directed *against themselves* the same sort of faulty conduct of which they accuse the tortfeasor.[20] This appears to be the theory articulated by Ramban above, who specifically emphasizes that the negligent victim in the sleeping case forfeits recovery because "he acted negligently *against himself*" [פשע בעצמו].(21) Tosafot Rid invokes a similar formulation when discussing the walking case [פשע ניזק אנפשיה].("22) Other commentators also apply similar formulations to a wide variety

of cases involving negligent victims—including those who fall victim to an animal's act of consumption, trampling,[23] or goring,[24] and even those harmed by judicial malpractice.[25]

The second possibility is that a negligent victim forfeits recovery because, through their negligence to themselves, they have actually harmed *the tortfeasor*. This is perhaps the least intuitive fault-based theory. Under this theory, as under the first, the tortfeasor still bears fault for harming the victim; however, unlike under the first theory, the victim under this theory loses their right to collect because they have directed their own faulty conduct *back towards* the tortfeasor. This type of theory is articulated by Chiddushei Ha-Rim regarding a case where a tortfeasor inadvertently places a hot coal on the garment of another party. According to the Chiddushei Ha-Rim, if the garment owner had the opportunity to remove the coal before it singed his garment, but neglected to do so, then that garment owner cannot recover from the tortfeasor.[26] Chiddushei Ha-Rim explains that the garment owner owed a duty of rescue to the tortfeasor. Just as the garment owner has a duty to rescue lost property (השבת אבדה) and return it to its owner, he has a duty to remove the coal to rescue the tortfeasor from incurring financial liability.[27] By characterizing financial liability for the economic damage suffered by the tort victim as the "lost item" of the *tortfeasor*, Chiddushei Ha-Rim argues that the tort victim has a duty to mitigate his own harm in order to prevent the tortfeasor from incurring (additional) liability.[28] It is because the negligent victim did not properly protect the tortfeasor's interests in this way that they themselves are barred from recovery.[29]

The third possibility is that a negligent victim forfeits recovery not because their conduct creates harm, and therefore *accrues* fault to *themselves*, but rather because their conduct *absolves* from fault, or at least from responsibility, those who harmed *them*. Under this theory, unlike under the first and second theories, the tortfeasor actually bears *no* fault for the victim's injuries, because a victim who voluntarily participates in the activity is considered to have consented to the possibility of such injury. This doctrine, commonly referred to as of assumption of risk,[30] is well established in halakhic tort theory.[31] Thus, for instance, commentators explain that wrestlers who injure each other in the course of their jostling,[32] or celebrants who injure each other in the course of lively dancing on holidays or at weddings,[33] are exempt from tort liability, because each participant implicitly forgives the others for injuries they might reasonably incur in the course of these activities.[34] It is because the negligent victim waived their rights in this way that they are barred from recovery.[35]

C. Cause-Based Theory: Tortfeasor as Non-Superseding Cause (מעשיו גרמו לו)

Under a cause-based theory, a negligent victim is barred from tort recovery due to some casual deficiency in the tortfeasor's conduct. Tosafot, cited above, advance this sort of theory by positing that the negligent victim who places his vessels beside a sleeping tortfeasor has thereby "caused" the damage that later befalls those vessels.[36] Of course, since it is the sleeping tortfeasor who ultimately breaks the vessels—not the negligent victim—Tosafot

clearly cannot mean that the negligent victim caused the damage in a *real-world* sense. Instead, Tosafot must mean that though the tortfeasor's conduct *physically* caused damage, the causal connection between his conduct (i.e. lying down to sleep in an area clear of vessels) and the resultant damage (i.e. breaking, in his sleep, vessels that had not been there when he lay down) is too tenuous to meet the threshold of tort liability.[37]

Indeed, neither under American law nor under halakha is a tortfeasor held liable for all possible damages caused by their actions. Instead, both systems adopt principles that limit the sorts of causality deemed legally actionable.[38] For our purposes, the most illuminating American law principle seems to be the doctrines of "intervening" and "superseding cause."[39] Under this doctrine, a tort defendant may be exempt from liability if his negligent act is superseded by the harmful act of an independent third party, since this intervening act interrupts the chain of causality between the defendant's negligence and the victim's harm. If, however, the intervening act follows as a normal or foreseeable consequence of a situation created by the defendant, then the defendant remains liable, because the intervening act did not interrupt the chain of causality, and so the intervenor did not supersede the defendant as the legal cause of the harm.

Analogous principles exist in Jewish law. For instance, if Reuven leaves an obstacle in the public domain, but Shimon then kicks that obstacle to another location, and Levi trips upon it at that location, then it is Shimon, the kicker, who is held liable for the damage.[40] By contrast, if Reuven gives a lit torch to an individual who lacks mental capacity, and that individual then sets the fire upon Levi's property, some hold Reuven liable for the damage.[41] The Talmud applies to both of these cases a version of the phrase "מעשיו גרמו לו"—"his actions were its cause." In the case of the kicked obstacle, Reuven's actions are *not* deemed to cause the damage, because Shimon's act interrupts the chain of causality, whereas in the case of the lit torch, Reuven's actions *are* deemed to cause the damage, because the act of the incapacitated individual does not interrupt the chain of causality.[42]

Since Tosafot also apply the phrase "הם גרמו לו" to the sleeping tortfeasor, it seems that our case should be analyzed along similar lines. On this reading, the sleeping vessel-breaker, like the incapacitated fire-setter, is not liable for damage because he neither initiated the chain of causation which produced that damage, nor intervened in that chain so significantly as to interrupt it. Applying this logic generally, the theory we would deduce from Tosafot for why a negligent victim is barred from recovery is that such a victim, through their negligent act, initiates the chain of causation that leads to their own injuries. To that extent, parties who emerge subsequently and direct harm towards the negligent victim would be mere intervenors, but would not be viewed as superseding causes of the victim's injuries unless they acted with autonomy sufficient to undermine the preexisting causal chain set in motion by the victim.[43]

D. Threshold of Negligence

One remaining question, for the authorities who recognize a distinct halakhic principle of contributory negligence, is whether the victim is barred from recovery whenever he is negligent *to any degree* or only when his negligence has crossed a certain *substantial* threshold. Some commentators appear to hold that *any* amount of negligence from the victim is sufficient to bar him from recovery. Pitchei Choshen, for example, writes that if there is any degree of negligence (צד פשיעה*)* from the victim, he cannot recover damages.[44] Other commentators hold that the victim is barred from recovery only when his negligence crosses a substantial threshold. Ralbag writes that a victim is barred from recovery only when he is at least as negligent as the tortfeasor.[45]

Conclusion

Talmudic case law establishes that a victim's right to recover in a tort action may be affected by his own conduct. Whether this case law stands for the principle of contributory negligence may depend on whose interpretation of that case law we adopt.

According to Tosafot, it is not clear if Jewish law would recognize an independent principle of contributory negligence. After all, Tosafot appear to hold that the victim's conduct will bar him from recovery only if he has disrupted the causal link between the tortfeasor and the harm.

According to Ramban and Tosafot Rid, however, Jewish law does recognize an independent principle of contributory negligence. In their view, the walking case and the sleeping case establish that a victim's contributory negligence bars him from recovery. We outlined three theories that explain why a victim's contributory negligence blocks recovery. According to the first theory, the victim is considered to have harmed *himself* through his own negligence. According to the second theory, the victim is considered to have harmed *the defendant* by increasing his liability. According to the third theory, the victim is considered to have consented to the harm by having assumed the risk of injury through his conduct.

Our next article will explore whether Jewish law recognizes a principle of comparative negligence, according to which the amount the plaintiff can recover would be reduced in proportion to his contribution of negligence.

Notes

[1] A tort is a civil wrong that causes a claimant to suffer loss or harm, resulting in legal liability for the tortfeasor, i.e. the person who commits the tortious act. Our focus in this article is on unintentional torts, which include both negligence and strict liability torts. As we will touch upon further in this article, negligence includes harms that a reasonable person can be expected to have foreseen and taken precaution to prevent, whereas strict liability torts include even harms that may not have been reasonably foreseeable or preventable.

[2] Throughout this article, we will use the terms “negligent victim” to refer to tort victims who bear some responsibility for their injuries. In using the former phrase, we do not mean to limit our discussion to victims whose conduct formally qualifies as negligent under the law of the governing jurisdiction.

[3] Although our introductory example featured a tortfeasor who committed the tort of *negligence*, the principles of contributory and comparative negligence may also apply when tortfeasors commit *strict liability* torts. For cases in American law where the negligence of the victim served to bar or reduce the tort damages that they could recover from plaintiffs who were otherwise strictly liable, see Gary D. Spivey, Annotation, *Products Liability: Contributory Negligence or Assumption of Risk as Defense Under Doctrine of Strict Liability in Tort*, 46 A.L.R.3d 240 (1972).

[4] See John C.P. Goldberg and Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 Ford. L. Rev. 743 (2016); Richard Epstein, *A Theory of Strict Liability*, 2 Journal of Legal Studies 151 (1973); Ernest Weinrib, *The Idea of Private Law* (1995), pp. 145-203. See also Shana Schick, *Negligence and Strict Liability in Babylonia and Palestine: Two Competing Systems of Tort Law in the Rulings of Early Amoraim*,” 29 Diné Israel 139.

[5] See, e.g., Bava Kamma 26a (“”אדם מועד לעולם בין שוגג בין מזיד בין ער בין ישן). Despite the unequivocal formulation of this principle, note that some commentators carve out certain categories of harms for which persons are not actually held strictly liable. See Tosafot Bava Kamma 27b, s.v. *shemu’el*.

[6] See, e.g., Bava Kamma 55b; Bava Kamma 45a and Rashi ad. loc., s.v. *kaltah;* Shulchan Arukh Choshen Mishpat 396:1 (henceforth simply “Choshen Mishpat”).

[7] Strictly speaking, of course, the conceptual reason for holding a *tortfeasor* liable for harm need not be the same as the reason for barring a *tort victim* from recovering for that harm. For example, one could theoretically hold that tortfeasors should be liable for harms which are their *fault*, but that victims should be barred from recovering for harms which they helped *cause*. In this section, we are primarily interested in the conceptual ground for barring a *victim’s* recovery. As such, references to fault- or cause-based theories of liability should be understood as applying to the specific question of why a victim should be barred from recovering from a tortfeasor, without implying any position on the question of why a tortfeasor might be compelled to compensate that victim, in the first place.

[8] To be sure, halakha recognizes four distinct categories of tortfeasors (“שור בור מבעה והבער”), each subject to its own rules of liability. See Bava Kamma 2a. It is thus conceivable that the halakhic treatment of negligent victims might depend upon the category of tortfeasor under discussion. For purposes of this article, however, we will not be wading into these subtler distinctions. Our aim instead is to outline, more broadly, the theoretical conditions under which halakha might adopt any version of a contributive or comparative negligence rule.

[9] Bava Kamma 32a.

[10] Yerushalmi Bava Kamma 2:8.

[11] Ramban, Bava Metzia 82b, s.v. *ve-ata*.

[12] Rambam, Hilkhot Chovel U-Mazik 1:11; Tur Choshen Mishpat, 421:6; Shulchan Arukh Choshen Mishpat 421:4; Sema ad. loc., s.v. *poshe'a*.

[13] Tosafot, Bava Kamma 4a, s.v. *keyvan*. Although it is not clear how precisely one ought to parse Tosafot's phrase "הם גרמו לו," the phrase clearly allocates causative responsibility for the damage to the tort victim rather than to the tortfeasor.

See also Maharitz Chayot, Bava Kamma 4a, who writes that, according to Tosafot, the tortfeasor is exempt because "the actions of others caused it/him" ("מעשי אחרים גרמו לו").

[14] Chiddushei R. Nachum (Partzovitz), Bava Kamma 4a, par. 111.

[15] For a cause-based explanation of the walking case, see Tosafot Bava Kamma 32a, s.v. *ve-ha*. Tosafot explain that the plaintiff barrel carrier who stopped short is barred from recovery because "by stopping, he caused [the defendant beam carrier]" to collide with him ("בעל חבית גרם לו בעמידתו").

[16] See *supra*, n. 5.

[17] Cf. Tosafot, Bava Kamma 27b, s.v. *shemu'el*. Tosfaot explain that the damage caused in the "sleeping case" and the "walking case" is non-cognizable because it is characterized as "אונס גמור," i.e. a totally unavoidable mishap. In this sense, Tosafot's comment on 27b is consistent with their comment on 4a. The plaintiff's decisive causal role in bringing about the harm eclipses whatever causal role the defendant might have played. Therefore, the defendant's relationship to the harm is considered legally inconsequential "אונס גמור."

[18] Cf. Shitah Mekubetzet Bava Kamma 21b, s.v. *ve-lo*, citing R. Yehonatan.

[19] Cf. Pitchei Choshen, Nezikin 6:1 n. 27; Chiddushei R. Nachum Bava Kamma 4a par. 111. Another important difference between the views would arise in a case where, by hypothesis, the defendant was the indisputable cause of the harm but the plaintiff, through his negligent conduct, contributed in some minor way to his own harm. By construction, the defendant in such a case would be the clear cause of the harm. Thus, according to Tosafot, the defendant would be liable, since Tosfaot holds that the plaintiff can recover so long as the defendant caused the harm. According to Ramban, however, it is at least possible that the minor contributory negligence of the plaintiff would bar him from recovery. Whether Ramban would in fact bar the plaintiff's recovery in such a case turns on the threshold question of how

much negligence is required on the part of the plaintiff in order to bar him from recovery. Since Ramban does not address this question, see *infra* Sec. D, it is an open question whether, in this constructed case, the plaintiff could recover.

[20] Cf. Page Keeton and William Lloyd Prosser, *Prosser and Keeton on Torts* (1984), p. 452 ("Many theories have been advanced to explain the defense of contributory negligence. It as been said that it has a penal basis, and that the plaintiff is denied recovery to punish him for his own misconduct. Another theory, sometimes advanced, has been that the plaintiff is required to come into court with 'clean hands.'... It has been said also that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety.")

[21] Ramban op. cit.

[22] Tosafot Rid, Bava Kamma 48b.

[23] Per Talmudic law, an animal owner is exempt from damages cause when his animal consumes or tramples produce left in a public area—i.e., "tooth and leg" damages ("שן ורגל"). See Bava Kamma 19b. Some commentators explain this exemption as grounded in contributory negligence. See Ralbag, Shemot 121, 239-40 ("כי דרך הבהמות ללכת ברשות הרבים, ואין דרך האנשים להניח כליהם או פירותיהם ברשות הרבים ולזה יהיה הניזק הוא הפושע בזה, לא המזיק"). Along similar lines, Rambam explains that "one is free from responsibility [for the damage caused by] a tooth or foot [of an animal] in a public place... [for] he (i.e. the victim) who puts a thing in a public place is at fault toward himself and exposes his property to destruction. Accordingly, one is only responsible for [damage caused by] a tooth or a foot in the field of the injured party." Moreh Nevukhim, 3:40; see also Yuval Sinai and Benjamin Yisraeli, *Maimonides and Contemporary Tort Theory* (2020), pp. 257-258. See also Ralbag, Shemot 21, pp. 239-40.

[24] In several instances, the Talmud invokes a rule known as "כל המשנה" ("all who deviate"): "when one deviates and another then deviates, [the second actor] is exempt" *("*כל המשנה ובא אחר ושינה בו פטור*")*. Under this rule, if a plaintiff acts in a manner that is unusual or out of the ordinary, and is harmed by the defendant's animal due to this unusual conduct, the defendant is exempt from liability. Although this rule appears to state a general principle of contributory negligence, it is only applied in two cases in the Talmud. In the first case, a plaintiff's cow crouches in the middle of a busy thoroughfare where it is then kicked by the defendant's cow. See Bava Kamma 20a. In a second case, a plaintiff antagonizes a defendant's dog which then bites him. See Bava Kamma 24b. Some commentators derive a general principle of contributory negligence from these cases, and apply the same sort of fault-based formulation that Ramban and others apply in the walking case discussed above. See, e.g., Bekhor Shor Shemot 22:4, who explains "כל המשנה" as consistent with the principle exempting "tooth and leg" damages (שן ורגל) in the public domain; cf. *supra* n. 24. In both cases, the victim is considered to have brought the injury upon himself ("איהו דאפסיד אנפשיה"). Other commentators limit the "כל המשנה" rule to animals, since animals are less capable of coordinating their response to extraordinary stimuli. See, e.g., Tosafot Bava Kamma 32a, s.v.

ve-ha; Hagahot Ashri Bava Kamma 3:1; Melechet Shlomo Bava Kamma 3:1. Other commentators further limit the "כל המשנה" rule specifically to "horn" damages ("קרן"). On this theory, "horn" damages are defined by the defendant's animal engaging in extraordinarily aggressive behavior, such as goring or kicking; thus, when the animal's action flows from the *plaintiff's* unusual conduct, its own action is no longer deemed extraordinarily aggressive. See, e.g., Shi'urei R. David (Povarsky), Bava Kamma 2b, par. 118. According to this last view, it would be difficult to derive a general principle of contributory negligence from the principle of "כל המשנה."

[25] Rashba and Ba'al Ha-Ma'or both argue that a judge who makes a basic error in deciding a case and erroneously disqualifies or invalidates some item belonging to a party may be exempt from liability if the parties were negligent in not correcting his error. See Shu"t Rashba 2:370; Ba'al Ha-Ma'or Sanhedrin 12a (Alfasi) ("דמשום פשיעותא דבעל דין נגעו בה, דכל טועה בדבר משנה דבר ברור הוא, והוה ליה לשיולי ולגלויי טעותא ולא הוה ליה למסמך עלויה, וכשנטלה דיין, להאכילה לכלבים הוה לה למחויי וכי לא מחה איהו דפשע בשלו."). According to these commentators, the negligent failure of the litigant to correct the judge's error renders the litigant contributorily negligent and bars him from recovering compensation from the judge. Ramban, however, objects that it is unreasonable to hold litigants accountable for correcting the errors of learned judges. See Milchamot Sanhredrin 12a (Alfasi) ("אטו כולי עלמא ידעי ספרא וספרי ותוספתא וכולי תלמודא... ובאשה וקטן מאי איכא למימר, אטו דינא גמירי").

[26] See Bava Kamma 27a where the Talmud seems to rule that the tortfeasor is liable for placing the coal on the garment even when the owner could have removed it. But Chiddushei Ha-Rim limits the Talmud's ruling to a case where the tortfeasor committed an intentional tort. When the tort was committed inadvertently, Chiddushei Ha-Rim holds that the tortfeasor would be exempt. Arukh Ha-Shulchan offers a similar distinction in interpreting the Talmud's ruling. See Arukh Ha-Shulchan 418:35.

[27] Chiddushei Ha-Rim, Hilkhot Dayyanim 25, s.v. *amnam* ("מחיוב זה להסיר [הגחלת] מטעם השבת אבידה... כדי שלא יתחייב בעל הגחלת לשלם.")

[28] Note that other commentators explain such cases according to the more conventional, first fault-based approach discussed previously. See, for instance, Rabbah's discussion of a tortfeasor who places a burning coal on someone's incapacitated servant where the master negligently fails to remove it. Bava Kamma 27a. According to Ramban, the plaintiff in this case fails to recover because "he has harmed himself" ("כיון דהוה ליה לסלקה כמאן דאיהו אזיק נפשיה"). Milchamot, Bava Kamma 12a (Alfasi), s.v. ve-'od

[29] *Id* ("וכיון שמחויב מדין השבת אבידה ממילא שוב אין בעל הגחלת כלל מחויב....דהא על כל פנים הי' מחיוב מטעם השבת אבידה להסיר הגחלת להציל המזיק מהפסד... ושוב בלא הציל...[המזיק] פטור.")

[30] Note that under common law, contributory negligence and assumption of risk are often discussed as two separate defenses to tort liability. As distinguished by one commentator, "Contributory negligence is a defense based on the plaintiff's failure to take reasonable care.

Assumption of risk is a defense based on the notion that the plaintiff consented to the defendant's conduct, which annuls the plaintiff's theory of negligence." Keith Hylton, Contributory Negligence and Assumption of Risk, in *Tort Law: A Modern Perspective* (2016), pp. 147-169. Not all courts, however, recognize a formal distinction between the two doctrines, and at the very least, most courts acknowledge that the doctrines are very closely related. See E. H. Schopler, Annotation, *Distinction Between Assumption of Risk and Contributory Negligence*, 82 A.L.R.2d 1218 (1962). Thus, for instance, a tort victim who fails to take reasonable care ("contributory negligence") might sometimes be deemed to have consented to the consequences of their conduct ("assumption of risk") for that very reason. See also *infra* n. 32.

[31] Note that under halakhah, as under common law, contributory negligence may be related to the principle of assumption of risk and waiver. For the suggestion that contributory negligence is in fact grounded in the principle of assumption of risk, see Chiddushei Ha-Rim, Hilkhot Dayyanim 25, s.v. *ve-im kein*. Chiddushei Ha-Rim posits, at one stage in his analysis, that in the case discussed above concerning the coal placed upon the garment, if the garment owner negligently failed to remove the coal from the garment, it is as if he instructed the defendant to destroy the garment and consented to damage ("מה שאינו מסיר ההיזק כאומר קרע...א"כ ממילא פטור דהוי אומר קרע... והוי ריצוי"). See also Shitah Mekubetzet, Bava Kamma 27a, s.v. *c"m*, citing Rabbenu Peretz, who explains the coal case based on the principle of waiver ("משום דמחיל ליה"). See also Pitchei Choshen, Nezikin 1:18, n. 49.

[32] See, e.g., Tur Choshen Mishpat 421:7.

[33] See, e.g., Tosafot Sukkah 45a, s.v. *mi-yad*; Pitchei Choshen, Nezikin 6:1 n. 29.

[34] See also Bava Kamma 32a, which rules that a person rushing to complete chores before Shabbat who inadvertently injures a passerby is exempt from liability under the theory that he acts "with permission" ("ברשות"). R. Meir Simcha explains this ruling as an application of the doctrine of assumption of risk. The plaintiff knows that people are in a hurry and move about hectically on Friday afternoon. Thus, when he voluntarily walks outside during the Friday hustle and bustle, he is deemed to have assumed the risk of being injured in the medley. See Chiddushei R. Meir Simcha, Bava Kamma 32a.

[35] For the idea of waiver in Jewish tort law, see Choshen Mishpat 380:1.

[36] Tosafot, Bava Kamma 4a, s.v. *keivan*.

[37] Cf. Page Keeton and William Lloyd Prosser, *Prosser and Keeton on Torts* (1984), p. 452 ("The greater number of courts have explained [contributory negligence] in terms of "proximate cause," saying that the plaintiff's negligence is an intervening, or insulating, cause between the defendant's negligence and the result.")

[38] Whether these limiting doctrines are actually grounded in cause-based rationales (i.e. limiting tort liability because the tortfeasor's conduct was not sufficiently *causal*) or in fault-based rationales (i.e. limiting tort liability because the tortfeasor's conduct, despite being sufficiently causal, was not sufficiently *blameworthy*) is an open question. Although we will discuss these doctrines purely in terms of considerations of *causality*, many authorities assume or argue that the doctrines are also grounded in considerations of *blameworthiness*. See, e.g., David A. Fischer, *Products Liability-Proximate Cause, Intervening Cause, and Duty*, 52 Mo. L. Rev. 547 (1987). For an interesting comparative perspective on this issue, see Steven F. Friedell, *Nobody's Perfect: Proximate Cause in American and Jewish Law*, 25 Hastings Intn'l & Comp. L. Rev. 111 (2002).

[39] See generally Restatement (Second) of Torts § 447 (1965). As formulated by the Restatement, "superseding causes" absolve a tortfeasor from liability, but not all "intervening acts" rise to the level of a "superseding cause."

[40] Bava Kamma 6a.

[41] Bava Kamma 59b.

[42] See also Pitchei Choshen, Nezikin 7:32.

[43] To be sure, similar analysis could apply if it is the tortfeasor, not the tort victim, who first undertakes negligent conduct. In that scenario, a cause-based theory of contributory negligence would require us to characterize the negligent victim as a superseding cause of their own injuries—i.e., the tort victim's negligence would be deemed to interrupt the chain of causation initiated by the tortfeasor.

[44] Pitchei Choshen, Nezikin, 1:13, n. 36 ("נראה שאם יש צד פשיעה מצד הניזק... הרי זה כניזק פושע, ופטור המזיק[[".)

[45] Ralbag, Shemot 21, p. 227 ("שלא יתחייב המזיק בשגגה אם היה הניזק הוא הפושע יותר בהגעת הנזקלו. כאלו תאמר שזרק את האבן והוציא ראשו וקבלה, או שנכנס לרשות המזיק שלא ברשותו והזיקו בשגגה. וכן הענין אם היו שניהם במדרגה אחת מהפשיעה. וזה מבואר בנפשו. ")

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