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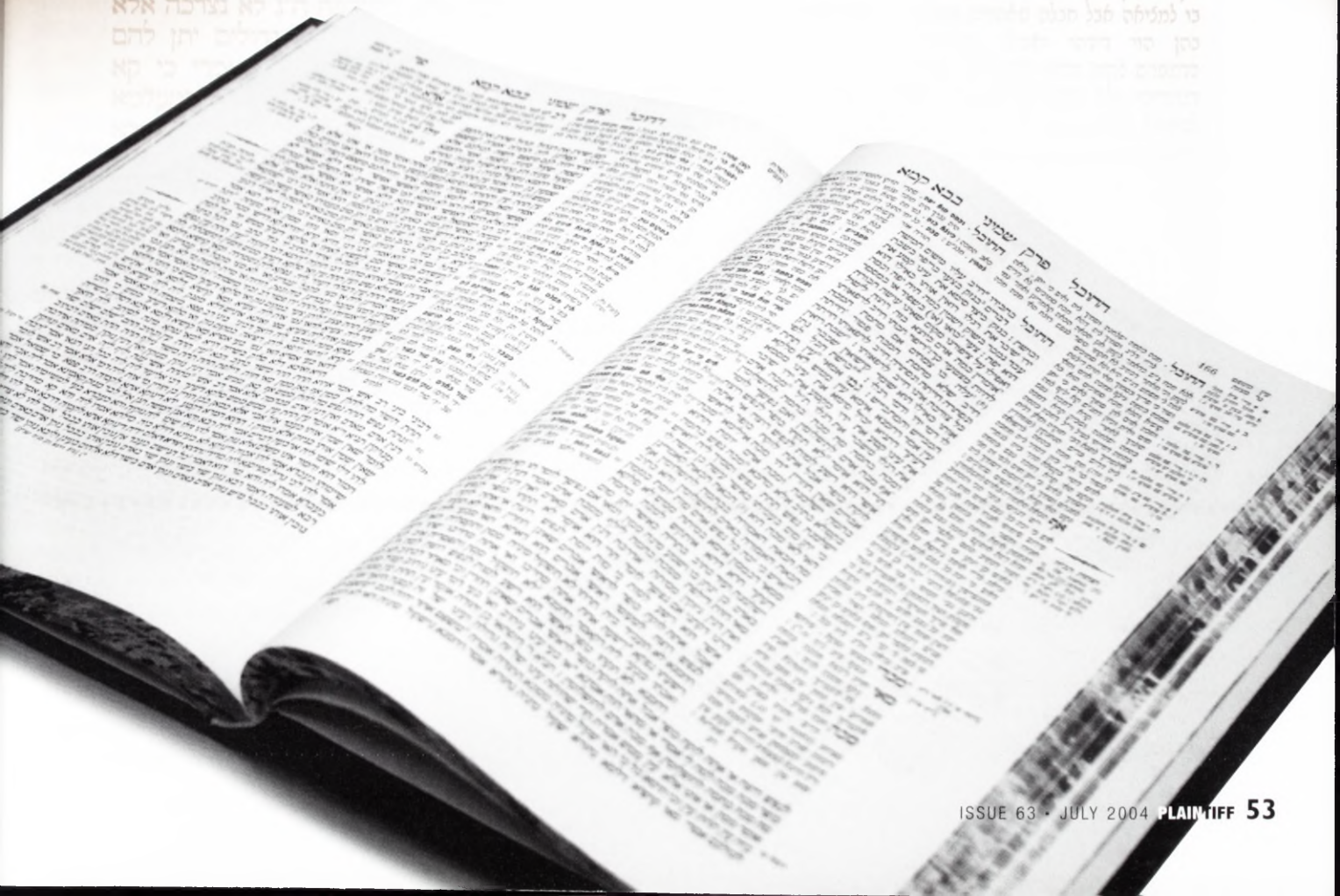
Personal injury compensation: lessons from Talmudic law



People claiming or entitled to monetary compensation for personal injury tend to have poorer health outcomes overall than those with comparable injuries when compensation is not an issue.[1]

This article examines some of the principles upon which our personal injury compensation systems are based, in order to better understand why the process of tort litigation has itself become such a major factor in healthcare in modern societies.

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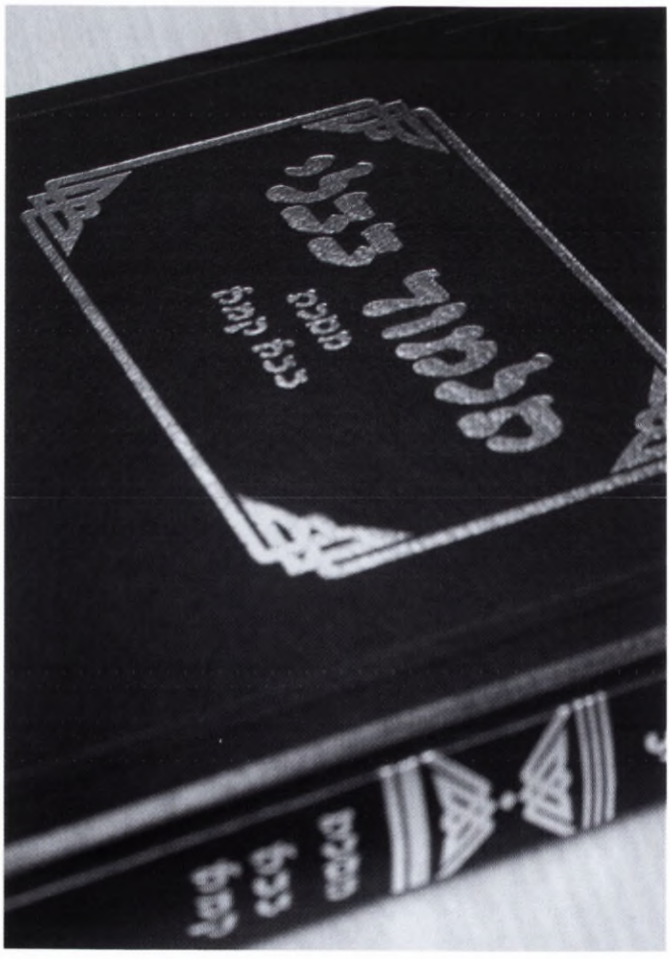

In attempting to explain this phenomenon, researchers have implicated a large number of psychosocial factors, but have not found any readily isolated causes. Moreover, it is not understood how the various factors might operate in individual cases.[2]

That the legal process itself can adversely affect the health of those litigating for personal injury compensation has long been known. As Sir John Collie, the famous British medical examiner, observed in 1932:

> 'Litigation magnifies pain, perpetuates incapacity and introspection; and subjective sensations are unwittingly fostered.'[3]

More recently, Nortin Hadler, Professor of Medicine in North Carolina, has reiterated the negative impact of the interaction between injured people and compensation systems.[4] He stated a truism: '[A]nyone who has to prove that he or she is ill cannot get better. In fact, they can only get more disabled; any other option will compromise their veracity.'[5]

THE TALMUD

A detailed exposition of the principles of compensation for injury can be found in the Talmud, which spans a period from 200 BCE to 700 CE, during which time the oral tradition of the Jewish people (the Mishnah) was committed to writing by generations of sages. The sages looked upon the law as an expression of the life of man, not merely abstract theory.

TALMUDIC LAW

The Talmud consists of 63 chapters within six categorisations. Tractate *Baba Kamma* (first gate) deals with Nezikim, or civil and criminal law. The laws regarding torts and damages are to be found in Chapter 8.[6]

The Mishnah says [83b] that:

> 'One who injures a fellow man becomes liable to him for five items: for damages (depreciation), for pain, for healing, for loss of time and for degradation (indignity).'[7]

The Talmud explains that five was the maximum number of items that could be considered by the court. An individual case may not necessarily require compensation under all items.

Depreciation

When determining depreciation for injuries resulting in loss of a limb, loss of an eye, or a fracture, the injured person was assessed as if he or she were a slave on sale in the open market place. A valuation was made as to the person's present worth, compared with that prior to the injury.

Obviously factors such as age, sex, education, and employment skills would be taken into consideration when judges determined the present worth of the injured person. The offender then had to pay the amount by which he had diminished the monetary value of the other person.

When the injured person claimed to be deaf or blind, monetary compensation was paid only after a long period of observation had eliminated the possibility of pretence.[8]

The payment to redress a wrong fulfilled the biblical injunction constituting the Lex Talionis, or the 'eye for an eye' concept (Exod.21: 24; Lev.24:20). As the law evolved, it became accepted that the word translated for signified payment of monetary compensation.

These ancient liabilities for injuries have been modernised and extensively modified in an attempt to provide more universal and predictable remedies, which are no longer necessarily dependent on the injured person being able to prove that the person or party who caused the injury was at fault.[9]

Emerging from this evolutionary process, current personal injury compensation systems are based upon the twin expectations that disabled people have fixed functional capacities, and that these are reliably measurable. The term 'disability' is used to denote the former concept, and 'impairment' to denote the latter.

'Disability' is understood to refer to the gap between what a person can do and what s/he wants or is required to do, whereas 'impairment' refers solely to disease or dysfunction of a bodily part or system.

In reality, both the nature and extent of impairments occur on a continuum, with no convenient distinction between ability and disability. Impairment is but one factor in the social construct known as 'disability'.[10]

Modern definitions of impairment

One way of producing more certainty – that is, reliably measuring - in outcomes when compensating people for personal injury is to assume that all medical conditions are clear-cut and straightforward, and that their effects on function can be reliably assessed. In reality, neither assumption is true.[11]

Schedules known as 'Tables of Maims' were originally formulated for the purpose of compensating injured factory workers under European workmen's compensation schemes. They were attempts to translate the loss of a bodily part into a sum of money paid in recognition of a worker's lost earning capacity.[12]

This exercise produced percentage ratings of disabilities attributed to the part in question, which could be scaled in terms of their relative severity and then converted into monetary awards.[13]

Despite the pseudo-rationality of this exercise, there was some relationship of the award to the degree of loss of function of the part –in other words, the scheme recognized disability.

Now change has been introduced whereby Australian medical practitioners are paid by insurers and compensation authorities to administer these 'schedules' based on objectively measurable (sic) impairment in order to determine the true extent of an injured person's 'depreciation'.

However, where there are subtle injuries with no impairment to explain disability, the inference from impairment to disability cannot be made. In such circumstances, these systems must inevitably fail, leading to chaos.[14]

In this situation, Hadler sees disability determination as being 'a fantasy that supports an industry whose efforts are iatrogenic...'and that impairment rating should therefore 'be relegated to the archives'.[15]

The relationship between impairment and disability is complex, but a consensus has emerged that there is no direct causal link between these phenomena. Rather, impairment and disability are seen as bi-directionally interactive, and attention must be paid to contextual and environmental factors as determinants of disablement for any given individual with impairment.

Thus, impairment ratings *per se* have little relevance to actual disability, apart from being a standard means whereby medical disability determinations are made and legitimized.

But when coupled with functionally based assessments of the impact of impairment on the individual, the resulting disability determinations become more relevant and socially just by providing an objective and valid means for awarding compensation according to medical losses suffered. This formula is also consistent with the Talmudic concept of 'depreciation'.

Pain

Under the item 'pain', the task of the judges was to determine how much money a man of equal standing would require before agreeing to undergo the pain suffered by the injured person. ▶

Moses Maimonides, a penetrating codifier of Talmudic law in the middle ages, explained the principles upon which these awards were determined:

'One person may be extremely delicate and pampered and rich, so that even if given a large sum of money, he would not voluntarily submit to even a little pain. Another person may be hardened and robust, but poor, so that he would voluntarily submit to great pain even for a single zuz.'[16]

In the case of a person who had suffered bodily pain without any discernable evidence of tissue injury, a payment could still be awarded. This rule was based upon the hypothetical case of a man who was guilty of rape, but who had not caused the woman bodily injury (Deut.22:29).

Over subsequent centuries, no better means of assessing pain has been devised. Nevertheless, the evaluation of pain and its relationship – if any – to impairment remains an important issue for the courts and tribunals that are set up to determine and compensate for disability under common law.

There is now good evidence that such systems that offer pain-contingent compensation can perpetuate pain complaints as well as lead to unfavourable treatment outcomes. However, both the process of returning injured people to work and providing specific pain management programs are known to improve prognosis.[17]

"There is good evidence that systems that offer pain-contingent compensation perpetuate pain complaints."

By contrast, in the workers' compensation jurisdiction and other no-fault statutory schemes of personal injury compensation, it is loss of work capacity and work disability that are compensable, rather than pain and suffering.[18]

Deyo[19] argues that, although it may seem unfair to restrict access to compensation for pain and suffering, such a policy can be justified if it means that more resources can be redistributed to those persons who have sustained the most severe and unequivocal impairments.

Healing

Talmudic law dictated that the offending person would be liable for the injured person's reasonable medical expenses until such time as the injury had healed. The question of reasonable expenses was to be determined by a competent and independent physician, who would charge a fee for his services.

The offending person was not allowed to take on the healing role, or to provide a physician who would undertake treatment for no charge, on the grounds that '[A] physician who heals for nothing is worth nothing.'[20]

Similarly, the injured person could not ask the offender for a sum of money to enable him to purchase medicines and cure himself. There was a real risk that the injured person might simply take the money, neglect his own treatment and as a result remain disabled.

It was imperative that an injured person did not disobey his physician. Should he do so and, as a result, become more disabled, the offender was no longer obligated to provide him with the costs of further medical treatment.

Third-party payers of today likewise insist that the treatment of injured people be 'reasonable'. In reality, as found by Cohen et al,[21] medical management of common compensable injuries (for example, lower back and neck/arm injuries) is often inappropriate and/or inadequate.

Loss of time

Those who had not been gainfully employed prior to their injury, either because they were wealthy or lazy, were not entitled to any payment under this heading.

Injured people who had been employed were considered, during the time that it took them to recover, as 'watchmen of cucumber beds' or doorkeepers - these being occupations that almost any person could perform. (A modern equivalent occupation today would be something like that of carpark attendant.) The difference in wages so occasioned was then reimbursed to them.

Indignity or humiliation

Anyone who humiliated another person was obliged to pay a separate amount of compensation under this heading. This ruling was based upon the following passage in Deuteronomy 25: 11-12: 'If she put out her hand and seized him by the private parts, you shall cut off her hand.' The interpretation was that she had to pay compensation for the shame that she had caused the man.

Compensation for humiliation was to be estimated in accordance with the status of the offender and the offended, but there were no hard and fast rules. For example, some sages argued that if the victim had been a poor man and was then assessed for damages according to his poverty, the amount of compensation paid by his assailant would be too low. On the other hand, if a rich man were to be compensated according to his wealth, there would be no limit to the amount that he might claim.

It therefore followed that all people were to be assessed equally: as if they had once possessed great material wealth but had then fallen upon hard times.[22]

Recognition that those who are injured through no fault of their own often suffer humiliation appears to be lacking in contemporary society. In fact, our adversarial systems can heap further humiliation upon them, by creating a sense of powerlessness, loss of social status, and loss of identity.[23]

Conclusion

From this brief historical review, it is clear that our current injury compensation systems are failing to meet the needs of injured people. Some of the issues that need to be addressed include the practice of assessing disability using impairment ratings, misguided attempts to compensate people for pain and suffering rather than for their inability to work, the poor standard of medical management of many of those claimants with commonly occurring injuries, and the apparent failure to recognise that assessment systems themselves can add to the humiliation of the people whom they were originally designed to serve.

Acknowledgement

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Endnotes: **1** *Compensable Injuries and Health Outcomes* (2001), The Royal College of Physicians, Sydney. **2** Ibid, p20. **3** Collie J (1932), *Fraud in Medico-Legal Practice*, Edward Arnold & Co, Sydney, p2. **4** N M Hadler, 'Work Incapacity for Low Back Pain', in *Clinical Orthopaedics and Related Research*, vol 336, 1997, pp79-93. **5** Ibid, p92. **6** *Baba Kamma* (1935), translated into English by E W Kirzner, Chapter viii, Soncino Press, London, pp473-540. **7** Ibid, p473. **8** *The Code of Maimonides* (1954), Book 11, The Book of Torts, translated by Hyman Klein, Yale University Press, New Haven, p166. **9** J Pollack (1963), 'Disability Insurance under Social Security', in *Occupational Disability and Public Policy*, edited by E F Chiet and M S Gordon, John Wiley & Sons, Inc, New York, pp158-87. **10** D Marks (1997), 'Models of Disability' in *Disability and Rehabilitation*, vol 19, pp85-91. **11** Ibid. **12** A Bale (1989), 'Medicine in the Industrial Battle: Early Workers' Compensation', in *Social Science and Medicine*, vol 28, pp1113-20. **13** Ibid. **14** J D Loeser and M Sullivan (1997), 'Doctors, Diagnosis and Disability', in *Clinical Orthopaedics and Related Research*, vol 336, pp61-6. **15** N M Hadler, 'Work Incapacity for Low Back Pain', in *Clinical Orthopaedics and Related Research*, vol 336, 1997, p92. **16** *The Code of Maimonides* (1954), Book 11, The Book of Torts, translated by Hyman Klein, Yale University Press, New Haven, p166. **17** G Mendelson (1991), 'Compensation in the Maintenance of Disability', in *European Journal of Pain*, vol 12, pp1-11. **18** Ibid. **19** RA Deyo RA (2000), 'Pain and Public Policy (editorial)', in *New England Journal of Medicine*, vol 342, pp1211-12. **20** *Baba Kamma* (1935), translated into English by E W Kirzner, Chapter viii, Soncino Press, London, p489. **21** M L Cohen, M K Nicholas and A W Blanch (2000), 'Medical Assessment and Management of Work-related Low Back or Neck-arm Pain: More Questions than Answers', in *Journal of Occupational Health & Safety – Aust NZ*, vol 16, pp307-17. **22** *Baba Kamma* (1935), translated into English by E W Kirzner, Chapter viii, Soncino Press, London, p489. **23** *Compensable Injuries and Health Outcomes* (2001), The Royal College of Physicians, Sydney, p20.

REDRESS FOR INJURY: TALMUDIC METHODS COMPARED WITH THOSE OF TODAY

Categories	Talmudic practice	Contemporary practice
Depreciation	Slave market value assessed	Schedules for assessment of impairment
Pain	Price of avoidance of pain	Assessment is problematic
Healing	Reasonable medical expenses	Reasonable medical expenses
Loss of time	Reimbursement	Reimbursement
Indignity	Monetary compensation	No longer compensable