

# Negligence and Strict Liability in the Babylonian and Palestinian Talmuds: Two Competing Systems of Tort Law in the Rulings of Early Amoraim

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## A. Two Models of Liability in the Theory of Tort Law

Every legal system must contend with civil wrongs, the need for rectifying losses inflicted by one party onto another, as well as determine by what standards such losses are evaluated. At issue is when and how the law of torts determines whether a person's conduct is culpable, making them legally at fault. Is blameworthiness as well as harm essential for liability or is it sufficient that one causes injury, irrespective of how or why it came about? The law must decide if culpability is to be determined based on intentional behavior, negligence, or a system of strict liability.

Negligence in this article refers to behavior that creates foreseeable risks of unreasonable injury to the person or property of others, even when done unintentionally or through indirect contact, without taking the precautions that are expected of a reasonable person in a particular society.<sup>1</sup> Strict liability is defined as the requirement to compensate another for damages even when

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the loss is not intentionally or negligently inflicted, and there is no fault on the part of the defendant.<sup>2</sup> The parameters dividing negligence from strict liability are not always apparent since both consider the unintended consequences of a person's actions. If defined broadly and at a high level of abstraction, almost any harm can be deemed foreseeable and, therefore, a result of negligence, since all actions by definition can potentially cause harm. Negligence could therefore look very much like a ruling that reflects strict liability. Conversely, if liability is defined more narrowly as based on the intention of the actor and the particular facts of a case, a more limited judgment of negligence will emerge with far fewer risks being deemed foreseeable.<sup>3</sup> Damages that arise from negligence could be considered happenstance, thereby making the defendant morally removed from the damage and, hence, legally exempt.

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- 1 Richard Wright, "The Standard of Care in Negligence Law," in *Philosophical Foundations of Tort Law*, ed. David G. Owen (Oxford: Clarendon Press, 1995), 249; and Patrick Kelley, "Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law," *Vanderbilt Law Review* 53 (2001): 1061. In American law, negligence refers to carelessness and the failure to exercise the standard of care that a reasonably prudent person would exercise in a similar situation (Brian Garner, ed., *Black's Law Dictionary: Abridged*, 7<sup>th</sup> ed. [St. Paul: West Group, 2000], 846, s.v. "Negligence"). American law also considers the cost of preventing risk. In the famous case of *U.S. v. Carroll Towing Co.*, 159 F.2d 169 at 173 (2d Circuit 1947), Judge Learned Hand established that an act is deemed negligent where the burden of adequate precautions (B) is less than the probability that damages will occur (P) multiplied by the gravity of the injury (L). He formulated his ruling in the following algebraic equation: one is liable for negligence if  $B < PL$ . See Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995), 148-49. However, this approach has received much criticism. For example, Richard Wright argues that there are "insurmountable problems" with this formula, including the impossible task of taking all of the expected costs and benefits into account when deciding whether one should take precautions to protect against a particular risk. He posits rather the "equal freedom theory" of negligence based on the Aristotelian and Kantian theories of right and corrective justice in which "the defendant is liable for an interactional injury if and only if her conduct foreseeably affected the person or property of another in a manner that was inconsistent with his Right to equal negative freedom, thus generating a corrective justice obligation of rectification" (Wright, "Standard of Care," 257).
- 2 Garner, *Black's Law Dictionary*, 741, s.v. "Strict Liability" under "Liability."
- 3 Steven Friedell, "Nobody's Perfect: Proximate Cause in American and Jewish Law," *Hastings International and Comparative Law Review* 25 (2002): 101-31.

In order to understand negligence as a standard distinct from strict liability and as a just mode of determining liability, the essential component that must be factored in—as per modern Anglo-American law—is that the defendant exposed the plaintiff to unreasonable risks that were within his power to mitigate. According to Ernest Weinrib, not taking proper care to reduce possible harm resulting from one’s actions “is to treat the world as a dumping ground for one’s harmful effects, as if it were uninhabited by other agents,” making one morally and legally culpable.<sup>4</sup> However, as opposed to a system of strict liability, one is not liable for remote possibilities of injury when liability is based on negligence. It is only those risks which are foreseeable and ultimately result in injury to the plaintiff that characterize conduct as wrongful and, therefore, worthy of blame.

The argument for imposing a doctrine of strict liability, championed by Richard Epstein, understands tort liability as stemming from a theory of causation.<sup>5</sup> In all cases of civil wrongs one party suffers a loss, even if both parties acted properly. Strict liability decides that the actor who causes the injury bears the burden of liability. In other words:

Proof of the non-reciprocal source of the harm is sufficient to upset the balance where one person must win and the other must lose... The choice is plaintiff or defendant, and the analysis of causation is the tool which, *prima facie*, fastens responsibility upon the defendant.<sup>6</sup>

The perpetrator of harm, and not its recipient, is considered legally responsible for the damaging effects of his actions, thus indicating the close connection between action and accountability.

This article examines whether similar legal principles may be abstracted from rulings in talmudic literature. While explicit legal terms such as negligence and strict liability are not readily apparent in the Mishnah’s rulings or

4 Weinrib, *Idea of Private Law*, 152.

5 Richard Epstein, “A Theory of Strict Liability,” *Journal of Legal Studies* 2 (1973): 151-204; *idem*, “Defenses and Subsequent Pleas in a System of Strict Liability,” *Journal of Legal Studies* 3 (1974): 165-216.

6 Epstein, “Theory of Strict Liability,” 169.

those attributed to (early) Amoraim,<sup>7</sup> a number of related positions reflect an underlying, albeit conflicting, system of tort liability. Thus, on the one hand, most of the mishnayot of tractate *Bava Qamma* consider different cases of varying degrees of fault and negligence, indicating a system that determines liability based on fault. At the same time, however, the dictum in *m. B. Qam.* 2:6, “man always stands forewarned,” seems to express the same principle as a system of strict liability.<sup>8</sup> In the amoraic strata, rulings attributed to earlier generations of Amoraim point to two underlying legal models that seem to have been employed by the two groups of Amoraim living in Babylonia and Palestine, respectively, in order to determine tort liability. A comparison of both Talmuds indicates that in Babylonia the early Amoraim favored a position of strict liability, while in Palestine they considered the actor’s level of fault. Numerous rulings attributed to the fourth-generation Amora, Rava, likewise demonstrate that he assigned liability only in the presence of intentional action in both civil and ritual law. This is further underscored by those instances in which he distinguishes between intentional and negligent conduct.<sup>9</sup>

The present study seeks to uncover and understand the aforementioned conflicting legal models presented in the Bavli and Yerushalmi. The starting point of such a study depends on the assumption that attributed statements found in both Talmuds may be trusted as reliable reports of the cited rabbis or, at the very least, of their specific generations and/or locales.<sup>10</sup> This is not

7 Rabbis of the third generation and onward, however, begin to use terms such as negligence, intention, and coercion. See David Daube, “Negligence in the Early Talmudic Law of Contract,” in *Collected Works of David Daube: Talmudic Law*, vol. 1, ed. Calum M. Carmichael (Berkeley, CA: University of California at Berkeley Press, 1992), 305-32; Yaakov Elman, “Toward an Intellectual History of Sasanian Law: An Intergenerational Dispute in Hērbedestān 9 and Its Rabbinic and Roman Parallels,” in *The Talmud in Its Iranian Context*, ed. Carol Bakhos and Rahim Shayegan (Tübingen: Mohr Siebeck, 2010), 59-60; Leib Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization* (Tübingen: Mohr Siebeck, 2002).

8 See discussion below.

9 See my dissertation, “Intention in the Babylonian Talmud: An Intellectual History” (Ph.D. diss., Yeshiva University, 2011).

10 Jacob Neusner has championed the skeptical approach. See his *In Search of Talmudic Biography: The Problem of the Attributed Saying* (Chico, CA: Scholars Press, 1984); idem, *Reading and Believing: Ancient Judaism and Contemporary Gullibility* (Atlanta: Scholars Press, 1986), 21; idem, “Talmudic History: Retrospect and Prospect,” in *History of the Jews in Babylonia*, vol. 1, *The Parthian Period* (Chico, CA: Scholars Press, 1984), xxviii-xxxv. See also William Scott Green, “What’s in a Name? The

to say that the Bavli does not contain some attributed statements that are entirely artificial or include foreign elements added at a later stage, either of which may arise from the process of oral transmission as well as the reworking of amoraic statements into larger sugyot by the Bavli's redactors.<sup>11</sup> While it is beyond the scope of the present study to engage in a lengthy discourse on the matter, suffice it to say that a number of studies have already pointed to methodological tools that may aid in the verification of attributed statements in the Bavli,<sup>12</sup> which include corroboration with other statements made by a particular rabbi's generation and school both in the Talmud and in other independent rabbinic texts.<sup>13</sup> In the case of the present study, the attributed statements examined show consistencies with their associated generations and, moreover, are commented on, and thus confirmed, by later generations. I therefore assume that the attributions and formulations I examine are generally reliable, but still appreciate that there were concepts and themes that coalesced at the final level of redaction.<sup>14</sup>

Problematic of Rabbinic 'Biography'," in *Approaches to Ancient Judaism: Theory and Practice*, vol. 1, ed. Jacob Neusner (Missoula, MO: Scholars Press, 1978), 77-96, who likewise espouses a skeptical position.

For responses, see Richard Kalmin, *Sages, Stories, Authors, and Editors in Rabbinic Babylonia* (Atlanta: Scholars Press, 1994). He also provides a condensed bibliography on the literature of talmudic stories as "evidence for history and biography"; see *ibid.*, 21-23 n. 1. See also *idem*, "The Formation and Character of the Babylonian Talmud," in *Cambridge History of Judaism*, vol. 4, *The Late Roman-Rabbinic Period*, ed. Steven T. Katz (New York: Cambridge University Press, 2006), 840-76; *idem*, "Rabbinic Literature of Late Antiquity as a Source for Historical Study," in *Judaism in Late Antiquity*, ed. Jacob Neusner and Alan J. Avery-Peck (Leiden: Brill, 1999), 187-99; David Kraemer, "On the Reliability of Attributions in the Babylonian Talmud," *HUCA* 60 (1989): 175-90; *idem*, *The Mind of the Talmud: An Intellectual History of the Bavli* (New York: Oxford University Press, 1990), 20-25; David Brodsky, *A Bride Without a Blessing: Texts and Studies in Ancient Judaism* (Tübingen: Mohr Siebeck, 2006).

11 Brodsky, *Bride Without a Blessing*, 386-88, 415.

12 For a discussion of the various methodological approaches, see Michael Chernick, *A Great Voice that Did Not Cease: The Growth of the Rabbinic Canon and Its Interpretation* (Cincinnati: Hebrew Union College Press, 2009), 14-20.

13 Kraemer, "On the Reliability of Attributions," 182-86; Kalmin, *Sages, Stories*, chaps. 2, 3, and 7. Also see David Goodblatt, "Toward the Rehabilitation of Talmudic History," in *History of Judaism—The Next Ten Years*, ed. Baruch Bokser (Chico, CA: Scholars Press, 1980), 37-38.

14 Ultimately, if I have done a satisfactory job of showing that theories of liability appear to have developed differently among different generations and locales, I

The picture is somewhat different with regard to the Yerushalmi. The Yerushalmi, which was closed in the second half of the fourth century, is often viewed as having been preserved in a more unaltered form than the Bavli, since it did not undergo nearly the same degree of redactional activity that the Bavli did.<sup>15</sup> Similarly, since its redaction, the Yerushalmi has been studied and recopied significantly less than the Bavli, resulting in fewer variants in transmission. Given these different factors, therefore, the amoraic statements found within the Yerushalmi are often considered to reflect more accurately the amoraic rabbis' actual thinking, if not their actual wording. The Yerushalmi tractate of *Bava Qamma* (which is part of tractate *Neziqin* along with the other two *Bavot*) is particularly important because of its terse discussions and simple presentation of amoraic statements and baraitot, suggesting that it contains amoraic statements in their more original form before they were embedded into larger sugyot by the redactors of the Bavli.<sup>16</sup> However, due to the dominance of the Bavli over the Yerushalmi, it is also apparent that in many instances the interpretation of the Yerushalmi was determined and greatly influenced by what is found in the Bavli, making it difficult to ascertain the meaning as well

have added either to the evidence that attributed statements appear to be reliable, or that the redactors had their own theory of the development of certain concepts and imposed them on the texts in order to make it appear as if they developed over time. I find the first approach more plausible.

- 15 Leib Moscovitz, "The Formation and Character of the Palestinian Talmud," in *Cambridge History of Judaism*, vol. 4, *The Late Roman-Rabbinic Period*, ed. Steven T. Katz (New York: Cambridge University Press, 2006), 663-77.
- 16 See Yaacov Sussman, "Ve-shuv li-yerushalmi neziqin," in *Talmudic Studies*, vol. 1, ed. Y. Sussman and D. Rosenthal (Jerusalem: Magnes, 1990), 104-13. Many have tried to account for the brevity of *y. Nez.* Saul Lieberman, for example, suggested that it is the oldest of all the Palestinian tractates of the Talmud, edited before later explanations and sugyot were created on the amoraic statements. See Saul Lieberman, *Greek and Hellenism in Jewish Palestine* (New York: Jewish Theological Seminary Press, 1994), 7. However, Epstein and Sussman both argue against such a position since there is no definitive proof that it is early. Furthermore, many "late" Amoraim are cited in *y. Nez.* (Sussman, "Ve-shuv," 72-73). Lieberman also attributed the differences between *y. Nez.* and the rest of the Yerushalmi as resulting from the different school that allegedly produced *y. Nez.* Unlike the rest of the printed Yerushalmi, Lieberman posits that *y. Nez.* was the product of a different group of rabbis that lived in Caesarea. Although Epstein argued against such a view, many, including Sussman, concur with Lieberman. See Saul Lieberman, *Talmuda Shel Kesarin* (Jerusalem: Azriel, 1931); idem, *Sifrei Zuta B: Talmuda shel Kesarin* (New York: JTS, 1968), 125-36; and Yaakov Epstein, *Introduction to Amoraitic Literature: Babylonian Talmud and Jerusalem Talmud* (Jerusalem: Magnes, 1962), 282ff. (Hebrew).

as the originality of statements in the Yerushalmi. Fortunately, in the case of Yerushalmi tractate *Neziqin*, E. S. Rosenthal has produced a critical edition based on MS Escorial, whose superiority is demonstrated by its consistencies with Genizah fragments, making it far more reliable than MS Leiden, the manuscript on which the printed edition is based,<sup>17</sup> and is the edition used in this article for citing passages from the Yerushalmi.

Passages from the Bavli are cited from MS Hamburg 165 (Gerona, 1184), the most reliable Bavli MS available.<sup>18</sup> In determining whether attributions represent Babylonian or Palestinian traditions, preference will be given to the Talmud in which they are found, unless the country of origin is explicitly stated or a given statement is clearly reflective of positions espoused in the other Talmud.<sup>19</sup> Nevertheless, no text may be taken for granted and each must be evaluated with a careful and critical eye.

## B. Legal Models in the Bavli and Yerushalmi

As has already been noted, the Mishnah is unclear as to whether the law requires the application of a standard of strict liability or one that considers fault. We find two seemingly conflicting positions presented in the mishnayot of tractate *Bava Qamma*. On the one hand, *m. B. Qam.* 2:6 famously states in categorical terms that a person always stands forewarned, and liability is imposed even for non-volitional acts such as those performed while sleeping, ostensibly

17 E. S. Rosenthal, *Yerushalmi Neziqin* (Jerusalem: Israel Academy of Sciences and Humanities, 1983). See Rosenthal's introduction in which he also points to the superiority of MS Escorial in terms of its preservation of the Galilean Aramaic dialect as well as Greek loan words, as opposed to MS Leiden, which betrays the influence of the Bavli.

18 Indeed, it is equivalent to some Genizah fragments in authenticity. See Shamma Friedman, "Geniza Fragments and Fragmentary Talmud MSS of Bava Metzia – A Linguistic and Bibliographic Study," *Alei Sefer* 9 (1981): 5-55 (Hebrew).

19 As Jeffrey Rubenstein has noted with regard to talmudic narratives, "What can be shown with more confidence is that a particular motif is Babylonian, not Palestinian, despite the fact that the Bavli attributes statements containing the motif to Palestinian sages." Jeffrey Rubenstein, *The Culture of the Babylonian Talmud* (Maryland: Johns Hopkins University Press, 2003), 7. As will be demonstrated below, section 2.b, this is the case in the ruling of R. Ilai reported in *b. B. Qam.* 27b.

conveying a doctrine of strict liability.<sup>20</sup> This position is likewise espoused in the *Mekhilta de-Rabbi Ishmael*, which posits that intentional and accidental torts be treated equally:

“If a fire breaks out” (Exod 22:5). Why is this said? Even if it had not been said I could have reasoned: Since he is liable for damage done by what is owned by him, shall he not be liable for damage done by himself? If, then, I succeed in proving it by logical reasoning, what need is there of saying: “If fire breaks out”? Simply this: Scripture comes to declare that in all cases of liability for damage mentioned in the Torah one acting under duress is regarded as one acting intentionally.<sup>21</sup>

The Yerushalmi likewise reports a similar teaching in the name of the Tanna, R. Ishmael, which expresses a view of liability without fault:

R. Ishmael taught... [The category of] Fire [mentioned in Scripture] teaches that for all of them (i.e., all the prime categories of damages) one is liable for [damages that occur] under coercion.<sup>22</sup>

Like the passage from *Mekhilta de-Rabbi Ishmael*, R. Ishmael is reported to have deduced from the primary category of fire that one is liable for damages that result even from acts performed under compulsion.

Yet, the balance of mishnayot dealing with torts as well as the Tosefta’s treatment of tractate *Bava Qamma* (hereafter: *t. B. Qam.*), distinguish between different degrees of risk and negligence,<sup>23</sup> and lay out a legal framework in which a person’s culpability varies depending on the circumstances and degrees of fault.

20 See Irwin Haut, “Some Aspects of Absolute Liability Under Jewish Law and, Particularly, Under View of Maimonides,” *Diné Israel* 15 (1989-1990): 8-11. This is at least how this mishnah is interpreted in the Bavli. In the Yerushalmi, however, the mishnah is qualified as describing instances of fault. For a fuller discussion of forewarned as well as a citation of the text, see section 1 below.

21 *Mekhilta de-R. Ishmael, Neziqin* 14. Jacob Lauterbach, trans., *Mekilta de-Rabbi Ishmael*, vol. 2 (1935; repr., Philadelphia: Jewish Publication Society, 2004), 432.

22 *y. B. Qam.* 2b (MS Leiden).

23 Importantly, *t. B. Qam.* contains no parallel to the ruling that “a person always stands forewarned.”

Indeed, already in the first mishnah of *m. B. Qam.*, fault and negligence seem to function as the source of liability for injury that occurs through one's actions or property. The four primary categories, or *avot*, of damages listed here are divided between those that are caused by the legs of an ox, the tooth of an ox, a pit, or a fire.<sup>24</sup> These four types of damages characterize a system that favors negligence in torts by virtue of the fact that all "are prone to doing damage, and they have to be under your watch."<sup>25</sup> The primary categories thus refer to properties that carry a high likelihood of potential risk for causing injury and must, therefore, be guarded to ensure that they do not. As such, one is liable for damages that occur because of an obstacle, such as a pit, that he has created in the public thoroughfare or through the everyday activities of his animals.

As the third chapter of *m. B. Qam.* continues the discussion of how to determine liability, it does so with the underlying assumption that an actor's levels of fault and negligence are at stake. Did the tortfeasor adequately secure his property, engage in an inherently dangerous activity, or follow expected norms when operating in a public domain? In particular, *m. B. Qam.* 3:1 rules that one who stumbles upon and subsequently breaks a jug that was left out in the public domain is absolved from legal responsibility presumably because he is not at fault.

Thus, we see that while *m. B. Qam.* 2:6 exhibits a preference for strict liability, the overriding majority of mishnayot favor a system of fault and negligence.<sup>26</sup> Yet, despite this majority, any appearance of conflict between mishnayot, however small, is met with attempts at harmonization within both Talmuds. What we find in this instance is that in both Talmuds, *m. B. Qam.* 2:6 and 3:1 are understood in light of each other. In the Bavli, *m. B. Qam.* 3:1 is reinterpreted under the assumption that strict liability would apply in accordance with 2:6. In contrast, the Yerushalmi does the reverse, understanding *m. B. Qam.* 2:6 in the context of 3:1's determination of legal responsibility based on fault and negligence. As will become clear below, these findings reflect two different systems of liability that were espoused by the early Amoraim of Babylonia

24 This follows the interpretation of Samuel recorded in the Bavli's discussion of the mishnah in question. The dissenting view of Rav understands the category of "ox" to include all damages caused by oxen (i.e., tooth, leg, and horn), and interprets *mav'eh* in the mishnah as damages caused by people. See *b. B. Qam.* 3b.

25 *m. B. Qam.* 1:1.

26 According to the Yerushalmi, all of the mishnayot favor a system of fault and negligence.

and Palestine; the former favored a system of strict liability, while the latter preferred to decide liability based on fault and negligence.

### 1. *m. B. Qam. 2:6*

As mentioned above, *m. B. Qam. 2:6* states the following:

A person is always forewarned whether for inadvertent or intentional [acts],<sup>27</sup> whether awake or asleep. If he blinded his friend's eye or broke vessels he pays full compensation for damages.<sup>28</sup>

On the surface, the mishnah adopts strict liability in its assertion that a person always bears the status of “forewarned” and is even liable for non-volitional acts done while asleep. Nevertheless, the clause stating that inadvertent and intentional torts are treated equally could indicate that there must be some degree of fault on the part of the tortfeasor in order to impose liability.<sup>29</sup> This is because a case of *shogeg*, or inadvertent action, is generally understood to be a case of an error in which the actor knowingly and intentionally performed an act, but under incorrect assumptions.<sup>30</sup>

27 As noted by David Weiss Halivni (*Mekorot u-Mesorot: A Source Critical Commentary on the Talmud Tractate Baba Kama* [Jerusalem: Magnes, 1993], 98 [Hebrew]), other versions of the mishnah also contain “whether willing or coerced;” see *b. Sanh. 72a, Tosafot b. Yevam. 53b, s.v. “hakha.”* Abraham Weiss views this as a later addition influenced by the statement of Hezekiah; see his *Diyyunim u-Verurim be-Bava Kamma* (New York: Feldheim, 1966), 382. However, Halivni, *ibid.*, disagrees and instead sees this addition as resulting from *m. Yevam. 6:1*, as well as from its common usage in the Tosefta.

28 The last clause functions to demonstrate the scope of man’s liability; it applies to both damages done to people as well as to objects. The example of knocking out an eye is used to parallel the biblical verse, Exod 21:24, which begins with “an eye for an eye”; see Weiss, *Diyyunim u-Verurim*, 382.

29 Many also understand the second clause of the mishnah, which states that the tortfeasor is liable whether he is awake or asleep, in light of the Yerushalmi which explains that one is only liable for damages done while sleeping if the item was present at the time he went to sleep. Since it is normal for one to move about while sleeping, one must insure that all objects are out of harm’s way. If, however, one is already sleeping and an item is placed in close proximity to him, he is exempt.

30 See *m. Ned. 3:2; b. Ned. 25b*, where one knows the law, but makes a vow due to a misunderstanding. Also see *b. Hor. 6b; m. Šabb. 7:1*; and, for a general overview, the second chapter of Maimonides’ *Mishneh Torah, Hil. Shegagot*.

Furthermore, the use of the term *mu'ad*, or forewarned, to imply legal responsibility for damages caused by a person is unusual, since elsewhere in *m. B. Qam.* and in all of *t. B. Qam.* it appears only in regard to animals and the types of damages caused by them.<sup>31</sup> There are certain activities that are likely to result in the damage of property, such as eating and walking, for which an animal perpetually retains the status of forewarned since they are common and, thus, foreseeable occurrences.<sup>32</sup> However, one is not expected to anticipate aggressive acts such as goring and pushing, unless the animal does so three times or is of an inherently violent species, such as a lion or a bear.<sup>33</sup> Until an animal engages in an act of aggression three times, it is considered *tam*, or innocent. The statuses of "innocent" and "forewarned" determine the degree of liability imposed on the owner of the animal; he pays for half the value of damages when his animal is "innocent" and full compensation when it is "forewarned."

Abraham Weiss infers that the ruling in *m. B. Qam.* 2:6, which states that persons always carry the status of forewarned, refers to the amount that one is liable to pay for tortious actions. Since a person always has the status of *mu'ad*, he is always required to make full restitution for damages caused by his own action, as is the case where his animal is *mu'ad*. This is not to say that he is always legally responsible for any damage he does regardless of the absence of fault, but that where he is judged to have acted wrongfully, full compensation is required. Furthermore, Weiss understands the mishnah to limit compensation for inadvertent wrongful actions to damages alone. The inadvertent tortfeasor is absolved of the other four compensations (i.e., pain, medical expenses, loss of income, and humiliation) required when one person intentionally causes bodily injury to another, because they are not required when the injury is caused by one's animal.<sup>34</sup> This is evidenced from the ruling of *m. B. Qam.* 2:6, which obligates the tortfeasor in *nezeq shalem*, "full compensation for damages," and

31 *m. B. Qam.* 1:4, 2:4. In *t. B. Qam.*, *mu'ad* is used only in regard to animals and inanimate objects.

32 *m. B. Qam.* 1:4.

33 Weiss, *Diyyunim u-Verurim*, 382.

34 *Ibid.*, 386-87. He states the mishnah's use of the term *mu'ad*, which normally refers to liability for damages caused by animals, indicates that the determinates for liability for damages caused by a man in this instance mirror what they are when the damages are caused by one's animal.

makes no mention of the four other compensations, even though it discusses a case of personal injury.

While Weiss has attempted to understand the original meaning of the mishnah in its mishnaic context, the two Talmuds bear witness to the ways in which the early Amoraim interpreted *m. B. Qam. 2:6* in drastically different ways.

#### a. Yerushalmi – R. Isaac: The Use of Fault

The Yerushalmi (hereafter: *y. B. Qam.*) contains only one statement with regard to *m. B. Qam. 2:6*.<sup>35</sup> The opinion of R. Isaac reads:<sup>36</sup>

R. Isaac said: Our mishnah involves [a case] in which two were asleep (having gone to sleep at the same time). But if one of them was sleeping and his fellow came and lay down next to him, this [person] who came and slept next to him is the forewarned.<sup>37</sup>

R. Isaac understands the mishnah to impose liability for damages done while sleeping only in the presence of fault; namely, where a person is aware of either another person or object nearby at the time that he goes to sleep.<sup>38</sup> In such an instance, one should be attentive to the possible damages that can occur

35 There has been much discussion on the striking terseness of *y. B. Qam.*, or, more precisely, tractate *Neziqin*, since it is so short no division was made between the three *Bavot* as in the Bavli. For a thorough discussion and summary of previous scholarship, see Sussman, “Ve-shuv,” 104-13. The fact that just one statement appears as the entire discussion on the above mishnah is characteristic of this particular tractate.

36 R. Isaac II, a third-generation Palestinian Amora.

37 *y. B. Qam. 3a*. Due to the incomplete text of this passage found in MS Escorial, the passage is based on MS Leiden.

38 Weiss explains R. Isaac’s exemption as having to do with the principle set forth in *m. B. Qam. 1:2*, which states, “anything that I have an obligation in guarding, I caused its damages.” One is only liable for those items that one has an obligation to watch. In the case where items are placed next to one who is sleeping, there was no obligation placed on him to safeguard them since he was sleeping at the time. He is thus exempt if he subsequently damages them. Weiss, *Diyyunim u-Verurim*, 383-84, rejected the notion that the exemption is due to his acting out of duress. Nahmanides offers another understanding of the Yerushalmi, arguing that it does not reject the view of strict liability. Rather, the reason the sleeper is exempt is because the second person who lies down next to him is deemed negligent (*Ḥiddushei Ha-Ramban al masekhet Bava Meṣi’a 82b s.v. “u-maṣati”*).

through the natural movements during sleep, and must take precautions to prevent such an outcome. However, if at the time that the actor went to sleep, there is neither another person nor object present, one is considered to have taken adequate precautions and is not liable for any damages that may result. In R. Isaac's understanding of the mishnah, a principle of negligence, which takes the fault of the actor into account, seems to be the source of liability and is read into the mishnah in question.<sup>39</sup> Such an interpretation maintains what Weiss deemed the plain sense of the mishnah.

While the Yerushalmi presents a consistent picture in imposing liability only in the presence of fault, one passage cited in the name of R. Ishmael, the Tanna, presents a challenge to this notion: from the primary category of fire it is deduced that one is liable for damages that result even from acts performed under compulsion.<sup>40</sup> However, this position is a tannaitic statement with no similar amoraic view. Furthermore, it is cited in the anonymous strata as part of a discussion explaining the necessity for Scripture to list all of the *avot*, or primary categories of damages. The redactors raised the possibility that Scripture had to list all of the primary categories, because they each have a distinct quality that may be applied to the others. Fire is different in that the damages it causes uniquely obligate a defendant to pay for damages that occur coercively. In the passage in question, however, there is no indication that this was a rule espoused by Palestinian Amoraim. We may, therefore, conclude that the position presented in and espoused by the Amoraim of the Yerushalmi is one that determines liability based on fault.

## b. Bavli – Hezekiah and Rabbah: A System of Strict Liability

The parallel passage in the Bavli does not contain the previously-cited teaching of R. Isaac, but rather records a different understanding of *m. B. Qam. 2:6*. In contrast to the position presented in the Yerushalmi, *b. B. Qam. 26b* records the view of the first-generation Amora, Hezekiah,<sup>41</sup> who makes a tortfeasor responsible for the outcome of his acts no matter how or why they came about.

39 This is as opposed to the position of strict liability, which is found in the Bavli on the mishnah in question. See Asher Gulak, *Yesodé ha-Mishpat ha-Ivri* (Berlin: Devir, 1922), 202-203.

40 See above, p. 146\*, for the text of *y. B. Qam. 2b*.

41 Originally Babylonian, he immigrated to Palestine with his father, Ḥiyya. See H. L. Strack and Günter Stemberger, *Introduction to the Talmud and Midrash* (Minneapolis: Fortress Press, 1996), 83.

In a ruling that does not appear in the Yerushalmi,<sup>42</sup> Hezekiah and his school bring biblical support for the dictum set forth by *m. B. Qam.* 2:6 that “man is always forewarned”:

Hezekiah said and the school of Hezekiah<sup>43</sup> likewise taught: The biblical verse states (Exod 21:25) “a wound for a wound,” in order to make one liable for inadvertent [harm] as intentional [harm], and coerced as willing [acts].<sup>44</sup>

Hezekiah understands the Torah’s injunction that one is liable for “a wound for a wound” as imposing liability even in the absence of fault; one is liable for any wound he causes, irrespective of how it came about. In doing so, he implicitly embraces the view of strict liability apparent in the mishnah by providing a biblical verse as a proof text and disregarding any reading of the mishnah that might imply otherwise. This is underscored by his replacing the clause, “whether awake or asleep,” with the more explicit underlying concept connoted by “coerced as willing [acts].” Hezekiah’s strict stance becomes especially apparent when viewed in light of the parallel Yerushalmi passage, in which the mishnah’s case of one who is liable for acts performed while asleep is limited to instances of fault.

Weiss pays particular attention to the difference between the mishnah’s formulation, “a person is always forewarned (*mu’ad*) whether for inadvertent or intentional [acts],” and the statement of Hezekiah, “to make one liable for inadvertent as intentional [harm].”<sup>45</sup> He infers that Hezekiah’s statement equates inadvertent harmful acts with intentional ones in all aspects and requires one who injures another person to pay for damages along with the four compensations that one is required to pay (i.e., pain, medical expenses,

42 However, another teaching cited in the name of Hezekiah and his school is recorded in both the Bavli and the Yerushalmi, albeit with a few differences. See *b. B. Qam.* 35a and *y. Ketub.* 27c. Hezekiah is recorded as ruling that when one kills another person, whether it is done inadvertently or maliciously, one is exempt monetarily. However, this is not a reflection of his view presented regarding torts since it is unique to the laws of murder.

43 Hezekiah and his school are reported as deducing rulings from biblical verses in three other instances, all in the Bavli: *b. Šabb.* 24b; *b. Sanh.* 15b; and *b. Tem.* 4b.

44 Weiss, *Diyyunim u-Verurim*, 387 n. 20, points out that Hezekiah’s understanding of the mishnah makes one liable even in the total absence of fault.

45 *Ibid.*

loss of income, and humiliation) in cases of personal injury.<sup>46</sup> As noted above, such a position is in opposition to the view that Weiss sees as implicit in the mishnah's ruling; he understands it to impose liability only for damages but not for the other four compensations in cases of inadvertent personal injury.<sup>47</sup> The four compensations are only required when one intentionally injures another person. Hezekiah, however, is reported as imposing them even where there is no intent to injure.

Following Hezekiah's statement and its related discussion, the Bavli records a number of cases cited in the name of Rabbah, a third-generation Amora, who concurs with Hezekiah's understanding of the mishnah in question and imposes liability for damages done without intent. The first of his many cases, and the one that most explicitly expresses his imposition of liability in the absence of fault,<sup>48</sup> states:

Rabbah<sup>49</sup> said: if one had a stone resting on his lap, of which he had never been aware,<sup>50</sup> and he got up and [the stone] fell, with

- 46 Support for Hezekiah's position is found in *Mekhilta de-Rashbi* to Exod 21:22, which states that where one injures another person, one is liable for all five compensations whether there is intent to harm or not.
- 47 This is also in contrast to the later view of Rabbah in *b. B. Qam.* 26b-27a (see below).
- 48 In most of his other eleven cases cited therein, there could be a degree of negligence on the part of the actor.
- 49 Or Rava, according to MSS Munich, 95, Vatican 116, Florence II 17-9. See Shamma Friedman, "The Writing of the Names 'Rabbah' and 'Rava' in the Babylonian Talmud," *Sinai* 110 (1992): 140-64 (Hebrew), who points out that the orthographic distinction between the names 'Rava' and 'Rabbah' was a later development, and that the differences found in the various MSS are not surprising. Both rabbis were originally referred to as 'Rava.' Friedman also discusses *b. B. Qam.* 26b and maintains that the correct attribution is Rabbah (154).
- 50 Such a case would be one in which one places an item in another person's lap while he is sleeping. Upon waking, he stands up and the stone that was placed without his knowledge falls and causes damage. See *Shiṭa Mequbbešet*, s.v. "ve-lo," cited in the name of R. Jonathan. Alternatively, Rabbah might have been describing a scenario in which the actor is sifting or winnowing grain. In such a case there is a possibility that a stone is mixed in and might land on his lap without his awareness. See *m. Beṣah* 1:8; *b. Beṣah* 13b; *b. Soṭah* 14b; and *b. B. Bat.* 93b-94a. If this is so, there is a certain amount of risk and the actor should therefore take precautions upon standing, though the danger that there is a stone is quite low. My thanks to Professor Steven Friedell, who suggested this interpretation to me.

regard to damages, he is liable; with regard to the [other] four compensations<sup>51</sup> he is exempt...<sup>52</sup>

In a case in which a tortfeasor stands up suddenly and, as a result of his motion, a stone of which he was unaware falls from his lap and damages someone's property, Rabbah deems him liable.<sup>53</sup> In this case, he had no intent or knowledge of the possible damage, did not anticipate it, and, therefore, could not have taken any steps to prevent it.<sup>54</sup> His ruling regarding damages, therefore, seems to indicate a system of strict liability and not of negligence. In a system of negligence, one is not required to take steps to avoid what are regarded as farfetched risks, nor is one liable for the endless consequences of his activity since every action by definition poses a potential risk. In determining liability for negligence, it is necessary to distinguish between "the potential for harm in the defendant's act from the background harms that are part and parcel of all action."<sup>55</sup> In the case at hand, the likelihood that there is a stone on one's lap is quite low; nevertheless, Rabbah considers him legally responsible for damages, consistent with strict liability.<sup>56</sup> Even if Rabbah's reasoning is that damage was caused by the intentional act of standing up,<sup>57</sup> the logic behind his application of strict liability would be, as Irwin Haut puts it, the "unintended consequences of intentional acts."<sup>58</sup> The placement of Rabbah's ruling immediately following

51 I.e., pain, humiliation, loss of income, and medical expenses.

52 *b. B. Qam.* 26b.

53 However, unlike Hezekiah, he did not extend liability to the other four compensations, just as the mishnah possibly does not. See above discussion.

54 If, however, Rabbah was referring to a case where the tortfeasor is sifting or winnowing grain, a situation in which a stone is likely to get mixed in, then Rabbah's ruling might have been motivated by negligence on the part of the actor. Since there is a distinct likelihood that a stone can land on the actor's lap, precautions must be taken to ensure that it will not subsequently fall—though the danger that there is a stone in one's lap is quite low.

55 Weinrib, *Private Law*, 167.

56 Weiss, *Diyyunim u-Verurim*, 388, suggests that liability was imposed in such a case for the same reason that the mishnah imposed liability for damages done while sleeping. Since one is required to check and ensure that there is nothing nearby that could possibly be damaged, he is thus liable if he causes damage.

57 As opposed to liability for non-volitional acts, such as the case of one who does damage while sleeping as in *m. B. Qam.* 2:6.

58 Haut, "Some Aspects," 39. But this is not to say that Rabbah considered intent, since the tortfeasor has no intent to do harm or even awareness that it is a possibility.

Hezekiah's dictum and in the context of the *m. B. Qam. 2:6* indicates that the redactors understood him as maintaining a similar stance.

The statements of Hezekiah and Rabbah, which appear only in the Bavli, take *m. B. Qam. 2:6* at face value and impose liability even for non-intentional acts. Furthermore, Hezekiah possibly goes even further than the mishnah by holding that one is liable for damages caused under compulsion and by imposing all forms of liability in cases of inadvertent injury.<sup>59</sup>

In conclusion, *m. B. Qam. 2:6* is understood in different ways in both Talmuds. In the Bavli, Hezekiah takes the mishnah's dictum literally, making it explicit that it applies even where one acts under coercion. He even cites a biblical proof text to garner support for this reading. The strict rulings of Rabbah likewise confirm this stance. In contrast, the Yerushalmi reports the ruling of R. Isaac who limits the apparent strict application of *m. B. Qam. 2:6* to instances where one acts with some degree of fault. The statements of Hezekiah and Rabbah are absent.<sup>60</sup>

## 2. *m. B. Qam. 3:1*

As opposed to *m. B. Qam. 2:6*, which at face value implies that a person is always liable, *m. B. Qam. 3:1* undeniably applies a rule of liability based on fault. The mishnah states as follows:

One who leaves a jug in the public domain, and another comes, stumbles upon it and breaks it, he (the one who breaks it) is absolved [from paying for the broken jug]. If he is injured by it, the owner of the jug is obligated to pay for his injury.

If his jug broke in the public domain and another slips on the water or is injured by its shards, he (the owner of the jug) is liable...

59 Weiss points out that whether one is liable for all five compensations when one injures another inadvertently was the subject of a tannaitic debate. The view found in the mishnah maintained that, in cases of *shogeg*, one is only liable for damages but not the other four compensations, while *Mekhilta de-Rabbi Ishmael* ruled that one is liable for everything (*supra* text at n. 21). Hezekiah thus preferred the view found in *Mekhilta de-Rabbi Ishmael* (Weiss, *Diyyunim u-Verurim*, 387).

60 In general, Rabbah is not mentioned in *y. Nez.*; see Sussman, "Ve-shuv," 131 n. 179.

As opposed to *m. B. Qam. 2:6*, this mishnah does not impose liability for having been the direct cause of injury, but exempts a pedestrian who accidentally breaks a jug that was left out in the public domain.

As in the previous case, both Talmuds present discussions of the mishnah with opposite conclusions. Remarkably, these different conclusions are reached by citing almost verbatim the same amoraic dicta. This distinction will be discussed in detail.

#### a. Yerushalmi – Rav, Samuel, and R. Eleazar: A Ruling of Fault

The Yerushalmi reports the following discussions on this mishnah:<sup>61</sup>

(A) Is it not customary for people to pay attention (*mavḥin*)<sup>62</sup> in the public domain?

61 Following the text of Rosenthal's edition, based on MS Escorial.

62 As opposed to MS Leiden, which states, "Is it not customary for people to leave [belongings] out in the public domain?" The difference in language found in MS Leiden is significant because it does not center on the exemption of the pedestrian and, therefore, comes to a different conclusion than the text in Rosenthal's edition. Instead, it emphasizes the responsibility of the owner of property left out in the public way that is subsequently damaged, where the key factor is whether he has a right to leave his property there. According to MS Leiden, the anonymous question, like the Bavli's, asks why a pedestrian is exempt if property owners have the right to leave their belongings out in the public domain. This is followed by Rav's statement, "where it fills the whole public domain..." According to MS Leiden, Rav's statement means that the only time a property owner may leave out his belongings and receive compensation for any damages, is where the public domain is already filled. However, where the public domain is not already filled, an individual does not have the right to do so and could not collect compensation if his property is damaged. This is followed by Samuel's statement. According to MS Leiden, his statement provides another instance in which a property owner may leave his possessions out—when he leaves it on the corner. It is not clear why placing one's belongings on a corner in the public domain, where it presumably sticks out (as is clear elsewhere in the Yerushalmi, see, e.g., *y. 'Eruv. 19b*), would give one the right to do so. R. Eleazar's ruling, which follows and presents a far greater problem, is then cited:

- A. And even if it does not fill the whole public domain,
- B. if one takes it from here and places it here; this is a pit [that is made].
- C. And even if it is not placed on a corner, it is not the norm for people to leave [their belongings] in the public domain.
- D. Where it fills the whole public domain, if one takes it from here and places it here, a pit is made...

(B) Rav said: [when] it fills the whole public domain—but if it does

The last clause of R. Eleazar's phrase cited here (D) states that the problem of moving an item from one place to another, thereby creating an obstacle that qualifies as a "pit," exists when the whole domain is already filled, presumably because he has no way to pass through without causing damage to other people's property. However, this line also appears in (B) as a continuation of the first clause of his statement (A), "and even if it does *not* fill the whole public domain." However, if the public way is not filled, the pedestrian should have no problem walking and therefore should not be faced with the dilemma of how to avoid creating a "pit." Furthermore, it seems certain that R. Eleazar is commenting on Rav's and Samuel's statements, arguing that the cases as set out by them do not resolve the issue in question (i.e., don't property owners have the right to leave out their belongings?), and (B), therefore, seems out of place. It may thus be inferred that (A) was originally followed by (C), appearing as one clause—just as it does in MS Escorial. However, when read together, R. Eleazar's exclamation that "even" where the whole domain is filled property owners may not leave out their belongings, does not cohere with Rav's ruling, since it already made the same point. We may therefore posit that (B) was copied from (D) and inserted between (A) and (C) in order to separate them.

While MS Leiden, which focuses on the owner of the property, is distinct from the Bavli's discussion, which is centered on the pedestrian, it is very possible that MS Leiden represents an attempt to make the Yerushalmi's sugya of *m. B. Qam. 3:1* correlate with the views espoused in the Bavli. The Bavli and the text in Rosenthal's edition of the Yerushalmi cite the same rulings of Rav and Samuel, yet come to opposite conclusions about the responsibility of pedestrians. In Rosenthal's edition, Rav's and Samuel's statements present the exceptional instances in which pedestrians are required to "pay attention" and thus take precautions, while in the Bavli, they present the only situations in which the pedestrian is exempt because there is no precaution available. With the change of one word throughout the sugya, *maḥin* to *maniḥan*, the scribe of MS Leiden was able to align Rav's and Samuel's statements with what is found in the Bavli by shifting responsibility back to the pedestrian and assuming that owners have the right to leave their property out. However, as already noted, the text it produces does not provide a coherent reading. Furthermore, the text of Rosenthal's edition is corroborated by the parallel sugya in the Bavli, where R. Abba reports in the name of R. Ilai that "in the West" they say, "because it is not the norm for people to pay attention on the roads." The text of Rosenthal's edition is thus supported in the Bavli by its report of the same Palestinian tradition. For all these reasons, along with the fact that MS Escorial on which Rosenthal's edition is based is generally superior to MS Leiden, it seems likely that Rosenthal's edition more accurately presents the original text of the Yerushalmi and the tradition prevalent in Palestine. See Rosenthal's introduction to *Yerushalmi Neziqin* in which he points to the superiority of MS Escorial in terms of its preservation of the Galilean Aramaic dialect as well as Greek loan words, as opposed to MS Leiden, which betrays the influence of the Bavli.

not fill the whole public domain, it is not the norm for people to pay attention in the public domain.

(C) Samuel said: when it fills the whole public domain or when it is left on the corner.

(D) R. Eleazar said: And even if [it does not fill] the whole public domain, and even if it is not left on the corner, it is not the norm for people to pay attention in the public domain.

(E) Where it fills the whole public domain, if one takes it from here and places it here, a pit is made.<sup>63</sup> Rather one should take his stick and break it or pass over it, and if it breaks, it breaks.<sup>64</sup>

Similar to what will be seen in the parallel Bavli sugya, the Yerushalmi's discussion opens with an anonymous question as to why the mishnah absolves the pedestrian of wrongdoing if one is required to pay attention while walking through the public domain (A).<sup>65</sup> The anonymous question thus shapes the meaning of and provides context for the ambiguous statements of the Amoraim that follow. This is further accomplished by the clause appearing after Rav's statement (B), which is absent from the Bavli and appears to be redactional,<sup>66</sup> "but if it does not fill..." This clause likewise directs Rav's statement toward addressing the anonymous question that opens the sugya. Rav and Samuel, both first-generation Babylonian Amoraim, are reported as answering the question by listing the rare instances in which a pedestrian is required to look where he is walking, thus affirming that normally one is not obligated to do so (B, C). R. Eleazar, a second-generation Amora,<sup>67</sup> posits that pedestrians are never expected to pay attention when passing through the public domain

63 The implication is that by moving the jug to a new place, one creates a pit or an obstacle in the public domain for which he would be liable if anyone/thing is damaged by it.

64 *y. B. Qam.* 3b.

65 See Lieberman's commentary in Rosenthal, *Yerushalmi Neziqin*, 114.

66 Following Shammah Friedman's criteria for distinguishing between amoraic and redactional statements as seen in "Al Derekh Heqer Hasugya," in *Mehkarim u-Mekorot*, ed. Haim Zalman Dimitrovsky (New York: Jewish Theological Seminary, 1977), 301-308.

67 Originally from Babylonia where he studied under Samuel and Rav, he later immigrated to Palestine, where he was a colleague/pupil of R. Yohanan.

(D).<sup>68</sup> It is unclear whether the first part of his statement, “And even if... corner,” is part of R. Eleazar’s statement; if it is, then we can understand him as responding directly to Rav’s and Samuel’s ruling. Alternatively, it could be a later addition, not part of his original statement, and placed there in order to connect R. Eleazar with Rav’s and Samuel’s statements. It is also unclear whether (E) is part of R. Eleazar’s statement or belongs to the anonymous strata. What is certain is that the ruling of R. Eleazar exempts the pedestrian from liability in all circumstances, and that either he or the redactors have applied this exemption even where one intentionally breaks a jug blocking his path. Intentional harm is justified because it allows a pedestrian to enjoy his inherent right to walk through a public area.<sup>69</sup>

One apparent difficulty with the Yerushalmi sugya, however, is that the statements of Rav and Samuel (and possibly R. Eleazar if he was responding to them) do not directly address the mishnah, but rather those rare instances when it is customary for people to pay attention when passing through a public area. As opposed to the mishnah, Rav’s and Samuel’s cases present the only occasions in which the tortfeasor *is* liable, since they are the situations in which one is expected to pay careful attention while walking. Without the anonymous question that precedes them, Rav’s and Samuel’s statements are incomprehensible, since on their own they appear to qualify the mishnah. Notwithstanding this possible difficulty, Rav’s and Samuel’s opinions are consistent with what has already been seen in the Yerushalmi—a system of strict liability is rejected, as evidenced by exempting the tortfeasor. The stance of this sugya, like that of *m. B. Qam. 2:6*, is that pedestrians are usually, if not always (as per R. Eleazar and perhaps the redactors), exempt from liability.

#### b. Bavli – Rav, Samuel, and R. Yohanan: A Ruling of Strict Liability

A very different conclusion is found in the parallel Bavli sugya. In contrast to their presentation in the Yerushalmi, the Bavli describes Rav and Samuel as limiting the exemption of the mishnah to those instances where the act is deemed to be out of the control of the passerby. Furthermore, only in the Bavli

68 In the Bavli, the attribution to R. Eleazar is absent, but the same ruling appears in the name of his student, R. Ilai. Furthermore, R. Yohanan’s position is presented as stating what is attributed to Samuel in the Yerushalmi. Samuel’s ruling in the Bavli is likewise absent from the Yerushalmi.

69 See David G. Owen, “Philosophical Foundations of Fault in Tort Law,” in *Philosophical Foundations of Tort Law*, ed. David G. Owen (Oxford: Clarendon Press, 1995), 220.

do the statements of Rav and Samuel (and R. Yohanan) directly address and hence qualify the mishnah. It states:

(A) Why is he (i.e., the pedestrian who stumbles in *m. B. Qam.* 3:1) exempt? Isn't he required to look and walk?<sup>70</sup>

(B) They said at the school of Rav in the name of Rav: [the mishnah speaks of a case] where the whole public domain is filled with jugs. Samuel said: they taught [this ruling in a case where the public domain is] in darkness.

R. Yohanan said: they taught [that the pitcher was placed] at a corner.

(C) R. Papa said: our mishnah is not precise unless [we interpret it] according to Samuel or R. Yohanan, for if [we explain it] like Rav, why [does the mishnah] specify 'stumble' (*nitqal*)—even if he broke it (*shavar*), [he would] also be [exempt]?

(D) R. Zebid said in the name of Rava: that is the law that even if [the pedestrian directly] broke [the jug], [he is] also [exempt]. And [the reason] that the mishnah teaches 'stumbles' is because it wanted to state the latter clause [of the mishnah:]...

(E) R. Abba said to R. Ashi: They say in the West in the name of R. Ilai:<sup>71</sup> because it is not the norm for people to pay attention on the roads.<sup>72</sup>

70 Despite the consistency between this redactional question and *m. B. Qam.* 2:6, which asserts that "man is always forewarned" and is, hence, liable for any damage he causes whether he acts willfully or inadvertently, many of the medieval commentators were bothered by the assumption guiding this question—namely that the one who stumbles should be liable. See, ad loc., *Tosafot; Shiṭa Mequbbešet* citing R. Peres; R. Shlomo ben Aderet's *Hiddushei Ha-Rashba*; and *Rosh*, each of whom tries to reconcile the assumption of this sugya with passages elsewhere in the Bavli which indicate that there is no liability in the absence of fault.

71 This attribution is found with multiple variants throughout the textual witnesses: "R. Ilai" in MSS Escorial G-I-3, Munich 95, Florence II I 7-9; "R. Ula" in ed. Vilna; "R. Eleaza" in MS Vatican 116. *Pisqei Ha-Rosh* and Rif also contain the attribution to "R. Ilai." *Hiddushei Ha-Ra'avad* states "R. Ilai."

72 This means that one is exempt in all cases where one stumbles and breaks something left out in the public domain, without the qualifications of Rav, R. Yohanan, and Samuel; see Rashi, s.v. "*lephi*." *Ra'avad* explains this exemption as having to do with the fact that jugs and similar objects are not usually left out in the public

(F) There was an incident in Nehardea and Samuel made one liable. In Pumbedita and Rabbah<sup>73</sup> made one liable.

(G) Samuel's [ruling] accords well, [for he is following] his [own] teaching [cited above]. But as for Rabbah, should we say that he holds like Samuel?<sup>74</sup>

(H) R. Papa said: There (in the case of Rabbah's ruling), it was on a corner of a press,<sup>75</sup> since he did it (i.e., the owner of the jug left it out) with permission<sup>76</sup> [the pedestrian] was required to look as he walked.<sup>77</sup>

This sugya, in its final, redacted form, captures the shift among Babylonian Amoraim from a regime of strict liability to one that considers fault. This is underscored by the chiasmic structure of the sugya:<sup>78</sup> (A)=(H) both state that

domain. Therefore, one does not anticipate them while walking and is exempt if he damages them. In *Hiddushei Ha-Ra'avad*, an attempt is also made to reconcile this position stated by R. Ilai with the one that appears in *b. B. Mešī'a* 82b, which states that one who stumbles is considered negligent (s.v. "ha").

73 "Rava" in MSS Hamburg, Vatican 116, ed. Vilna; "Rabbah" in MSS Escorial G-I-3, Munich 95, Florence II-I 7-9, ed. Soncino, and Rif's *Sefer Ha-Halakhot*. See Friedman, "The Writing of the Names," 140-64, for an extensive discussion on attributions of 'Rava' and 'Rabbah.' The fact that the incident is reported as having occurred in Pumbedita strongly suggests that Rabbah is the correct attribution.

74 The talmudic commentary *Penei Yehoshua* explains that the redactors only cited Samuel when questioning Rabbah's ruling since Samuel is cited immediately prior to Rabbah as issuing a ruling in accordance with his understanding of the mishnah. He also notes that the redactors were troubled by Rabbah's strict ruling since the law in this case is seen to follow the position held in the West cited by R. Ilai (s.v. "be-gemara").

75 Michael Sokoloff, *A Dictionary of Jewish Babylonian Aramaic* (Baltimore: Johns Hopkins University Press, 2002), 875b, s.v. "azura"; Rashi (s.v. "qarna") similarly states: "the corner next to an olive press."

76 Rashi (s.v. "deho'il") explains that when the olive press was full, it was customary for those waiting to leave their vessels filled with olives outside in the public domain until there was room to bring them inside the olive press.

77 *b. B. Qam.* 27b.

78 Chiasmic structure is a literary feature found in many ancient—including biblical and rabbinic—and classical texts and is often employed to highlight the point at the center. For examples in the biblical texts see, e.g., Umberto Cassuto, *A Commentary on the Book of Genesis: From Noah to Abraham*, trans. Israel Abrahams (Jerusalem: Magnes Press, 1964), 46, 98; Jacob Milgrom, *The JPS Torah Commentary: Numbers*

pedestrians are required to look as they walk; (B,C)=(F,G) discuss and question the early amoraic strict stance; and (C)=(D) report the later Babylonian amoraic and Palestinian rulings, which consider fault. The placement of the late Babylonian and Palestinian positions in the center, thereby making them the focal point of the sugya, highlights their importance to the Bavli's redactors. This will become evident below.

Similar to the Yerushalmi, the Bavli sugya begins with an anonymous question on the mishnah. The first half of the mishnah rules that one who stumbles on and breaks a jug that was left in the public domain is absolved from legal responsibility, while the owner of the jug is responsible for injuries caused in the fall. In (A) surprise is expressed at the mishnah's ruling, using the same words as R. Papa cited at the end of the sugya: Don't pedestrians have an obligation to watch where they are going? The working assumption is that in such a case, an unintentional fall is not sufficient to absolve a tortfeasor of responsibility for the damage caused.<sup>79</sup> The sugya (B) then reports the views of the first-generation rabbis, Rav and Samuel, and R. Yohanan of the second generation. All three are presented as reinterpreting the case of the mishnah to avoid any indication that the pedestrian should have been able to avoid stumbling.<sup>80</sup> Rav explains that the public domain was filled with jugs, while Samuel explains that the incident took place when it was dark. R. Yohanan maintains that the jug was left on a corner so that the pedestrian was unaware of it. In all other instances, however, the pedestrian would be liable.

Despite the qualifications of these Amoraim, the plain sense of the mishnah is that one who stumbles upon a jug that someone else left out in the

(Philadelphia: Jewish Publication Society, 1990), xxiv, xxix, 254; Devora Steinmetz, *From Father to Son: Kinship, Conflict, and Continuity in Genesis* (Louisville, KY: Westminster John Knox Press, 1991), 60-87. For rabbinic texts, see Norman J. Cohen, "Structural Analysis of a Talmudic Story: Joseph-Who-Honors-the-Sabbath," *JQR* 72 (1982): 161-77; Jonah Frankel, *Darchei ha-Aggada vaha-Midrash* (Jerusalem: Massada, 1991), 23, 269, 307; Devorah Steinmetz, "Must the Patriarch Know 'Uqtzin? The Nasi as Scholar in Babylonian Aggada," *AJSR* 23 (1998): 171.

79 Just as R. Papa assumes (H) about the strict ruling later reported in the name of Rabbah (F).

80 Rav and Samuel were both first-generation Amoraim, dating to the end of the second century to the mid-third century CE. R. Yohanan b. Nappaha was a second-generation Palestinian Amora of the third century, though he is mentioned several times with Rav and Samuel, indicating that if he was not of the same generation as them, he was at the very least on par with them.

public domain is not held accountable at all. On the contrary, the owner of the jug is at fault, and he is liable for any consequential damages that occur. In contrast to the Yerushalmi, the underlying assumption of all three rulings is that a pedestrian would be liable were it not for the fact that almost no degree of caution on his part could have prevented the accident while still allowing the public domain to serve its purpose as a thoroughfare. It may be that in the Bavli the mishnah was interpreted against its plain meaning in order to reconcile it with *m. B. Qam. 2:6*, which states, “man is always forewarned,” and must, therefore, always pay full restitutions for damages.<sup>81</sup>

While it might appear that all three amoraic rulings subscribe to a system of negligence in that they consider a pedestrian at fault under normal circumstances, this is not necessarily so. In order not to be considered negligent, one need only take precautions that a reasonable person would take in that particular society in order to prevent damage. But the cases of Rav and Samuel, in particular, construe the mishnah as referring to a case in which the pedestrian cannot avoid causing damage, and it is only at that point that fault shifts back to the owner of the property. When the public domain cannot be used for its intended purpose without a passerby causing damage, the accidents that result are not merely unintentional, they are essentially inevitable. It is, therefore, likely that at least Rav and Samuel can be understood as having maintained that, unless the damage caused by a tortfeasor was inevitable, he would be liable even if he had taken measures to prevent causing damage. What this implies is that, as presented in the Bavli, Rav and Samuel maintain a position of absolute liability for torts, and that the opinions of Rav, Samuel, and R. Yohanan do not take intent or the presence of fault into account when determining liability.

Moreover, despite the negligence on the part of the property owner in leaving his belongings in a public thoroughfare where there is a high likelihood that damage will occur, the early amoraic positions focus on the immediate cause of the damage and the agent who performed that action, making the pedestrian liable. This, then, is consistent with a doctrine of strict liability.<sup>82</sup>

81 In *Pisqei Ha-Roshi* to *b. B. Qam. 3:1*, R. Asher b. Yeḥiel (late thirteenth to early fourteenth century) makes this point, stating that “even though [the mishnah maintains] ‘man is always forewarned,’ in a case of great coercion like this, a person is exempt.” The case described in *m. B. Qam. 3:1*, as explained by Rav, Samuel, and R. Yohanan, is one of coercion, which therefore does not contradict the principle established by *m. B. Qam. 2:6* that a person is liable for all damages whether they are intended or not.

82 Epstein, “A Theory of Strict Liability,” 177-79.

When faced with a choice between a negligent act that leads to damages and an action that is the immediate cause of the damage, they choose the latter as the determinate for liability. Also consistent with the rules of strict liability is the notion that where the jug owner creates a dangerous situation, one that leads to and, thus, causes the damage, Rav, Samuel, and R. Yohanan all consider him responsible. In this case, the dangerous condition is what results in the specific injury that ultimately occurs when the thoroughfare is subjected to its intended purpose of passing through. The damage is therefore inevitable, irrespective of the intervening stumbling of the pedestrian.<sup>83</sup> Their construal of the mishnah is, therefore, not an exception to their view of strict liability, but a refocus on to whom strict liability applies; the jug owner as opposed to the pedestrian. This insistence on a doctrine of strict liability led Rav, Samuel, and R. Yohanan to impose an interpretation of the mishnah that is neither apparent in nor compelling according to its plain sense.

As recounted in the sugya, the later Amoraim ultimately reject this interpretation. R. Papa (fifth-generation Amora and student of Rava) subsequently challenges the interpretation of Rav (C). Rav is reported as construing the case of *m. B. Qam. 3:1* as one in which a pedestrian is exempt from accidentally breaking a jug only in a public domain that is filled with jugs (i.e., only where the property owner creates an inherently dangerous situation). R. Papa points out that according to Rav's construal of the case, the pedestrian should be exempt even if he *shavar*, a verb that, in this context, clearly signifies that he intentionally and directly breaks a jug in order to walk therein. R. Papa's statement might be explained as exposing a hole in Rav's stance of strict liability. Richard Epstein notes that in a consistent system of strict liability, one who creates a dangerous situation is responsible for subsequent damages even if the intervening act, which directly causes the injury, is performed negligently or even deliberately. This is because the harm is, in essence, a result of the dangerous condition initially created by the first party, making the intervening act inconsequential.<sup>84</sup> R. Papa thus makes the case that Rav's interpretation does not accord with the phrasing of the Mishnah, which states that the pedestrian is exempt only where he acts accidentally.

It is not clear whether the following statement by R. Zebid (D) is intended as a response to R. Papa's challenge or as an independent report of a ruling by Rava. If the former, R. Zebid might be attempting to reconcile Rav's inter-

83 Ibid.

84 Ibid., 181.

pretation with R. Papa's objection by affirming that it does comply with the mishnah.<sup>85</sup> If R. Zebid's statement was cited independently, which its placement at the center of the sugya's chiasmic structure might suggest,<sup>86</sup> then that would indicate that Rava maintains that pedestrians are always exempt for damages they cause—even if the domain is not filled with jugs, or in darkness, etc. This latter possibility would mean that Rava's position is a radical departure from the early amoraic one since the pedestrian is never deemed responsible. Importantly, it also coincides with the last ruling reported in the Yerushalmi sugya.<sup>87</sup> Whatever the context of his original statement, it remains certain that Rava sanctions intentional harm on the part of the pedestrian (under certain or all circumstances). In contrast, the early Amoraim did not, at least not explicitly, hold this view—either because it is inevitable or because it allows pedestrians to enjoy their prior inherent entitlement to pass through public areas.<sup>88</sup>

R. Papa's more apparent rejection of the earlier position is evidenced in his interpretation of a ruling reported in the name of the third-generation Amora, Rabbah, in which the latter imposes liability on a pedestrian in a case comparable to the one presented in the mishnah (F, H). As already discussed, this decision of Rabbah is entirely consistent with many of his rulings that assign liability in the absence of fault.<sup>89</sup> Nevertheless, R. Papa limits Rabbah's ruling to a case in which the jug is left on the corner of an olive press, and, therefore, he (or perhaps the redactors) explains that the owner of the jug has permission to leave it out. In this case, pedestrians are expected to proceed with caution, while

85 Halivni seems to understand R. Zebid's statement as a response to R. Papa since he addresses the reason why R. Papa was unaware of Rava's ruling that answered his questions. He explains that, while Rava preceded R. Papa, it is possible that R. Papa was unaware of Rava's statement; the tradition was passed down by R. Zebid alone. Halivni, *Mekorot u-Mesorot*, 102.

86 See above, pp. 161\*-62\*. This is also indicated by the fact that the explanation for how intentional harm accords with the words of the mishnah appears to be redactional and not part of Rava's statement.

87 It has been shown that Rava demonstrates a tendency to apply Palestinian interpretations of the Mishnah. See Yaakov Elman, "Rava ve-Darkei ha-Iyyun ha-Eretz Yisraeliyot be-Midrash ha-Halakhah," in *Merkaz u-Tefutzah: Eretz Yisrael voha-Tefutzot bi-Ymei Bayit Sheini, ha-Mishnah voha-Talmud*, ed. Y. Gafni (Jerusalem: Merkaz Shazar, 2004), 217-42.

88 See Owen, "Philosophical Foundations of Fault in Tort Law," 220, regarding rights to public areas.

89 See, e.g., *b. B. Qam.* 26b-27a; Haut, "Some Aspects," 28. See also the fourth chapter of my dissertation, *supra* n. 9.

in all other instances, R. Papa understands Rabbah to have exempted them. The later Amoraim did not determine liability solely on the basis of the result of damage without regard for the contributing circumstances that lead to it.

In the middle of the sugya, R. Zebid and R. Papa's statements are followed by R. Abba's report to R. Ashi<sup>90</sup> of another interpretation of the mishnah in the name of the third-generation Palestinian Amora (and student of R. Yohanan), R. Ilai "from the West," which has a similar connotation (E).<sup>91</sup> R. Abba states that one is exempt for damages he inadvertently caused when passing through the public domain, since it is not the norm for pedestrians to pay attention while doing so. This exemption presumably applies even in those instances where the damages are preventable. This is certainly a departure from how the earlier Babylonian Amoraim interpreted the mishnah, since R. Abba did not obligate pedestrians to take any precautions and yet exempted them from remitting compensation for damages. Unlike the interpretations of the early Amoraim, this interpretation maintains the plain sense of the mishnah and is virtually identical to the ruling of R. Eleazar (who was also R. Ilai's teacher<sup>92</sup>) as reported in the Yerushalmi.<sup>93</sup> Given a number of similarities—their names, the time and place in which they lived, and their close connection to R. Yohanan—along with the general tendency of the Bavli and Yerushalmi to give different attributions for the same ruling, it is not surprising that "Ilai" and "Eleazar" could have been confused.<sup>94</sup> However, it is also possible that R. Ilai taught this ruling in consonance with the position of his teacher, R. Eleazar. Irrespective of whether

90 Sixth-generation Amoraim.

91 R. Abba is cited a number of times as reporting Palestinian teachings before R. Ashi. During the period of the fourth and fifth generations of Babylonian Amoraim, a number of Palestinian Amoraim immigrated from Palestine to Babylonia and brought with them teachings from their homelands. Sussman, "Ve-shuv," 113 n. 211. The Bavli reports that a number of his teachings were sent to Babylonia (*b. Eruv.* 96a; *b. B. Bat.* 144b). In the Yerushalmi this teaching is attributed to R. Eleazar, and the Bavli contains a number of possible variants in the MSS and printed editions. Richard Kalmin has also noted the "influx of Palestinian traditions" into Babylonia during the fourth century; see his *Jewish Babylonia between Persia and Roman Palestine* (New York: Oxford University Press, 2006).

92 See *y. Ter.* 2:1 (41b).

93 They are identical if the first part of R. Eleazar's statement is not original but represents the work of the redactors. See Yerushalmi discussion above, section 2.a.

94 Zecharias Frankel, *Mevo Ha-Yerushalmi* (Breslau: Shletter, 1870; reprinted Jerusalem, 1967), 41b. Moreover, "Ilai" appears in a variety of forms in the text witnesses with

“Ilai” is a corruption of “Eleazar” or a reliable attribution, the Palestinian ruling reported by R. Abba is consistent with and corroborated by the Yerushalmi.

The later Amoraim thus reject the previously held view of strict liability and base their rulings on how the damage came about. Furthermore, where a ruling cited in the name of Rabbah contradicts their position, R. Papa has interpreted and re-contextualized it accordingly. Their rejection of strict liability and positions that exempt only in cases in which damages are unavoidable is a reversal from the view presented in the name of the earlier Amoraim, which considered the objective outcome.

This sugya is organized around a clear progression of the Babylonian Amoraim’s system of liability. The first three generations of Amoraim cited—Rav, Samuel, R. Yohanan, and Rabbah—all impose liability despite the absence of fault on the part of the pedestrian. The fourth-generation Rava, along with the Palestinian rabbis, exempts the pedestrian in all cases. As a result, his students question and re-interpret earlier amoraic positions that ruled otherwise. The tight literary structure of the sugya by the Bavli’s redactors indicates that they concurred with the position of both the Palestinian Amoraim and the later generations of Babylonian Amoraim (along with the latter’s understanding of the earlier generations).

It is tempting to suggest that the Bavli contains the more authentic context of the statements by Rav and Samuel, since only in the Bavli do they directly address the mishnah and qualify the case it refers to. In the Yerushalmi, on the other hand, their statements highlight exceptions to the mishnah’s ruling and are explicable only in response to the anonymous question preceding them, thus indicating that they were re-contextualized by its redactors. Moreover, the Bavli’s version of Rav’s viewpoint is confirmed by R. Papa of the fifth-generation in his challenge of Rav’s strict interpretation, which indicates that it was not the product of redactional filtering but already an established tradition during the amoraic period. Samuel’s interpretation is also confirmed, albeit anonymously, by a tradition in which he issues a strict ruling. R. Papa’s attempt to harmonize a similar ruling issued by Rabbah of the third-generation likewise confirms the fifth-generation’s understanding of the early amoraic position. In addition, in the Yerushalmi, Rav’s statement has an added explanation, which appears to be redactional and is absent from the Bavli’s report of his ruling. Likewise, the Yerushalmi’s version of Samuel’s statement reiterates Rav’s ruling as well as

regard to this particular attribution, with MS Vatican 116 even containing “Eleaza,” perhaps to accord with the Yerushalmi.

what is attributed to R. Yohanan in the Bavli, while his statement cited in the Bavli is absent. As it is more likely that a statement be left out than created anew, this might also suggest that the Bavli contains the more authentic version of Samuel. Furthermore, Rav and Samuel lived in Babylonia and most probably issued their respective dicta there. It is therefore possible that their traditions were preserved more accurately in their native context, especially since their positions presented in the Bavli correspond with the Babylonian tradition of their time.

One exception to the seeming authenticity of the Bavli sugya is the attribution of a strict interpretation to R. Yohanan, a Palestinian Amora, which is discussed by R. Papa, but absent in the Yerushalmi itself.<sup>95</sup> The fact that R. Yohanan's ruling runs counter to what has been found to be the predominant Palestinian position favoring fault would suggest that either R. Yohanan merely maintained an opposing position or that the Bavli's attribution is unreliable and the Yerushalmi's report is more accurate in attributing R. Yohanan's statement to Samuel. While it is possible that R. Yohanan dissented from the prevailing Palestinian position, it is also conceivable that the Bavli correctly attributes the three statements to three different tradents, but in the course of transmission the author of the final statement was lost. This would mean that in the Bavli it was subsequently attributed to R. Yohanan, whose rulings often follow Rav's and Samuel's,<sup>96</sup> while in the Yerushalmi it was combined with Samuel's statement.<sup>97</sup> R. Yohanan's position presented in the Bavli may thus still be representative of the tradition of the early Babylonian Amoraim despite its (inaccurate) Palestinian attribution. Whether this crafted attribution was known to R. Papa or whether his challenge was also shaped by the Bavli's redactors remains unclear.<sup>98</sup> Zvi Dor has noted that in a number of passages in the Bavli R. Papa reports teachings in the name of R. Yohanan, which are

95 It is not uncommon for the Bavli to possess a ruling attributed to a Palestinian authority, which the Yerushalmi lacks, and vice versa. See Frankel, *Mevo*, 41a.

96 E.g., *b. Šabb.* 37b, 145a; *b. Hul.* 95b.

97 See David Brodsky, *Bride Without a Blessing*, 386-88, 415, who finds a number of variant attributions and explains them as resulting from the process of oral transmission. His findings point to a certain degree of fallibility with regard to attributions such that we can not be certain of them or their history but that, *contra* Neusner, they were not late fabrications but represent well-meaning attempts to accurately report them, albeit within the confines of oral transmission.

98 It is possible that this challenge posed by R. Papa is a redactional construction in order to introduce R. Zebid's report of Rava's statement and create a literary

either absent from the Yerushalmi or are attributed to other Palestinian tradents. Moreover, he demonstrates awareness of early redactional discussions concerning various Palestinian traditions.<sup>99</sup> A crafted attribution to R. Yohanan reported by R. Papa is, therefore, not unusual.

Questions regarding context and authenticity also raise larger questions about the redactional history of the two Talmuds. If the Bavli contains the more original context, this could suggest that the redactors of the Yerushalmi had a heavier hand in reshaping their sources than has previously been thought, a degree of editorial formation that most scholars have reserved for the Bavli's redactors alone.<sup>100</sup> These scholars have assumed that the sugya of the Yerushalmi represents an earlier version, which the Bavli's redactors restructured and into which later Babylonian amoraic comments were incorporated. One indication for the latter possibility is that all of the rulings reported in the Yerushalmi are included in the corresponding Bavli sugya; the ruling that appears at the end of the Yerushalmi directly corresponds to Rava's statement reported by R. Zebid, and R. Eleazar's ruling likewise is cited by R. Abba to R. Ashi in the name of R. Ilai. This is, of course, in addition to the statements of Rav and Samuel that are cited in both Talmuds. Moreover, as has already been noted, the Yerushalmi, and tractate *Neziqin* in particular, did not undergo the same extent of redactional activity as the Bavli and hence contain amoraic statements in a more pristine form. Nevertheless, the fact that the Bavli takes pains to include chains of transmission in reporting the rulings of Rava and R. Ilai is more indicative of an attempt at authenticity rather than a conceit of the redactors, who sought to give the impression that they were reported by Babylonian tradents. Indeed, it is possible that the anonymous ruling cited in the Yerushalmi is actually a report

balance for the chiastic structure. Since R. Papa already appears at the end of the sugya, the redactors placed him at the beginning as well.

- 99 Zvi Dor, *The Teachings of Eretz Israel in Babylon* (Tel Aviv: Dvir Publishing House, 1971), 94-113 (Hebrew). Dor also notes that only R. Papa possessed the tradition that attributed the ruling in question to R. Yohanan, while both Rava and the "Palestinian *beit midrash*," as reported in the Yerushalmi, did not (97-98).
- 100 See, e.g., Shamma Friedman, "Pereq ha-Ishah Rabbah Ba-Bavli," *Mehqarim u-Meqorot*, ed. H. Dimitrovski (New York: Jewish Theological Seminary, 1977), 283-321; David Weiss Halivni, "Sefequei de-Gavrei," *PAAJR* 46-47 (1980): 67-93; David Weiss Halivni, *Midrash, Mishnah, and Gemara: The Jewish Predilection for Justified Law* (Cambridge, MA: Harvard University Press, 1986); idem, "Aspects of the Formation of the Talmud," *Sidra* 20 (2005): 117-69 (Hebrew), as well as the introductions to his *Mekorot u-Mesorot*.

of Rava's teaching minus the attribution, and not the other way around.<sup>101</sup> With so much competing evidence, any conclusion concerning the more authentic context must remain speculative.

What is definitive, however, is the existence of two distinct traditions among early Amoraim in Babylonia and Palestine respectively, which were either preserved or conceived by fifth-generation Babylonian Amoraim as well as the redactors of the Bavli. These later Amoraim, in turn, questioned their Babylonian predecessors and tried to harmonize them with the plain sense of the mishnah and their own system, which based liability on fault. They furthermore reported the Palestinian interpretation of the mishnah that accords with the Yerushalmi sugyot. While we cannot determine with absolute certainty the original positions of Samuel and Rav from the versions of their statements shaped by redactors, we can confirm the picture that emerges from both Talmuds of two different traditions concerning liability.

### C. Conclusion

Underlying the various rulings regarding tort law in the Bavli and the Yerushalmi exist two different systems of liability. The Bavli reports the rulings of early Amoraim, who all impose liability despite the absence of fault. Hezekiah rules strictly according to *m. B. Qam. 2:6*, Rav, Samuel, and R. Yohanan limit the exemption of *m. B. Qam. 3:1*, and Rabbah likewise issues strict rulings in a number of cases involving damages. In contrast, the Yerushalmi reports the same rulings of Rav and Samuel (and R. Yohanan in the name of Samuel) almost verbatim, but places them in another context and, in doing so, yields a series of opposing conclusions. In the Bavli, they are presented as limiting the exemption issued to pedestrians in *m. B. Qam. 3:1*, while in the Yerushalmi they limit exceptions to the mishnah. Furthermore, in the Bavli, *m. B. Qam. 2:6*, which considers a man always forewarned, is understood literally by Hezekiah and his school, while in the Yerushalmi it is limited by R. Isaac to instances where one acts negligently. We may infer that in Palestine there was a tradition of imposing liability only where one could be said to have acted with some degree of negligence and fault. This is likewise affirmed in the Bavli by R. Abba's report to R. Ashi of the Palestinian tradition (*b. B. Qam. 27b*). In Babylonia, however, there was a tradition of absolute liability among the

101 For some examples of this phenomenon, see Frankel, *Mevo*, 41a.

early Amoraim; hence, *m. B. Qam.* 3:1 was reinterpreted and Hezekiah and his school understand *m. B. Qam.* 2:6 literally and render it applicable even when the damage is unavoidable, a teaching that only appears in the Bavli. Whether Hezekiah and his school actually made such a statement is uncertain, since it appears nowhere else in rabbinic literature.<sup>102</sup> However, as it correlates with other Bavli statements attributed to early Amoraim, it likely represents an authentic position of the period, even if the attribution itself remains less certain. The later Babylonian Amoraim along with the Bavli's redactors, on the other hand, rejected the received tradition of the early Amoraim and re-interpreted their statements accordingly.<sup>103</sup>

The question that remains is how to account for the rise of these distinct legal traditions in the Bavli and Yerushalmi. One approach is to posit a historical explanation, which in this instance may be deduced by additional Palestinian evidence that provides a fuller picture of the conditions of public thoroughfares in Palestine. Daniel Sperber notes that it was the accepted practice in Roman-Palestine for vendors to exhibit their wares outside the confines of their shops, but that they did so at their own risk. In some places the narrow streets were so crowded with merchandise that it blocked the flow of traffic.<sup>104</sup> This situation is evidenced in *Genesis Rabbah* 19.5 in which a glass-vendor leaves his glass vessels outside his shop in the public thoroughfare and a blind man passing by inadvertently breaks them:

R. Judan in the name of R. Yohanan son of Zakkai (cited) R. Berekhiah in the name of R. Akiva: [it can be compared] to a blind man who was passing before a glass-vendor's shop. In front of him was a box filled with cups and *diatreta* (i.e., cut or engraved glass vessels). [The blind man] swung his stick and broke them (the glassware). [The vendor] stood up and grabbed him, [and]

102 See Meir Katz and Eliyahu Stern, "Hithayvut Muḥletet: Toledot Adam ha-Maziq," *Beit Yiṣḥaq* 31 (2000): 260-72.

103 Alternatively, all of the sources have been filtered by the redactors and the appearance of two distinct traditions does not represent a historical reality, but a literary construction. Either way, the picture that emerges from both Talmuds is of two different traditions in Babylonia and Palestine, whether it be historical or not.

104 Daniel Sperber, *The City in Roman Palestine* (Oxford: Oxford University Press, 1998), 12. In Rome proper, the practice of leaving merchandise outside shops only ceased when Domitian (81-96 CE) issued an edict forbidding it.

said to him: 'I know that I cannot get anything out of you, but come, I will show you how much you have destroyed.'<sup>105</sup>

The parable reflects a reality in which a vendor acknowledges that although he may not collect compensation from the blind man, he nevertheless wishes to show him the extent of the damages. While it can be argued that the exemption in this case extends only to a blind person who is considered like one who acts under coercion, read in tandem with the above passages from the Yerushalmi, the third chapter and mishnah 6:6 of *m. B. Qam.*, along with *t. B. Qam.*, the picture that emerges is of a community that exonerated pedestrians from any damages they cause to merchandise left out in crowded marketplace thoroughfares. The position espoused by the rabbis of the Yerushalmi thus conforms to the historical conditions of their time—the unreasonably crowded thoroughfares made the chances of collisions likely and, hence, made pedestrians blameless.

The trajectory of Roman law, which eventually based liability on fault and negligence, likewise confirms the Palestinian stance. Boaz Cohen has described the transition in both biblical and ancient Roman law (as it appears in the *Twelve Tables*, a product of the fifth century BCE) from systems that imposed liability only for damages that resulted from direct physical contact to a gradual acceptance of systems that imposed liability even for indirect damages.<sup>106</sup> It has likewise long been asserted that Roman law developed from a system that considered objective standards in determining liability to one that added subjective considerations. Thus, while the Aquilian law (ca. 287 BCE) established liability only if a defendant directly killed another,<sup>107</sup> Gaius in his *Institutes* Book 3 (ca. second century CE) considers malice and negligence as determinants for liability.<sup>108</sup> As such, if a defendant does not directly kill but rather creates the circumstances for it, Gaius deemed him liable. In the

105 *Gen. Rab.* 19.5 (ed. Theodor-Albeck).

106 Boaz Cohen, *Jewish and Roman Law: A Comparative Study*, vol. 2 (New York: Shulsinger Bros., Inc., 1966); see, in particular, his chapter on the "Principle of Causation," 578-609.

107 Alan Watson, *The Spirit of Roman Law* (Athens, GA: University of Georgia Press, 1995), 31. *Lex Aquilia* contains three sections, each dealing with property damages.

108 *The Institutes of Gaius* dates to 161 C.E. Samuel Parsons Scott, ed. and trans., *The Civil Law: Including the Twelve Tables, the Institutes of Gaius, The Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo*, vol. 1-2 (Cincinnati: Central Trust Co., 1932; New Jersey: The Lawbook Exchange, 2006), 181.

sixth century CE, intention and negligence continued to be considered in a number of contexts in Justinian and juristic law, albeit not in a systematized or consistent manner.<sup>109</sup>

The picture of the situation in Babylonia is far less clear. What limited evidence there is may be gleaned by examining individual passages from Zoroastrian legal and religious texts of the Sasanian period, which is contemporaneous with the Babylonian Amoraim. Thus, *Hērbedestān* 9.5 records a debate between the late fourth to early fifth century Sasanian jurisconsults Sōšāns and Kay Ādur Bozēd, both of who impose liability based on the presence of injurious outcome alone, irrespective of an actor's intent.<sup>110</sup> In turn, Abarg, who was Sōšāns' student and can be dated to the first half of the fifth century, considered the defendant's level of fault and negligence, using the term *adādīhā salarīh*, or unlawful guardianship.<sup>111</sup> Similarly, Mariah Macuch has pointed out that the *Frahang ī Oim*, a later text that deals with Avestan words, contains the terms *bōdōzed* for deliberate offenses and *kādōzed* for injury caused through negligence.<sup>112</sup> Whether these terms accurately reflect Sasanian law or are later retrojections is not certain. However, the term *bōdōzed* very likely appears in the *Hērbedestān* 2.4.1 and in the Pahlavi *Vidēvdād* in the name of Neryōsang, whose dates are unknown, but who probably lived after Abarg.<sup>113</sup> Consequently, the earliest evidence of negligence in extant Sasanian legal texts can be dated to Abarg, who lived roughly half a century after Rava.<sup>114</sup> While such passages may indicate a similar line of development to the Babylonian Amoraim and, hence, explain the changing Babylonian positions, the evidence is far too sparse to make sweeping conclusions.

One further point worthy of note is that the Sasanian dynasty seized power from the Parthians in the early third century during the period in which Rav and

109 Watson, *Spirit of Roman Law*, 117-23.

110 The *Hērbedestān* is one of twenty one books that once comprised the Avesta, the holy book of the Zoroastrians. Orally composed in Young Avestan, the *Hērbedestān* was eventually written down around 500 C.E. During the Sasanian period, the Zand was composed, which was a Middle Persian translation and commentary that also includes the opinions of a number of named jurisconsults.

111 See Elman, "Toward an Intellectual History of Sasanian Law," 21-22, along with the seventh chapter of my dissertation, *supra* n. 9.

112 Elman, "Toward an Intellectual History," 37.

113 *Ibid.*, 53.

114 *Ibid.*, 5.

Samuel lived.<sup>115</sup> This is significant because the traditional, if simplistic, view in legal and social theory is that legal systems evolve from “primitive” beginnings to more “complex” as they continue.<sup>116</sup> Although David Daube rejects the use of the term “primitive,” he suggests that such development occurs in this way because legal systems in their earliest stages do not generally have sufficient means to investigate subjective considerations nor the authority to do so.<sup>117</sup> As such, initially liability is imposed for the presence of harm irrespective of an actor’s intent, level of fault, or even awareness. Perhaps the same was true of the Sasanian legal system as well. The rise of the new Sasanian dynasty might have ushered in a new legal paradigm, which, in the spirit of other early legal systems, preferred strict liability and, in turn, was embraced by the rabbis.<sup>118</sup> This could account for the early Babylonian preference for strict liability, despite the overriding tannaitic stance that considered fault. However, without further evidence, such a possibility remains speculative.

Another possible method to account for the different traditions is to investigate internal exegetical concerns that likewise may have contributed to multiple interpretations. Indeed, Christine Hayes has persuasively cautioned against the scholarly tendency to reduce all differences between rulings in the Bavli and Yerushalmi to distinctions in historical and socioeconomic factors alone.<sup>119</sup> She argues:

115 See *b. Avod. Zar.* 10a-11b; *b. B. Qam.* 117a-b.

116 This also accords with Yochanan Muffs’s findings in his philological study of the volition clauses found in Ancient Near Eastern deeds and in later Seleucid transaction formulary. He states, albeit hesitatingly, that “the later the literature—be it legal, religious, or literary—the greater the stress on inner states of mind, and in legal contexts in particular, the great constitutive importance of intent and volition.” Yochanan Muffs, *Love and Joy: Law, Language, and Religion in Ancient Israel* (New York: Jewish Theological Seminary of America, 1992), 145. However, this approach has received much criticism; see Annelise Riles, *Rethinking the Masters of Comparative Law* (Oregon: Hart Publishing, 2001).

117 David Daube, *The Deed and the Doer in the Bible: David Daube’s Gifford Lectures*, vol. 1, ed. Calum Carmichael (West Conshohocken, PA: Templeton Foundation Press, 2008), 33-34.

118 Tellingly, it was Samuel who famously maintained that *dina de-malkhuta dina* (*b. Git.* 10b; *b. Ned.* 28a; *b. B. Qam.* 113a).

119 Christine Hayes, *Between the Babylonian and Palestinian Talmuds: Accounting for Halakhic Difference in Selected Sugyot from Tractate Avodah Zarah* (New York: Oxford University Press, 1997), 3-24.

Such a view undermines a serious appraisal of the Talmuds as hermeneutical literatures and fosters an impression of them as purely independent and ideologically driven discussions superimposed upon the Mishnah in the light of socioeconomic and regional interests of a later time.<sup>120</sup>

She maintains that while historical and cultural analyses are worthwhile, they must first and foremost be preceded by a textual analysis that takes into account exegetical and other internal considerations that may often be the motivation behind rabbinic statements.

In the case of the present inquiry, there is a compelling textual reason for the conflicting sugyot in the Bavli and Yerushalmi: the ambivalence of the Mishnah itself. On the one hand, *m. B. Qam.* 2:6 states, “man is always forewarned,” thus indicating that liability is always imposed for damages caused by a person, irrespective of fault. On the other hand, the balance of tractate *Bava Qamma* presents a system that considers a person’s level of fault and negligence, and seemingly rejects the notion of absolute liability. Consequently, the early Amoraim, as reported in the Bavli, viewed 2:6 as the overarching principle and attempted to reconcile conflicting mishnayot in order to provide a streamlined and unified approach. Hence, 2:6 was taken at face value as indicated by Hezekiah’s dictum and Rabbah’s rulings, which unambiguously rule that one is liable for damages caused by his person even where there is a total lack of intent and awareness. Similarly, Rav, Samuel, and R. Yohanan are recorded as reinterpreting 3:1 against its plain meaning and limiting the exemption of pedestrians in the mishnah to cases where the damage is unavoidable. In contrast, in the Yerushalmi, the balance of mishnayot was preferred, and R. Isaac therefore reinterpreted the apparent stance of strict liability in 2:6 to instances of fault. One is only liable for non-volitional activities if aware of possible danger and, therefore, expected to take precautions. In a similar manner, assuming the Bavli contains the more authentic context of Rav’s and Samuel’s statements in regard to *m. B. Qam.* 3:1, the redactors of the Yerushalmi re-contextualized them to conform to the preferred system of fault. Any position that expresses absolute liability was effectively silenced.

The struggle to explain why certain legal theories and approaches to law become popular in specific cultures at specific moments in time is an issue

120 Ibid., 6-7.

that legal theorists contend with as well.<sup>121</sup> Some posit that there is a deep inner logic guiding the development of law, some view it as accidental, while still others point to historical and economic imperatives that shape the tort doctrine.<sup>122</sup> What this rabbinic debate demonstrates is that different systems of liability may also be explained as stemming from diverse interpretations of a single authoritative text, which may in turn be motivated by historical factors such as the dominant legal system along with societal needs.

Ultimately, this initial rupture between the Babylonian and Palestinian traditions was mended by the fourth and fifth generations of Babylonian Amoraim as a result of natural progression in legal thinking, the increasing influence of Palestinian teachings in some of the Babylonian academies, a refocused attention on the plain-sense readings of the Mishnah, or some combination thereof. Intentional and purposeful behavior ultimately became the measuring stick for determining a person's culpability.

121 For theories of legal history, see John Witt, "Contingency, Immanence, and Inevitability in the Law of Accidents," *Journal of Tort Law* 1 (2007): 1-41.

122 Ibid.