

Contributory Negligence and Comparative Negligence in Jewish Tort Theory

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INTRODUCTION

When one party acts negligently,² 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 victim³ 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

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² 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.

³ 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.

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, in Part I, 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, in Part II, we 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.⁴

I. 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 (פּשַׁע בְּעֵצְמוֹ) vs. Cause-Based Liability

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*

⁴ 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).

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.⁵

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 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.⁶ By contrast, certain harms caused by property under one's custodianship generate liability only if the custodian acted *negligently*.⁷

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?⁸ As we will show below, there are authorities in support of

⁵ 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.

⁶ See, e.g., Bava Kamma 26a ("adam mu'ad le-'olam kein shogeg kein mezid kein 'er kein yoshen"). 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*.

⁷ See, e.g., Bava Kamma 55b; Bava Kamma 45a and Rashi ad. loc., s.v. *kaltab*; Shulchan Arukh Choshen Mishpat 396:1 (henceforth simply "Choshen Mishpat").

⁸ 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

either position.⁹ 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.¹⁰ 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.¹¹ 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 (*mishum de-sbeni pasha’ be-atzmo*),” and similarly, that in the walking case, “it is because of the victim’s negligence/carelessness that they exempt [the defendant] (*mishum peshi’ah de-nizak patru be-hu*)”¹² Similar formulations, all highlighting the “carelessness/negligence (*peshi’ah*)” of the victim in one or both of these cases, appear in the works of the Rambam, Tur, Shulchan Arukh and Sema.¹³ These commentators appear to ground the legal outcome of our cases in a *fault*-based (*peshi’ah*) theory of liability.

By contrast, Tosafot explain the victim’s loss of recovery in these cases not in

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.

⁹ To be sure, halakha recognizes four distinct categories of tortfeasors (*shor, bor, mav’eh, and bev’er*), 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.

¹⁰ Bava Kamma 32a.

¹¹ Yerushalmi Bava Kamma 2:8.

¹² Ramban, Bava Metzia 82b, s.v. *ve-ata*.

¹³ 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*.

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)." ¹⁴ A clearer formulation appears in the novella of R. Nachum Partzovitz, who writes that, according to Tosafot, the tortfeasor is exempt in this case because the victim "is the one who caused the damage (הוא שגרם להזקק)." ¹⁵ These commentators appear to ground the legal outcomes of our case in a *cause*-based theory of liability. ¹⁶

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. ¹⁷ 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, and as such, they actually fail to satisfy the element of causality required to establish even the basic case for tort liability. ¹⁸

¹⁴ Tosafot, Bava Kamma 4a, s.v. *keyvan*. Although it is not clear how precisely one ought to parse Tosafot's phrase "*bem garmu lo*," 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").

¹⁵ Chiddushei R. Nachum (Partzovitz), Bava Kamma 4a, par. III.

¹⁶ For a cause-based explanation of the walking case, see Tosafot Bava Kamma 32a, s.v. *ve-ba*. 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").

¹⁷ See *supra*, n. 6.

¹⁸ Cf. Tosafot, Bava Kamma 27b, s.v. *shemu'el*. Tosafot explain that the damage caused in the "sleeping case" and the "walking case" is non-cognizable because it is characterized as "אונס גמור,"

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.¹⁹ 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.²⁰

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."

¹⁹ Cf. *Shitah Mekubetzet Bava Kamma 21b*, s.v. *ve-lo*, citing R. Yehonatan.

²⁰ 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 Tosafot 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

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 (מהילה)

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.²¹ This appears to be the theory articulated by Ramban

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.

²¹ 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 has 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 ac-

above, who specifically emphasizes that the negligent victim in the sleeping case forfeits recovery because “he acted negligently *against himself*” (פשע בעצמו).²² Tosafot Rid invokes a similar formulation when discussing the walking case (“פשע נזיק אנפשיה”).²³ 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,²⁴ or goring,²⁵ and even those harmed by judicial malpractice.²⁶

cidents, by denying recovery to those who fail to use proper care for their own safety.”)

²² Ramban op. cit.

²³ Tosafot Rid, Bava Kamma 48b.

²⁴ Per Talmudic law, an animal owner is exempt from damages caused when his animal consumes or tramples produce left in a public area—i.e., “tooth and leg” damages (“shen ve-regel”). See Bava Kamma 19b. Some commentators explain this exemption as grounded in contributory negligence. See Ralbag, Shemot 121, 239-40: (“האנשים להניח כליהם או, ואין דרך ברשות הרבים, ודרך הבהמות ללכת ברשות הרבים, ולזה יזיה הניח 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 Shmueli, *Maimonides and Contemporary Tort Theory* (2020), pp. 257-258. See also Ralbag, Shemot 21, pp. 239-40.

²⁵ 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.”

²⁶ 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;

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.²⁷ 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.²⁸ 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.²⁹ It is because the negligent victim did not properly protect the tortfeasor’s interests in this way that they themselves are barred from recovery.³⁰

Ba'al Ha-Ma'or Sanhedrin 12a (Alfasi): (“דמשום פשיעוּתא דבעל דין נגעו בה, דכל טועה בדבר משנה דבר”) (“ברור הוא, והוה ליה לשיולי ולגלווי טעותא ולא הוה ליה למסמך עלויה, וכשנטלה דיון, להאכילה לכלבים הוה לה למחויי ברור הוא, וכי לא מחה איהו דפשע בשלך.”).

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 Sanhedrin 12a (Alfasi): (“אטו כולי עלמא ידעי ספרא וספרי ותוספתא וכולי תלמודא... ובאשה וקטן מאי איכא למימר, אטו דינא גמירי”).

²⁷ 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.

²⁸ Chiddushei Ha-Rim, Hilkhoh Dayyanim 25, s.v. *amnam*: (“הגחלת] מטעם”) (“השבת אבידה... כדי שלא יתחייב בעל הגחלת לשלם”)

²⁹ 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 לסלקא כמאן דאיהו אויב נפשיה”). Milchamot, Bava Kamma 12a (Alfasi), s.v. *ve-od*.

³⁰ Chiddushei Ha-Rim, Hilkhoh Dayyanim 25, s.v. *amnam*: (“כיון שמחוייב מדין השב”)

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,³¹ is well established in halakhic tort theory.³² Thus, for instance, commentators explain that wrestlers who injure each other in the course of their jostling,³³ or celebrants who injure each other in the course of lively dancing on holidays or at weddings,³⁴ are exempt from tort liability, because each participant implicitly forgives the others for injuries they might

אבידה ממילא שוב אין בעל הגחלת כלל מחויב... דהא על כל פנים הי' מחויב מטעם השבת אבידה להסיר [הגחלת להציל המזיק מהפסד... ושוב בלא הציל...]. [המזיק] פטור

³¹ 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. 33.

³² 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, *Hilkhos 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 ריצו"). 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.

³³ See, e.g., *Tur Choshen Mishpat* 421:7.

³⁴ See, e.g., *Tosafot Sukkah* 45a, s.v. *mi-yad*; *Pitchei Choshen, Nezikin* 6:1 n. 29.

reasonably incur in the course of these activities.³⁵ It is because the negligent victim waived their rights in this way that they are barred from recovery.³⁶

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.³⁷ 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.³⁸

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.³⁹ For our purposes, the most illuminating American law principle seems to be the doctrine of

³⁵ 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.

³⁶ For the idea of waiver in Jewish tort law, see Choshen Mishpat 380:1.

³⁷ Tosafot, Bava Kamma 4a, s.v. *keivan*.

³⁸ 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.")

³⁹ 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 Int'l & Comp. L. Rev. 111 (2002).

“intervening” and “superseding cause.”⁴⁰ 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.⁴¹ 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.⁴² The Talmud applies to both of these cases a version of the phrase “*ma’asav garmu lo*”—“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.⁴³

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

⁴⁰ 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.”

⁴¹ Bava Kamma 6a.

⁴² Bava Kamma 59b.

⁴³ See also Pitchei Choshen, Nezikin 7:32.

unless they acted with autonomy sufficient to undermine the preexisting causal chain set in motion by the victim.⁴⁴

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 even a slight degree of negligence (“צד פשיעה”) from the victim, he cannot recover damages.⁴⁵ Other commentators hold that the victim is barred from recovery only when his negligence crosses a substantial threshold. Ralbag, for instance, writes that a victim is barred from recovery only when he is at least as negligent as the tortfeasor.⁴⁶

CONCLUSION: CONTRIBUTORY NEGLIGENCE IN JEWISH LAW

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

⁴⁴ 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.

⁴⁵ Pitchei Choshen, *Nezikin*, 1:13, n. 36: “נראה שאם יש צד פשיעה מצד הניזק... הרי זה כניזק.” (“[פושע, ופטור [המזיק]

⁴⁶ Ralbag, *Shemot* 21, p. 227: “שלא יתחייב המזיק בשגגה אם היה הניזק הוא הפושע יותר בהגעת הנזק.” “לו. 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.”)

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.

In Part II we 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.

II. COMPARATIVE NEGLIGENCE IN HALAKHA

INTRODUCTION

In Part I, we examined sources that establish a halakhic principle of contributory negligence, under which a tort victim's recovery might be totally barred when they bear responsibility for the harm they sustained. In Part II, we will now examine sources that support a halakhic principle of *comparative* negligence, per which a tort victim's recovery might be partially reduced, though not completely precluded, when they contribute to their own injuries.⁴⁷

The two fundamental principles that would yield a halakhic doctrine of comparative negligence are well-established in Jewish law. The first principle is that a victim's right to recover tort damages may be negatively impacted when their own negligence contributed to their damages. This is the principle we discussed in Part I, and as we documented there, it has broad support among halakhic authorities. The

⁴⁷ Historically, several factors prevented common law courts from embracing the doctrine of comparative negligence. These included "the notion of the indivisibility of any single injury" and "the lack of any definite basis for apportionment." Page Keeton and William Lloyd Prosser, *Prosser and Keeton on Torts* (1984), p. 470. Cf. *Helf v. Glanding* ("[T]he law cannot measure how much the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct.") However, "there has been for many years an increasing dissatisfaction with the absolute defense of contributory negligence." *Prosser op. cit.*, p. 469. The reason for this shift is that the doctrine of contributory negligence "places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage." *Id.* See also *Haeg v. Sprague, Warner & Co. Inc.*, 202 Minn. 425, 429, 281 N.W. 261, 263 (1938) ("the rule of comparative negligence would serve justice more faithfully than that of contributory negligence").

second principle is that tortfeasors are only liable for the share of damages that they cause, but are exempt for any share of damage sustained by the victim due to some other source. This, too, is a strongly supported halakhic principle.⁴⁸ Taken together, these two principles yield a halakhic doctrine of comparative negligence: a tortfeasor should not be liable for the share of damages caused by the victim, and the victim's right to recover should be reduced in proportion to the amount they contributed to their own harm. That said, no Talmudic case explicitly combines these two principles to articulate a clear rule of comparative negligence.⁴⁹

Our goal, then, is to explore the halakhic validity of a comparative negligence rule. We do so in two ways. First, we will consider whether it is possible to *derive* a comparative negligence rule *from* existing case law. To do so, we will find categories of tortfeasors who pay less than full damages under established halakha, and will evaluate whether the comparatively negligent tortfeasor can be reasonably characterized so as to fit into one of these established categories, such that the legal outcome applicable in those cases would apply in our case as well. Second, we will consider whether it is possible to *locate* a comparative negligence rule *within* existing case law. To do so, we will find, here again, categories of tortfeasors who pay less than full damages under established halakha, but this time, we will try to show that the halakhic ruling in those cases actually presupposes a rule of comparative negligence. Put another way, under the first approach, we will be grounding the halakhic rule of comparative negligence in other, pre-existing halakhic tort principles, whereas under the second approach, we will argue that in fact, those pre-existing tort principles are themselves grounded in the more fundamental principle of comparative negligence—even if that underlying principle is not explicitly identified as such.

Applying these approaches, we will consider, in this article, two particular categories of tortfeasors who pay less than full damages under established halakha: joint tortfeasors (שותפים בנזק), which might provide a model for a comparative negligence rule; and reciprocal tortfeasors (חבלו זה בזה), which might either provide a model for comparative negligence, or which might in fact presuppose such a principle. Under the paradigm of joint tortfeasors (שותף בנזק), the negligent victim will be characterized as having harmed *themselves*, while under the paradigm

⁴⁸ See, e.g., Shulchan Arukh Choshen Mishpat 410:13. See also *infra* n. 54.

⁴⁹ In general, Talmudic case law tends to focus more on determining liability than on apportioning damages once liability has been determined. Even where the Talmud finds a tortfeasor liable, it is an open question how damages are to be apportioned between the parties. See, e.g., Rambam, Hilkhot Sekhirut 3:6; Rabad, ad. loc.

of reciprocal tortfeasors (חבלו זה בזה), the negligent victim will be characterized as having harmed the *tortfeasor*. That said, characterizing the negligent victim in these ways, for the purposes of a comparative negligence rule (i.e. merely *reducing* their recovery), poses some doctrinal complications that are perhaps not as challenging in the context of contributory negligence (i.e. completely *barring* their recovery). We will note some of those complications in our discussion as well.

A. Theory #1: Negligent Victim as Joint Tortfeasor (שותף בנזק)

1. *The Theory*

Our first halakhic theory of comparative negligence appeals to the law of joint tortfeasors. Under the law of joint tortfeasors, two tortfeasors who mutually harm a victim must compensate that victim in proportion to the harm that each one caused. Thus, for instance, if the first tortfeasor is 40% liable for the victim's injuries, and the second tortfeasor is 60% liable, then the tortfeasors would be individually liable for 40% and 60% of the victim's damages, respectively. As applied to our case, this theory would characterize the comparatively negligent tort victim as a joint tortfeasor together with the actual tortfeasor. Put another way, the victim who contributes to his own harm would be viewed, under this theory, as having acted in concert with the actual tortfeasor to injure *himself*. Practically, then, if the victim's negligence was, say, 40% responsible for his injury, then he could recover that portion of the damages only from "himself." All he could recover from the actual tortfeasor would be the remaining 60%.

The key idea here is that every instance of comparative negligence can be characterized as a case of joint tortfeasors, which yields identical legal outcomes to an actual doctrine of comparative negligence.

2. *The Authority*

The legal principle of joint tortfeasors, which underlies our first theory, is firmly established in Jewish law. For example, the Talmud discusses a case involving six people who sit on a bench. If the bench breaks as a result of their combined force, each person is liable to pay for his share of the damage.⁵⁰ Based on this case and

⁵⁰ Tosefta Bava Kamma 2:9; Bava Kamma 10b.

similar cases in the Talmud,⁵¹ Rambam⁵² and Shulchan Arukh⁵³ codify the general principle that tortfeasors who participate jointly in inflicting damage upon a tort victim split the damages between them, with each party bearing their share of the liability. Several other authorities explicitly endorse the principle that liability should be apportioned among joint tortfeasors according to each party's contribution to the harm.⁵⁴

3. *The Challenge*

The challenge with our first theory is that it appears to present a single party as both tort victim and the tortfeasor in the same cause of action. It does this by characterizing the negligent victim as a joint tortfeasor vis-à-vis the damage he suffered. Yet the principle of joint tortfeasors typically applies to defendants. It is not obvious that this principle can be applied to the plaintiff himself in his own cause of action.⁵⁵

⁵¹ For some examples of joint tortfeasors in the Talmud, see Bava Kamma 10b and Choshen Mishpat 383:3; Bava Kamma 19b and Choshen Mishpat 390:10; Bava Kamma 21b and Choshen Mishpat 392:1; Bava Kamma 53a-b and Choshen Mishpat 410:32-34. For an overview of cases of joint tortfeasors in the Talmud, see Pitchei Choshen, Nezikin 10:25-33.

⁵² See Bava Kamma 10b; Rambam, Hilkhot Chovel U-Mazik 6:13-17.

⁵³ Shulchan Arukh Choshen Mishpat 383:3.

⁵⁴ See, e.g., Tur Choshen Mishpat 410:

דוקא עד שיעור מה דהוה חייב ביה אהאי נזקא היכא דהוה עביד ליה איהו לחודיה אבל טפי לא.

And Sema Choshen Mishpat 410:57 (first interpretation); Ketzot Ha-Choshen 410:3. See also Shulchan Arukh Choshen Mishpat 410:13:

חפר אחד שמונה ובא חבירו וחפר עוד טפה, שניהם חייבים בנזקין, כל אחד לפי מה שחפר.

And Pitchei Choshen, Nezikin 10:31 n. 67:

היה הספסל עומד להשבר מחמת הראשון תוך ב' שעות, ומחמת ישיבת השני נשבר קודם לכן, שניהם חייבים... נראה פשוט שאם הראשון גרם שנתרועע הספסל ביישיבתו... חייב מה שנפחת הספסל מחמתו... שיש לשער כמה שוה הפיץ שיכול לעמוד ב' שעות וכמה שוה שיכול לעמוד שעה אחת וההפרש ישלם השני לבד.

Other authorities write as though joint tortfeasors split the liability evenly. But it is possible that this is only true when either: (a) each party's contribution was sufficient to cause the damage on its own, i.e., each party was a sufficient cause of the harm; or (b) there is no possibility of a fruitful inquiry to determine each party's actual contribution. In such cases, an even split between the joint tortfeasors is quite reasonable. For an example of the first type of case, see Bava Kamma 53a:

האי כוליה היוקא עביד והאי כוליה היוקא עביד.

For an example of the second type of case, see Shulchan Arukh Choshen Mishpat 383:4:

אם אין ידוע כולם משלמים בשוה.

⁵⁵ In theory, one could raise a similar challenge against the first theory of contributory negligence discussed in Part I. After all, that theory similarly characterizes the negligent victim as having acted negligently against themselves. That said, the challenge is stronger against our current, comparative negligence theory, because this theory requires us to formally analogize the negligent victim to a joint tortfeasor, in order to import to our case the precedent of partial tort recovery. Taken to its logical extreme, this analogy might imply that the negligent victim technically functions as both a plaintiff and a defendant in the same cause of action.

Nevertheless, the crucial step of characterizing a negligent victim as a joint tortfeasor in his own harm has already been taken by Or Sameach. Or Sameach posits the following case.⁵⁶ Suppose that Reuven dug a pit but failed to guard it appropriately. Suppose further that Shimon owns two oxen, and that one of Shimon's oxen pushes the other one of Shimon's oxen into Reuven's pit. Or Sameach argues that Shimon (the ox owner) is a joint tortfeasor together with Reuven (the pit owner) in damaging his own ox.⁵⁷ As such, Or Sameach concludes, Shimon should recover only those damages arising from Reuven's share of the negligence, but not the damages arising from his own share. This is an explicit application of the comparative negligence principle, modelled upon the law of joint tortfeasors. Thus, there is precedent to support the theory that a tort victim can be characterized in the same cause of action as both a victim and joint tortfeasor in his own harm.⁵⁸

More fundamentally, we may not need to characterize the negligent victim as actually occupying the role of tortfeasor against *himself* in order to preserve our basic analogy between that victim and a joint tortfeasor. For our purposes, it is sufficient to treat the negligent victim as a joint tortfeasor merely in the sense that no *other parties* are liable for that share of harm which he brought upon himself. Put otherwise, the rule of joint tortfeasor liability can be conceptualized in two different ways. Phrased positively, the rule provides that a joint tortfeasor is liable for whatever share of harm he personally causes. Phrased negatively, however, the

⁵⁶ Or Sameach, Nizkei Mammon 12:19. Moreover, there are many cases in the Talmud and halakhic literature where the negligent plaintiff is characterized as having “harmed himself” (“איהו איזיק אנפשיה”). For several examples, see *supra* Part I.

⁵⁷ Or Sameach, Nizkei Mammon 12:19:

כיון דאיהו גרים לנפשיה, היינו ששורו דחף שורו... איהו שותף בנוק כמו... בעל הבור... דהוא [ר"ל בעל השור] עשה היזק כמו בעל הבור... וע"ז אין צריך לשלם בעל הבור, כיון שבעל השור הזיק שור של עצמו

See also Pitchei Choshen, Nezikin 10:27 n. 55, discussing Or Sameach's case:

[פשוט שאין בעל הבור משלם אלא חצי הנוק, כיון שהשור שלו [של הניזק] הוא הדוחף, והרי זה כאילו הוא עצמו [ר"ל הניזק] שותף לנוק

⁵⁸ Mishnah Bava Kamma 8:6 may shed light on this question. The Mishnah rules that one who inflicts an injury upon himself (“חובל בעצמו”) is “exempt” (“פטור”) from damages. This might imply that in principle self-harm does trigger a cause of action—after all, one cannot be “exempted” from a claim that was incognizable to begin with. If so, then an individual could theoretically occupy the role of both victim and tortfeasor in the same course of action. To be sure, one might be tempted to read “exempt” as referring to a different cause of action: the prohibition against destroying God's creatures (“בל תשחית”). But that reading is inconsistent with the fact that, in the very same breath, the Mishnah compares the exemption for self-injury with a ruling of financial liability for others who impose harm on him (“אחרים שהבלו בו חיביבין”). This comparison implies that “exempt” and “liable” in this clause of the Mishnah refer to the same type of tort liability (i.e., compensation). See Tosafot, Bava Kamma 91b, s.v. *ha-chovel*; Tiferet Yisrael, Bava Kamma 9:6, 39.

rule provides merely that a joint tortfeasor is *not* liable for any share of harm that he did *not* personally cause. If this second, weaker formulation of the principle is applied to a tortfeasor whose victim was comparatively negligent, that principle alone would suffice to exempt the tortfeasor from the share of harm caused by the victim. This weaker application of the principle does not depend upon characterizing the victim's share of negligence in any sense. It depends merely on recognizing that the tortfeasor was not the source of that particular share of negligence.

B. Theory #2: Negligent Victim as Reciprocal Tortfeasor (חבלו זה בזה)

1. *The Theory*

Our second halakhic theory of comparative negligence is modelled upon a law pertaining to reciprocal tortfeasors. Under the law that we will consider, where two tortfeasors harm each other, their damages offset, and the party who sustained greater damage receives the difference from the other party. As applied to our case, this theory would characterize the comparatively negligent tort victim as a reciprocal tortfeasor of the actual tortfeasor. Put another way, the victim whose negligence contributes to his own harm would be viewed, under this theory, as having harmed not only himself through his negligence, but also *his tortfeasor*. One possible justification for this characterization, which we encountered in our previous article, is that a tort victim whose own negligence amplifies his losses thereby increases the amount in damages that his tortfeasor must pay him as compensation. By imposing this additional cost upon the tortfeasor—beyond what the tortfeasor ought to have paid on account of his own conduct—the victim “harms” that tortfeasor financially, and it is this harm, we might argue, which the actual tortfeasor recovers when he deducts that value from the full damages owed to the victim.⁵⁹ Practically, then, if the victim's negligence was, say, 40% responsible

⁵⁹ This theory of comparative negligence bears strong similarities to Chiddushei Ha-Rim's approach to contributory negligence, which we discussed in Part I. Chiddushei Ha-Rim, *Hilkhot Dayyanim* 25, s.v. *ammam*. Chiddushei Ha-Rim argues that a victim wrongs the tortfeasor when he negligently fails to avoid the harm that the tortfeasor set in place—for example, by failing to remove the burning coal that the tortfeasor placed on his garment. Such failure breaches the victim's duty to “rescue” the tortfeasor from incurring liability (“השבת אבדה”). As such, the victim forfeits his right to recover damages. See *supra*, n. 28 - 31. Like Chiddushei Ha-Rim, we also characterize a negligent victim as wronging the tortfeasor under the present theory of comparative negligence. However, for Chiddushei Ha-Rim, the wrong is one of nonfeasance: the victim *failed* to rescue the tortfeasor from liability. For us, it is one of *malfesance*: the victim *caused* the tortfeasor to incur (additional) liability.

for his injury, then he would “owe” that portion of his injury to the tortfeasor, as compensation for causing the tortfeasor to incur the increased portion of liability. The tortfeasor would therefore deduct that amount from the full damages owed to the victim, leaving him with a net obligation of 60%.

To be sure, it is no simple matter to characterize the marginal increase in damages that the tortfeasor owes to the victim on account of the victim’s negligence as a “harm” imposed by the *victim* upon the *tortfeasor*. We will address that issue below. Notice, though, that this theory avoids the problem inherent in the previous theory: here, unlike there, the victim is not conceived of as both the plaintiff and the defendant in the same cause of action. Instead, the case is conceived as involving two separate causes of action: a first cause of action in which the victim sues the tortfeasor, and a second cause of action in which the tortfeasor countersues the victim.

2. *The Authority*

The legal principle underlying our second theory derives from a series of Mishnahic cases involving two oxen—or two people, or one person and an ox—each of whom harms the other and is harmed by that party in return. Although it will be necessary to examine the most complex of these cases later on, for now it will suffice to consider a simplified version of the most basic case. Suppose that Reuven and Shimon both own oxen and that both owners fail to guard their oxen appropriately. Suppose that as a result of this failure, Reuven’s ox gores Shimon’s ox, inflicting \$100 worth of damage, and that Shimon’s ox likewise gores Reuven’s ox, inflicting \$50 worth of damage. Suppose further than no other tort principles apply that would spare either Reuven or Shimon from paying full damages when their oxen gore. In this scenario, the Mishnah rules that the damages are netted against each other, leaving Reuven liable to pay Shimon \$50 (\$100—\$50).⁶⁰

When we consider the above scenario from Shimon’s perspective, we discover that the amount which he can recover, as the victim of Reuven’s tort, is directly reduced by the value assigned to his own tortious act. That is, Reuven’s tortious conduct cost Shimon \$100 of damage, but Shimon’s tortious conduct cost Reuven \$50 of damage. Thus, we deduct the value of Shimon’s tort from the value of Reuven’s tort in order to determine how much Shimon can ultimately recover.

Now return to the case of the comparatively negligent victim. In this case, too, the victim acts tortiously; and in this case, too, the victim’s tortious conduct

⁶⁰ Bava Kamma 33a.

imposes costs upon the tortfeasor—here, in the form of increased tort liability that the tortfeasor would not otherwise have incurred. If, then, we were to characterize the victim’s act of imposing such additional costs upon the tortfeasor as a form of cognizable harm (קרן) committed against that tortfeasor, then perhaps we could reduce the tortfeasor’s liability in such cases by applying the same principle which would require the greater of two joint tortfeasors to pay the lesser tortfeasor only the net damage produced between them. This would effectively result in a halakhic rule of comparative negligence.

The key idea here is that the cases of comparative negligence can be characterized as cases of reciprocal tortfeasors. Applying the principle of reciprocal tortfeasors would yield results identical to a comparative negligence rule.

3. *The Challenge*

The challenge with our second theory is that it characterizes an indirect harm, i.e., amplifying the tortfeasor’s liability, as a cognizable harm under halakha. The theory does this by assigning liability to the tort victim for the economic costs indirectly imposed upon the tortfeasor as a result of the victim’s negligence. Yet as a general principle, only certain forms of indirect harm (“*garmi*” harms) are cognizable under halakha, whereas many other forms are not (“*gerama*” harms).⁶¹

However, the distinction between cognizable and non-cognizable forms of indirect harms is subject to dispute among the commentators.⁶² Thus, our case may conceivably fall outside the scope of the *gerama* exemption.

⁶¹ Note that the challenge discussed here may not apply with equal force to the parallel theory of *contributory* negligence discussed in Part I. Here, like there, the marginal harm produced by the victim’s own negligence is viewed as producing some derivative harm to the tortfeasor. But here, that marginal harm is formally characterized as a tort injury (“נזק”), whereas there, Chiddushei Ha-Rim characterized the marginal harm as a “lost object” which the victim was required to “return” to the tortfeasor (“השבת אבדה”). On the other hand, Chiddushei Ha-Rim’s characterization raises challenges of its own. Most fundamentally, it is not at all clear that the duty of returning lost objects can be applied to “returning” hypothetical future economic “liabilities,” such as the liability that the tortfeasor would incur if a plaintiff were permitted to court additional injury at the tortfeasors’ expense.

⁶² Per one view, the harm is sufficiently direct so long as it results from the actions of the tortfeasor himself. Per another view, it is sufficiently direct so long as there is no meaningful time delay between the tortious conduct and the injury. Per yet another view, the harm is sufficiently direct so long as it is the sort of harm that occurs with reasonable frequency. See Tosafot, Bava Batra 22b, s.v. “zot.” For an overview of *gerama* and *garmi*, see *Encyclopedia Talmudit* Vol. 6, s.v. *gerama* and *garmi*. Whether the harm caused by the comparatively negligent tort victim qualifies as a halachically cognizable harm would thus depend on how it is characterized under these directness criteria.

Alternatively, and more fundamentally, the *gerama* exemption might be completely irrelevant for our case. For while the *gerama* rule does treat indirectly caused harms as legally insignificant, it does so only for a very specific purpose. Under the *gerama* rule, indirectly caused harms are not legally significant enough that we would *compel* a tortfeasor who caused such harms to *pay* compensation for having caused them. However, indirectly caused harms may be significant enough to *offset* the claims of a victim-plaintiff who imposed such harms on a tortfeasor-defendant in the same legal action.⁶³ After all, when we characterize the comparatively negligent victim-plaintiff as a reciprocal tortfeasor by virtue of his amplifying the liability of the tortfeasor-defendant, the legal question is not whether the victim-plaintiff must *pay* out damages, but whether the victim-plaintiff's role in causing the tortfeasor-defendant to incur additional liability is sufficient to offset and *exempt* the tortfeasor-defendant from those (additional) damages. Thus, even if the causal role of the victim-plaintiff in magnifying the liability of the tortfeasor-defendant formally amounts to *gerama*, it is *gerama* that works to extinguish the liability of the tortfeasor-defendant. The outcome of our case is thus fully consistent with the rules of *gerama*.

C. Theory #3: Reciprocal Tortfeasor as Negligent Victim (תבלו זה בזה)

1. *The Theory*

Our third halakhic theory of comparative negligence is a variation of the second in that it, too, looks to the law of reciprocal tortfeasors. Unlike in the previous section, however, where we used the principle of reciprocal tortfeasors as a model that would generate legal outcomes identical to a comparative negligence rule, here we will consider whether the relationship might be reversed—that is, whether a principle of comparative negligence may actually underly the law of reciprocal tortfeasors. To see how this might be, we will return once again to the case of the reciprocal tortfeasors, and this time, consider one of its variants in greater detail.

⁶³ The distinction between compelling a tortfeasor to *pay*, on the one hand, and *offsetting* liability, on the other, would also defeat a similar challenge one could raise against our theory based on the halakhic principle that blocks tort recovery for “indiscernible damage” (“היזק שאינו ניכר”). See generally *Encyclopedia Talmudit* Vol 9, s.v. *bezek she-eino nikkar*. It is not clear whether the reciprocal harm imposed by the negligent victim upon the tortfeasor by amplifying his liability would constitute a form of indiscernible damage.

1. *The Authority*

The Legal Rule

As described in the previous section, the halakhic treatment of reciprocal tortfeasors derives from a series of Mishnahic cases involving two parties, each of whom harms the other and is harmed by that person in return. Above we considered the simplest version of these cases. Here, however, let us consider a more complex case. The case involves two ox owners: one whose ox is a *tam* (literally: “innocent”) and another whose ox is a *mu'ad* (literally: “forewarned”). A *tam* ox is one who has no established history of goring, and whose owner generally pays only half damages when it gores. A *mu'ad* ox is one who does have an established history of goring, and whose owner generally pays full damages when it gores. The case addresses how damages are apportioned when the owner of a *tam* ox and the owner of a *mu'ad* ox each negligently fail to guard over their oxen, leading those oxen to gore one another. If the *mu'ad* ox causes greater damage than the *tam* ox, then, per the Mishnah, the owner of the *mu'ad* ox must pay “מותר נזק שלם”—“net of the full damage.”⁶⁴

Commentators debate how precisely this rule is to be applied. Let us illustrate the debate through an example. Suppose Reuven’s ox is a *mu'ad* and Shimon’s ox is a *tam*. Suppose further that Reuven’s *mu'ad* ox inflicts \$100 of damage upon Shimon’s *tam* ox, and that Shimon’s *tam* ox inflicts \$40 of damage on Reuven’s *mu'ad* ox. How do we determine how much money Reuven owes Shimon in this case?

According to Rambam, we apportion damages in the case of the goring oxen by netting the *legal liabilities* (מותר חיוב).⁶⁵ This means, in effect, that we analyze each act of goring separately, and allocate liability for each act per the usual rules applicable to goring oxen. Applying this approach, Reuven’s legal liability is \$100 (\$100 of damage inflicted x 100% recovery because Reuven’s ox is a *mu'ad*) and Shimon’s legal liability is \$20 (\$40 of damage inflicted x 50% recovery because Shimon’s ox is a *tam*). Thus, the net liability is \$80 (\$100 of Reuven’s liability — \$20 of Shimon’s liability), and Reuven owes Shimon this sum.

According to Rosh, however, we apportion damages by netting the *actual injuries* (מותר חבלה).⁶⁶ This means, in effect, that we ignore the usual rules applicable to goring

⁶⁴ Bava Kamma 33a.

⁶⁵ Rambam, *Hilkhhot Nizkei Mammon*, 9:14.

⁶⁶ Rosh, *Bava Kamma* 3:13.

oxen and instead simply consider the economic impact of each ox's respective damage. Here, Reuven's ox inflicted \$100 of damage, and Shimon's ox inflicted \$40 of damage. Thus, Reuven's ox inflicted \$60 of net damage upon Shimon's ox (\$100 of Reuven's damage to Shimon — \$40 of Shimon's damage to Reuven). Since Reuven's ox is a *mu'ad*, Reuven owes Shimon the full \$60 (\$60 net damage inflicted x 100% recovery because Reuven's ox is a *mu'ad*).

The Implication of the Legal Rule

The debate between Rambam and Rosh regarding how we apply our Mishnah's rule for apportioning damages may implicate whether or not we can locate a principle of comparative negligence within our case. Both Rambam and Rosh agree that Reuven owes Shimon for negligently harming him. Both agree, moreover, that Reuven's obligation to Shimon is reduced because Shimon also acted negligently. Where the commentators diverge, however, is on how precisely Shimon's act of negligence affects his recovery.

According to Rambam, Shimon's act of negligence has no special effect upon his right to tort recovery. That is because, for Rambam, we treat each act of goring as an independent act of negligence: in order to determine each tortfeasor's individual liability, we apply to each tortious act the standard rule of tort liability pertinent to its particular negligence category (i.e. *tam*-negligence vs. *mu'ad*-negligence). Only afterwards do we net the monetary damages produced by this analysis. Thus—and this is the key—the netting process is in no way affected by the tortious nature of the liabilities in question.⁶⁷

According to Rosh, by contrast, Shimon's act of negligence *does* have a special effect upon his right to tort recovery. That is because, for Rosh, we do *not* treat each act of goring as an independent act of negligence. Instead, the fact that the victim also contributed harm changes the way we conceptualize the tort overall: rather than analyzing each act individually, and applying to each tortious act the standard rule of tort liability pertinent to its particular negligence category (i.e. *tam*-negligence vs. *mu'ad*-negligence), we evaluate the parties' actions *in toto*. Put another way, Rosh conceptualizes the case of reciprocal harm as consisting of a single tortious act, defined by the *net* harm. That is, instead of viewing Reuven

⁶⁷ To that extent, Rambam's rule is not fundamentally a tort rule. It is a generic debt rule. We could apply the same netting process to any other type of offsetting debt (for example, reciprocal loans) without any need to adjust the way the rule operates.

as having inflicted \$100 of damage on Shimon, and Shimon as having inflicted \$40 on Reuven, Rosh characterizes the event as a *single* tortious act defined by the \$60 of damage (the *net* amount, \$100 – \$40) that *Reuven imposed* on Shimon (“אין כאן חבלה אלא המותר”).

On Rosh’s interpretation, the Mishnah’s ruling appears to presuppose a principle akin to comparative negligence. For Rosh defines the tort in the Mishnah’s case exclusively in terms of the harm that Reuven imposed upon Shimon; in his view, as mentioned, the case involves a single tortious act defined by the net damage (אין כאן חבלה אלא המותר).⁶⁸ Yet whereas Reuven inflicted \$100 worth of material damage upon Shimon, Shimon only recovers \$60. Why is Shimon barred from recovering the remaining \$40 of damage he suffered? The answer appears to be that Shimon is barred from recovering \$40 because that is the amount Shimon (the victim) contributed to (Reuven’s) tort through his own negligence.⁶⁹ Thus, Rosh’s analysis presupposes the legal doctrine that a tortfeasor is not responsible for the portion of harm contributed by the victim—i.e., the doctrine of comparative negligence. Put another way, Rosh’s reading of our Mishnah represents at least one instance within established halakhic case law wherein the principle of comparative negligence is implicitly operative.

CONCLUSION

Where a tort victim bears some responsibility for their injuries, halakha offers several possible approaches for barring or reducing their recovery.

The grounds for barring recovery completely are more firmly established. As we discussed in Part I, such an outcome might result on the theory that the tort victim is at fault for harming themselves (איתזיק בנפשיה); that they are at fault for imposing additional liability upon the tortfeasor (השבת אבדה); that they absolved the tortfeasor from fault through implicitly consenting to the possibility of injury

⁶⁸ Rosh’s novel characterization of our case as involving only one tortious act bears halakhic implications beyond the issue of comparative negligence. See, e.g., Reshimot Shiurim Bava Kamma, s.v. *Tosafot d”h sbnei*.

⁶⁹ The answer cannot be that Reuven’s \$100 obligation to Shimon is offset by Shimon’s \$40 obligation to Reuven. That way of thinking is consistent with Rambam’s view that two tortious events occurred in this case, but it is inconsistent with Rosh’s view that a single tortious event occurred. Indeed, had Rosh treated these as two separate torts, then only \$20 should be offset, since Shimon’s ox, as a *tam*, is liable only for half damages. Yet Rosh requires Reuven to pay \$60. This result is reached only because Rosh views the case as involving a *single* tortious act that Reuven committed against Shimon.

(מחילה); or that, as a result of the tort victim's negligence, the tortfeasor's conduct now lacks the degree of causal connection to the victim's injuries that must be established in order to hold the tortfeasor liable for those injuries (מעשיו גרמו לו).

The grounds for merely reducing recovery in proportion to the victim's share of responsibility are less firmly established. As we discussed in Part II, such an outcome might result on the theory that the tort victim can be characterized as a joint tortfeasor (שותף בנזק) in causing their own injuries, or that the tort victim can be characterized as having reciprocally harmed (חבלו זה בזה) the actual tortfeasor by negligently increasing the scope of the tortfeasor's liability.⁷⁰ However,

⁷⁰ It is worth considering another Talmudic principle which may presuppose the doctrine of comparative negligence. As we saw above, when a *tam* (i.e., "innocent") ox gores, its owner is liable to pay half-damages. See Bava Kamma 15a. Why is the owner's liability reduced by one-half? Some contemporary tort scholars interpret Rambam in Moreh Nevukhim 3:40 as explaining the half damages rule as a comparative negligence rule. They write:

From the context of what Maimonides writes... it would appear that... since it is not the way of the ox to gore frequently, his owner does not know what caused the ox to gore that particular time and how to prevent such infrequent behavior in the future. In this case it is preferable to split the liability between the owner of the ox and the victim, for the injured party, too, ought to have taken precautionary measures on his part and been wary of the ox even if it was not considered a mu'ad ox, since all oxen can potentially gore. Yuval Sinai and Benjamin Shmueli, *Maimonides and Contemporary Tort Theory* (2020), p. 236

On their interpretation of Rambam, the owner's liability is reduced by a half because the victim is deemed to have been 50% comparatively negligent for not having taken proper precautions. Note, however, that the comparative negligence rule that would emerge from the *tam* half-damages case differs from a standard comparative negligence rule. Whereas a standard comparative negligence rule requires an inquiry into the amount of actual comparative negligence of the victim, the *tam* half-damages rule stipulates categorically, and without an inquiry, that the victim is deemed to have been 50% comparatively negligent.

Understood this way, Jewish law's *tam* half-damages rule parallels the old law of admiralty (the body of maritime law) governing a collision between two ships both of which were deemed to have acted negligently. See *Prosser* op. cit., p. 471 ("The original English admiralty rule divided the damages equally between the negligent parties.... The American courts followed the equal division rule in admiralty law until 1975.") One possible explanation for this categorical stipulation of an equal split is that a rigorous inquiry into the actual percentage assignment of fault can be exceedingly difficult, if not impossible. Thus, because of the difficulties in administering a pure comparative negligence rule, it may be reasonable to adopt a general rule of equal division for cases of comparative negligence. For an application of this type of reasoning to the case of joint tortfeasors, see Shulchan Arukh Choshen Mishpat 383:4 ("אם אין ידוע כולם משלמים בשוה"). See also *supra*, n. 54.

In any event, there is scant textual evidence to support Sinai and Shmueli's reading of Moreh Nevukhim 3:40.

It is true, as we noted in Part I, that Rambam appeals to the principle of contributory negligence to explain why there are no damages for "tooth and foot" ("שן ורגל") in a public domain. Rambam explains that for tooth and foot damages in the public domain, the victim is deemed to

these theories raise unique doctrinal challenges that may perhaps warrant further inquiry. Alternatively, these challenges may be irrelevant if, instead of grounding a comparative negligence principle in other tort principles, it turns out that one of those principles is actually itself grounded in a principle of comparative negligence. In that case, the principle of comparative negligence already functions within the halakhic system—a possibility we examined in the context of Rosh's interpretation of reciprocal tortfeasors (הבלו זה בזה).

have been negligent by leaving his property in the public domain, and therefore cannot recover damages: “[For] he who puts a thing in a public place is at fault toward himself and exposes his property to destruction.” Moreh Nevukhim 3:40. *Cf. supra*, n. 24.

It is also true, as Sinai and Shmueli note, that Rambam's discussion of half damages for a *tam* ox immediately follows his discussion of tooth and foot in a public domain. Moreh Nevukhim 3:40. Yet to derive from this juxtaposition, as Sinai and Shmueli do, that the *tam* half damages rule must be grounded in considerations regarding the victim's negligence is problematic for several reasons. First, Rambam never explicitly applies the logic of comparative or contributory negligence to the case of *tam* half damages. Second, in the passage at issue, Rambam appears equally interested in the full damages of a *mu'ad* ox, implying no connection between the *tam* rule and prior discussion of the tooth and foot rule in the public domain.

The entire passage reads as follows:

One is free from responsibility [for the damage caused by] a tooth or a foot in a public place. For this is a matter with regard to which it is impossible to take precautions, and also damage is seldom caused in this way. Moreover he who puts a thing in a public space is at fault toward himself and exposes his property to destruction. Accordingly one is only responsible for [damage caused by] a tooth or foot in the field of the injured party.

On the other hand, damage caused by a horn and similar things regarding which precautions can be taken in all places and with respect to which those who walk in public places cannot take care, the law applicable to it—I mean the horn—is one and the same in all places. There is, however a distinction that is made between an animal that is docile and one about which its owner has been warned. If the act is exceptional, the owner is held responsible only for half the damage; if however, the animal that causes the damage continually does similar things and is known for this, the owner is held responsible for the whole of the damage. Moreh Nevukhim 3:40.