

# JEWISH TORT LAW REMEDIES NOT BASED ON TORAH LAW — AN APPROACH BASED ON THE RAN AND THE RIVASH\*

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*This essay examines how two of the leading rabbis of fourteenth century Spain defined the roles of the rabbinic courts and the secular Jewish community in the governance of tort disputes that arose within the community. Recognizing the impracticalities of the Torah's legal system, the Ran developed a theory of Jewish self-government that gave much power to the secular Jewish leaders. His responsa reveal that he applied this approach not just in criminal cases as some have suggested, but also in torts cases. He also limited the rabbinic court's power to punish even religious offenses. The Ran's disciple, the Rivash, took a similar view, and recognized broad authority of the Jewish community to legislate without rabbinic oversight. The two rabbis differed in a fundamental respect. The Ran viewed the rabbinic court as independent of the community; the Rivash viewed the court as subordinate to the community.*

*The essay concludes by suggesting ways in which the Ran's and the Rivash's views could be implemented in the State of Israel. The essay suggests that a variety of different approaches are consistent with these views. Rabbinic courts might function alongside secular courts, or be given limited jurisdiction, or operate solely under voluntary jurisdiction. Also, the law these courts apply might be limited to Jewish law or might include other sets of laws.*

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## The Impracticalities of the Torah's Tort Law

Rabbis have noted for centuries the impracticalities of the Torah's tort system.<sup>1</sup> These impracticalities are even more pronounced in an industrialized society. Viewed from the perspective of the common law of torts, Jewish tort law generally favors the defendant. Damages are severely limited, and many defendants incur no liability. There is, for example, no recovery for most cases of wrongful death,<sup>2</sup> generally no *respondeat superior* liability,<sup>3</sup> and no joint and several liability in unintentional tort cases.<sup>4</sup> In cases of personal injury caused directly by another person, a defendant incurs no liability for pain and suffering or for medical expenses, the two largest aspects of a modern tort recovery, unless the defendant acts intentionally or recklessly or perhaps with gross negligence.<sup>5</sup> For simple negligence a defendant is only liable for *nezek*, calculated as the plaintiff's loss of market value determined as if the plaintiff were a slave.<sup>6</sup> But a rabbinic court today cannot award collection for even this limited damage since these courts lack ordained judges.<sup>7</sup> There is no "eggshell skull" rule in Jewish law for personal injuries committed by a person. That is, a defendant is liable only for damages that would ordinarily result from the wrongful contact.<sup>8</sup> Furthermore, Jewish law severely limits liability for indirect injuries.<sup>9</sup> According to some rabbinic sources, a defendant is liable only for injuries that occur immediately when he acts and only if he inflicts those injuries directly to the plaintiff's body or property.<sup>10</sup> Given all these rules, most tort victims today would have either no remedy or a very limited remedy. By contrast, the common law in the past few decades has vastly expanded the range of tort liability, having as its primary goal the compensation of victims.<sup>11</sup>

One can adjust Talmudic law to meet the needs of modern times by reinterpretation and by legislation. For example, one could reinterpret many of the Talmudic tort concepts including "pit," "ox," and the limitations on indirect damage as examples of liability for intentional or negligent conduct<sup>12</sup> or as examples of strict liability.<sup>13</sup> Legislation could be used to fill in any gaps so that the result would resemble the Second Restatement of Torts. This would empower rabbinic courts to apply modern remedies to tort claims but would supplant the traditional understanding of Talmudic law. Alternatively, one could leave the Talmudic law untouched but confer jurisdiction on non-rabbinic courts to resolve all tort cases. This would leave Talmudic torts as a subject to be studied but not a matter for judicial enforcement. The Ran and the Rivash, who lived in Spain at the end of the fourteenth century, promoted other solu-

tions based on a sharing of power between rabbinic courts, lay courts, and civil authorities.

Even in Talmudic times, rabbis fixed gaps in the law by providing additional remedies. For example, rabbis had the power to impose fines where the strict law would leave the plaintiff remediless.<sup>14</sup> The rabbis also prevented defendants from taking unfair advantage of procedural rules.<sup>15</sup> In addition, rabbis sometimes appealed to a defendant's ethical or religious sense of obligation to go beyond the requirement of the law.<sup>16</sup> Also, rabbis encouraged parties to authorize the court to resolve their dispute by imposing a compromise.<sup>17</sup>

The responsa of the Rashba<sup>18</sup> and others inform us that it was common in medieval Spanish Jewish communities for appointed lay judges to try at least some tort cases.<sup>19</sup> These lay judges, the "*berurim*," applied non-rabbinic substantive law and procedures. The exigency of the time required two deviations from the ideal. One was that non-rabbinic law was applied. The other was that Jews other than rabbis would apply that law. The Rashba approved of this practice as an emergency measure authorized by the gentile state.<sup>20</sup>

This essay will focus on the approaches taken by the Ran and his disciple, the Rivash, and their implications for the Israeli legal system. The Ran developed his approach both in a theoretical fashion and in a practical one. In his "*Derashot*"<sup>21</sup> the Ran discusses the separation of powers between the king and the Sanhedrin, and in his responsa the Ran resolved actual cases which involved dividing power between the civil authorities and the courts. As for the Rivash, his responsa show how the rabbinic powers had been limited by the communities. Although sharing much in common, the Ran and the Rivash have different conceptions of the roles of the courts and the community.

### **The Ran's Approach**

The Ran developed a novel theory to explain the practical difficulties posed by Torah law. He recognized that some gentile societies have law that is better suited than the Torah to improve the social order.<sup>22</sup> According to the Ran, the Torah law is designed to serve a religious purpose — to cause the divine emanation to descend on the Jewish people<sup>23</sup> — not to improve the social order. The improvement of the social order is a possible secondary effect of the Torah law, but it is not its purpose. Rather, it is for the king to establish social order.

The Ran identifies three types of law. One is the Torah law which is the revealed law of God. A court applying this law properly becomes, as it were, a partner with God in creation. A second type of law is that which is necessary in an emergency in order to make a fence around the Torah law. This, too, may be exercised by a court but not in matters between one person and another. The court has the inherent authority to exercise emergency powers only in matters between man and God.<sup>24</sup> The third type is law designed to improve the social order. The Ran reserves this law exclusively to the king unless the king delegates the power to the court. If there is no king, then the court has the king's prerogative to make law for the social order.<sup>25</sup> The Ran discusses the law of murder as an example of how the king's law and the Torah law operate. According to Torah law a murderer cannot be executed unless he has been warned by two witnesses and has acknowledged their warning.<sup>26</sup> The Ran says that this is appropriate for the Torah law to insure that the person being executed forfeited his life. But social order requires a stricter standard to deter others from killing.<sup>27</sup>

According to the Ran, a rabbinic court in the Land of Israel would have an even more circumscribed role due to his interpretation of *dina d'malkhuta dina*.<sup>28</sup> The concept of *dina d'malkhuta dina* ordinarily requires a rabbinic court to apply certain laws of the government.<sup>29</sup> According to the Ran, the concept is derived from the king's power to evict others from the king's territory. Since all Jews have an inalienable right to live in the Land of Israel, a king in Israel would lack the power to evict one from the land, and therefore the principle of *dina d'malkhuta dina* would not apply.<sup>30</sup> Consequently, a rabbinic court in Israel would be doubly limited in its role. It would lack emergency powers or those appropriate for the social order, and it would be unable to apply the government's law. Its role would be solely focused on the Torah law. There is a tension in the Ran's approach. Although he considers the king's law better able to regulate society than the Torah law, the Ran maintains that it would be a sin to substitute the king's law for that of the Torah.<sup>31</sup> Moreover, even a gang of robbers knows how to establish order among its members.<sup>32</sup> The Jewish people are distinguished by the special role of the rabbinic courts.<sup>33</sup> The Ran does not resolve the conflict between the need for order and the need for God's law by limiting the rabbinic court to "religious" issues, those involving only man and God. Rather, the king's law and the Torah law overlap in some way when it comes to "civil" issues between one person and another.

The Ran does not explain how this overlap between the king and courts would operate. However, it would seem that the plaintiff

would not be given the ability to choose the initial forum. Otherwise, the plaintiff would be unlikely to choose the rabbinic forum with its limited recovery instead of the more generous recovery available in the king's court. This would be inconsistent with the Ran's insistence that the Israelites sinned by demanding a king to be their exclusive judge. To avoid this sin, a plaintiff would have to bring his case to the rabbinic court initially and the king's court would have jurisdiction only after the rabbinic court rendered judgment. Such a system would be cumbersome but would allow the court and the king to perform their special functions.<sup>34</sup>

Some have thought that the Ran intended his description to be theoretical only.<sup>35</sup> Others have thought that he intended it only to apply to cases of murder or serious criminal matters.<sup>36</sup> A look at the Ran's responsa suggests that he may have been describing the function of the Jewish courts and communities in Spain.<sup>37</sup> As we will see from the Ran's responsa, in Spanish Jewish communities the courts were limited in their power, the central power being conferred on the *kahal* and its secular leaders.<sup>38</sup> The Ran hinted in one of his responsa that the *kahal* is the equivalent of the king.<sup>39</sup> He compared the power of a court or citizens of a town to impose a ban to the power of Sanhedrin or king. If the court is like the Sanhedrin, then one might conclude that the town's citizens are comparable to the king. The Ran thus followed the Rashba who compared the *kahal* to the king and thus legitimated its authority to legislate.<sup>40</sup> The Ran goes further. Since the *kahal* has the king's power, the court is therefore restricted in its authority.

Two of the Ran's responsa present a striking illustration of the different roles and powers of the courts and the *kahal*.<sup>41</sup> In one the Ran was asked to determine the marital status of a woman named Beile. After she was betrothed to a man named Nitzak Klot, another man named Ansh'lomo Avram spread rumors that she had already been betrothed to him. The Ran reviewed the various testimonies prepared by the courts of three separate towns and concluded that the rumors were legally insufficient to affect her status. But then the Ran adds:

The leaders of that town and of all the nearby and surrounding towns ought to be alert to this matter and strike with their staff of discipline the man who sought to spread this false and malicious rumor because it is apparent — based on several reasonable inferences in the documents — that he acted deceitfully. I have discussed them at length because one can only render judgment according to strict law when the law is clear. But the leaders of each town

should consider closing the breach so that the fox does not make a large breach.<sup>42</sup>

Ansh'lomo injured Beile by interfering with her relationship with her intended husband, by defaming her reputation, and by humiliating her. Jewish law, however, would provide Beile no adequate compensation for these injuries against Ansh'lomo.<sup>43</sup> Nonetheless, public order demands some deviation from the law in this matter in order to stop Ansh'lomo and others from spreading malicious rumors in similar situations. The Ran distinguishes between the strict legal remedy of declaring the marital status of the parties and the need to punish the offender to protect society. The former may be exercised by a court only when the matter is clear but the latter can be based on reasonable inferences. Other rabbis, before and after the Ran, had dealt with similar matters where penalties needed to be imposed because the Talmudic law was inadequate.<sup>44</sup> The striking feature of the Ran's ruling is that the leaders of the communities rather than the court are to impose the penalties not available under strict law.<sup>45</sup> The Ran's approach of distinguishing the roles of the court and the *kahal* helps to insure that each will correctly fulfill its role. The court's role is internal; its task is to assure that its holding is required by the divine commands; it must apply the law "which justifies itself."<sup>46</sup> By contrast, the *kahal's* role is external; its role is to control behavior and protect society.<sup>47</sup> If the two roles were combined in one body, there is a risk that one or both roles would not be fulfilled.

The responsum may shed light on why the Torah's tort rules impose such limited liability. The limitations are based on the court's limited power. The court can only hold a defendant liable if the matter is clear; mere probability is not enough. The requirement of clarity may derive from the court's role of acting as God's surrogate and partner. God presumably acts on perfect knowledge, and a court must not act unless it can do its best to do likewise. Consequently, the court may impose liability only when it is as certain as possible that the defendant is responsible for the loss.<sup>48</sup> By contrast, the social order requires a more lenient standard of enforcement, and corrective measures are appropriate if there is a reasonable inference that the defendant was responsible. By the same token, even if the court lacks the power to hold a defendant liable, there may still be liability in the Heavenly court,<sup>49</sup> since God can discern the truth that is unknowable with certainty to the human court.

In another matter the Ran was asked whether a court should fine a creditor who lent money on interest, and if there were

*berurei aveirot* (secular authorities appointed by the community to police such matters) in the town, how much they should fine the creditor.<sup>50</sup> The Ran answered that the court under strict law may only disallow the collection of interest but must uphold the creditor's right to collect the principal of the debt. The Ran also wrote that he can set no standard for the fine which the *berurei aveirot* may impose. Instead, the *berurei aveirot* are to set the fine as they see fit based on the needs of the time and the place.

Once again the Ran distinguishes the power of the court from the power of the secular authorities. The court can only apply strict Torah law, whereas the *berurei aveirot* are able to impose whatever fines they deem appropriate. Further, if the town lacked a secular authority to impose the fine, the court would still be without power to do so. The responsum fits well with the idea expressed in the Derashot that the role of the court is to apply the Torah law for its own sake and not with regard to its effect on the social order. It actually clarifies the Derashot in two respects. First, the court's power is limited even when the town lacks other means of imposing a fine. One might have thought if the town lacked any *berurei aveirot* that the court might act in their place, on the theory that in the absence of a king the court may assume its powers. But the Ran rules to the contrary, presumably on the theory that the community itself is the equivalent of the king so that no vacuum needs to be filled by the court. Second, the responsum limits the power of the court to impose extraordinary punishment even though lending money on interest is a religious violation and not merely a civil wrong. One might have read the Derashot as allowing the court to impose extraordinary punishment whenever a religious violation occurs, but this responsum requires a narrower reading of that power.

A Polish responsum from the late sixteenth century or early seventeenth century dealing with a similar issue demonstrates how special the Ran's approach was.<sup>51</sup> Rabbi Benjamin Slonik was asked if a court could fine a borrower for agreeing to pay interest. The answer was it may do so if it sees fit even though strict law imposes no such penalty. The power of the court was enlarged to encompass the power that the Ran reserved to secular authorities. Ironically, the responsum cites the Ran's responsum for support.<sup>52</sup>

### The Rivash's Approach

The leaders of the *kehilot* possessed not only extensive judicial power but extensive legislative power, too. Were there any rabbinic

checks on this power? In detailing the powers of private associations to make rules for their members, the Talmud requires the concurrence of an "*Adam Hashuv*,"<sup>53</sup> which Ibn Migash held was a person appointed to that post.<sup>54</sup> Post-Talmudic authorities differed over whether his concurrence was necessary only in the case of private associations so as to protect the interests of the public, or whether his concurrence was also necessary for communal legislation to have effect.<sup>55</sup> The Rivash, a disciple of the Ran, took what was to become the minority view that a community might legislate for itself without the consent of an "*Adam Ha-shuv*."<sup>56</sup> Under the Rivash's view, the *kahal* obtained a measure of autonomy, not only with respect to the outside governmental authority, but also with respect to the internal political structure.

The Rivash further recognized that the *kahal's* power to legislate was not limited to the particular cases mentioned in the Talmud.<sup>57</sup> According to the Rivash, the community could legislate with respect to matters that affected the entire community or any segment of it.<sup>58</sup> Further, the Rivash equates the *kahal's* power to inflict corporal punishments that are not required by Torah law with the power of a court. Given that power, the Rivash holds that the power must logically apply also to the more moderate remedies of fines and expropriation.<sup>59</sup>

The Rivash holds that the *kahal* is superior to the court. In one responsum he writes that Jewish judges in Spain are empowered to adjudicate cases due to the *kahal's* legislation.<sup>60</sup> This is reminiscent of the Ran's observation in the *Derashot* that the king may delegate power to the court, but it differs significantly from it. According to the *Derashot*, the court has two bases of jurisdiction, a Torah basis empowering it to apply Torah law and the power, if delegated by the king, to apply laws for the social order. But according to the Rivash, the courts function solely as creatures of the *kahal*. Since courts derive their authority from the *kahal* and not from the Torah, it would seem to follow that the courts apply the law prescribed by the *kahal*.<sup>61</sup>

The *kahal* could limit the jurisdiction of the rabbinic court in other ways, too. It is apparent from one of the Rivash's responsa involving a tort case of property damage that the *berurim* functioned as fact gatherers and fact finders, determining whether expert opinions were necessary, viewing the site on their own and determining the extent of damage.<sup>62</sup> The *berurim* then consulted with the two rabbis of the town as to the proper legal result. The two rabbis then advised the *berurim* of their conclusions and the *berurim* rendered their judgment in accordance with the judgment of the two rabbis.<sup>63</sup> Although the responsum is silent about the

rabbis' power to overrule the *berurim's* findings of fact and the power of the *berurim* to ignore the rabbis' conclusions of law, it seems that the *kahal* had limited the rabbinic role to ruling on matters of law.

### The Ran, the Rivash, and the State of Israel

There is a fundamental difference between the structure of government envisioned in the Derashot and that observed by the Rivash. According to the Derashot, the court's existence and basic power to apply Torah law are independent of the king. The monarch does not create the courts or endow them with their power to apply Jewish law. The courts derive their authority directly from the Torah, and their role is to serve as God's surrogate. Although the king may give the court power to apply laws for maintaining the social order, the king cannot compel the courts to do so. By contrast, the Rivash sees the courts as creations of the *kahal* and subordinate to the *kahal's* extensive power. The courts apply *halakhic* law only to the extent that the *kahal* prescribes, and their ability to act as fact finders is subject to the *kahal's* control.

How may we apply the views of the Ran and the Rivash to tort law in Israel? Each of their approaches could be implemented in several ways, both as to the structure of the court system and as to the substantive law to be applied. One way of implementing the Ran's approach described in the Derashot would be for rabbinic courts to function independently of the state, in which case they would apply Torah law, could not apply Israeli law on grounds of *dina d'malkhuta dina*, and could not deviate from Torah law for purposes of improving the social order. Their purpose would be religious. The state's administrative or quasi-judicial authority could supplement the rabbinic courts' remedies if the state determined that this was appropriate for the social order. Alternatively, the Ran's approach could be implemented by the state delegating to the rabbinic courts the power to supplement the Torah law with additional remedies.

The view of the Rivash could be implemented by making rabbinic courts dependent on the state. They would derive their power from the state. They could be empowered to apply any body of substantive law which the state chooses. It might be Torah law supplemented with laws deemed necessary for the improvement of the social order. Alternatively, the state could establish a separate administrative body to provide relief not available in the rabbinic court.

The differences between the Ran's and Rivash's approaches, while perhaps not apparent to the ordinary litigant,<sup>64</sup> have important legal implications. As the Rivash observed, the status of the witnesses and judges appearing before the two types of courts is different. The judges and witnesses of an independent rabbinic court must be totally impartial. But if the rabbinic court is dependent for its existence on the laws of the state, then the state could modify its procedures.<sup>65</sup> Also, the independent rabbinic court would be free to establish its own rules of decision. Even if the state delegated certain powers to it, the court would be able to refuse to exercise those powers. By contrast, since a dependent court's authority to apply Torah law derives from a statute, the state could prevent it from deciding certain cases or applying certain rules of Jewish law. Furthermore, the state could compel the dependent court to apply state law.

Whether the rabbinic courts are independent of the state might also affect the court's religious role. If the Ran's approach of an independent rabbinic court is implemented, the court will be able to fulfill the religious function for which it is designed — to bring the Jewish people closer to God. A rabbinic court established by the state and required by the state to apply Torah law might not fulfill the same religious function, particularly if the state regulation of the rabbinic court is so pervasive as to make the court but an administrative arm of the state. Although rabbinic judges might be able to serve two masters, the greater the state's control of the rabbinic court, the less likely it is that the court will perform a religious function.

If rabbinic courts are given jurisdiction to hear tort cases, what would the substantive law of torts be like? Again there are several options. One is to authorize the rabbinic courts to supplement Torah law governing torts with common law remedies. Alternatively, these additional remedies could be reserved to a state administrative or judicial body. Each alternative has its advantages and disadvantages. The chief advantage of authorizing or compelling rabbinic courts to apply the common law to tort cases would be efficiency. One court would administer both rabbinic law and state law in one proceeding. The chief disadvantage is that the court might be inclined to mix the rabbinic law with the common law, incorporating elements from one into the other, and thus doing justice to neither. The advantage of a two-court system is the assurance that each court would fulfill its role. Rabbinic courts would apply God's law and state courts would care for the social order. The disadvantage of setting up this system is the burden it would place on litigants to undertake two proceedings in almost every case.

A more radical solution would be to accept the limitations of the *halakhic* tort system without directing the rabbinic court to change it in any way. Although this would leave most injured persons with little remedy in the rabbinic courts, the need for social order can be met without the common law of torts. The vast bulk of tort victims suffer from unintentional injuries. These injuries could be covered by first-party insurance which the state would either provide or require individuals to have.<sup>66</sup> The state could provide supplemental common law remedies for victims of intentional torts only.

A more modest solution would be to authorize rabbinic courts to function in a voluntary capacity. As the Ran observed in a responsum to the Rivash, tort law affects the public sphere, but it also affects the private relations between parties.<sup>67</sup> It might be politically unfeasible to have rabbinic courts adjudicate all tort disputes, but private parties could themselves agree to adjudicate their tort disputes in rabbinic court. The agreement could be made after the tort occurred or in advance. For example, individuals could be given the opportunity when they apply for a driver's license to agree to being sued in rabbinic court and to agree to sue there if their opponent has made a similar declaration. Such a solution could be achieved with minimal state action.<sup>68</sup>

The approaches of the Ran and Rivash do not compel us to conclude that any one solution is the right one. The ultimate solution will depend on a variety of political, ideological, social, and economic factors. As Don Isaac Abravanel observed, "Experience triumphs over logic."<sup>69</sup> The Ran and the Rivash give us a range of possible solutions to resolving the tension between the need for a community to govern itself in an orderly manner and the need for a religious community to live according to the Torah.

## Notes

- \* The Ran, Rabbi Nissim ben Reuben Gerondi, lived from about 1310 until 1375, primarily in Barcelona, Spain, where he headed a yeshiva and wrote numerous works on Jewish law. See generally, *Encyclopaedia Judaica* (Jerusalem: Keter, 1972) 12:1185. One of his disciples was Rabbi Isaac ben Sheshet Perfet, known as the Rivash. He lived from 1326 until 1408 and served as a rabbi in Barcelona, Saragossa, Valencia, and Algiers. His responsa were considered one of the pillars of Jewish law. See *Encyclopaedia Judaica* 9:32.
1. See, e.g., B. Bava Kamma 96b (Rav Nahman ruled that a notorious robber should be penalized for his theft of oxen even though under strict law there would be no liability because he returned the oxen

intact after using them); Responsa Rashba 3:393 (if cases of personal injury and other matters were decided according to strict law, the world would be destroyed; therefore the leaders of the community are authorized to impose monetary fines and corporal punishments as they deem fit); Responsa Rashba 4:311 (it is necessary for the leaders of the community to apply non-Torah law as the rabbinic courts lack the necessary jurisdiction to provide relief under Torah law); Responsa Hatam Sofer 1:208 (matters for which the Torah provides no liability are not necessarily permitted; rather the Sanhedrin and the king will take appropriate action, as the Torah itself is intended to supplement the pre-existing law since the all the ways of the Torah are pleasantness).

2. See Shulhan Arukh, Hoshen Mishpat 410:21 (not liable for the death of a person who falls into a pit); Maimonides, *Hilkhot Na'arah Betulah* 1:13-14 (if a matter could have been punishable by death by a court if done intentionally, then the defendant is exempt from paying damages even if the action was unintentional); Shulhan Arukh, Hoshen Mishpat 423:4 (one who unintentionally kills a pregnant woman and thus causes a miscarriage has no liability in tort for the loss of the fetus).

A penalty for wrongful death was imposed only for death caused by an animal that was a habitual killer. See Exodus 21:30; Maimonides, *Hilkhot Nizkei Mammon*, chs. 10-11.

3. The general rule is "There is no agent for a transgression." B. Kiddushin 42b. But an exception could be made in some circumstances, such as where Levi tells Simeon to break Reuben's objects knowing that Simeon believes they belong to Levi. In these circumstances, Levi would be held liable. See Ephrayim ben Aaron Navon, *Mahaneh Efrayim*, *Nizkei Mammon* 7 (1738). See generally 11 *Encyclopaedia Judaica*, "Liability" 183 (1972); Aaron Kirschenbaum, "A Cog in the Wheel, The Defence of Obedience to Superior Orders in Jewish Law," *Israel Yearbook on Human Rights* 4(1974):168.
4. Shulhan Arukh, Hoshen Mishpat 410:37. Cf. Id. at 361:5 (if a robber stole from another robber, they are jointly and severally liable to the owner).
5. B. Bava Kamma 26b-27a. See Rashi's and the Meiri's commentaries. "Intentionally" is a translation of *mezid*; "recklessly" is a translation of *karov la-mezid*. An example of the latter is one who falls from a roof due to a wind that is of normal intensity. He is presumably aware of the risk when he stands on the roof. By contrast no recklessness arises if one was aware that he had a stone in his clothing and then subsequently forgot about it so that when he stood up the stone fell out and injured another. In such a situation the defendant would be liable only for *nezek*. B. Bava Kamma 26b. Professor Shalom Albeck translates *karov la-mezid* as "gross negligence." *Encyclopaedia Judaica* 5:1234.

A person may recover only *nezek* if the damage is caused by another's pit or ox or by derivatives of those two tort categories. See Maimonides, *Hilkhot Nizkei Mammon* 14:15.

6. B. Bava Kamma 84a.
7. Shulhan Arukh, *Hoshen Mishpat* 1:2 (can also not collect pain or humiliation but can collect loss of time and medical expense).
8. Shulhan Arukh, *Hoshen Mishpat* 420:28; *Yam Shel Shelomo*, Bava Kamma 8:38. By contrast, American tort law makes a defendant liable for any personal injuries that result from the wrongful contact. E.g., *Bartolone v. Jeckovich*, 103 A.D.2d 632, 481 N.Y.S.2d 545 (1984) (a defendant who drove a car negligently is liable not only for minor injuries that arose immediately but also for aggravating the plaintiff's pre-existing paranoid schizophrenic condition). See W. Page Keeton, *Prosser & Keeton on the Law of Torts*, 5th ed. (St. Paul: West, 1984), pp. 291-92.
9. Another principle of limited liability arises when a person or object has been partially injured or damaged or when different parts of the object have been damaged. Rava stated that if an ox gored a cow causing it to miscarry, the damage to the cow and the calf must not be measured separately as this would make the defendant suffer unduly. Instead the damage to the pregnant cow is the basis for awarding damages. B. Bava Kamma 47a. Rava distilled the principle from the measurement of damages in personal injury (valuation of the hand of a slave) and property matters (valuation of part of a field that has been damaged). See also Solomon Luria, *Yam Shel Shelomo*, Bava Kamma 8:1 ("we are lenient [to the defendant] in all estimations of damage.") The meaning of Rava's principle is that when an object or person has been damaged partially, the part damaged must not be valued separately from the entire object or person as this would unjustly inflate the damage award. See *Yam Shel Shelomo*, Bava Kamma 5:1; Meiri, Bava Kamma 47a. Crop damage is measured not by determining the diminution in value of the actual crop damaged. Rather one calculates how much less one would be willing to pay for a field sixty times as large as that actually damaged on account of the actual damage done. B. Bava Kamma 58a. See, generally, Steven F. Friedell, "Some Observations on the Talmudic Law of Torts," *Rutgers L. J.*, 15:897(1984): 902-6.

Although all the Talmudic tort rules did not limit liability, this was the general trend. Among the rules extending liability one must count the principle that if a defendant's actions began as being culpable but ended up being non-culpable, he would in some circumstances be liable. B. Bava Mezia 42a. For example, if a person stored another's goods in a cot of bulrushes, he is liable for their theft. The method of storage is considered safe against theft but is negligent with respect to fire.

10. See *Tosafot*, Bava Batra 22b s.v. "*Zot omeret*." Rosh Bava Batra 2:17; Rosh, Bava Kamma 9:13.

11. Tort law has expanded liability by many methods including: removing or limiting immunities, such as charitable, family and governmental immunity; by removing the privity bar to recovery against manufacturers and exposing them to strict liability; expanding the concept of foreseeability to include more remote actors; holding medical and other professionals to a higher standard of care than previously; expanding the liability of landowners; and relaxing the requirement that the plaintiff must prove cause-in-fact in situations where it is deemed unfair such as in some of the DES cases. These changes have been compounded by procedural reforms that make it easier for plaintiffs to pursue their claims and by a greater willingness of judges to leave liability issues to juries.
12. See, e.g., Shalom Albeck, Torts, 15 *Encyclopaedia Judaica* 15: 1271 (the basis of liability in the Talmud is negligence). Certainly the Talmud intends that “pit” and “ox” are but examples of similar kinds of things that cause injury. But the Talmudic categories have a far more limited range of liability than modern tort concepts. For example, in cases of pit, there is no liability for inanimate objects falling into the pit and no liability for non-fatal personal injuries. B. Bava Kamma 28b. Oxen that gore expose their owners to only half damages limited by the value of the defendant’s ox unless the ox has been formally adjudged to be a “goring ox” in which case liability is limited to *nezek*. B. Bava Kamma 16b, 24a . Under modern tort law one who creates an obstacle in a public way is liable for property damage and personal injuries. E.g., *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 414 N.E.2d 666, 434 N.Y.S.2d 166 (1980) (personal injuries). Owners of domestic animals are liable for full damages when they had reason to know of their animal’s dangerous propensity. E.g., *Duren v. Kunkel*, 814 S.W.2d 935 (Mo. 1991) (bull).
13. See, e.g., Irwin Haut, “Some Aspects of Absolute Liability under Jewish Law, and Particularly, under the View of Maimonides,” *Dine Israel* 15 (1989/90):7.
14. E.g., Bava Kamma 96b. See note supra.
15. E.g., B. Bava Mezia 39b (Rav Hisda shifted the burden of proof in a case involving Mari bar Isak who was a powerful individual who might intimidate witnesses from testifying against him).
16. E.g., Bava Mezia 83a (Rav ordered Rabbah bar R. Huna not to seek compensation and indeed to pay some porters who negligently broke one of his barrels of wine; as a matter of strict law the porters were liable for the damage and not entitled to payment, but the result was explained in terms of Proverbs 2:20, “That you may walk in the way of good men and keep the path of righteousness”). See generally, Aaron Kirschenbaum, *Equity in Jewish Law, Halakhic Perspectives in Law, Formalism and Flexibility in Jewish Civil Law* (New York: Ktav, 1991); Aaron Kirschenbaum, *Equity in Jewish Law, Beyond Equity: Halakhic Aspirationalism in Jewish Civil Law* (New York: Ktav, 1991). These types of remedies were

often employed in post-Talmudic times when there was no liability under strict law. E.g., Solomon ben Abraham Ha-Kohen (?1520 to ?1601), Responsa Maharshakh 4:31 (an informer who would have no liability under strict law for the indirect losses he caused must nonetheless compensate for them in order to seek atonement); Isaac Jacob Weiss, Responsa Minhat Yitzhak 2:88 (20th century England/Israel) (plaintiff was a counselor at a religious summer camp who used his car frequently for the benefit of the camp; one night a fellow counselor used the car and damaged it in an accident; although not required to, it would be righteous for the camp and the driver to pay for the damage to the car leaving the owner to bear more remote losses including increased insurance premiums and loss of use of car); R. Yom Tov B. Moses Zahalon (sixteenth-seventeenth century Israel), Responsa Maharitatz Hahadashot 49 (Reuben, a scholar who was the father-in-law of Simeon, suffered various losses because he was afraid that if he entered a certain country he would be arrested and held hostage and the ruler of that country would demand substantial payments from Simeon; even though Simeon is not obligated by strict law to compensate Reuben, it not even being a case of *gerama*, it is proper that he do so).

17. See B. Sanhedrin 6b.
18. R. Solomon ben Abraham Adred (c.1235-1310).
19. See, e.g., Responsa Rashba 4:311. See also Responsa Ritva 67 (it is customary for communities either to fine or to inflict corporal punishment on those who fight with others). The Ritva lived in Spain from 1250 until 1330 and was a student of the Rashba. This practice was reestablished by the statutes of Valladolid in 1432. See Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: P. Feldheim, 1964), p. 356; M. Elon, *Ha-Mishpat Ha-Ivri* (Jerusalem: Magnes Press, 1973), pp. 23-24 (in Hebrew).
20. See, e.g., Responsa Rashba 4:311.
21. It is now generally agreed that the Derashot Ha-Ran were written by Rabbi Nissim ben Reuven from Gironde despite some doubts earlier. See Aviezer Ravitzky, *Al Da'at Ha-Maqom* (Jerusalem: Keter, 1991), p. 108, n. 12 (in Hebrew); Leon Feldman, ed., *Derashot Ha-Ran* (Jerusalem: Shalem, 1973), pp. 5-8 (in Hebrew).
22. Leon Feldman, ed., *Derashot Ha-Ran*, 11th Derasha, p. 191. See also Aaron Kirschenbaum, "The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought," *Jewish Law Annual* 9:123(1991):126-27 (translating part of the Derashot).
23. *Ibid.*
24. *Derashot Ha-Ran*, p. 192. The qualification that the court may not exercise emergency powers in "civil" cases is not found in all manuscripts.
25. See *Derashot Ha-Ran*, pp. 189-192.
26. B. Sanhedrin 40b.

27. *Derashot Ha-Ran*, p. 190.
28. Ran, Nedarim 28a, s.v. be-mokhes (quoting the Tosafists).
29. See *Encyclopaedia Judaica* 6:51-55.
30. The Hatam Sofer suggested that the Ran may have only intended to exclude the rule of *dina d'malkhuta dina* in matters of taxation since the king's rules in these matters do not depend on the consent of the people but are imposed against the people's will and can only be justified by the king's power over the land. But in matters of custom where the people consent, the Ran would agree that the court is bound to apply the king's law. Responsa Hatam Sofer 5:44 (Hoshen Mishpat). The Hatam Sofer's suggestion would leave the king in Israel powerless to have his tax law recognized by rabbinic courts. This would be somewhat odd as the king has a greater interest in enforcing his tax measures than he does in enforcing the general customs of the realm. Moreover, it is not clear that people do not consent to having a tax system though they would rather not pay taxes. Just as people consent to customs even though they may be hurt when those customs are applied to their case, so they consent to having a tax system. See Rashbam, Bava Batra 54b, s.v. "*Mi amar.*" Cf. *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Homes, J., dissenting) ("Taxes are what we pay for civilized society.")
31. *Ibid.* at 192-93. He explains the sin of the Israelites in demanding that Samuel appoint a king to judge them instead of being judged by Torah judges. See 1 Sam. 8:5.
32. *Ibid.* at 189. The idea that a gang of robbers has a legal system of its own was common to Jewish and non-Jewish philosophers. See Judah Halevi, *Sefer Ha-Kuzari* 2:48; Dante Alighieri, *Convivio* 1:12; Plato, *Republic*, 351. Dante credits the "Philosopher" in the fifth of his *Ethics* for the idea, and the Ran similarly credits the "Hakham" with the idea, but it is not found in Aristotle's *Ethics*.
33. A similar idea was expressed by Rabbi Isaac ben Moses Arama (c. 1420-1494). He said that the people who built the tower of Babel did not sin in their desire to establish social order. Their sin consisted of thinking that social order was an end in itself and not a way to attain the higher goal of spiritual salvation. Isaac ben Moses Arama, *Akeidat Yizhak*, section 14.
34. Chief Rabbi Herzog, sensing the administrative burden of having two courts try the same matter, thought that the king's court was intended primarily for trying murder cases but could also try robberies and similar matters, and that when the need arose, the matter could be brought directly to the king. Isaac Herzog, "Din Ha-Melekh Ve-Din Ha-Torah," *Talpiot*, vol. 4, (1957/58):19-20.
35. Rabbi Abraham b. Ze'ev Nahum Bornstein of Sochaczew (c. 1839-1910), *She'elot U-Teshuvot Avnei Nezer*, Y.D., no. 312, section 50.
36. See note *supra*.

37. See Gerald J. Blidstein, "On Political Structures — Four Medieval Comments," *Jewish J. of Sociology*, 22:47(1980):53 (suspecting that the Ran was less concerned in the Derashot with the roles of the monarch and court and more interested in "the need to provide a broad defence for allowing deviations from Talmudic law in the workings of a contemporary Spanish polity").
38. The novellae to Sanhedrin attributed to the Ran state that a beit din can only inflict extraordinary punishment if it is expert and is ordained like Shimon ben Shetah and his colleagues or, if outside the Land of Israel, if it has the authority from the government. Hiddushei Ha-Ran, Sanhedrin 46a. See also Hiddushei Ha-Ran, Sanhedrin 27a (the infliction of extraordinary punishments imposes a stronger need for great and expert judges than do cases to be decided by Torah law). The beit din's role is to apply Torah law. Any deviation from that role is an extraordinary act appropriate to the highest level of government alone. The novellae recognize an exception for dealing with informers. Custom has sanctioned the beit din's infliction of capital punishment to root out this evil. These novellae are not believed to have been authored by Rabbi Nissim of Gerondi. See *Encyclopaedia Judaica*, 12:1186.
39. Responsa Ha-Ran 68. The text used is by Leon Feldman, *Teshuvot Ha-Ran* (Jerusalem: Moznaim, 1984).
40. The Rashba had compared the power of the *kahal* to the high court and to the king. Responsa Rashba 3:411; 3:417; 7:490. See Menahem Elon, "Democracy, Basic Rights and Proper Administration in the Judgments of the Sages of the East after the Expulsion from Spain," *Shenaton Ha-Mishpat Ha-Ivri*, 18:9(1995):15 (in Hebrew). In another matter, the Rashba had ruled that if a local gentile authority has the power to make laws in his town, then the principle of *dina d'malkhuta dina* ("the law of the kingdom is the law") applies to his laws so that they are binding on the Jewish court. Responsa Rashba 1:612. See Shmuel Shilo, *Dina D'Malkhuta Dina* 91 (Jerusalem: Jerusalem Academic Press, 1974). This suggests that anyone having the power to make law is the equivalent of a king.
41. Responsa Ha-Ran 30.
42. *Ibid.*
43. See, e.g., Tur, Hoshen Mishpat 420 (humiliation by words alone of one other than a scholar is a grave sin but does not subject one to tort liability); Maimonides, Hilkhhot Hovel U-Mazik 3:7 (same).
44. E.g., Maimonides, Hilkhhot Hovel U-Mazik 3:5 (the court ought to repair the breach as it sees fit); Israel Isserlein, Terumat Hadeshen 1:307 (fifteenth century Austria) (Simeon slandered Reuben, causing Reuben to lose his position as prayer leader. Even though Simeon was not obligated as a matter of strict law to compensate Reuben, the court may fine him in order to try to limit such acts); R. Joseph Trani, Responsa Maharit 1:98 (sixteenth-seventeenth century Israel, Turkey) (Reuben, who impregnated Simeon's ser-

- vant, is not liable to Simeon under strict law for losses but he deserves to be punished and the court may also fine him if they deem it appropriate).
45. The Rosh had earlier written that the power to deviate from the Torah law can be exercised either by a judge who is a great one in his generation like R. Nahman, who was a son-in-law of the Exilarch's house and who was appointed by the Exilarch to try cases, or by the *tovei ha-ir*, the secular leaders who are appointed by the public, but such power cannot be exercised by an ordinary court. Rosh, Bava Kamma 9:5.
  46. Derashot Ha-Ran p. 190.
  47. Professor Seidman has argued that the modern criminal law is marked by two models, a formal model which assigns moral fault and inculcates internal moral inhibitions, and a regulatory model. He further asserts that the two models are based in human nature as healthy people maintain both an external and an internal perspective. Louis Michael Seidman, "Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State," *J. Contemporary Legal Issues*, 7:97(1996).
  48. See Arnold Enker, "Aspects of the Interaction between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law," *Cardozo L. Rev.*, 12:1137(1991):1144.
  49. See, e.g., Mishnah Bava Kamma 6:4 (if one puts a fire in the hands of a legal incompetent causing injury to a third party). See also Rabbi Solomon ben Abraham Ha-kohen (?1520 to ?1601) Responsa Maharshakh 1:27 (liability in Heaven depends on intention of defendant).
  50. Responsa Ha-Ran 41.
  51. Rabbi Benjamin Slonik (1550-1619), Responsa Masat Binyamin 34.
  52. Citing the Ran's responsum as number 45 as printed in the Constantinople edition.
  53. B. Bava Batra 8b.
  54. See Hiddushei Ha-Ran to Bava Batra 9a (quoting Ibn Migash).
  55. See *Talmudic Encyclopedia* 15:98 (Jerusalem: Talmudic Encyclopedia Institute, 1990) (in Hebrew).
  56. Responsa Rivash 399. The issue was whether a betrothal was valid if not made in accordance with a communal ordinance requiring betrothals to be performed in the presence of the officials of the community and 10 men. The Rivash wrote that as a matter of *halakhah* the ordinance was valid but as a practical matter he was unwilling to rule that the betrothals made in violation of the ordinance were void unless all the sages of the regions would agree with his opinion.
  57. B. Bava Batra 8b quotes a beraita as saying, "The towns-people are also at liberty to fix weights and measures, prices and wages, and to inflict penalties for the infringement of their rules."

58. Responsa Rivash 399. The Rivash notes that the Tosefta, Bava Mezia, ch. 11 provides that the community may, in addition to those powers quoted in Bava Batra 8b, provide fines for anyone who is seen with a particular person or with the king or allows his cow to graze among the seeds.
59. *Ibid.*
60. Responsa Rivash 476 (near the end). The question was whether judges of a *kahal* may hear cases involving the *kahal* itself due to their interest in the matter. The Rivash ruled that they may do so even though they would be forbidden to do so under strict law. But since the courts exist as a result of communal legislation the members of the community have accepted them as judges and waived any disability.
61. So in cases of taxation the Ran ruled that the courts are governed by customs of the communities and not by strict law. Responsa Ha-Ran 11.
62. Responsa Rivash 506.
63. Apparently the case arose in Saragossa. The two rabbis were Rabbi Joseph ben David and the Rivash. After the *berurim* gave their judgment, the plaintiff appealed to the appellate judge, Rabbi Joseph ben David, who reversed his earlier judgment. The Rivash writes a blistering criticism of the appellate decision. See Leon Aryeh Feldman, "R. Yosef ben David, Ha-Dayyan mi'Saragosa, ve-Yahaso l'ha-Ran, l'ha-Rivash ul'ha-Rashbatz," *Proceedings of the Sixth World Congress of Jewish Studies* 3:349(1976/77):351.
64. By comparison, consider the differences in the United States between an Article I court established by legislation, like the Tax Court, and the Article III courts like the federal district courts. The ordinary litigants may not sense the difference between the two in terms of the impact on them, but the two courts have different powers as a result of their pedigree.
65. See Responsa Rivash 476.
66. This type of arrangement exists in New Zealand. See G. Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Wellington: Oxford University Press, 1979).
67. Responsa Ha-Ran 80. The responsum, written to the Rivash is also contained in Responsa Rivash 390. The issue was whether it is appropriate to announce during the synagogue service on the Sabbath that anyone having a claim with respect to particular property that is about to be sold must make a claim with the leaders of the community within 30 days. The Ran rules that the practice, though bizarre, is justified because matters of public importance may be discussed on the Sabbath. He observes that even though each instance is a private matter, they also relate to the social order.
68. The state would need to authorize drivers to make the choice and maintain lists of parties willing to litigate in rabbinic court. The

state might also need to require insurance companies to honor their insureds' choice in the matter.

69. Isaac Abravanel (c.1437-1508), Commentary on Deut. 17:14 (first introduction).