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Nobody’s Perfect: Proximate Cause in American and Jewish Law

By Steven F. Friedell*

Introduction

Although it may seem counterintuitive, wrongdoers are not liable for most of the damage they cause. The law leaves most of the burden of torts on the victims because it would be neither just nor practical to hold culpable defendants liable for all the harm they cause. To do otherwise would expose a wrongdoer to liability to an indefinite number of people for an indefinite amount of time. The difficult task for any legal system is to define the criteria that determine the limits of liability and to prescribe the procedures for applying those criteria. This Article will compare the doctrine of proximate cause used in American courts with a set of doctrines that

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1. See, e.g., In re Kinsman Transit Co., 388 F.2d 821, 824 (2d Cir. 1968) (Kinsmann II) (“Numerous principles have been suggested to determine the point at which a defendant should no longer be held legally responsible for damage caused ‘in fact’ by his negligence.... Such limiting principles must exist in any system of jurisprudence for cause and effect succeed one another with the same certainty that night follows day and the consequences of the simplest act may be traced over an ever-widening canvas with the passage of time.”)

One limitation, akin to the doctrine of proximate cause, is that a person who violates a statute is not liable for resulting injuries unless the plaintiff was within the class of persons that the statute was designed to protect and unless the injuries were the type that the statute was designed to prevent. The law occasionally makes exceptions to this rule, but these exceptions can be justified by particular policies and goals that are unique to the circumstances. For example, in Kerman v. American Dredging Co., 355 U.S. 426 (1958), the Court held that violation of a Coast Guard regulation that was intended to prevent collisions constituted negligence per se even though no collision occurred. A seaman died when the tug carried a torch too close to the water such that it ignited highly inflammable vapors. The Court imposed liability in part out of a recognition that seamen are not covered by worker's compensation and that industrial employers owe a special responsibility to their workers.
have been worked out over the centuries in Jewish law.

Although they differ, the rules in both legal systems are open-ended, permitting almost any result in any particular case. The problem is more severe in American law because juries decide many proximate cause questions and jury instructions on proximate cause are confusing. The instructions give the jury, which is ignorant of precedent, no real guidance on how to decide the scope of liability issue. By contrast, Jewish law uses trained professionals to judge cases, and these judges are familiar with the precedents and the need to achieve justice in each case. The open-ended nature of the Jewish legal rules on indirect damages empowers judges to make decisions that will justly deal with the particular facts of each case.

This Article will explore the problem in both systems and suggest ways in which the American system can be reformed. Part I will discuss the proximate cause rules in American law. Part II will cover the Talmudic sources on indirect damage, and Part III will focus on the three most influential approaches of medieval commentators. We will see that the medieval approaches neither explain the Talmudic examples satisfactorily nor predict future outcomes with certainty. Part IV will focus on a case that arose out of the Venetian Inquisition in the late Sixteenth Century. We will see how two rabbis reached different results even though they used the same approach to the problem of indirect damages. The last part of the Article will look at some of the lessons that can be drawn from a comparison of Jewish and American law on the issue of proximate cause.

I. The Proximate Cause Tests of American Law

American courts generally analyze proximate cause by using a foreseeability test and/or a direct connection test. For a time, a few courts asked juries to decide if the injuries were the "natural or necessary" consequences of the defendant's acts. The foreseeability test requires the fact finder to determine if the defendant should have

2. E.g., Pattern Jury Instructions: Fifth Circuit, Civil Cases § 4.6 (for injuries caused by unseaworthiness, proximate cause requires a showing that the injury was "a direct result or a reasonably probable consequence"); Florida Standard Jury Instructions in Civil Cases 5.1(a) ("legal cause" defined in terms of "directly and in natural and continuous sequence"); Illinois Pattern Jury Instructions—Civil No. 15.01 (1995) ("natural or probable sequence").

reasonably foreseen the type of harm that occurred. The direct connection test asks the fact finder to decide whether the harm complained of was a direct consequence of the defendant’s wrongful act. As part of this test, some courts will ask the jury to determine if the damage followed in an “unbroken sequence, without an intervening efficient cause,” from the defendant’s negligent act.

The foreseeability and direct connection tests are open-ended. The foreseeability test can be used by both sides and can justify any result. If viewed at a high level of abstraction, almost any consequence can be deemed foreseeable. However, if one focuses on the particular facts of a case, almost nothing is foreseeable. For example, no one would expect that failure to maintain a railroad right-of-way would cause a man to get his peg leg stuck in the hole such that he would break his good leg while trying to extricate a car from the mud. However, the risk of physical injury to one stuck in a hole is foreseeable. Some courts have stretched the foreseeability concept to impose liability in some fairly far-fetched cases; other

4. DAN DOBBS, THE LAW OF TORTS 447 (2000). See also 1 N.Y. Pattern Jury Instructions—Civil No. 2:72 (3d ed. 2000) (defining intervening causes for which defendant is liable in terms of whether a reasonably prudent person “would have foreseen an act of the kind committed by [a third person] would be a probable result of the defendant’s negligence”).

5. See, e.g., Pattern Instructions for Kansas (PIK) No. 5.01 (1966) (“direct, unbroken sequence”). By 1975 the Kansas Committee on Pattern Jury Instructions recommended that “no instruction be given defining causation.” PIK 5.01 (1975 Supp.). However, the instruction on intervening cause asks jurors to determine “whether the causal connection between the party responsible for the first cause and the injury was broken by the intervention of a new, independent cause which acting alone would have been sufficient to have caused the injury.” PIK 5.03 (1975 Supp.).

6. Dellwo v. Pearson, 107 N.W.2d 859 (Minn. 1961). But see Wartnick v. Moss & Barnett, 490 N.W.2d 108 (Minn. 1992) (concluding defendant not liable for effects of an intervening cause which was not reasonably foreseeable by the original wrongdoer).

7. See Patrick J. Kelley, Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law, 54 VAND. L. REV. 1039, 1046 (2001) (“Both ‘foreseeability’ and ‘public policy’ work beautifully as explanations of judicial decisions because they are both so open-ended they can be used to explain any decision, even decisions directly opposed to each other.”) See also CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 165-66 (2d ed. 1980).


9. See, e.g., Chicago, Rock Island & Pac. Ry. Co. v. Goodson, 242 F.2d 203 (5th Cir. 1957) (holding defendant liable for explosion when it allowed water to back up onto another’s land; the water allowed some oil in a pit to rise so that it came in contact with a hot exhaust pipe).
courts have been more restrained.\textsuperscript{10} The resulting conflict in the cases demonstrates that the courts "are making use of the same words [to] mean whatever they are desired to mean."\textsuperscript{11}

One effort to solve the problem is to hold a defendant liable if the harm was within the risk that the defendant negligently created.\textsuperscript{12} For example, if the defendant gives a loaded gun to a young child, and the child drops it on her foot, the defendant is not liable.\textsuperscript{13} One can say that the defendant was not negligent with respect to that risk of the child dropping the gun. Alternatively, one can argue that the injury did not flow from the aspect of the defendant's conduct that made it wrongful.\textsuperscript{14} Although helpful in some cases, this approach shifts the difficulty from the uncertainty over the meaning of "foreseeability" to the equally difficult task of defining what is meant by "risk."\textsuperscript{15} As the Restatement observes, the concept of risk is flexible and can be understood in both a broad and narrow sense.\textsuperscript{16} Indeed the Restatement asserts that courts should use a hindsight approach to determining the correct risk. It says:

If an event appears to have been normal, not unusual, and closely related to the danger created by the actor's original conduct, it is regarded as within the scope of the risk even though, strictly speaking, it would not have been expected by a reasonable man in the actor's place.\textsuperscript{17}

According to the Restatement, the risk created by a speeding driver includes the chance that a person hit by the car and forced to use crutches will suffer further injury when she falls later even though the

\textsuperscript{10} E.g., Wood v. Pa. R.R. Co., 177 Pa. 306 (1896) (unforeseeable that when a speeding vehicle hits a person, the person's body would fly off at an angle and strike another person); Ryan v. N.Y. Cent. R.R. Co., 35 N.Y. 210 (1866) (unforeseeable that fire would spread beyond first building).

\textsuperscript{11} See W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 300 (5th ed. 1984).

\textsuperscript{12} E.g., Socony-Vacuum Oil Co. v. Marshall, 222 F.2d 604 (1st Cir. 1955). See also RESTATEMENT (THIRD) OF TORTS § 29 (Prelim. Draft No. 3, 2001).

\textsuperscript{13} RESTATEMENT (SECOND) OF TORTS § 281(b) cmt. f, illus. 3 (1965). See Kelley, supra note 7, at 1065-66. In the latest draft of the Restatement, the example now is that the defendant gave a shotgun to a 9-year old. See RESTATEMENT (THIRD) OF TORTS § 29 cmt. f, illus. 2 (Prelim. Draft No. 3, 2001).

\textsuperscript{14} 2 FOWLER HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1138 (1956).

\textsuperscript{15} RESTATEMENT (SECOND) OF TORTS § 281(b) cmt. g (1965). See also KEETON, supra note 11, at 283.

\textsuperscript{16} RESTATEMENT (SECOND) OF TORTS § 281(b) cmt. g (1965).

\textsuperscript{17} Id.
driver could not reasonably foresee this particular risk.\textsuperscript{18} Nor would one say that a driver who speeds is negligent with respect to this particular risk.

Because of its flexibility, the harm-within-the-risk approach is often useless in predicting a case's outcome. For example, suppose a railroad wrongfully delays the shipment of goods and an unusual flood destroys the goods while in the railroad's terminal. Are we to say that flooding was not within the risk created by the negligent delay?\textsuperscript{19} Or can we look more broadly at the risks created and recognize that delays in shipment prolong the risk of loss or injury to the goods from a variety of causes?\textsuperscript{20} The harm-within-the-risk approach cannot answer these questions. Professor Dobbs summarizes the problem by saying, "It is not usually possible to say that only one description of the risk is the right one, so the question calls for judgment."\textsuperscript{21} The judgment that is required is not a further application of the test of foreseeability. It is the application of something else—at best some policy choice\textsuperscript{22} but perhaps a gut feeling, sympathy, or even prejudice. Whatever it is, judges and juries are determining the liability issue based on that "something else," not on the principle of foreseeability. It is particularly galling when juries make the judgment because typical jury instructions not only offer no guidance as to how to make that judgment, they do not even inform

\begin{footnotes}
\footnotetext[18]{Id.}
\footnotetext[19]{See Dobbs, supra note 4, at 476 (noting railroad's delay "was negligent, but not because of the danger of flooding").}
\footnotetext[20]{See Green-Wheeler Shoe Co. v. Chicago, Rock Island & Pac. Ry. Co., 106 N.W. 498, 500 (Iowa 1906) ("[D]efendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper."). In admiralty cases, an unreasonable delay constitutes a violation of the carrier's duty to care for the cargo. Sedco, Inc. v. S.S. Strathewe, 800 F.2d 27, 32 (2d Cir. 1986). This strips the carrier of the exemptions such as Act of God. See Atl. Mut. Ins. Co. v. Poseidon Schiffahrt, 313 F.2d 872 (7th Cir. 1963) (concluding unreasonable delay makes carrier insurer of goods). See Michael Sturley, 2A Benedict on Admiralty § 123, at 12-19 (2000). See also Smith v. U.S. Shipping Emergency Fleet Corp., 2 F.2d 390 (S.D.N.Y. 1924), modified 26 F.2d 337 (2d Cir. 1928) (noting risk of cargo loss increased by extended route "simply because the risk would be prolonged").}
\footnotetext[21]{Dobbs, supra note 4, at 469.}
\footnotetext[22]{One concern that may have motivated the courts in the cases on negligent delay was that the delay deprived the cargo owner of its insurance. See 1 Robert Hutchinson, A Treatise on the Law of Carriers § 307 (3d ed. 1906). See generally Steven F. Friedell, The Deviating Ship, 32 Hastings L.J. 1535, 1543 (1981).}
\end{footnotes}
the jury that a judgment of that kind is required.

The direct consequences test is also highly plastic. Consequences can be "direct" even when there is a substantial interval of space or time. For example, when a spark from a railroad engine set fire to some grass next to the rail, which then spread across the road, burned 200 yards of stubble and destroyed a house at the end of the field, the damage was nonetheless held to be direct. By contrast, consequences can be "indirect" even when the connection to the defendant's misconduct is plain. For example, a court held that a lumber company that sold defective lumber to the plaintiff's employer was not liable for the plaintiff's injuries when the scaffolding collapsed where the lumber company and the plaintiff's employer were aware that the lumber was defective and not suitable for its intended use.

The efforts that have been used to explain these two cases are unsatisfactory. It is said that the damage in the fire case was direct because the railroad's negligence operated on conditions and forces that existed at the time, and that no new forces came into operation. By contrast, the court exonerating the lumber company said that the knowledge of the plaintiff's employer broke the chain of causation between the injuries and the alleged negligence of the lumber company. Neither argument is compelling. By turning the arguments around one could exonerate the railroad by reasoning that the 200 yards of stubble, and certainly the road that the fire had to cross, broke the chain of causation. In the scaffold case one could argue that the employer's willingness to use defective lumber was a condition that existed at the time of the negligent sale by the lumber

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25. See Keeton, supra note 11, at 294.
26. Id. at 693. See also Pittsburg Reduction Co. v. Horton, 113 S.W. 647 (Ark. 1908). In that case the court exonerated a company that discarded an unexploded dynamite cap near a public school, which subsequently injured a boy. One boy, Charlie, brought the cap home and played with it. His mother, who did not know what it contained, would pick it up when he finished playing with it. With her permission, Charlie brought the cap to school a week later where he traded it to another boy, Jack, who was severely injured when the cap exploded. Although the defendant was negligent, and its negligence was plainly a cause-in-fact of the injury, the court held Charlie's mother's actions "broke the causal connection" between the company's negligence and the injury. Id. at 649. For a similar case, see Carter v. Towne, 103 Mass. 507 (1870), where the court held that a mother's custody of gunpowder meant that the person who sold it to her nine year-old son was not a direct cause of his subsequent injuries.
company.

The direct consequences test is further complicated when courts introduce the notion that an "independent efficient cause" will exonerate the defendant. For example, in *Loftin v. McCrainie*,

railroad employees negligently allowed some wild steers to escape from a cattle car and did not attempt to retake them until the next morning. As the defendant's agents were chasing the steers down a street, some automobile drivers blew their horns, which excited the steers. One of the steers charged into the plaintiff, causing her injuries. The court said that the blowing of the horns was not an independent efficient cause but was set in motion by the original wrongful act. It reasoned that the blowing of the horns might have been an intervening independent cause had the defendant's employees been in complete control of the steers.

The court's interpretation was strained and artificial. The motorists blew their horns to try to clear the road of the steers. This was arguably a new force, not one existing at the time of the original negligence. The court apparently thought the result was just because the defendant was negligent and the plaintiff was "absolutely faultless." 29

At first blush, Professor Beale's suggestion that there is no proximate cause when a defendant's conduct had "come to rest in a position of apparent safety" helps explain the court's hypothetical in *Loftin*. If the railroad's agents had regained control of the steers, they would have been in a "position of apparent safety" so that any honking by other drivers would be a new cause that would break the chain of causation. However, this explanation offers little more than a description of the result reached. We could also say that the steers, even if under control, were still in a position of danger because they were near traffic and one could anticipate that drivers would honk their horns. As Professor Beale observed, the "apparent safety" test boils down to a foreseeability issue.

27. 47 So. 2d 298 (Fla. 1950).
28. *Id.* at 302.
29. *Id.*
31. Beale, supra note 30, at 652. See also First Springfield Bank & Trust v. Galman, 702 N.E.2d 1002, 1007 (Ill. App. Ct. 1998) (in deciding whether something is a condition or a cause the court considers the kind of hazard created, its gravity, its relation in time and space to the injury, and foreseeability).
harm. Consequently, this test suffers from the same kind of weakness observed above concerning the foreseeability test.

Either despite these difficulties or because of them, the courts have established categorical rules that deprive the jury of any say in resolving many proximate cause issues. For example, the "egg-shell skull" rule dictates that a negligent defendant who causes some foreseeable personal injury to another is liable for all personal injuries to that victim no matter how unlikely.\(^{32}\) As a result, a victim of a minor traffic accident who becomes psychotic as a result of the collision can recover from the negligent motorist.\(^{35}\) Another settled rule is the "danger invites rescue" doctrine, which holds that the negligent actor is generally liable for the physical injuries to a rescuer.\(^{34}\) Similarly, courts will hold negligent defendants who injure others liable for the results of subsequent medical treatment even if the doctor or nurse has been negligent.\(^{35}\) By contrast, many courts hold that neither a state nor a parole board is liable for injuries inflicted by a prisoner released on parole.\(^{36}\) In all of these situations courts are in effect saying, "Proximate cause is generally a question of fact for the jury to decide but in this case the matter is so clear that it must be decided by the court as a matter of law." Only cases that do not fall within some well-recognized category are left to the jury.\(^{37}\)

One might find the subject of proximate cause perplexing because of the inconsistencies between the categorical rules. For example, it seems highly unlikely that a minor car accident would cause one of the passengers to become psychotic. It seems much more probable that releasing a convicted felon on parole would

\(^{32}\) E.g., Koehler v. Waukesha Milk Co., 208 N.W. 901 (Wis. 1926) (woman died from infection after she cut her finger on a broken milk bottle); Spade v. Lynn & Boston R.R., 52 N.E. 747, 748 (Mass. 1899) (plaintiff can recover for emotional harm even if greater than that normally expected).

\(^{33}\) Steinhauser v. Hertz Corp., 421 F.2d 1169, 1173 (2d Cir. 1970).


\(^{35}\) See KEETON, supra note 11, at 309.


\(^{37}\) Kelley, supra note 7, at 1054.
expose the public to future harm. Yet the law allows recovery in the former case but not the latter one. These inconsistencies can be justified. A driver's insurance can be expected to compensate the victims of automobile crashes even when the injuries are unusual. Given the social policy of encouraging widespread use of the automobile with all of its inherent dangers, one can tolerate a small increase in insurance premiums to compensate victims who suffer unusual consequences. By contrast, there is an overall public good in releasing individuals from prison who appear ready to behave as productive members of society. Exposing parole board members to liability would likely discourage them from allowing early release.

A more serious problem occurs when judges give the proximate cause issue to the jury. Justice demands that the jury receive instructions that are clear and that accurately state the factors to consider in reaching a decision. The typical jury instruction on proximate cause does neither of these things. A typical instruction is as follows:

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.  

We should either instruct the jury that it should weigh a list of factors or that it should use its common sense in limiting the liability of a negligent actor who has caused damage. The standard jury instruction does neither of these things. We instead give jurors an instruction on “natural and continuous sequence” that can only hope

38. See text, supra notes 33 and 36.

39. Florida Standard Jury Instructions in Civil Cases 5.1(a) (2001). As one author commented on a similar instruction, “Difficult though it may be for the average juror to understand this definition, it is standard.” GRAHAM DOUTHWAITE, JURY INSTRUCTIONS ON DAMAGES IN TORT CASES 153 (2d ed. 1988). California courts used to give a similar instruction. BAJI No. 3.75 (7th ed. 1986). The California Supreme Court disapproved of this instruction in Mitchell v. Gonzales, 819 P.2d 872 (Cal. 1991). The new instruction defines “cause of injury” as “a substantial factor in bringing about the injury, damage, loss or harm. BAJI No. 3.76 (8th ed. 1994). This confuses the cause-in-fact issue with the issue of scope of liability. Adding to the confusion, the California instructions define a concurring cause as one “that was operative at the moment of injury.” Id. No. 3.77.

to confuse them.\textsuperscript{41} Neither these two phrases nor a fuller description of the foreseeability and the direct causation tests are capable in themselves of allowing juries to reach reasoned outcomes.\textsuperscript{42}

\section*{II. Indirect Liability in Talmudic Law}

It would be helpful to contrast the proximate cause problem in American law with a similar problem in Jewish law.\textsuperscript{43} Over the past 2000 years, the Jewish legal system has developed several approaches for limiting liability for indirect harm. These approaches differ from the American doctrines but have some parallel features. Of particular importance, the Jewish legal rules on indirect damages are open-ended. These rules work well in Jewish law, however, because they provide rabbinical courts with flexibility to do justice in individual cases. The legal rules' lack of determinacy is not as great a problem in Jewish law. That system lacks juries so that learned judges can exercise judgment in applying the rules. Also Judaism has a legal and religious culture that is well suited to a process of \textit{ad hoc} adjudication.

The Babylonian Talmud contains many pronouncements on indirect damages. Sometimes the Talmud refers to a case of this type as \textit{gerama}, a word meaning “cause.” At other times it uses the expression \textit{dina d'garme}, meaning “the law of causes.” At other

\textsuperscript{41} E.g., Illinois Pattern Jury Instructions—Civil No. 15.01 (1995). Colorado defines “cause” in the same terms. However, it drops the word “proximate.” Colorado Jury Instructions, 4th—Civil No. 9.26 (2000). \textit{See} \textit{RESTATEMENT (THIRD) OF TORTS} § 29, reporter's notes to cmt. e, at 214 (Preliminary Draft No. 3, 2001). For other examples of confusing instructions see \textit{supra} note 2. The term “proximate” is also likely to confuse jurors, many of whom think it means “approximate” or some other fabrication. \textit{See} Mitchell, 819 P.2d at 877-78 (citing Robert Charrow & Veda Charrow, \textit{Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions}, 79 COLUM. L. REV. 1306, 1353 (1979)).

\textsuperscript{42} \textit{See} DOBBS, \textit{supra} note 4, at 447. \textit{See} William Prosser, \textit{Proximate Cause in California}, 38 CALIF. L. REV. 394, 424 (1950) (“There are probably few judges who would undertake to say just what [the old California jury instruction on proximate cause] means, and fewer still who would expect it to mean anything whatever to a jury.”). Some have concluded that the proximate cause problem is better analyzed as a problem of duty to be resolved by the judge instead of the jury. \textit{See} LEON GREEN, \textit{RATIONALE OF PROXIMATE CAUSE} (1927).

times the Talmud uses no term at all. The Talmud sets out no system for explaining the results. The following set of Talmudic statements as collected by the medieval Tosafot\(^4\) gives a sense of the range of the cases:

- If A threw an object from the top of the roof that would have landed on a cushion, but B removed the cushion while the object was in mid-air, B would not be liable.\(^4\) Further, even if A removed the cushion (by pulling on a rope when the object was in mid-air), A would not be liable.\(^6\)
- If a person brought fruits into another’s courtyard without permission, and an animal ate them and was injured by them, he is exempt.\(^4\) Similarly, if one put poison before another’s animal and the animal ate it and died, he would be exempt under the laws of man but liable under the laws of Heaven.\(^4\)
- A person who puts a torch in the hand of a deaf-mute, imbecile or minor would be exempt under the laws of man for damage caused.\(^9\)
- If one made a breach in a fence in front of another’s animal, allowing it to escape and do damage, he is exempt under the laws of man.\(^5\)
- If one bends down another’s stalk in front of a fire so that the stalk is destroyed, he is exempt under the laws of man.\(^5\)
- If one does work with the waters of purification thus disqualifying them from their intended use, he is exempt under the

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4. *B. Bava Batra* 22b. The word “tosafot” means supplements or additions. The collection of these commentaries and dialectical remarks were written in the twelfth to fourteenth centuries in France and Germany and are printed alongside the Talmudic text.

45. *B. Bava Kamma* 26b.

46. The Provincial scholars Meiri and R. Jonathan Ha-kohen of Lunel added the idea that the one throwing the object pulled on a rope. Meiri, *B. Bava Kamma* 26b; Perush Rabbenu Yehonatan, *B. Bava Kamma* 26.

47. *B. Bava Kamma* 47b.

48. *Id.*

49. *B. Bava Kamma* 59b.

50. *B. Bava Kamma* 55b.

51. *Id.* The Talmud limits this rule so that it applies to two kinds of situations. One is where the fire is spread by an unusual wind. The other is where the defendant covers an object with the stalk. Under the law there is generally no liability for damage by fire to goods that are covered. Therefore the defendant has prevented the owner of the covered object from recovering from the one who set the fire. *B. Bava Kamma* 56a.
laws of man.\textsuperscript{52}

- If a person fanned a fire that was also fanned by the wind, and the fire caused damage, he is exempt.\textsuperscript{53}
- If one frightened another, he is exempt under the laws of man. It is considered as though the injured person frightened himself.\textsuperscript{54}
- If one incited a dog or snake to bite another, he is exempt.\textsuperscript{55}

Another example of exemption for indirect damage, one not given by the Tosafot, is the case of a person who bribes witnesses to testify falsely. Even though he indirectly causes a loss to the affected party, he is considered liable only under the laws of Heaven.\textsuperscript{56} A similar ruling applies to a witness who refuses to testify and thereby causes a loss to one of the parties.\textsuperscript{57}

The Talmud did allow recovery for some types of indirect damage. As summarized by the Tosafot, liability was imposed in the following cases:

- If a person pointed out another's field to bandits, the person pointing it out is liable.\textsuperscript{58}
- If a money changer recommends a coin as being good but it turns out to be bad, he would be liable unless he were an expert and the mistake involved a new type of coin that had just been issued.\textsuperscript{59}
- Jewish law prohibited the planting of two different crops in the same field. If a fence of a vineyard near a field of crops has been broken through, the crop owner may tell the vineyard owner to repair it; if it is broken through again, he may tell him again to repair it. If the owner of the vineyard abandons the broken fence and renders the produce proscribed because the two different crops are planted too closely together, then he is liable.\textsuperscript{60}
- If a judge decides a case incorrectly, he is liable according to Rabbi Meir even if he did not physically transfer the money or object in dispute from one party to another.\textsuperscript{61}

\textsuperscript{52} Id.
\textsuperscript{53} B. Bava Kamma 60a.
\textsuperscript{54} B. Kiddushin 24b.
\textsuperscript{55} B. Bava Kamma 23b.
\textsuperscript{56} B. Bava Kamma 55b.
\textsuperscript{57} Id.
\textsuperscript{58} B. Bava Kamma 116b.
\textsuperscript{59} B Bava Kamma 99b.
\textsuperscript{60} B. Bava Kamma 100a-b.
\textsuperscript{61} B. Sanhedrin 33a-b.
• If one burns another's notes of indebtedness he is liable.62
• If one sells a note of indebtedness to another and then waives the debt, thus causing a loss to the new owner of the note, he is liable.63

The Talmud suggests that there were disagreements about at least some of these statements.64 For example, if a defendant destroyed another's note of indebtedness, some rabbis would hold the defendant liable for only the value of the paper whereas others would hold the defendant liable for the amount of the note.65 Indeed some of the leading post-Talmudic codifiers like Maimonides imposed liability even in the face of Talmudic dicta to the contrary.66

An important feature of the Talmudic rules is that the Talmud does not clearly indicate the criteria to be used to determine whether to impose liability for indirect damage. The closest one can come to such an explanation is in the discussion about the Mishnaic exemption for one who gives a lit fire to a deaf-mute, imbecile or minor. Two Palestinian sages disagreed over the scope of this exemption. Resh Lakish held that the exemption only applied if one handed over a flickering coal that was soon to go out. Rabbi Yohanan would have exempted even one who handed over a coal already in flames. Rabbi Yohanan would have imposed liability had the defendant given tinder, shavings, and a fire to the deaf-mute or other legally incompetent individual because “then his act was certainly the cause.”67 Resh Lakish explained his ruling by saying that damage is “certain” when he handed over a lit fire.68 We may conclude that Resh Lakish and Rabbi Yohanan held the same standard—that liability for indirect damage would be imposed only if the damage was certain to occur. They differed only in the application of that principle to the case at hand.69

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62. B. Bava Kamma 99b. Burning the note only causes indirect damage to the creditor as presentation of the note is not necessary for collection of the debt.
63. B. Bava Kamma 89a.
64. Some rabbis were known to impose liability in cases of garme. B. Bava Kamma 98b.
65. B. Bava Kamma 98b.
66. See Maimonides, H. Hovel U-Mazik 7:7; H. Nizkei Mammon 14:7. See also Rif, B. Bava Kamma 11b-12a (suggesting the law did not support the view that one who removes the pillows is exempt for damage to objects thrown from the roof).
67. B. Bava Kamma 59b-60a. Rabbi Yohanan uses the Hebrew term vadai to describe the certainty with which his actions caused the damage.
68. B. Bava Kamma 9b; 22b. Resh Lakish uses the Aramaic term bar hezeikah.
69. Rabbi Lichtenstein suggests a different analysis. He emphasizes that only
It does not follow, however, that the Talmud contained a general rule that liability for indirect damage turned on a determination of whether the damage was "certain" to happen. The difficulty arises from Resh Lakish's view that fire is a separate heading of liability from that caused by a person.\(^7\) We therefore cannot know if he would have applied his concept of "certainty" to all cases of damage caused by a person. Moreover we cannot know if other Talmudic rabbis subscribed to the "certainty" requirement. Nonetheless, many post-Talmudic rabbis made the certainty of damage a prerequisite for liability.\(^7\) Other rabbis did not impose this requirement.\(^7\)

Another feature of the Talmudic law of indirect damage was that a defendant who was exempt under the laws of man might be liable under the laws of Heaven. This meant not only that God might seek to punish the defendant in some way, either in this life or in the world to come, but also that a rabbinic court could enjoin the defendant from acting in a manner that would continue to cause the indirect harm.\(^7\) A rabbinic court could thus protect people from all sorts of environmental harms—smoke, noxious odors, leaking privies—that caused indirect harm. Moreover, a rabbinic court's determination that a defendant was liable under the laws of Heaven would likely carry great moral force in a small, closely knit religious community. It might induce the defendant to pay for some or all of the harm caused. Further, rabbinic courts and Jewish communities had the power to develop additional rules of liability if necessary to preserve order in the community.\(^7\)

III. Medieval Interpretation of the Talmudic Rules

In the post-Talmudic period, rabbis took a variety of approaches to explain the Talmud's many statements on the law of indirect damage. Three approaches were most influential: the Ri as

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Resh Lakish uses the term *bari hezekah* (the damage is certain). According to him, Resh Lakish did not mean that damage was certain but only that there was a high risk of damage. This high level of risk would suffice to make the fire the equivalent of the defendant's ox. A person is liable for damage done by his ox even though damage is not certain to occur. SHI'REI HARAV AHARON LICHTENSTEIN, DINEI D'GARMI 116 (1999/2000).

70. B. Bava Kamma 22a.
71. See infra text accompanying notes 81 and 99.
72. See infra text accompanying note 90.
73. B. Bava Batra 22b.
74. B. Yevamot 90b; B. Sanhedrin 46a.
elaborated by the Rosh, the view of the Ritzvah, and the analysis by Nahmanides. We will look at each of their approaches in turn and will consider the shortcomings of each as a method of resolving the problem of liability for indirect harm.

A. The Ri and the Rosh

The Ri, Rabbi Isaac ben Samuel of Dampierre (died c. 1185), was one of the most famous Tosafists, a group of scholars in France and Germany who sought to reconcile apparent contradictions in the Talmudic text. According to the Ri, a defendant is liable for indirect harm only if two requirements are satisfied: the defendant must himself do the injury to the property of another and the injury must occur at the time of the deed. All other indirect damages are not compensable. The Ri used two terms to describe the different types of indirect damage. A defendant was liable for damage that was termed garme; he was exempt for damage that was termed gerama.

As pointed out by the Tosafot, the Ri’s explanation could not account for all of the Talmudic cases. Under Jewish law a non-ordained judge could be liable for making a mistaken ruling. The Mishnah held that if a non-ordained judge declared ritually unclean produce to be ritually clean, and the owner himself mixed them with his other produce, the judge is liable. Under Jewish law, if one mixes ritually clean produce with ritually unclean produce, the entire mixture becomes unclean. The judge’s ruling would cause a financial loss since ritually clean produce has a higher value. The Ri could not account for this Mishnaic holding. The judge did not touch the property, and the damage did not occur at the time he declared it ritually clean.

75. See 9 ENCYCLOPAEDIA JUDAICA 31 (1972).
76. B. Bava Batra 22b.
77. Id.
78. The Mishnah is part of the Babylonian Talmud that was completed around 200 A.D. It formed the basis for the discussions in the Babylonian and Palestinian academies. Those discussions are reflected in the Gemarah, which was compiled in Babylonia about 300 years later. A different and independent work known as the Jerusalem Talmud was completed around the year 400. This was also based on the Mishnah.
79. B. Bava Kamma 100a (quoting Mishnah, Bekhorot 4:4).
80. This is based on an interpretation of B. Bekhorot 28b. The Gemarah first suggests that the Mishnah interpretation is according to Rabbi Meir who judged cases of garme. But Rabbi Iai then explained in the name of Rav that the Mishnah, in saying “he mixed them with his produce,” is to be understood to mean that the judge
Despite this difficulty, the Ri's approach was given a major boost when it was adopted by the Rosh, Rabbi Asher ben Jehiel (c. 1257-1327). The Rosh added one important factor borrowed from the Talmud. In order to be liable, the damage must be certain to occur (b reactor). He explained that if a person incited another's dog to bite, the damage would be gerama and the defendant would be exempt because it was possible that the dog would not bite. By contrast, if one informs a gentile robber about a Jew's property, the informer is liable for the subsequent theft since the Talmud regards it as certain (vada) that the robber would not have mercy on a Jew's property. The Ri's test, augmented by the Rosh's gloss, became the standard approach to limiting liability until the middle of the seventeenth century.

In his Talmudic commentaries, the Rosh limited liability severely by his strict interpretation of the three prerequisites of liability. According to the Rosh, the first requirement—action against the thing damaged—is not satisfied when a person removes the cushions underneath a thrown object. The person removing the cushions did nothing to the object itself. As for immediacy, the Rosh said that when one removes cushions from underneath an object thrown from a roof, he is exempt because "when he removed them, the object was not yet broken; [it only broke] when it hit the ground." Similarly, immediacy is lacking where one incited another's dog to bite a third party because the dog bite did not occur until later. The Rosh also strictly defined the concept of certainty. When one incites another's dog to bite, the damage is not certain. The dog might have ignored the defendant. Thus, even though the defendant intended the dog-bite, the damage is considered gerama.

The Rosh's formulation seems strict. If someone other than the defendant caused damage, or if the defendant's action somewhat preceded the damage, or if there was some uncertainty about whether

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mixed them with the owner's produce. Rashi, B. Bekhorot 28b. The implication is that, according to Rabbi Meir, the judge would be liable even if the owner mixed them with his own produce pursuant to the judge's decision. See Rabbi Nissim Chaim Moses Mizrachi (d. 1749), Responsa Admat Kodesh 1, Hoshen Mishpat 69. Because Jewish law usually follows the view of Rabbi Meir, it is important to establish what he held.

82. Rosh, B. Bava Batra 2:17.
83. Id.
84. Id.
85. Id.
the damage would occur, the Rosh's test would preclude liability.

Sometimes the Rosh applied his strict approach in practice. In one responsum, the Rosh exempted a man who was alleged to have aided his sister in taking her husband's belongings. It was alleged that the wife had thrown them out of the window and the defendant then helped his sister move them to another place. The defendant did not take the goods for himself. Because the wife had already stolen the goods, the Rosh reasoned, the defendant merely prevented the husband from pursuing his stolen property. Because the defendant did not damage the property, the injury was *gerama* and the defendant was exempt from liability.

But in other cases, the Rosh was more willing to impose liability for indirect damage. In one responsum, Reuben produced a document purporting to be a release by Simon. A rabbinical court had upheld the validity of the release. The witnesses who signed the release later admitted that they had signed falsely, explaining that they had done what Reuben asked after he had gotten them drunk. The Rosh ruled that the release must be given effect since a rabbinical court had already approved it, but that the witnesses were liable. The damage they caused was *garme* because all three of the Ri's requirements were satisfied. The witnesses had done the damage to Simon's assets, the damage was certain to occur, and the damage occurred to Simon at the moment they signed the document. The

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86. *Responsa Rosh* 64:1. The Rosh analogized the case to one where a person breaks down a fence allowing animals to escape. He would be exempt for the loss of the animals. See text, supra note 50. Although the Talmud holds that the one breaking down the fence would be liable under the laws of Heaven, the Rosh held that such liability applied to the damage to the fence but not to the animal. See also *Responsa Rosh* 95:1 (if one stole another's land but did not plow it or plant on it, or if one stole a house but did not use it, the damage to the owner from not being able to use his property is only *gerama*). In another responsum the Rosh ruled that a Jewish community, a *kahal*, was not liable for indirect losses it caused Reuben. Reuben had given a personal note to a non-Jew to cover a debt owed by the *kahal*. The non-Jew took in pledge some notes that Reuben had received from other non-Jews. Reuben pleaded several times with the *kahal* to redeem his notes, but they refused, and even ignored a judgment that Reuben obtained in a rabbinic court. Reuben then redeemed the notes himself, but they had become worthless due to the delay. The Rosh distinguished the case from the rule that one who burns another's notes is liable, because here the *kahal* did nothing at all to the notes themselves. Indeed, the *kahal* was completely passive, and therefore the damage was merely *gerama*. This was therefore analogous to removing the cushions while an object is in mid-air. The person removing the cushions is exempt because he did not do anything to the falling object itself. *Responsa Rosh* 101:10.

Rosh did not apply the requirements of *garme* as strictly as he might have. The witnesses were not a direct cause of any loss to Simon. Reuben still had to present the release in court and have it approved by that court. One could argue that the loss occurred later and that it was not certain to occur since Reuben might have had a change of heart.

In another case, a person bound another's animal and left it in the sun to die. In finding that there was liability the Rosh wrote, “He himself did the damage to the other's property by binding his animal, it is *b"ari hezeka* because he will certainly die, and the damage begins immediately and progressively gets worse.”


89. In another responsa, Reuben left a barrel in a public way and placed a rock on top of it to keep it from rolling. Simon removed the rock when Reuben was not present, saying that the rock belonged to him. The next day Reuben found that his barrel had broken. Reuben sued Simon for damages, and Simon claimed that he had replaced the rock with another. The Rosh ruled that if Simon would take an oath to support his version of the events, then he would be exempt. But the Rosh specifically ruled that this was not a case of *gerama* because the barrel was certain to roll if it lacked a support. Simon would have been liable had he not substituted another rock as he claimed. *Responsa Rosh* 101:3. The Rosh did not discuss the other requirements of *garme*—direct injury to the object and immediate injury. But the Rosh apparently did not insist that Simon actually touch the barrel or that the damage occur immediately when he removed the stone. *But see* R. Moses Alshekh (c. 1507-1593), *Responsa Mahram Alshekh* 134 (saying that the damage in this case occurred “immediately”).

90. The Jerusalem Talmud records the view that a fine is imposed on those who

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**B. The Ritzvah**

The Ritzvah, Rabbi Isaac ben Abraham, who lived in the twelfth century, agreed with the Ri that there were two types of indirect damage—*garme*, for which one was liable, and *gerama*, for which one was exempt. But he rejected the Ri's criteria. Instead, based on the Jerusalem Talmud, the Ritzvah insisted that the liability imposed in
garne cases was a rabbinic fine meant to deter others from causing similar damage. As is true of other rabbinic fines, liability is imposed when the type of injury is "common and ordinarily happens." According to the Ritzvah the only reason that liability is not imposed in gerama cases is that the injuries are not common or ordinary. It matters not whether the injury occurred at the same time as the wrongful act or whether the defendant inflicted the harm directly on the object injured. The Ritzvah's approach was widely adopted in the thirteenth century. Afterwards it took a back seat to the Ri's approach, but it enjoyed a strong revival in the seventeenth century. At first blush, the Ritzvah's approach seems to be easier to apply than the Ri-Rosh three-part test. A judge is only required to know whether the damage is a type that occurs commonly and frequently. But that raises several difficulties. For example, how often must damage occur before it is frequent or common? In making that determination, how is the court to characterize the damage? A broad definition will more likely lead to a finding that the damage is common. A narrower definition, more tailored to the facts of the case, will more likely lead to a finding that the damage was uncommon. Further, can damage that was at one time common become uncommon at a later time? Finally, can a court take into account the seriousness of the damage or the ease with which it could have been prevented in making that determination? In sum, there is substantial uncertainty about how to apply the Ritzvah's test. It leaves the court with substantial flexibility.

A striking example is a case decided by Rabbi Menahem Mendel Krochmal (c. 1601-1666) who was chief rabbi of Moravia. A non-tear another's note of indebtedness. P. Shevuot 6:6. See also P. Kilaim 7:3 (Rabbi Meir imposed a fine on a man who suffered his vine to overshadow his fellow's growing grain, which rendered it forfeit). The Jerusalem Talmud is a separate work from the Babylonian Talmud and is not considered authoritative when its rulings conflict with the Babylonian Talmud.

91. B. Bava Batra 22b.
92. E.g., the Maharam of Rothenburg, Rabbi Meir ben Baruch (c. 1215-1293), Responsa Maharam of Rothenburg 4:460 (Prague ed.); Rabbi Yakar ben Samuel Ha-levi (thirteenth century, Cologne and Mainz), Responsa Rosh 101:1 (the liability of the informer is on account of a rabbinic fine); Rabbi Moses ben Jacob of Coucy, Sefer Mitzvot Gadol, Mitzvot Asseh 70. But see Responsa Maharam of Rothenburg 4:1013 (Prague ed.) (damage must be immediate).
93. Shabbetai ben Meir Ha-kohen, better known as the Shakh (1621-1662), adopted this approach in his highly influential commentary on the Shulhan Arukh. See Shakh, Shulhan Arukh, Hoshen Mishpat § 381.
94. Responsa Zemach Zedek 36.
Jew stole a silver ritual object from a Christian church and sold it to a Jew, who re-sold it to another Jew who was the defendant in the case. The non-Jewish thief was caught, and he told his captors that he sold the object to a Jew but that he was unable to identify him. The Jewish community, under pressure from the church, paid for the stolen object and sought reimbursement from the defendant (the first fence was too poor to reimburse the community). The defendant argued that even the first fence would not be liable since the thief could not recognize him. Rabbi Krochmal dismissed this argument by writing:

Since the power [of the church] is strong, [the damage] is common and certain to occur. That is so because they usually bring the thief among the Jews so that he can say which one bought the stolen item, even if it is not true, for their mouths have spoken lies as has happened many times due to our many sins. Thus, one who commits this violation is called a pursuer and one who causes danger to the public. Therefore it is obvious that he must pay the community for all of its damage.

Rabbi Krochmal went on to hold that the defendant was liable because the first fence would not have bought the stolen church items if he knew that he would be unable to resell them. Drawing on a Talmudic proverb, Rabbi Krochmal said that it takes both a mouse and a mouse hole to steal a piece of cheese. The defendant therefore was a “pursuer” who endangered the Jewish community. Further, he reasoned that even if the damage were merely indirect, it would still be proper to force the defendant to pay. He invoked the rule that in case of gerama the court can force the defendant to prevent future harm. Here, he reasoned that the harm had not yet occurred because the thief did not identify the fence. The damage would have been much worse had the fence been identified.

Rabbi Krochmal did not mechanically apply the Ritzvah’s test. Although he states that events like this had occurred many times, his determination that the damage was “common” seems to have been influenced by the potential for serious repercussions against the Jewish community. Rabbi Krochmal distinguished a case where the Maharalbah held that a fence was not liable when, on account of his illegal activities, a government official arrested innocent Jews and

95. B. Gittin 45a.
96. See supra text accompanying note 73.
97. Rabbi Levi ben Habib (c. 1483-1545 Jerusalem), Responsa Maharalbah 5.
forced them to pay ransom. Rabbi Krochmal reasoned that fencing Christian ritual objects was more serious than an ordinary act of fencing stolen property. According to Rabbi Krochmal, the case before him differed from that before the Maharalbah in that the Jewish fence damaged the public and the matter was common.

In reaching his decision, Rabbi Krochmal characterized fencing of ordinary stolen property as different from fencing church property. It is not clear why that characterization should be made or that it supported his conclusion. One could just as well characterize both cases simply as examples of receiving stolen property. But even if they were to be differentiated, in the Maharalbah's case a government official actually arrested a number of innocent Jews; in Rabbi Krochmal's case the church and the Jewish community settled the matter without any arrests or violence. Moreover, it would seem that fencing of ordinary stolen property would be far more common than fencing of church items. Nonetheless, Rabbi Krochmal was apparently aware of a great potential for mischief in the case before him. If Jews were known to fence stolen church ritual items, there would be enormous potential for religious hatred and serious violence. The church's claim was not merely for loss of valuable goods but for insult to Christianity.

Rabbi Krochmal's responsum shows that the Ritzvah's test does not dictate any particular result. It leaves open the issue of how to characterize the loss and allows flexibility in determining whether the type of loss is common. Far from dictating any particular outcome, the Ritzvah's test is a tool that a judge must use wisely to reach a needed result.

C. Nahmanides

Nahmanides, also known as Rabbi Moses ben Nahman or the Ramban (c. 1194-1270), wrote a treatise on the subject of indirect damages where he concluded:

Take hold of the following general rule. Every cause which results in injury where it is impossible for the injury not to occur and where it is not dependent on another's will—but when he caused it the injury occurred or would occur in the future—in such cases Rabbi Meir imposed liability. In the Gemarah98 this is called

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98. The term Gemarah refers to that part of the Talmud that reflects the discussions of the academies on the Mishnah. See supra note 78.
certain injury [*bati herdakha*].

According to Nahmanides, the plaintiff must satisfy only two elements: the defendant must be a cause of the injury and the injury must occur of necessity. Neither immediacy nor direct contact with the thing injured is required. Unlike some other authorities, Nahmanides thought that there was liability even for unintentional injuries, even in cases where the defendant was completely without fault. He recognized an exception for informers who were forced to reveal the location of another’s assets.

Nahmanides’s approach is closer to the Ri’s than to the Ritzvah’s. It rejects the notion that liability is imposed as a fine. Nahmanides emphasized that the doctrine is called *dina d’garame,* “the law of garme,” not “the fine of garme.” Although Nahmanides disagreed with the Ri on the resolution of certain important issues, his rejection of the Ritzvah’s approach served to bolster the Ri’s view. In fact, later authorities like Rabbi Joseph Caro said that Nahmanides had adopted the Ri’s view.

The difficulty with Nahmanides’s approach is ascertaining how certain the injury must be. Nahmanides exempts the person who hires others to testify falsely. He also exempts a person who breaks another’s fence so that animals escape and cause damage. In these cases he regards the damage as uncertain to occur. The witnesses


100. A responsum that had been attributed to Nahmanides but which is now believed to be written by the Rashba says that to be *garame* the damage must be done by the defendant’s act to the body of the thing injured. *Responsa Rashba* (attributed to Nahmanides 240).

101. HIRSHLER, supra note 99, at 121.

102. Id. at 123.

103. He rejected the Ritzvah’s use of the Jerusalem Talmud for support. See supra note 90. Nahmanides asserted that the Jerusalem Talmud quotes rabbis who imposed fines in particular cases of indirect damage because they did not hold that there was generally a rule of liability in those cases. HIRSHLER, supra note 99, at 122.

104. Id. at 118.

105. For example, according to Nahmanides one who removes cushions is liable for the breakage of falling objects. HIRSHLER, supra note 99, at 132. According the Ri, this is a case of *gerama.* See supra note 81.

106. *Responsa Avkat Rokhel* 89. See also Solomon Luria (1510-1565), Yam Shel Shelomo, *B. Bava Kamma* 9:26 (supporting the Ri’s view and quoting Nahmanides to refute the Ritzvah).

107. HIRSHLER, supra note 99, at 129.

108. Id. at 126-27.
could have chosen not to testify and the animals might not have escaped or caused damage. However, he would impose liability on an informer who reveals another's valuables to a robber. In that case the damage is regarded as if it occurred when the informer told the robbers. Similarly, a judge who renders a verdict in error is liable even though the party he held liable pays the judgment later. The damage is regarded as having occurred at the moment he imposed the verdict. These cases are hard to distinguish. Robbers might possibly have a change of heart; those who win lawsuits through a judge's error might forego collection. It is hard to say how the damage in those two cases is regarded as more "certain" than the false testimony of witnesses who were paid or the escape of animals through a broken fence. Given this tension, Nahmanides's approach can be relied upon by any plaintiff or defendant.

In short, all of the medieval approaches we have studied are indeterminate. They are imperfect explanations of the Talmudic cases and leave us uncertain as to their application in future cases. This uncertainty is illustrated by an actual case that is described in the next section.

IV. An Analysis of a Case from the Venetian Inquisition

By the late sixteenth century, the approach taken by the Ri and the Rosh dominated rabbinic analysis of the indirect damage problem. Two major figures of this period, the Maharam of Lublin and the Maharshakh, were called upon to help resolve a difficult case that arose out of the Venetian Inquisition. Their responsa dramatically show that the test they were using was indeterminate.

109. Id. at 130.
110. Id. at 126.
111. Another difficulty with Nahmanides's approach is his position that one who "prepares damage" is never liable. Id. at 131. Nahmanides thus explains that a person who sets poisonous food before an animal is not liable for the death or injury of the animal. Id. Nahmanides's conclusion is too broad. The informer and the judge who rule erroneously are both liable even though they merely created the conditions where others took away the plaintiff's property. Id.
112. The Maharam of Lublin, Rabbi Meir ben Gedaliah, occasionally referred to simply as the Maharam, lived from 1558 to 1616 in Lublin, Cracow, and Lemberg.
113. The Maharshakh, Rabbi Solomon ben Abraham Ha-kohen, lived from about 1520 to about 1601 primarily in Salonika.
A. The Facts

The two responsa provide a brief outline of what happened but provide no names or dates. More detailed information is available from the records of the Venetian Inquisition that were published a few years ago. The following account emerges from these three sources.

Filipe de Nis, who had the Jewish name of Solomon Marcos, was


There is no doubt that the Inquisition records and the Maharshakh’s responsum deal with the same case. The Maharshakh’s responsum says that the events occurred in Venice, and the Venetian Inquisition records contain only one case involving a mohel. Also, both of these sources indicate that the defendant was circumcised by someone other than the mohel who circumcised the defendant’s brother’s son. The Maharam of Lublin’s responsum is more general, and there is a possibility that he dealt with a similar but different case. It tells us that the events occurred in “Italy” and it recounts the circumcision only of the defendant. However, it is likely that the Maharam of Lublin was describing the same case that came before the Maharshakh. Events of this kind were rare. Indeed, there is no known case of a similar denunciation. The questions addressed to each rabbi present only arguments on behalf of the mohel, and the two rabbis addressed the same issues. This suggests that the case was brought ex parte. Moreover, in both responsa, the questions posed used the same expression, makhaneh yisrael, to describe a ghetto. The Maharam’s responsum describes the ghetto where the Converso did not reside; the Maharshakh’s responsum describes the ghetto in Dubrovnik. Although the term was common in Biblical literature as a description of the Israelite camp in the desert and in rabbinic literature as the area outside the Temple but inside the walls of Jerusalem, its occurrence in these two responsa as a description of a ghetto may be unique and would suggest that the two questions were written by the same author. Other scholars agree that the two rabbis addressed the same case. See H.J. Zimmels, Die Marranen in der Rabbinischen Literatur 151 (1932); Judah Rosenthal, Le-Korot Ha-Yehudim be-Polin Le-or Shut Ha-Maharam Mi-Lublin, 31 Sinai 311, 330 (1952).


The Venetian Inquisition was more humane than others and did not sentence any Conversos to death. On two occasions it banished Jews from Venice on pain of death if they should return. One of these banishments was in this case, against Benarogios and Naar should they return to Venice. See Zorattini, supra, at 83, 86. But those arrested by the Venetian Inquisition faced long terms of imprisonment and the possibility of torture. See Pullan, supra, at 132-37.
born in Portugal around 1531 to two Conversos.\textsuperscript{116} He became a wealthy merchant and later went to Venice with his two brothers around 1580. They had travelled from Portugal to Flanders and then to Venice. One brother departed shortly thereafter for the Levant but left behind a son, Jacob, and the other brother died a few years later. Filipe, Jacob and the other members of the household lived in an expensive house outside the ghetto. To the outside world, Filipe and his family lived as Christians. But inside their home, they observed the Jewish Sabbath and other Jewish customs and rituals.

The Nis family was planning to emigrate to the Ottoman empire where they could live openly as Jews. Filipe's wife and two children had gone to live in the Jewish ghetto in Dubrovnik. His nephew, while still in Venice, had been circumcised by a mohel\textsuperscript{117} named Jose Naar. One Easter when Filipe fell sick, he called for another mohel, named Dr. Benarogios, to circumcise him.

At dawn on October 12, 1585, the Inquisition arrested Filipe. The Inquisitors found that he was circumcised and practicing as a Jew. After more than nine months of imprisonment, Filipe informed the Inquisitors on July 29, 1586 that Benarogios and Naar had circumcised him and his nephew, respectively.\textsuperscript{118} On August 20, 1586, the Inquisition publicly posted a summons to Benarogios and Naar, giving them nine days to appear.\textsuperscript{119} On November 20, 1586, the Inquisition banished them from Venice, on pain of death, for failure to respond to the summons.\textsuperscript{120}

Filipe wrote letters to his wife and persuaded her to return to Venice and be reconciled to Christianity. The Inquisition sentenced Filipe to forced residence in Venice. He was released from prison but was required to post a substantial bail. Seven months after his wife and children returned to Venice and were reconciled to Christianity, Filipe requested that the bail be returned to him.\textsuperscript{121} We do not know if the Inquisition returned the bail to Filipe. We also do not know if

\begin{footnotes}
\item[116] See \textit{Processi}, \textit{supra} note 115, at 131. A Converso is someone who had been forced to convert to Christianity or is the descendant of such a person. Many Conversos secretly observed some Jewish practices.
\item[117] A mohel is someone who performs a ritual circumcision. Such circumcisions are normally performed when an infant is eight days old or when a non-Jew converts to Judaism. But a person who is born Jewish has an obligation to be circumcised as an adult if infant circumcision was not performed.
\item[118] \textit{Processi}, \textit{supra} note 115, at 137.
\item[119] \textit{Id.}
\item[120] \textit{Id.} at 150-51.
\item[121] \textit{Id.} at 165-67.
\end{footnotes}
he remained in Venice.

Benarogios sought compensation in a rabbinic court for his various losses in having to flee Venice for the Ottoman Empire. These included his expenses in leaving Venice such as the losses from selling his home and furnishings at reduced prices, the expense of bringing his wife and young children to him, and the loss of income and financial support of the community. He filed suit, apparently _ex parte_. The questioner asked the Maharam of Lublin: “If God should cause us to acquire jurisdiction over the informer’s assets,” would the informer be liable for these losses “if the mohel can clearly show what he lost.” Apparently Benarogios hoped that a rabbinic decree would allow him to levy against wares belonging to Filipe de Nis.

We will now see how the Maharshakh and the Maharam of Lublin used the law of indirect damages to resolve the issue of liability in this case.

### B. The Maharshakh

The Maharshakh saw two fatal objections, one procedural and one substantive, to holding Filipe liable. The procedural objection was that in the absence of witnesses who could testify about the amount of Benarogios’s losses, his complaint must fail. The substantive objection was that Filipe caused only indirect injury based

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122. The Maharshakh assumed that Nis was before the court. He wrote, “It appears from the question that the informer now resides outside the place where he was forced to convert and that he has now returned to the true and just faith, for otherwise what would be the purpose of knowing if the law makes him liable.”

Jewish law requires that testimony normally be received only in the presence of the opposing party. But an exception is made in cases of an informer because of the danger that the informer will cause further damage. See _Responsa Rivash_ 237; _Responsa Rosh_ 17:1; _Shulhan Arukh_, H.M. 388:14. These sources refer to the taking of testimony, not to the filing of suit, but the need for secrecy extends to the entire proceeding. See Moses Isserles (c. 1525-1572), _Darkhei Moshe_, _Tur_ H.M. 388:15. Although Jewish law normally required that testimony not be given until after the defendant’s answer, courts were allowed to deviate from this procedure. _Responsa Rivash_ 234.

Unlike the Maharshakh, the Maharam of Lublin does not address the question of atonement. The Maharam of Lublin would likely have addressed this issue had the informer been before the Bet Din, as he often prescribed measures for repenting even when no damages were legally due, as was common at that period. See, e.g., _Responsa Maharam of Lublin_ 43, 44.

123. As indicated earlier, neither the Maharshakh nor the Maharam of Lublin used the actual names of the parties, referring to Dr. Benarogios as “the mohel” and to Felipe de Nis as either “the converso” or “the informer.”
on the rule of *gerama*. The Maharshakh reasoned that Filipe did not inform the Inquisitors about any of the mohel's assets, but only informed them about the mohel himself. Although the court could not issue a judgment against Filipe, the Maharshakh wrote that Filipe would need to pay Benarogios for his losses if he hoped to atone for his sin of converting to Christianity.

The Maharshakh did not explain in this responsum why the damages were indirect or *gerama*. In other responsa he showed that he followed the approach of the Ri and the Rosh.124 As variously stated by the Maharshakh, a defendant is liable for damages that are sufficiently direct under the rule of *dina d'garne* if (1) the defendant himself does the damage to the plaintiff's property, (2) the damages are certain to occur, and (3) the damages occur immediately when the defendant performs his act. It would appear that the mohel’s damages failed to meet any of these three requirements. First, Filipe did not take away any property belonging to Benarogios. Instead, Benarogios spent money on his own to avoid capture and to bring his family out of Venice. Second, the damages were not certain to occur as it was possible that the Inquisition would have arrested the plaintiff. Third, the damages did not occur immediately when the defendant informed the Inquisitors but rather some time later.

As we will see, the Maharam of Lublin responded to these objections.

**C. The Maharam of Lublin**

The Maharam of Lublin first responded to the procedural difficulty of lack of competent testimony. Relying on a responsum of the Maharil,125 the Maharam of Lublin ruled that a rabbinic enactment allowed the victim of an informer to recover damages although the victim had no witnesses who could testify about the amount of his losses.

The Maharam of Lublin had to extend the Maharil's holding. Benarogios, unlike the victim in the Maharil's responsum, had not been arrested. The Maharam reasoned that when Filipe de Nis revealed the mohel's identity to the Inquisition, it was as if Benarogios were arrested at that moment. Consequently, a court should regard any money spent by Benarogios to escape as if it were spent to be released from capture.

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125. Rabbi Jacob ben Moses Moellin (c. 1360-1427), Responsa Mahari Moellin 86.
Having swept aside the procedural objection, the Maharam of Lublin turned to the substantive issue of whether the damage to the mohel was a case of *gerama* or *garme*. The Maharam, like the Maharshakh, followed the Ri and the Rosh, but he reached different results. The Maharam of Lublin distinguished three different types of damage suffered by the mohel: (1) the expenses of the mohel’s escape from Venice, (2) the expense of bringing his family out of Venice, and (3) the loss of employment suffered by the mohel.

The Maharam of Lublin determined that the mohel could recover his expenses in escaping from Italy. Since Benarogios had in effect been arrested at the moment Felipe informed the Inquisition, his damages were regarded as if they were expenses to escape arrest. The Maharam quoted the Mordekhai who said, “When one hands over another’s body to gentiles it is as if he directly handed his money over.”

The Maharam of Lublin did not allow Benarogios to recover his expenses in bringing his wife and family to him. These expenses did not occur immediately when the informer acted and therefore failed to satisfy at least one of the Ri’s requirements. However, the Maharam of Lublin determined that Benarogios could recover damages for his lost work. He ruled that these losses were similar to the lost earnings a worker suffers if locked in a room and unable to work. Damages for lost earnings are generally recoverable when a defendant intentionally, knowingly, or recklessly injures a defendant’s body or directly prevents a person from working. The key to allowing recovery for the mohel’s lost earnings was again the Maharam of Lublin’s view that Filipe de Nis had directly injured the mohel when he informed on him. If the informing was a direct injury to the mohel, then it was as if Filipe had at that moment prevented

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126. Mordekhai, *B. Bava Kamma*, 9:114. The Mordekhai analogized the cost to medical expenses that are collectible and are deemed to be caused directly by the defendant.

127. *See supra* text accompanying note 76.

128. The Maharam of Lublin cites as authority Mordekhai, *B. Bava Kamma* 9:114. The rule is stated as follows in the Shulhan Arukh:

> If he put him into a room, locked the door on him, and prevented him from doing his work, he only pays for his loss of time. But if he was already in the room, and he locked him in so that he could not exit, it is *gerama benizkin* and he is exempt under the laws of man.

*Shulhan Arukh, Hoshen Mishpat* 420:11. The distinction was derived from the Rosh, *B. Bava Kamma* 8:3. In the first example the defendant performed an act upon the body of the plaintiff; in the second example he did not. *Ephrayim Ben Aaron Navon, Mahaneh Efrayim, Sekhirut* 18 (1738).
the mohel from obtaining his livelihood.

The Maharam of Lublin imposed a major limitation on Benarogios's ability to recover. He wrote that the above reasoning was conditioned on the assumption that Filipe de Nis could have saved himself without revealing the mohel's name. For example, perhaps Filipe could have convinced the Inquisition that a foreigner who had since left Venice had circumcised him. However, if the informer had to reveal the mohel's name, then no compensation was due.

We may summarize the differences between the Maharam of Lublin and the Maharshakh as follows: the Maharam of Lublin would impose liability for Benarogios's expenses of leaving Italy and for his lost employment but only if Filipe de Nis did not act under compulsion. The Maharam of Lublin regarded these elements of damage as garme. He also would allow Benarogios to take an oath as to the amount of his losses and recover on that basis even without competent witnesses. The Maharshakh regarded all of the damage as gerama and therefore uncollectible even if Filipe did not act under duress. Also, he would not allow Benarogios to recover these damages unless he had competent witnesses who could verify the amount of the loss. The Maharshakh, however, concluded that to atone for his wrongs, Filipe must pay whatever damages he has caused the mohel, even if he acted under duress.

**D. Gerama, Garme and the Converso's Dilemma**

The opinions of the Maharam of Lublin and the Maharshakh show that even when two rabbis use the same basic approach to deciding whether liability extends to indirect liability, they may come to different conclusions. The Maharam of Lublin imposed liability because of his extension of earlier rulings and concepts. The Maharshakh was not so willing.

The Maharshakh's strict application of the Ri's approach is particularly striking since he was willing in another responsum to stretch the requirements. The questioner in that responsum asked the Maharshakh if Simon was liable for losses to Reuben caused by Simon's mistaken return of a document to a gentile merchant that enabled the merchant to collect a debt from Reuben for a second time. The Maharshakh answered that Simon was liable. Simon was

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deemed to meet all the Ri's requirements: (1) he himself damaged Reuben by returning the document to the merchant, (2) the damage was deemed to be immediate because it was analogous to the case of one who destroys another's note thereby causing loss to the creditor, and (3) it was obvious that return of the document to the merchant would cause loss to Reuben because one could assume that the gentile merchant would be unsympathetic to a Jew. In reaching this result the Maharshakh disputed the authenticity of a contrary responsum attributed to the Rashba even though Rabbi Joseph Caro had quoted that responsum in his authoritative commentary.130

Given that the Maharshakh was willing to use the Ri's test in a flexible manner, why was he unwilling to be more flexible in the mohel's case? Although he does not allude to it, one possibility is that Benarogios undertook a severe risk in circumcising a Converso. The risk was not only that the circumcision could endanger himself and the Converso, but that it would also endanger the Jewish community as a whole. Rabbis and Jewish communal organizations had long recognized the danger and forbade the circumcision of gentiles who sought to convert to Judaism if it was prohibited by the non-Jewish authorities.131 Presumably this prohibition applied also to the circumcision of Conversos because the non-Jewish authorities regarded them as Christians and were especially sensitive to preventing them from resuming Jewish practices. Jews took the matter so seriously that if a mohel violated this prohibition, Jewish law permitted other Jews to reveal the name of the mohel to the gentile authorities if it would save the community from harm.132

Another factor that may have influenced the Maharshakh was the predicament faced by Filipe de Nis. Two religions claimed him as one of their own. What one religion might view as an act of piety the

130. Bet Yosef, Commentary to the Talmud, Hoshen Mishpat 386 (quoting Responsa Rashba 3:76).
131. See Mordekhai, Yevamot 4:41; Responsa Maharah Or Zarua 142. The Responsa Maharah Or Zarua, like the Mordekhai, dates from the thirteenth century. Cf. Solomon Luria, Yam Shel Shelomo, B. Yevamot 4:49 (warning against converting gentiles to Judaism because of the grave offense to the gentile government). See Solomon Ibn Verga (15-16th centuries), Shevet Yehudah 64 (some Marranos are circumcised in hiding, and there are some who circumcise themselves out of fear of having it being revealed); Reuven Bonfil, New Information on Rabbi Menahem Azariah da Fano and His Age, in STUDIES IN THE HISTORY OF JEWISH SOCIETY 98 (1980) (in his notebook listing circumcisions, mohel concealed names of the Conversos that he circumcised).
132. Responsa Maharah Or Zarua 142; Hillel ben Naphtali Zevi, Bet Hillel, Yoreh Deah 267 (c. 1615-1690).
other religion would view as betrayal. Further, since he was a second generation Converso, he did not choose the awful situation in which he found himself. He was in peril from the moment of his birth.

Although we cannot be sure of the Maharshakh's reasoning, he appears to have used the rules of indirect injury in a flexible manner. He adapted them to the needs of each case. The rules themselves did not decide these cases for indeed the Maharam of Lublin applied the same rules and reached different results.

V. Comparison of Jewish and American law

Jewish and American legal systems have developed parallel approaches to the problem of limiting liability for indirect harm. The Ri and the Rosh required that damage be immediate, direct and certain to occur. This is similar in some respects to the idea that proximate cause limits liability to the direct consequences of the defendant's wrongful act. The Ritzvah's approach—limiting liability to damage that is common and usual—is similar to the foreseeability test. Nahmanides's approach of requiring necessity has its parallel in early descriptions of proximate cause, limiting damages to those harms that necessarily resulted from the defendant's conduct. 133

The experience of Jewish law teaches that these approaches to limiting liability are all indeterminate. Their genius and true value rests on their ability to change and adapt to the needs of individual cases. In the hands of a skillful and wise judge they can be used to correct perceived injustices or prevent further harm to the community.

Early on, rabbis recognized the difficulty of formulating a universal test for the scope of liability. The Tosafot recognized that the Ri's test was not capable of explaining all of the Talmudic cases. 134 In the thirteenth century, the Mordekhai wrote that he could not understand the Ri's distinctions. 135 Some 300 years later Rabbi Mordecai ben Abraham Jaffe wrote, "It is not entrusted to every man to be able to reckon which are cases of garmi and which are gerama. Rather the sages of blessed memory reckoned them by themselves and said that these are cases of garmi for which one is liable." 136 American scholars have voiced similar criticisms of the proximate

133. See supra text accompanying note 3.
134. See supra text accompanying note 77.
135. Mordekhai, B. Bava Kamma 119.
136. Levush, Hoshen Mishpat 386. Rabbi Jaffe lived from about 1515-1612.
cause doctrine. Henry Edgerton wrote that the word \textit{proximate} "is so ambiguous that it is almost impossible to use it consistently."\footnote{Henry W. Edgerton, \textit{Legal Cause}, 72 U. PA. L. REV. 211, 213 (1924).} A nineteenth century lawyer, Nicholas St. John Green, wrote:

When a court says this damage is remote, it does not flow naturally, it is not proximate; all they mean, and all they can mean, is, that under all the circumstances they think the plaintiff should not recover. They did not arrive at that conclusion themselves by reasoning with those phrases, and by making use of them in their decision they do not render that decision clearer to others. The employment of such phrases has never solved one single difficulty \footnote{Nicholas St. John Green, \textit{Torts under French Law}, 8 AM. L. REV. 508, 519 (1874).}.

The proximate cause doctrine in American law has two problems. One is that courts impose liability in some cases where damage is less foreseeable or less direct than other cases where it does not impose liability. The second issue is that we give little guidance to juries in their determination of the proximate cause question.

As this Article has shown, the first problem can be resolved by understanding the policy factors that courts implicitly consider when they determine the proximate cause issue as a matter of law. The second problem is more serious.\footnote{See, \textit{e.g.}, Kelley, \textit{supra} note 7, at 1063.} The difficulty with assigning the matter to the jury is that the jury instructions do not clearly tell the jury what is expected of them. The standard jury instruction is so bad that even the judges giving it have no clear idea what it means.

One might think that the difficulties we have been discussing would be more serious in the context of Jewish law. Since Judaism views the law as an expression of God's will, one might think that Jewish courts would have a greater concern for finding predictable rules. There are several reasons why this is not so. Rabbinic courts approach their task with the utmost seriousness. Not only are they charged with interpreting and applying God's revealed law, but they consider themselves responsible for the maintenance of the world by correct application of that law and are accountable for the destruction of the world if they pervert the law.\footnote{See Yehiel ben Asher (c. 1270-1340), \textit{Tur}, \textit{Hoshen Mishpat} 1. The Tur is one of the foremost codes of Jewish law, a precursor to the Shulhan Arukh. It is significant that its author placed this description of the judge's responsibility at the beginning of his work, \textit{Shemos}.} This seriousness with which
Rabbinic judges approach their task does not translate into a demand for fixed, inflexible rules. There are several reasons for this. Partly out of concern for the seriousness of making an incorrect decision, Jewish law emphasizes compromise as a better way of resolving disputes. The court not only encourages the parties to settle their dispute, but also seeks authority from the parties to resolve the dispute by imposing a compromise rather than by applying the strict law.\textsuperscript{141} Jewish law also lacks a concept of \textit{stare decisis}. Each rabbinic judge is obligated to determine the law for himself. Prior decisions and other writing sources must be consulted, but in the end each judge remains bound to make his own determination of the correctness of prior rulings. The Talmudic dictum is that “a judge only has what his eyes see.”\textsuperscript{142} Consistent with this view, there is no appellate process in Jewish law.\textsuperscript{143} Moreover, because Jewish law is a religious system, courts are mindful of the parties’ obligations not only to each other but also to God. As we have seen, in many instances of indirect damage the defendant is exempt only according to the laws of man but is obligated under the laws of Heaven.\textsuperscript{144} Consequently, even when a defendant would be exempt for indirect damage, he might find himself under moral pressure backed up by possible social sanctions for failing to compensate the victim. Jewish law also recognizes that sometimes compensation would be required as a religious act of atonement even if not legally required.\textsuperscript{145} Further, Jewish law allows courts to enjoin defendants who engage in activities that threaten to bring about continued indirect damage.\textsuperscript{146} The cumulative effect of all these rules and practices has been to entrust rabbinic courts with a broad level of discretion, trusting in the rabbis’ training and wisdom to arrive at a just result.

It would be asking too much to expect a set of instructions that would educate the jury about all of the policy factors that it ought to

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\footnote{142. \textit{B. Bava Batra} 131a.}
\footnote{143. Even in modern day Israel where an appellate system has been instituted for rabbinic courts, some maintain that the decisions of the appellate court are binding only on the parties to the case but not on the lower court judges. \textit{See} 4 \textsc{MENACHEM ELON, JEWISH LAW} 1810-1818 (1994).}
\footnote{144. \textit{See} text, \textit{supra} notes 48-52, 54, 56-57.}
\footnote{145. \textit{See} text, \textit{supra} notes 122, 124.}
\footnote{146. \textit{See} text, \textit{supra} note 73.}
\end{footnotes}
consider. Even law students after a semester of study have difficulty understanding and applying these concepts. The jurors, however, have a lifetime of experience and hopefully a measure of common sense. What is needed is an instruction telling them how to use that experience and common sense in resolving the proximate cause problem.

New York courts have improved on the instructions used in other states. Their basic instruction on proximate cause reads, “An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury.” Unfortunately the instruction combines the issue of proximate cause and cause-in-fact. It uses the word “cause” to mean both cause-in-fact and “one at fault.” However, it may indicate to jurors the notion that they are not to hold someone liable unless reasonable people would conclude that they should be held liable. It would be better to instruct the jury as follows:

The law does not impose liability on a negligent actor for all damage that results from the negligent act. The law does this to avoid making negligent actors liable to an indefinite number of people for an indefinite amount of time and for an indefinite amount of money. If you find that the defendant was negligent and was a cause-in-fact of the injury, you should impose liability if reasonable people would regard liability in this case to be just and fair.

Taken as a whole, the Jewish legal system was comfortable having rules on indirect damages that contained a high level of uncertainty. The American legal system is different. It chooses jurors not for their advanced learning and wisdom, but because it hopes they reflect the common sense judgment of the people. If we give jurors the proper tools to do their job, the system is likely to work well enough.