

The Law of Moses and Modern Tort Law

by Edward Fudge, M.A., J.D.

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INTRODUCTION

As ancient Israel prepared to enter its Promised Land, the aged Moses addressed the people in what would prove to be his farewell speech. He rehearsed their rescue from Egyptian slavery, their wondrous passing through the Sea to safety and their marvelous provision during 40 years of wandering in the wilderness. Most of all, he urged them to remember and to observe God's laws once they had settled in the new land (Deut. 1-33; especially chapters 1-5).

This law would provide a structure for their entire society, Moses told the Israelites. More than that, it would make Israel a showpiece to the nations, an exemplar of what society should be and what, under God's rule, it could be. This benevolent law given by a gracious God was intended transform a motley mass of lately-liberated slaves and more-recently nomads into a just community, a prototype of what later Hebrew prophets would envision as a universal utopia in an Age to Come. Precisely because this society consisted of the most unlikely constituents, its formation and ongoing existence would bear explicit testimony to the wisdom of the God who had "created" this People and set them in the center of the nations.

Israel's jurisprudential challenge

Moses therefore challenged the people to fulfill their exalted destiny as recipients of God's law:

Behold, I have taught you statutes and ordinances, as the LORD my God commanded me, that you should do them in the land which you are entering to take possession of it.

Keep them and do them; for that will be your wisdom and your understanding in the sight of the peoples, who, when they hear all these statutes, will say, "Surely this great nation is a wise and understanding people."

For what great nation is there that has a god so near to it as the LORD our God is to us, whenever we call upon him? And what great nation is there, that has statutes and ordinances so righteous as all this law which I set before you this day? (Deut. 4:5-8.)

This passage has fascinated me for many years with its claim that Israel's laws surpassed other contemporary laws for sheer wisdom and justice. After I began law school in January 1985, the ancient text repeatedly came to mind as modern notions of justice and equity stirred memories of specific commands scattered through the books of Exodus, Leviticus, Numbers and Deuteronomy.

Could it be that the Law of Moses, given more than 3,200 years ago,¹ actually incorporated those principles of duty and culpability, due process and damages, which today are commonly accepted as representing the insights of enlightened American jurisprudence? What would we find if we investigated this ancient law in light of modern tort law?

The realm of Torts

It has been said broadly that the law of Torts embraces "all breaches of duty and obligation other than contractual"² However, while it is true that during the medieval period, public and private law "were, in truth, but imperfectly distinguished," today it is settled that a tort is not, per se, a criminal offence.³ Nor is a tort, per se, a breach of contract. We may safely think of a tort as "an act or omission giving rise, in virtue of the common law jurisdiction of the Court, to a civil remedy which is not an action of contract."⁴

While our common law has distinguished between *torts* (injuries of omission or commission done to individuals), *contracts* (agreements, express or implied) and *crimes* (injuries done to the public or to the state), it is theoretically conceivable that the same offense might be viewed under one, two or even all three of these categories. When we come to the Law of Moses, these neat distinctions indeed do merge into an overlapping multi-category. By its origin, nature and purpose, the Law of Moses is the formal structure of an *agreement* between God and Israel. Its violation therefore constitutes a breach of divine *contract*. It is also the Word from on high in a society where God is king. Its violation is thus also a *crime*. And it is the legal structure for a society of *individuals* whose relationships are defined by their membership within the congregation. In this framework, the violation of certain laws also constitutes a *tort*.

¹ I am aware of the theories of biblical criticism and I understand that the questions of the origin and development of these biblical books are still hotly debated. However, Jews and Christians alike are "people of the Book," and I have chosen to treat the biblical material as it stands in its accepted canonical form.

² Edgar B. Kinkead, *Commentaries on the Law of Torts*, Vol. I, page 4. San Francisco: Bancroft-Whitney Company, 1903.

³ Frederick Pollock, *The Law of Torts*, page 2. New York and Albany: Banks & Brothers, 1892.

⁴ *Id.*, page 3.

THE BASES OF THE MOSAIC LAW

Before attempting to analyze duties, breaches or penalties under the Mosaic Law, we note three primary bases on which those duties rested. Those were:

- (a) The character and mighty deeds of God;
- (b) Israel's history and experiences in Egypt; and
- (c) Israel's covenant with God.

God's character and mighty deeds

Moses repeatedly prefaced or concluded statements of laws with the expression, "I am JHWH." This covenant name of God -- the Tetragrammaton or "Sacred Four Letters" which none could pronounce with impunity, stands always for the majesty and character of the God who by that name made himself known to Israel. The Law of Moses reflected God's character. It was based in God's identity as the Holy One of Israel. This annotation appears especially frequently in Leviticus, which is the book of the cultus with its sacrificial system, in which God's holiness is a repeated theme (Lev. 19:18, 34; 23:22; 25:17).

God's mighty deeds of deliverance also undergirded the Law of Moses. God had rescued Israel from the "house of bondage." On that basis, he gave the Ten Commandments -- and on that basis he expected Israel to hear and to heed (Ex. 20:2). As Moses stated in the Deuteronomic charge:

You shall remember that you were a servant in the land of Egypt, and the LORD your God brought you out thence with a mighty hand and an outstretched arm; *therefore* the LORD your God commanded you to keep [his laws]" (Deut. 5:15).

Moses also anticipated a future generation living in the Promised Land who would inquire about the significance of Israel's "testimonies," "statutes" and "ordinances." When that happened, the father was to tell his son the story of Israel's slavery and redemption, the saga of God's mighty works for his covenant people (Deut. 6:20-25).

Israel's own past experiences

Israel's previous experience as exiles and slaves in Egypt was also a basis for certain humane elements of its law. We read, for example:

When a stranger sojourns with you in your land, you shall not do him wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself; *for you were strangers in the land of Egypt* (Lev. 19:33-34).

You shall not pervert the justice due to the sojourner or to the fatherless, or take a widow's garment in pledge; but you shall *remember that you were a slave in Egypt* and the LORD your God redeemed you from there; *therefore* I command you to do this (Deut. 24:17-18; cf. Deut. 24:19-23; Ex. 22:21; 23:9).

Israel's covenant with God

Israel's laws also rested on the foundation of a unique covenant, a divine-human encounter at Sinai in which God the deliverer identified himself to the people and announced that they were chosen, by him, for his own purpose. This solemn relationship was ratified by a ceremony that included writing the laws in a book, the people orally affirming acceptance of the laws and the sprinkling of sacrificial blood (Ex. 24). Throughout Israel's future history, they were commanded to read the book of the Law aloud in public assembly every seven years to remind them of their covenant with God (Deut. 31:24-26).

This covenant involved stipulations, blessings and curses. The Law of Moses was more than an impersonal legal code. It was the visible symbol of a contractual relationship between Israel and God. To break this Law meant rejection of God who gave it -- God who had graciously rescued Israel from slavery and constituted them his own chosen People (Deut. 30:15-20).

THE FUNDAMENTAL DUTY: JUSTICE

One legal commentator has suggested that “[a] system of laws promulgated by a lawgiver of sufficient wisdom and illimitable foresight would undoubtedly commence with a definition of rights, and thence proceed to prescribe duties, thence to prohibit wrongs, and finally to provide legal remedies.”⁵ One could argue that this description squarely fits the Law of Moses. It begins by telling the people who they are: God's chosen covenant People. They are therefore to behave in a certain way toward each other: with justice, mercy and love. Certain acts or omissions violate these standards and violators will be liable to certain penalties and punishments.

Interestingly, our own common law evolved in almost precisely the opposite order. At its roots in medieval England, the Anglo-Saxon common law was “formal” but “unmoral.”⁶ Even until the time of the Industrial Revolution, it could be accurately said that the law “regards the word and the act of the individual; it searches not his heart.”⁷

⁵ Thomas Atkins Street, *The Foundations of Legal Liability*, Vol. III, page 3. Northport, N.Y.: Edard Thompson Company, 1906.

⁶ James Barr Ames, “Law and Morals,” reprinted in *Selected Essays on the Law of Torts*, page 1. Cambridge, Mass.: Harvard Law Review Association, 1924. First published in 22 *Harvard Law Review* 97 (Dec. 1908).

The invention of industrial machinery gave rise to a quasi-moral concept of a standard of care in the notion of “negligence,” which gradually became the basis for a separate cause of action.⁸ Such a standard met the criteria of being “external and objective” rather than resting on individual judgment; it was the same for all persons; and it made “proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act.”⁹ In this way there evolved what one writer calls the “ethical standard of reasonable conduct.”¹⁰

Perhaps it is not accidental that “reasonableness” determined the ethical at that time in history. This was, after all, “The Age of Reason.” And so the “reasonable man of ordinary prudence” became the jurisprudential ideal, though he has always been “a fictitious person, who has never existed on land or sea.”¹¹ As a result, “this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.”¹²

Today we think of the “reasonable, ordinary, prudent person.” The ancient Israelite thought instead of the covenantally-faithful person, the “just” person, the one who did what was “right” -- and then tempered that with mercy in view of God’s mercy and Israel’s own past bitter experience. Moses thus charged the people:

You shall not pervert justice; you shall not show partiality; and you shall not take a bribe. . . . Justice, and only justice, you shall follow, that you may live and inherit the land which the LORD your God gives you (Deut. 16:18-20; *cf.* Ex. 23:1-3, 6-8; Lev. 19:15; 25:17).

There is little reason to suppose that ancient Israel ever fully embodied the ideal but there can be no doubt of God’s intention. Israel’s commonwealth was to be a showcase for the nations, a reflection and incarnation of the wisdom and justice of God himself (Deut. 4:6-8).

⁷*Id.*

⁸William L. Prosser, *Handbook of the Law of Torts: Hornbook Series*, 4th edition, page 140. St. Paul, Minn.: West Publishing Company, 1971.

⁹ *Id.*, page 150.

¹⁰ Ames, *Op. cit.*, page 3.

¹¹Prosser, *Op. cit.*, page 150.

¹²*Id.*

NOTIONS AND DEGREES OF NEGLIGENCE

The Law of Moses clearly distinguished between the intentional harm (which would be at once a *tort* against the individual injured, a *crime* against society and a *breach of contract* with God) and the injurious act done without intent to cause harm, which we would attribute to negligence.

Notions of negligence

A clear example of this distinction is the provision for a network of urban sanctuaries scattered throughout the land for the protection of one who killed another person without malice or intent. When the inadvertent manslayer reached one of these “cities of refuge,” he or she was legally protected from retribution by the “avenger of blood” -- normally a relative of the slain individual. This arrangement is set out in Numbers 35 and Deuteronomy 19, both of which chapters draw a sharp line between culpability that accompanies intentional murder and the exculpatory defense of a wrongful death that results from unintentional negligence.

The Law of Moses anticipated particular negligent acts or omissions that resulted in civil liability. Four specified circumstances involved:

- * Digging a pit but failing to cover it (Ex. 21:33-34);
- * Allowing animals to trespass on to the property of another and do harm (Ex. 22:5);
- * Kindling a fire but negligently allowing it to get out of control and harm a neighbor’s property (Ex. 22:6); and
- * Building a flat roof on which people foreseeably would spend time, but failing to construct protective parapets to prevent their falling off the sides (Deut. 22:8).

Degrees of negligence

The Law of Moses recognized degrees of negligence. An act that foreseeably might cause injury resulted in greater liability than a similar act where no injury was foreseeable. Likewise, one who had notice of a dangerous condition but made no attempt to correct it could be held liable for what we would call gross negligence. These distinctions are illustrated in laws pertaining to a goring ox, as stated in Exodus 21:28-32.

When an ox gores a man or a woman to death, *the ox shall be stoned*, and its flesh shall not be eaten; but the *owner* of the ox shall *be clear*.

But if the ox has been accustomed to gore *in the past*, and its owner has been *warned* but has not kept it in, and it kills a man or a woman, the *ox shall be stoned*, and its *owner shall be put to death*. If a ransom [money damages in lieu of execution] is laid on him, then he shall give for the redemption of his life whatever is laid upon him.

STRICT LIABILITY

The Law of Moses also included the concept of strict liability. If a man borrowed a neighbor's chattel and it was hurt or destroyed while in the borrower's custody and control, the borrower was required to make full restitution (Ex. 22:14). Liability here does not either negligence or evil intent. Nor is this a matter of *res ipsa loquitur*, for even an intervening cause does not exculpate the person held strictly liable.

DAMAGES

As in our legal system today, the person who caused harm, injury or death to the person or property of another, whether intentionally or negligently, faced a considerable range of possible damages under the Law of Moses. Damages could be both monetary and corporal, since wrongs among members of the covenant commonwealth were sometimes both tortious and criminal in essence.

Monetary damages

Monetary damages under the Mosaic code were compensatory, punitive and sometimes both. Compensatory damages could include general damages (restitution) or special damages (medical expenses; lost wages). Punitive or exemplary damages ranged from a statutory 20% for most torts to 200-500% of the value lost in cases of conversion. Two causes of action provided for open-ended punitive damages, which were determined by the plaintiff's demand and the judgment of the court.

Compensatory (general damages). General damages were most common and were usually measured on the basis of actual restitution of the chattel that had been lost or destroyed. (This rule did not hold in the case of gross negligence. One who willfully ignored notice of a dangerous condition or intentionally disregarded an animal's prior violent behavior, through which ignorance or disregard harm resulted, was subject to much greater penalties than those stated here.)

He who kills a beast shall *make it good*, life for life (Lev. 24:18, 21).

When a man causes a field or vineyard to be grazed over, or lets his beast loose and it feeds in another man's field, he shall make *restitution* from the best in his own field and in his own vineyard (Ex. 22:5).

When fire breaks out and catches in thorns so that the stacked grain or the standing grain or the field is consumed, he that kindled the fire shall make *full restitution* (Ex. 22:6).

When a man leaves a pit open or when a man digs a pit and does not cover it, and an ox or an ass falls into it, the owner of the pit shall *make it good*; he shall give money to its owner, and the dead beast shall be his (Ex. 21:33-34).

Similarly, if a man's ox was known to hurt other animals and the man did not keep it confined, if the ox killed another person's beast the owner of the rogue animal was to pay "ox for ox," with ownership of the dead animal passing to the defendant (Ex. 21:36).

Restitution was also the rule of damages for goods lost during a bailment. If someone borrowed a neighbor's property and it was stolen while in his possession, the borrower was required to make restitution to the owner (Ex. 22:12). The same rule applied to goods damaged or lost while borrowed if the owner was not present when the loss occurred (Ex. 22:14). However, if a loss occurred while the owner was present, as when someone was hired to work and he brought his own animal or equipment for the job, the one hiring him was not liable for the loss (Ex. 22:15). An independent contractor assumed a delegable duty of ordinary care, along with any liability in event of its breach.

Compensatory (special damages). If two men fought physically and one man injured the other, the injured man had a civil cause of action even though the one who caused the injury was not criminally liable. In such a case, the defendant was to pay the injured man's medical expenses until he recovered fully. He also was to reimburse the plaintiff for all his lost wages. This is how the Law of Moses put it:

When men quarrel and one strikes the other with a stone or with his fist and the man does not die but keeps his bed, then if the man rises again and walks abroad with his staff, he that struck him shall be clear; only he shall pay for the loss of his time, and shall have him thoroughly healed (Ex. 21:18-19).

Punitive damages (standard 20%). We have previously seen that the Law of Moses sometimes blended our categories of tort, crime and breach of contract. In cases involving injury to person or property, the general rule of damages for situations not otherwise covered seems to have been restitution of actual value plus punitive damages of 20%. If the plaintiff had no relative to collect the judgment, the award went to the priest instead. The Book of Numbers gives the details:

When a man or woman commits any of the *sins* [criminal offense against God] that men commit by *breaking faith* [breach of contract] with the LORD, and that person is guilty, he shall confess his sin which he has committed; and he shall make *full restitution* [tort damages] or his wrong, *adding a fifth* [punitive damages] to it, and giving it to him to whom he did the wrong.

But if the man has no kinsman to whom restitution may be made for the wrong, the restitution for wrong shall go to the LORD for the priest, in addition to the ram of atonement with which atonement is made for him (Num. 5:5-8).

Punitive damages (statutory prescriptions). The Law of Moses also prescribed statutory punitive damages for actions arising out of intentional conversion of chattels [equivalent // criminal theft]. In the case of animals, damages varied with the type of chattel lost.

If a man steals an ox or a sheep, and kills it or sells it, he shall pay *five oxen* for an ox, and *four sheep* for a sheep. He shall make *restitution* If the stolen beast is found alive in his possession, whether it is an ox or an ass or a sheep, he shall pay *double* (Ex. 22:1-4).

If a thief stole property from someone's dwelling, the civil penalty was restitution of the stolen item's value, *doubled* (Ex. 22:7). Breaches of trust not otherwise covered carried a statutory penalty of twice the actual restitution, "whether it is for ox, for ass, for sheep, for clothing, or for any kind of lost thing" (Ex. 22:9).

Statutory punitive damages also applied when a man defamed his new bride's virginity, for which the defendant was required to pay 100 shekels of silver to the girl's *father*. The same judgment also called for a criminal penalty (a public whipping) as well as the equitable remedy of specific performance -- the defendant was required to remain married to the defamed woman for the rest of his life (Deut. 22:12-19). In this situation, the Law of Moses provided a range of remedies even broader than our own courts "at law and in equity!"

Punitive damages (open-ended). At least two circumstances allowed for open-ended damages with no statutory ceiling. The first was an action for wrongful death involving gross negligence. The second was personal injury to a pregnant woman that resulted in a miscarriage.

In the case of wrongful death resulting from gross negligence, the Law of Moses provided for open-ended punitive damages as an alternative to capital punishment. If a man allowed an animal to roam loose which he knew to be dangerous and the animal killed a person, the beast was to be destroyed and its owner executed (Ex. 21:29). Capital punishment could be avoided, however -- and surely it actually was, most of the time -- if the defendant paid monetary damages to the survivor(s) in an appropriate sum. The determination of appropriateness depended on the demand of the plaintiff and the finding of the court: "If a ransom [for his life, in the form of punitive damages] is laid on him," the Law said, "then he shall give for the redemption of his life whatever is laid on him" (Ex. 21:30).

This particular statute provided a wrongful death cause of action for a parent who lost a child or a master who lost a slave (in which case the penalty was reduced to 30 shekels of silver) as well as for the survivor of a free adult (Ex. 21:31-32).

The other case of open-ended punitive damages involved the situation in which two men fought physically and somehow injured a pregnant woman so that she suffered a miscarriage. This gave rise to a cause of action in favor of the woman's husband. The person who caused the death of the fetus was to be "fined according as the woman's husband shall lay upon him; and he shall pay as the judges determine" (Ex. 21:22).

CONCLUSION

More than 3,200 year ago a people came into being whom we know as Hebrews or Israelites, under the most unlikely of circumstances. Within a single generation this people moved from slavery to desert nomads to settled agrarians and merchant-tradesmen within an ordered society.

Their ancient Law contained many elements comparable to today's best insights of equity and justice, including most major concepts that define our modern law of Torts. Little wonder that Moses could exclaim, as he reminded the Israelites to observe God's laws, "What great nation is there, that has statutes and ordinances so righteous as all this law which I set before you this day?" (Deut. 4:5-8.)