WHAT HAVE CALABRESI & MELAMED GOT TO DO WITH FAMILY AFFAIRS? WOMEN USING TORT LAW IN ORDER TO DEFEAT JEWISH AND SHARI'A LAW

BENJAMIN SHMUELI [*]

Abstract

Intrafamilial tort actions have become increasingly common. Spouses sue each other or their ex-spouses and even children sue parents. These actions create a fascinating intersection between tort law, which generally deals with relationships between strangers, and family law, which generally concerns the regulation of relationships between intimates. This is especially interesting when these situations create a clash between secular tort law and religious Jewish and Shari'a law. This Article charts new territory by exploring the legal, social, and law and economics implications of these emerging legal actions at the intersection of tort law and family relations.

I use the now-famous Calabresi and Melamed framework (Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)) of primary and secondary remedies drawn from different entitlement regimes in order to provide a theoretical foundation to explore the emerging use of tort law to provide remedies for family disputes (sometimes known as "four rules"). I focus in particular on categories of disputes in which family law either refuses or is unable to provide adequate remedies for harms caused by one family member against another. The Calabresi and Melamed framework will help illustrate five circles of civil-tort actions in the service of the family unit, in some of them there is a real clash between secular tort law and religious Jewish or Shari'a law, and women use secular tort law in order to fight and defeat religious Jewish and Shari'a law. But beyond just presenting the issues, this framework will have great importance in providing a theoretical-tort basis for understanding new and future developments in case in which there are real conflicts between tort law and religious family law.

Ultimately, this Article asks, among other questions: Can women indeed defeat religious Jewish and Shari'a law, using secular tort law? What are the characteristics of the relationships between intrafamilial tort litigation and religious Jewish and Shari'a law? Are rights connected to personal status tradable, i.e. can they be transferred or sold? Can the family court fill an active and legitimate role in creating deals on behalf of the state, under which a family member is recognized as having injured the rights of another family member on the plane of personal status? Should the state allow for the damaged personal status right to be priced, e.g., by setting a price tag on the infringement by using tort law?

[*] Ph.D. 2005, L.L.M. 1999, L.L.B. 1998, Bar Ilan University; Visiting Professor, Duke University School of Law, 2006/7-2007/8; Associate Professor (Senior Lecturer) and Co-Director of the Center for the Rights of the Child and the Family and Director of the legal clinics, Sha'arei Mishpat Law College, Israel. My thanks to Chemi Ben-Noon, Amos Herman, Ariel Porat, Chagai Vinizky, and to my research assistants Eden Cohen, Tobie Harris, Erez Korn, and Idan Regev. Special thanks to Guy Keinan. This article was presented in the ISFL (The International Society of Family Law) international conference, Hod Hasharon, Israel, 6.8.09, and in the ILSA (Israeli Law and Society Association) annual conference, Tel-Aviv University, Israel, 12.21.09. I thank the participants in the conferences for contributing comments.

* * *

I. INTRODUCTION

Intrafamilial tort lawsuits are no longer as rare as they once were. Spouses file suit against current spouses or former spouses, and children file suit against their parents.[1]

These actions create a fascinating intersection between tort law, which generally deals with relationships between strangers, and family issues, which involves current or past members of the same family. In some of these cases, such as actions for abuse by a parent or spouse, there is no intersection between civil law and family *law* because only tort law is involved, although these lawsuits obviously have effects on the family unit, as well. But the more interesting cases are those in which there is an intersection between family law and civil law, and this confrontation sometimes creates real sparks.

Actions like these are often controversial. In this Article, I analyze the issues raised in civil actions in service of the family unit through the lens of the Calabresi and Melamed framework for economic torts.[2] I draw largely on examples from Israeli law, which is particularly complex with respect to this issue. The framework presented here will present this picture by drawing on five categories, or "circles," of tort lawsuits in the service of the family unit. But beyond presenting a descriptive survey of the issues, the framework presented will be important in providing a theoretical basis for new and future developments in cases in which there are real conflicts between tort law and Jewish and Shari'a law, and between the courts in which questions of tort law in family issues are discussed: the family court on one hand and the religious court (primarily the rabbinical or Shari'a court) on the other.

For many years, countries such as the United States, the U.K., and Israel adhered to the common law doctrine of interspousal immunity, which provided that individuals could not sue

[1] For examples, see *infra* Chapters III & IV.
[2] Guido Calabresi & A. Douglas Melamed**,** *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

their spouses under tort law. However, this immunity has now been repealed in the U.S.,[3] U.K.[4] and Israel.[5] Subsequent to this repeal, there has been a marked growth in intrafamilial tort lawsuits in Israel,[6] a growth fueled partly, but not exclusively, by the use of the new "weapon" for women who are refused a *get* (the Jewish Halakhic divorce bill – the marriage release) – a civil action against their recalcitrant husbands. Jewish women sometimes find themselves unable to break free from a marriage or subject to extortion by their husbands. Until recently, these women had no recourse in the civil court system, which traditionally avoided interfering with the absolute control of the religious system over issues of divorce. As of 2004, this has started to change with the recognition of a tortious cause of action for "*get* refusal." However, this is a "weapon" which has sparked much controversy primarily because of its contribution to the aggravation of the struggle between the Rabbinical-religious court and the civil family courts. In a number of prominent decisions, courts have awarded punitive or aggravated damages or increased damages for intangible non-pecuniary damage,[7] to the point that these actions have become a factor that cannot be ignored in research on tort law and its influence on the system of family law either in Israel and more broadly.

In contrast with American law,[8] under Israeli law there has never been a parental immunity. Children could always bring tort law claims against their parents, even if there have historically been some restrictions on these claims.[9]

Intrafamilial tort actions in Israel are conducted exclusively before the civil Magistrate's family court,[10] and for various reasons relating to the structure of the courts in Israel, appeals are almost

---

[3] *See* LEONARD KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT, AND SEXUAL ABUSE (rev. ed., 2005); William E. McCurdy, *Torts between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); *Notes, Litigation between Husband and Wife*, 79 HARV. L. REV. 1650 (1966); Merenoff v. Merenoff, 76 N.J. 535, 539-42, 388 A. 2d 951, 953-55 (1978); Yuval Sinai & Benjamin Shmueli, *Changing the Current Policy towards Spouse Abuse: A Proposal Inspired by Jewish Law for a New Model*, 32 HASTINGS INT'L & COMP. L.J. 155 (2009).

[4] *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-43 (vol. 1, 1765); Glanville Williams, *Husband and Wife*, 10 MLR 16 (1947). This immunity was abolished in the U.K. with the enactment of Law Reform (Husband and Wife) Act 1962, Ch. 48. Article 1(2).

[5] In Israel, § 1(2) of the Law of Family Court, 5755-1995, S. H. 1537, 393 [hereinafter Law of Family Court] enables the filing of a civil action against a family member, including partner, spouse and ex-spouse. §18(a) of the Civil Wrongs Ordinance (New Version), 5732-1972, 2 LSI 12 (1972) (Isr.) [hereinafter Civil Wrongs Ordinance], which is based on English law, provided immunity in suits between spouses: "No claim shall be entered by a spouse or the representative of their estate against a spouse or the representative of their estate in respect of a tort done prior to their marriage or as long as their marriage is in force." The origin of this section is in §9(1) of the Civil Wrongs Ordinance, 1944, which was in force under the British Mandate. This section was criticized by the Supreme Court because blocking any tort lawsuit against a spouse, under any given circumstance, seemed unjustified (*See*, for example, CA 257/57 Barnett v. Barnett, IsrSC 12, 565 [1958]; CA 479/60 Appelstein v. Aharoni, IsrSC 15(1), 682 [1961]). Ultimately, the immunity was repealed in Israel in 1969, with the passage of the Litigation between Spouses (Regulation) Law, 5729-1969, S. H. 5729, 151. §3 of this law repealed §18(a) of the Civil Wrongs Ordinance. Like English law, this law enables the courts to invoke a stay of proceedings (*id*., at § 1) if they feel that there is a chance to repair the relationship and feel that the proceedings in the civil action will destroy this chance and are not worth the damage to family harmony, and also if the couple is already participating in a reconciliation proceeding in the civil or rabbinical court. This arrangement grants the court very wide discretion on this issue, although stay of proceedings is possible for three months only, subject to an extension by a reasoned decision. However, no such stay has ever been invoked in suits between one spouse and the other. *See* FamC (Tel Aviv) 81233/98 Doe v. Roe, *Tak-Mish* 00(1) 147 (2000), section 3 to Judge Shochat's judgment. For a summary on Israeli law *see* Sinai & Shmueli, *supra* note 3.

[6] For examples see *infra* Chapters III & IV.

[7] *See infra* Chapters III & IV.

[8] For a summary on parent-child immunity in American law see KARP, *supra* note 3; Sandra L. Haley, *Comment: The Parental Tort Immunity Doctrine: Is It A Defensible Defense?*, 30 U. RICH L. REV. 575 (1996); Steven G. Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689 (2000).

[9] Rhona Schuz, *Child Protection in the Israeli Supreme Court: Tortious Parenting, Physical Punishment and Criminal Child Abuse*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 2001 EDITION 165, 176 (Andrew Bainham ed., 2001); C.A. 2034/98 Amin v. Amin, 53(5) IsrSC 69 (1999). For the English version see http://elyon1.court.gov.il/files_eng/98/340/020/q07/98020340.q07.htm

[10] According to §1 of the Law of Family Court, *supra* note 5.

never filed on decisions and rulings of courts this instance, so that these actions have rarely, thus far, been adjudicated before the District Courts or the Supreme Court. There are, thus, no binding precedents on the subject, notwithstanding the fact that Israel is a common law country.[11]

This essay fills an important gap in the literature by providing an overview of the history of such actions with the goal of understanding not only the basis of these actions but also of understanding the connection between tort law, discussed in the civil forum of family court in Israel, and family law, discussed sometimes in that forum and sometimes (as in the case of marriage or divorce) in the religious courts.[12]

In service of this goal, I illuminate the issue of intrafamilial tort lawsuits through a slightly different prism than is normally used, by reference to a leading theoretical approach in tort law, since at the end of the day the action is a civil-tort one. Examining the question by means of common theoretical approaches to tort law can help us reach conclusions regarding the place of tort law in the family sphere. This examination will help justify the steps, such as actions for the refusal of the *get*, that tort law has taken in the service of family law that are seen by certain sectors as controversial and to predict and justify future developments in this field. However, the comparison must be cautious – after all, these are still civil actions happening within the family unit, which is special and must receive special treatment. Although I draw most heavily on examples from Israeli law, many of the descriptions to be presented and the developments to be proposed have policy implications for and could be adapted to other countries' law, as well.

One of the first instincts of a researcher faced with an intersection of tort law and questions involving the family unit, whole or dismantled, may be to see tort law as a secondary remedy, whose goal is to fill the vacuum created by family law in various fields. Tort law awards the victim "consolatory" damages in cases in which the remedies in family law cannot be achieved, either for legal or technical reasons. This association can easily lead the researcher, particularly a tort researcher, to Calabresi and Melamed's famous article from 1972,[13] sometimes known as "four rules," which discusses the ways in which tort law can be effectively employed to fill gaps where remedies in property are not sufficient to protect the interests of the parties. Although Calabresi and Melamed were not the ones to invent the use of the two alternative layers of remedies, their article strongly emphasizes the use of two alternative remedies and analyses it in a unique manner. I borrow from their framework as a tool for exploring the complex interactions taking place in the tort law in the service of the family unit in general, and in Israel in particular. Ultimately, I use the Calabresi and Melamed framework to help establish and justify existing and future processes related to intrafamilial tort actions.

Calabresi and Melamed, when discussing the ways of protecting entitlements, explained that sometimes tort law serves as a complementary source, when it is impossible or undesirable to grant a primary property remedy. Entitlements are protected on two different, alternative levels: the primary level, which provides entitlements with a high amount of protection by granting a certain remedy, and a secondary level which gives less protection by granting another, weaker remedy. The typical example is protection from nuisances: a factory disturbs the slumber of its neighbor, who tries to get an injunction that will require closing the productive factory.[14] Sometimes, the legal system is not willing to grant an injunction to stop the party creating the nuisance from continuing to operate, and instead it prefers to allow compensation to be given to the victim.[15] In this example, the injunction would be the primary remedy, and tort compensation a

---

[11] Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZONA J. INT'L & COMP. L. 279 (2009).

[12] *Id*. at 279-81 and the references there.

[13] Calabresi & Melamed, *supra* note 2.

[14] *See, e.g.*, Boomer v. Atlantic Cement Inc., 26 N.Y. 2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970).

[15] If the remedy of an injunction is not granted via property law, one can turn to the path of the tort remedy. *Cf.* the economic analysis on the subject: David Kretzmer, *Judicial Conservatism v. Economic Liberalism: Anatomy of a Nuisance Case*, 13 ISR. L. REV. 298 (1978).

secondary, alternative remedy. Similarly, in cases of libel, damages can be used to "heal," as a secondary remedy, since injunctions against publication may be impermissible because of a fear of impinging upon guarantees of freedom of expression.

The question at the foundation of this Article is whether, and under what circumstances, tort law serves the family unit by filling the vacuum created when family law is not willing or perhaps is not able to supply the requested remedy, in a reality in which two sets of courts might get involved. This question will be examined against Calabresi and Melamed's approach regarding primary and secondary remedies. Thus, I will examine whether compensation given via tort law serves, in effect, as a secondary remedy in cases in which family law does not, for various reasons, provide the primary remedy that is sought. Here, as well, society can protect the entitlement in two different ways, and here too, fundamentally speaking, there are cases in which society decides not to protect the entitlement at the primary level of protection sought, such as, in the case of family law, the remedy of changing a family or personal status, but does allow the entitlement to be protected at a secondary level, e.g. by giving the victim compensation via tort law.

The comparison to the framework presented by Calabresi and Melamed is not conducted only for its own sake, although this comparison definitely has academic and even practical value. Rather, the primary goal is to survey, as an overview, the relationship between the civil-tort law system and the family law system on the subject of tort law in the service of the family unit. Examining this issue by generally and specifically comparing it to the Calabresi and Melamed framework, which is a framework familiar to every tort researcher and which seems extremely relevant to the present case, will illuminate, clarify, and explain the question better and more clearly. Among other goals, I will examine whether the framework of protecting the same entitlement by means of secondary remedy when society decides not to grant the primary remedy can be seen as fundamentally appropriate for this issue. The discussion will also clarify the difference between the roles of the different courts and illuminate the question of the jurisdictional struggle between these courts. Beyond that, I will examine whether the Calabresi and Melamed framework can be used to justify innovative and controversial steps already taken regarding the issue of tort lawsuits within the family unit, particularly in the case of tort actions for *get* refusal. I further examine whether the framework can suggest or justify, from a theoretical perspective, additional future developments on the same subject, developments which will presumably be even more controversial. The contribution is significant in that it allows us to analyze these decisions while basing our analysis on "pure" tort approaches, untinged by politics, feminist agendas, or antagonism against the rabbinical courts.

In the framework of this Article, I will ask, among other questions: Are the rights connected to personal status tradable, i.e., can they be transferred or sold? Can the family court fill an active and legitimate role in creating a sort of deal on behalf of the state in which a family member can injure the rights of another family member on the plane of personal status? Does the state allow for the damaged personal status right to be priced, by setting a price tag on the infringement by using tort law?

In Section II, I introduce Calabresi and Melamed's approach. In Section III I discuss whether this approach, particularly the liability rule in favor of the plaintiff, can be suitable to tort actions against family members. Section IV moves from the general to the specific and examines five different circles of interfamilial tort actions in Israel, some of which are relevant to other states in which actions like these are possible, through the lens of the Calabresi and Melamed framework. Section V examines possible future developments in the framework of these circles. Section VI summarizes and reaches conclusions on the subject.

It is possible that this comparison will also help examine the implications of the law and economics approach, of which Calabresi was one of the founding fathers of this movement, and Calabresi and Melamed's article one of the seminal works, in family law as well. This contribution is significant, since family issues have historically been viewed as less amenable to classic law and economics approaches to research.

II. CALABRESI & MELAMED FOUR RULES: TWO ALTERNATIVE FORMS (PRIMARY AND SECONDARY REMEDIES) OF PROTECTING A LEGAL ENTITLEMENT AND THE "LIABILITY RULE IN FAVOR OF THE PLAINTIFF"

From the perspective of Calabresi and Melamed, there are two ways in which the law can protect an entitlement. The first order of legal decisions involves deciding between conflicting rights; here the courts must decide whose right is preferable, e.g., the right of the party interested in clean air, or the right of the party interested in polluting in order to realize his freedom of occupation. The law must make sure to enforce the right, as otherwise whoever is strongest (or smartest) wins.[16] Sometimes the normative decision is to protect the right of the victim, and sometimes the decision is to leave the damage as it falls, that is, to have the victim bear it.[17]

The second order, more relevant to our discussion, which also stands at the center of Calabresi and Melamed's article, involves decisions about *how* an entitlement should be realized and enforced: via property law, i.e. through enforcement or injunctions, or by awarding damages.[18] This is, in effect, a question of normative choice between remedies, in addition to a question of whether after an entitlement has been set at the first stage, the entitled party can be forced to sell or transfer his entitlement.[19]

According to Calabresi and Melamed, there are three basic types of protection for entitlements.[20] The first type is protection of the entitlement via a property rule. This means that the owner of the property has the legal ability to prevent others from using his property without his consent and to prevent them from damaging his property. He may sell this right to another only if he agrees to do so and agrees with the buyer on a transfer and a price following negotiation. That is to say, in such a case, the parties themselves decide on the price for transferring the entitlement, and the government's intervention is minimal; its primary intervention occurred in the previous stage, when it decided beforehand to whom the original, transferrable, property entitlement belonged.[21] An injunction is the classic form of a property rule protection. An injunction against the damaging activity, such as an injunction against a publication that might injure a reputation or an injunction against a nuisance, means a complete stoppage of the infringement upon the right. However, the damaged party can still agree to sell this right to the damaging party. That is, the damaging party can continue to be a nuisance and injure the property rights of the damaged party with the consent of the latter if he is willing to agree to a transaction under which the damage will continue, but he will be compensated by a sum agreed upon by the parties.

The second kind of protection, most relevant to our discussion, is protection via liability rule. Liability rules derive primarily from tort and protect entitlements less strongly than at property law.[22] The damage to the entitlement is subject to compensation, but in this case, it is not only the entitlement itself that is determined by the state. The compensation is also objectively determined

---

[16] Calabresi & Melamed, *supra* note 2, at 1090-91.

[17] *Id*. at 1091. The state's allocation can be done in different ways, based on considerations of economic efficiency, distributional considerations, and other justice-related considerations. For more, see *id.* at 1093-1105. Regarding the other justice-related considerations (which they do not list), in their opinion these are of marginal importance, and it is not clear whether they really have any place at all after the parameters of economic efficiency and distributional considerations have been applied.

[18] *Id*. at 1092. There is also a possible combined path, of enforcement and compensation, although the alternative is central to their article.

[19] *Id*. at 1092.

[20] *Id*. at 1105-06.

[21] *Id*. at 1092. If the state sets the price at the start, rather than the sides doing so via negotiation, the costs of the transaction will be so high that this will sometimes prevent even worthwhile transactions from being realized. Therefore, setting the price of the transaction of the sale of the entitlement is left to negotiation between the sides. *See id.* at 1106. On this subject, Coase's theorem is obviously relevant. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). The Coase theorem, which is one of the foundations of the field of law and economics, deals with the selling of property rights. According to Coase, once a court has determined the legal entitlements of parties, the parties might bargain among themselves in order to reach the outcome they find most efficient.

[22] Calabresi & Melamed, *supra* note 2, at 1092, 1106-10.

ahead of time by the state or by one of its organs.[23] The damaged party has no real opportunity to refuse compensation and also does not have room to bargain over the price. Society in essence sends him a message that it is willing to defend his entitlement, but only in a limited way. At the same time, it should be noted that not every entitlement is one of property, and the tort protection can sometimes of course be the central and principal protection.

The third kind of protection, which is relevant to our discussion only partially and for a few points, is the rule of inalienability. There are entitlements which society under no circumstances allows to be transferred, even if the entitled party agrees to the transfer or sale and even if the transfer would be economically efficient.[24] For example, we will never allow someone to sell his body into slavery or, while alive, to sell his organs for transplant in another person.[25] He cannot do so from his own will, nor does society allow setting a price for such an action done against his will, since that would amount to tacit approval of an action that society views as immoral and inappropriate.[26] This absolute bar on sale of the entitlement remains in effect notwithstanding the fact that if the entitlement is infringed upon despite the bar, it is sometimes possible for society to set a price tag *ex post facto*.[27] Among the three kinds of transactions, it is here that the state intervenes most actively.[28]

It should also be noted, however, that in many cases, the rules are mixed, and the same entitlement sometimes receives property protection, sometimes liability protection, and sometimes is not permitted to be transferred at all.[29]

Using these types of protection, Calabresi and Melamed formulate four rules, which they illustrate by drawing examples from nuisance: (1) A property protection in favor of the damaged party: the damaged party requests and receives an injunction ordering the polluter to cease his polluting activities;[30] (2) a liability rule in favor of the damaged party, on which I will primarily focus: the damaged party cannot compel the polluter to stop, but he is eligible for damages compensating for the pollution;[31] (3) a property rule in favor of the damaging party: the polluter is judged not to be a nuisance and thus has the right to continue its activities with the damaged party able to buy the entitlement in a negotiation, if he wishes;[32] (4) and a liability rule for the damaging party, which is in fact one of the principal novel suggestions of Calabresi and Melamed: the damaged party has the right to prevent the pollution, e.g., by completely stopping the polluting activities or demanding that the activities be done in a way that does not pollute, but he must compensate the polluter. Under this fourth regime, as long as the polluter is not compensated, he may continue his activities.[33] The remedies 1 and 3 actually come from property law, since they

---

[23] *Id*. at 1092.

[24] *Id*. at 1092-93, 1111-14.

[25] *Id*. at 1112.

[26] *Id*.

[27] *Id*. at 1111-12.

[28] *Id*. at 1111.

[29] *See id*. at 1092. Calabresi and Melamed illustrate this by using the case of sale of an apartment. Here, the property rule fundamentally applies. The liability rule applies when the state is interested in expropriating the house. The inalienability rule applies when the seller is not legally competent, permanently or temporarily (such as being drunk). *See id*. at 1114. According to them, the distinctions between the rules are not always clear. *See id*. at 1092.

[30] *Id*. at 1115-16. Faithful to his approach regarding the cheapest and most efficient avoider of damage, Calabresi (together with Melamed) claims that this rule is the most economically efficient when the polluter can prevent the pollution or minimize his expenditures more cheaply than the party damaged by the pollution. *Id*. at 1118.

[31] *Id*. at 1116, 1119.

[32] *Id*. at 1116.

[33] *Id*. at 1117-21. There, both the aspect of economic efficiency and the distributional aspect are examined in this solution, and in their opinion this rule integrates these considerations well. Regarding other justice-related considerations in the framework of this rule, there might, in the opinion of the authors, be a part of the economic and distributional concerns (such as the question of who came first – the polluter or the victim, in the example that they give). Calabresi and Melamed call for a serious examination of the liability rule in favor of the defendant as a real alternative to rule 2, although they are aware that there is hesitation on the subject. *See id*. at 1116, 1123.

declare a property right to either use property or be prevented from the use of the property, while remedies 2 and 4 come from tort law, since they declared monetary damages.

Nuisance, including issues related to real estate and pollution in general, as well as fields in which use is made of injunctions, even to a limited extent (e.g. slander), are the most classic examples for the implementation of Calabresi and Melamed's approach.[34] However, the authors themselves note that they cannot enter into a minute examination of the relevance of their approach to all other fields of the law in the scope of the article.[35] I will answer the challenge and examine whether their approach can fit the issue of intrafamilial tort lawsuits as well. Can the entitlements arising from familial and interpersonal relationships be transferred or sold? Can one see intrafamilial tort lawsuits as a form of transactions for transformation of rights? Is it possible to use Calabresi and Melamed's framework of liability rule in favor of the damaged party to examine the above questions?

III. CAN THE "LIABILITY RULE IN FAVOR OF THE PLAINTIFF" FIT TORT ACTIONS AGAINST FAMILY MEMBERS? AN OVERVIEW

Calabresi and Melamed speak in effect about two regimes within the same legal system – property and tort law – that are included in the same law and discussed in the same legal system. Their innovation is the observation that the situation should not been seen as raising two issues that should be analyzed separately – property law and tort law – but rather that the analysis should be integrative.[36] The secondary remedy under the second rule above, the liability rule in favor of the plaintiff, is employed in cases in which it is impossible, unjust, unfair, or inefficient to award the primary remedy. The principal and secondary legal remedies belong to the same system of law, property or tort. Thus, the right of a person to live in peace and quiet without disturbance or nuisance is protected by an injunction as the primary remedy and by damages as a secondary remedy.[37] The initial situation under a liability rule in favor of the plaintiff is that when the decision is to protect that entitlement, but, for whatever reason, not by using an injunction, then the damaging action is allowed to continue, and protection is granted only by giving the injured party the option of suing for compensation. The same system of law decides when to give the principal – property – protection of injunction and when to give the secondary – tort – protection of damages. Thus, the same right is protected by two entitlement regimes.

At first glance, the situation seems very different for family issues. Family law in Israel, and in many other countries in the world, is infected with an unhealthy dichotomy – some types of family matters are adjudicated before religious courts and others before civil courts. There is no doubt that tort actions against family members are adjudicated only in civil-family courts according to tort law because of its inevitable role as a mediator of civil disagreements between family members.[38] In contrast with tort actions, cases relating to marital status in Israel, i.e. cases adjudicating marriage and divorce, are conducted exclusively before religious courts of the relevant community.[39] Therefore, questions of status are ostensibly discussed only in the religious courts, and questions of damages only in family court. Family issues not related to marriage and divorce themselves, e.g. child custody, are discussed in the family court under the family court law, and some of these issues are occasionally actually discussed in rabbinical courts, as well.[40]

---

[34] *Id*. at 1115, *see* especially n. 52, and at 1117-18, n. 58.

[35] *Id*. at 1124. Except for the nuisance example, they deal also with criminal offences against body and property. *See id*., at 1124-27.

[36] *Id*. at 1089. It is to be mention that sometimes compensation can be granted inside the system of property law itself.

[37] And in certain situations two rules can exist at once. Thus, contractual reliance is sometimes protected by enforcement as the primary remedy and sometimes by damages as the secondary remedy.

[38] According to §1 of the Law of Family Court, *supra* note 5.

[39] Blecher-Prigat & Shmueli, *supra* note 11, at 279-81.

[40] *Id*. at 279-81. And *see* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953, 7 LSI 139 (1953-4) (Isr.) [hereinafter Rabbinical Courts Jurisdiction (Marriage and Divorce) Law].

The law applicable to those cases is family law, with the rough though not always accurate division being that in the religious court, religious law applies, and in the civil courts, civil law applies. In contrast, tort actions between spouses, ex-spouses, or parents are always conducted in the family court. These actions are conducted entirely according to tort law, with the main differences from "regular" civil courts being procedural matters, and a stronger desire to bring about a peaceful resolution of the family conflict, which is one of the primary motivations of creating the family courts in Israel in 1995.

However, under various circumstances, there is a struggle between the family and religious (especially rabbinical) courts regarding the law on many various issues. This struggle originates in many cases from subjects that are still found in some parallel jurisdiction, whether because questions of personal status have been attached to actions in the jurisdiction of the family court or for other reasons.[41] Sometimes this leads to a "jurisdiction race," which makes the struggle much more fierce, in which one spouse rushes to file an action with the rabbinical or civil court in order to gain control over the choice of venue, sometimes at a stage in which the conflict could have been solved in other ways.[42]

This situation seems different from the case that Calabresi and Melamed discussed, as there are two different kind of courts and, at least formally, two different types of legal systems. However, upon closer inspection, there seems actually to be some similarity to the liability rule in favor of the damaged person, i.e. the plaintiff. Here, as well, the possibility of a primary and secondary remedy is relevant – two remedies that both protect the same entitlement to different degrees. In many cases, the primary remedy that is sought relates to the matter of status, and this is the remedy from family law; but in cases in which this remedy is not given by society (by the religious court that deals with the personal law of status) either because it cannot or does not want to provide it, the secondary remedy of damages remains. Society thus protects the entitlement on two plains: a primary remedy of status (family law) and a secondary remedy of damages (tort law), and when the normative decision is made not to give the primary remedy, society allows the secondary remedy. But not all the remedies provided by family law are remedies that change personal status, so that the situation is more complex.

I will attempt to show here that, despite the differences that arise when dealing with family affairs, a different system of law from the one which Calabresi and Melamed discussed, their framework of liability rules in favor of the damaged party can illuminate the present situation regarding civil actions against family members. The skeleton of the idea fits and can explain the current situation in a clear and orderly manner, and from this analysis, we can shed light on new and controversial developments in the field and also offer a firm theoretical basis for a discussion of future needs and concerns in the field. This Section illustrates through an overview of four typical cases.

The first case is that of a woman whose partner promised to marry her, who has changed her position in detrimental reliance on the promise of marriage, and for whom the promise was broken. She cannot receive a legal remedy declaring her married and changing her and her partner's status if he does not want to marry her despite his promise. That is to say, on the plane of the primary remedy of family law, she has no remedy. However, she can file suit for damages for breach of promise of marriage. Beyond the non-monetary damages (e.g. pain, humiliation, embarrassment), this action can compensate her for indirect monetary damages, such as wedding expenses, leaving her job, or renovating the house in anticipation of the expected change in familial status.

The second case is that of a partner who abused or sexually assaulted his partner. In those cases in which family law does not allow her to divorce on this grounds alone, thus providing a primary remedy of change of status, the injured partner can at least file a civil-tort action for the battery. In

[41] Blecher-Prigat & Shmueli, *supra* note 11, at 279-81.
[42] *Id.* at 279-81.

such a case, damages can be seen as a secondary remedy, less preferable to the plaintiff than the unattainable primary remedy of divorce.[43]

The third case is that of a Muslim husband who divorced his wife against her will. According to the Shari'a (Islamic religious law), a husband is permitted to divorce his wife against her will.[44] The preference, however, is that he does so with the agreement of the Shari'a court and under its auspices. Nevertheless, notwithstanding the displeasure of the Shari'a court at such behavior, there are situations in which a husband divorces his wife against her will directly, without the consent of the Shari'a court, and the divorce is valid. In such a case, the marriage is dissolved, and the court cannot save the woman who has been divorced against her will and thus humiliated or sometimes even left with no source of income, since in Israel there is no basic concept of alimony. Family law does not allow the primary remedy of status, wherein the woman would be declared married in spite of everything and the divorce to be invalidated, since the divorce is valid according to the personal law, despite the fact that the Shari'a court may not be happy with the actions of the husband. But the woman can file a tort action against her ex-husband for her damages. She is, in effect, thrown out onto the streets, generally at a relatively advanced age, without support, without education, without real ability to work and support herself, and generally without real ability to re-marry within the sector to which she belongs. In Israel, there is a specific crime of divorcing a woman against her will,[45] but there is no such particular tort, and the action is possible via one of the general torts, like negligence. The damages obviously do not let her reclaim her married status, and therefore they are a secondary remedy not on the plane of status, but they can help to alleviate her desperate economic situation following the change for the worse in her personal status.[46]

The fourth and last case is that of *get* refusal, which is to some degree the "opposite" case of the case of divorcing a woman against her will. Under Jewish religious law, a divorce, known as a *get*, may not be obtained without the husband's granting of it of his own free will. Thus, if a Jewish husband refuses to divorce his wife, the wife cannot receive the primary remedy of a valid divorce. But the husband causes his wife damage by the very act of refusal – primarily non-monetary damages of pain, humiliation, injury to autonomy, loss of ability to re-marry, and loss of real chance to bear children with a new partner, since such children would be declared bastards, and she is permitted to sue her husband for these damages.[47] The protected entitlement is a woman's right to autonomy over her life, to dignity, to be able to free herself from marriage in order to enable her to marry another – a right recognized under international law[48] – and to bring children into the world without their being considered bastards under Jewish law and thus facing enormous social stigma. If personal law cannot protect this right by granting the primary remedy of changed

---

[43] If this is enough to constitute cause for divorce, then there will the option of receiving both remedies, without connection between the two.

[44] See the second Sura of the Koran, lines 226-27.

[45] Penal Law § 181, 5737-1977, S.H. 864, 226.

[46] This kind of a claim is acknowledged in Israel for many years. *See*, *e.g.*, C.A. 1730/92 Masarwa v. Masarwa, *Dinim Elyon* 38, 369 [1995].

[47] FamC (Jer) 19720/03 K.S. v. K.P. [Dec. 21, 2004] (unpublished); FamC (Kfar Sava) 19480/05 Jane Doe v. Estate of John Doe [Apr. 30, 2006] (unpublished); FamC (Jer.) 6743/02, K. v. K. [July 21, 2008] (unpublished); FamC (Rishon LeTzion) 30560/07 H.Sh. v. H.A. [Feb. 12, 2008] (unpublished; FamC (Tel Aviv) 24782/98 N.S. v. N.Y. [Dec. 14, 2008] (unpublished). "Reverse" cases, of a husband suing a wife who refuses to accept a divorce from him, have already been filed FamC (Rishon LeTzion) 14160/07, filed 15.4.07, settled; FamC (Jer) 23420/01, pending as of the writing of this article. In this essay, I will nevertheless discuss the action of women refused a *get* against their recalcitrant husbands as a prototype, since the vast majority of cases are this way and not the reverse. However, so long as I do not note otherwise, there is no reason that the things written here cannot be applied to the reverse cases with the necessary adjustments.

[48] Covenant on Civil Rights, § 23(2); International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, § 23. *See* also Universal Declaration of Human Rights (UDHR) of 10 December 1948, § 16(1); Covenant on Elimination of All Forms of Discrimination Against Women, § 16(1). It is interesting that divorce is not recognized as a right of itself, but only the right to marry. Since there is almost no reality in the law of any country of a woman who can be married to two men (unlike the reverse), the only way for a married woman who to marry another man, is to divorce.

marital status, in lieu of receiving no remedy at all, many women would prefer to file a civil-tort action and thus receive a secondary remedy of monetary damages. This case is different from, and more complex than, the classic Calabresi and Melamed cases, since in a large number of these cases the woman's goal is not to receive damages but to immediately trade them, in a combo-deal, for a *get.* This is a very delicate situation, since there is a fear that forgoing damages in exchange for the *get* constitutes "monetary coercion" (*ones mamon*) which would cause the *get* to become an unlawfully coerced *get*, and thereby invalid from the perspective of the Jewish law.[49]

In all these cases, the tort action does not change the personal status but rather fills the vacuum created by an inability or lack of desire to provide the primary remedy sought in family law. In the third case, that of forced divorce, the civil-tort remedy supplies a certain amount of friction with family law, since the woman is divorced against her will, but tort law sees such action as tortious. Another way to see this is as the cooperative effort of the two arms of the law on two different planes of the law to allow a consolatory remedy in a case in which there is no ability or desire to provide the primary remedy sought – that is, it is possible to see this example as not one of conflict but one of resolution. Also in the fourth case, the woman is refused a *get* and according to the personal law, she cannot receive her *get* and be divorced, but tort law sees such action as tortious. At the same time, in the third case, the secondary remedy does not affect the likelihood of receiving the primary remedy. In the fourth case, however, there are situations in which such an effect does exist, regrettably indirect, and sometimes, as I have mentioned, this is the original goal of filing the civil suit, rather than the desire to receive the damages themselves. On their face, some of these cases match the liability rule in favor of the plaintiff, and some of the cases, although they do not necessarily contradict this framework, are more complex.

Sometimes the "family" remedy is not connected to status issues at all. Thus, for example, a temporary injunction can be issued expelling a violent party from the house.[50] This is not a question of status at all, and the law is equally relevant to parents and children, in which there is obviously no issue of status in the personal law. The partner or child can also file a tort action for that violence. Here, one can generally identify the injunction as a primary remedy (albeit a temporary one), since it is that remedy that is really sought, and the damages as a secondary remedy protecting the right on a relatively lower level and only *post facto.*

If so, the case of intrafamilial tort actions may fundamentally and in certain, but not all, cases be reminiscent of the idea of the liability rule in favor of the plaintiff. There is a distinction between primary remedies – remedies of changing status or of another remedy under family law – and tort remedies, primarily damages, which would be the secondary remedy. The secondary remedy does not directly change the status and also does not, for example, expel the violent spouse from the house. In some, though not all, cases society really cannot or does not want to provide the primary remedy, and therefore the victim is referred to the path of the secondary remedy – damages – as is the case under the liability rule in favor of the plaintiff. It seems that there are no particular transaction costs in this case and that, unlike the classic example of nuisances and pollution, these are not mass torts in which there is some difficulty in making all of the parties

[49] *See* Yehiel S. Kaplan, *Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law*, 15 JEWISH L. ANN. 57, 61-107 (2004); Yehiel Kaplan & Ronen Perry, *AL Achraiutam Be'Nezikin shel Sarvanei Get* [*Tort Liability of Recalcitrant Husbands*], 28 EIUNEI MISHPAT [TEL AVIV U.L. REV.] 773, 782, 802, 804 & n.110 (2005). This must be distinguished from a lawfully coerced *get (get meuseh kadin),* a *get* in which the rabbinical court was involved, in certain cases, in the coercion of the husband, for the causes that allow this coercion under the law only. *See* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, *supra* note 40. The sanctions are based on the "distancing of Rabbeinu Tam" under which these means are not considered coercing a *get*, and this opinion has been accepted over generations by additional halakhic authorities (decisors). *See* Avraham Be'eri, *Harchakot De'Rabenu Tam*, 18-19 JEWISH LAW YEAR BOOK (Shenaton HaMishpat HaIvri) 65 (1992-94); Rabbi Uriel Lavie, *Sidur Get Le'achar Khiuv Ha'Ba'al Bepitzui Kaspi Leishto* [*Arranging a Get After Holding the Husband Liable to Pay Compensation to His Wife*], 26 THUMIN 160 (2006).

[50] In Israel, it is § 3 of the Family Violence Prevention Law, 5751-1991, S.H. 1352, 138 [hereinafter the Family Violence Prevention Law].

aware and getting all of them to work together to defend their rights, etc.[51] There is one known tortfeasor and one known damaged person, and sometimes additional secondary victims (such as children of the couple), but all within a clear and limited framework. In some cases, the comparison is less clear, but it will help us understand the types of intrafamilial tort actions, the differences between them, and the relations between the systems of law and between the instances.

The cases discussed here generally and as an overview open the door to point out the existence of a few different circles of tort lawsuits in the service of the family unit. I will list five circles of tort lawsuits against family members in comparison to Calabresi and Melamed's framework regarding the liability rule in favor of the damaged party. The goal is not necessarily to create a one-to-one correlation between Calabresi and Melamed's idea and intrafamilial tort actions, although I do so in the next Section. Rather, the central idea is to use the skeleton of Calabresi and Melamed's idea to create an organized presentation of the different circles of intrafamilial tort actions, and even to attempt to use their rationales to develop controversial ideas in one of the central circles,[52] while not attempting to "force" the situation entirely into the mold of their approach.[53] Calabresi and Melamed themselves summarize their essay by saying "[t]he framework we have employed may be applied in many different areas of the law."[54] As mentioned, I will attempt to follow in their footsteps.

IV. FIVE CIRCLES COMPARED WITH "LIABILITY RULE IN FAVOR OF THE PLAINTIFF": IS THERE AN INTERACTION BETWEEN FAMILY LAW AND TORT LAW?

A) First Circle: No interaction between the civil actions against the family member and family law

This circle includes cases in which there is fundamentally no interaction between the courts and the systems of law. For example: compensation for violence towards a spouse;[55] compensation for libel against a spouse;[56] and most actions of children against their parents, e.g. for abuse, neglect, etc.[57] There has even been a tort action filed by a parent against his son and daughter-in-law.[58] These kind of lawsuits create no friction between the religious courts and the family courts, since they relate exclusively to tort law, which is adjudicated solely in family court and are not a matter of personal law or for the religious court.

In this situation the liability rule in favor of the plaintiff is relevant only in a very limited way. The tort remedy is not connected to status or any other issue of family law. At most, it serves as a complementary or parallel remedy. Family law does not deal with giving compensation in cases in which partners or children are injured by their family members, and these cases are under the exclusive jurisdiction of the family court serving as the civil court that rules on civil actions

---

[51] *See* Calabresi & Melamed, *supra* note 2, especially at 1122.

[52] In Israel it is § 3 of the Family Violence Prevention Law, 5751-1991, S.H. 1352, 138 [hereinafter the Family Violence Prevention Law].

[53] *See id*. at 1128 (discussing the general disadvantages of presenting models).

[54] *Id*. at 1128.

[55] *See, e.g.*, FamC (Tel Aviv) 64901/96 Polack v. Polack, *Tak-Mish* 2001(3) 83 [2001]; FamC (Jerusalem) 18551/00 K.S. v. K.M., unpublished (7.6.04), and the appeal: FamA (Jerusalem) 595/04, John Doe v. Jane Doe, unpublished (24.2.05); FamC (Jer.) 28230/99 K.A. v. K.Y., *Tak-Mish* 04(4) 183 (2004); FamC (Krayot) 1330/01, 1332/01, 1334/01 A. v. Doe (unpublished, 6.4.09).

[56] FamC (Jer.) 19286/98 Roe v. Doe, *Tak-Mish* 01(3) 659 (2001); FamC (Tel Aviv) 314827/96 Doe v. Roe, *Dinim Mishpaha* B 032 (2002); FamC (Kfar Sava) 24983/04 Rodrig v. Bar On (unpublished, 2.13.08).

[57] FamC (Jer.) L. v. L. (unpublished, 8.31.05) (physical and sexual assault); FamC 2880/00 M.P. v. Y.Sh. (unpublished, 11.6.03) (sexual abuse); CivilF (Dist. Haifa) 518/07 Roe. V. Doe (unpublished, 5.14.09) (sexual abuse); FamC (Krayot) 1330/01, 1332/01, 1334/01, *supra* note 54 (sexual abuse); C.A. 2034/98, *supra* note 8 (emotional neglect); FamC (Haifa) 1620/00 Doe v. Roe, *Tak-Mish* 01(3) 33 (2001) (emotional neglect); FamC (Jer.) 19286/98, *supra* note 55 (emotional neglect); FamC (Tel Aviv) M.T. v. Z.D., *Dinim Mishpaha* B 90 (2003) (the parent did not report to the welfare authorities or to the police on abuse that was done towards his child, the plaintiff).

[58] FamC (Tel Aviv) 110794/97 Doe v. Roe, *Tak-Mish* 99(2) 207 (1999) (a suit filed by a parent against his son and daughter-in-law for slander and infringement of privacy after the couple included the father in their wedding invitation without his permission, after a rift between the father and son a number of years before. Naturally, actions of this sort are (still) very rare.).

between family members. In contrast with the regulation of marital status, which falls under the exclusive domain of the religious courts, all other aspects of family affairs, including tort and other civil actions between family members, are litigated in family court..

Beyond that, even when it is possible in theory to receive the primary remedy – enforcement or an injunction for the future – this doesn't mean that one cannot, within the first circle, receive the other, "secondary," remedy of compensation for the past injury.[59] Calabresi and Melamed themselves do not dismiss this possibility, but simply mainly discuss the cases in which there is a need to choose between remedies, as the liability rule in favor of the plaintiff discusses compensation *in place of* application of the property entitlement. Therefore, the match with the liability rule in favor of the plaintiff is very incomplete, despite there being two forms of protection for the same entitlement, consistent with Calabresi and Melamed's basic principle.

Unlike the liability rule in favor of the plaintiff, this is also not a transaction involving the sale of the right not to be exposed to violence or slander. This is not a case in which the law allows an action but sets a price tag for that action. While the damages paid by the tortfeasor for his actions are a price tag that society sets for such behavior so that there is some similarity to the liability rule in favor of the plaintiff, nevertheless society does not approve these actions, *ex ante* or *ex post.* The partner or parent is not allowed, by law, to be abusive, and the price tag set *ex post* for the abusive behavior does not validate the past actions and certainly does not authorize them to continue in the future.

In effect, some of these rights of the plaintiff are inalienable, unlike the liability rule which permits transfer of the rights in exchange for compensation for the transfer itself. The right of a child or partner to bodily and mental safety, for example, is not at all transferable, even for money. The damages paid come only *ex post* to compensate for the tort of abuse, and this cannot be seen as a real transaction by virtue of the law. It is possible that some of the rights in this circle are transferable, such as, transfer of the right to injure reputation or privacy for money (as in cases of releasing pictures or facts about celebrities by their family members) and then the property rule is more relevant than the liability rule in favor of the plaintiff. But in general "transactions" such as these are not done *ex ante*, in an ordered manner, and certainly not under the auspices of the court, since had such agreement been reached by the parties there would be no reason for anyone to refer to court and to file a tort action.

Now, I will turn to the other circles and see if they are more relevant to the liability rule.

B) Second Circle: The family law remedy has already been given or is not relevant and now the civil remedy is sought

In the second circle are a small number of the civil actions by women who were once refused a *get*. These are the cases in which the primary remedy – the *get* – has already been given or is no longer relevant, factually speaking, since the marriage has been dissolved in one way or another. One example of this would be a woman who was refused a *get* at first, then received her *get*, and afterwards sued her ex-husband for past suffering. There is no need to deal with the primary remedy since that has already been given. A woman who was refused a *get* who is now suing her late husband's estate is another example of this. The death of the husband has, in any case, dissolved the marriage, and the primary remedy no longer has any relevance, only the secondary remedy. In one such action, which was filed and ultimately adjudicated, the widow who had been refused a *get* was awarded damages for past suffering.[60] (Most of the cases of women who have been refused a *get* belong to the fifth circle, as will be explained below).

In those cases in which the primary remedy is no longer relevant, whether because it has already been given or because the husband is already deceased, the basic situation of the liability

[59] As mentioned *supra* note 37, in certain cases compensation can be received in addition to another remedy, such as in contract law, including enforcement.

[60] FamC (Kfar Sava) 19480/05, *supra* note 47.

rule in favor of the plaintiff does not really exist from a factual perspective. However, the second circle is at least vaguely reminiscent, if only in result, of some of the cases belonging to the first circle. And so here, too, the liability rule's basic framework exists in some way, since there are really two ways to protect the entitlement. Only the second method, the secondary remedy of damages, is relevant factually speaking, and so, obviously, the plaintiff chooses this path and not that of the primary remedy. While this is not a case in which society *chose* not to provide the primary remedy that has already been given or is no longer relevant, the tort remedy is, in fact, secondary compared to the remedy from family law, i.e., the *get*. The secondary remedy simply happens to be in the spotlight at the moment. Thus, this is not really a situation of a transaction selling the entitlement in exchange for compensation, under the auspices of the law.

C) Third Circle: The civil action is based on findings and decisions reached in family law

This circle includes cases in which there is a certain interaction between the systems of law, but this interaction is "healthy." This would include tort actions that rely on family law, if only evidentially, so that the tort remedy becomes a follow-up remedy that relies on the judicial findings in the family matter. Thus, for example, a civil action for damages for violence may rely, as part of proof of violence, on a restraining order issued based on the Law for Prevention of Violence in the Family, which is part of family law. Similarly, a civil action for kidnapping also bases itself on the family-law decision of the family court which rules whether the kidnapped child should be returned to his legal guardian. If family law decides that the parent who kidnapped his child did so unlawfully and must return the child to the custody of the other parent, this fact can form the fundamental basis for a civil action for compensation for damages caused by the kidnapping.[61] The same goes for a civil action for violation of visitation rights: the basis of the civil action is indicating a violation of the visitation arrangement reached in family law, in the decision of the family court. Tort law can rely on this fact, which states that the custodial parent violated visitation arrangements that were established by the family law and did not allow the non-custodial parent to see the children, and will thus allow a remedy of damages for the party hurt by the violation of the visitation arrangement.[62]

American law also allows claims against a spouse on the grounds of infidelity. Such a claim is recognized in the United States, albeit with limitations, such as the need to show intent to destroy marital life, and the display of at least a certain level of active participation in the act, beyond being tempted by a lover.[63] Such a suit is also possible against the lover, for providing such temptation.[64] Thus, in these kind of cases there is also an interaction between tort law and family law, even though, at first glance, the suit only has elements of tort. Moreover, in states in which fault is taken into account in property and alimony cases, there is in effect concern for "double jeopardy," that is that the fault will be taken into account for monetary compensation both in the proceedings regarding the family law division of property and maintenance, and in the tort proceedings, for the same fault.[65] In my opinion, such a concern and the issue of getting fault in by the back door do not apply here, since the fault is of a different nature. The fault that serves as a basis for negligence (i.e. breach of a duty of care) is one that is woven through tort law, which relies on a rule of negligence, and its interpretation is different from that of fault in family-personal law (here, it means that the individual did not act in the way a reasonable person would act, and did not foresee what he ought to have foreseen). In other words, the outcome of accepting a tort claim in cases of negligence can only come about by indicating fault, since these are fault-based torts that belong to a rule of negligence, and not to strict liability. Therefore, there is no escaping the assignment of fault in such a tort action; it should not be seen as bringing fault in through the

[61] FamC (Tel-aviv) 42273/99 Z.M. v. R.M.P. (unpublished, 8.9.05).

[62] FamC (Jer.) 13993/02 Doe v. Roe, *Tak-Mish* 07(1) 516 (2007).

[63] *See, e.g.*, W. PROSSER & W. KEETON, TORTS 365, 918-23 (5th ed., 1984); DOUGLAS E. ABRAMS ET AL, CONTEMPORARY FAMILY LAW 369 (2006).

[64] *Id.*

[65] *See* ABRAMS, *supra* note 63, at 395-96.

back door, while family law seeks to abandon it in favor of no-fault divorce. The parallel between the development in family law and tort law is, therefore, a problematic one. Nonetheless, there is no necessary clash between the two, and proving cheating of the spouse, sometimes by evidence that was accepted in family law procedures, might be the basis of a tort claim.

The civil actions in the third circle thus enter a vacuum that family law doesn't deal with. In some of these cases, it is possible that family law handled the situation and even handled it well, in a preventative manner (such as preventing domestic violence or preventing someone from leaving the country – the injunction was, in fact, issued; or, regarding kidnapping, there was a judicial decision that the child should be returned). But family law cannot, and does not claim to, provide the victim with compensation.

This is not a case of a secondary remedy provided as "consolation," in place of the primary remedy. The secondary remedy follows and complements the remedy given by family law, on which it relies. In many cases, as mentioned, family law has provided a remedy via an injunction. The meaning of this remedy might be a judicial decision such as deciding visitation rights or an indication that the behavior of one of the parties towards the other was inappropriate, such as a case of issuing a restraining order or when one party failed to notify the other of an injunction against leaving the country issued against the latter. If this behavior can form the basis of an action under tort law, this is done on another stratum and under a different set of laws, based on the same inappropriate behavior analyzed by the court under family law. Therefore, the case isn't really similar to the liability rule in favor of the plaintiff, since in this circle the secondary remedy doesn't come into the picture after an inability or unwillingness to grant the primary remedy. At the same time, the basic concept of two layers of protection for the same entitlement still applies.

This case also differs from the liability rule in favor of the plaintiff in the matter of inalienability, as the compensation is provided only *ex post*. One cannot say that the law approves of the violation of visitation arrangements or the restraining order in exchange for proper compensation set by the court. The right of the damaged party to have the visitation arrangement or the restraining order honored seems to be an inalienable right which cannot be transferred in exchange for setting a price tag and paying compensation. The payment is made *ex post facto*, after the infringement, and the action is not condoned, either retroactively or prospectively. This, then, is not a transaction by virtue of the law, under which the court sets a price tag for the transfer of the right. This is a *de facto* and illegal transfer of the right by the tortfeasing or injuring party, and the law sets a price tag only after the fact. Therefore, this is not really an *ex post facto* transaction, just like a case in which someone takes another's limb without his permission.

At the same time, in this circle, too, just as in the previous circle, the rights may not be inalienable but may actually be property rights. It is possible that the sides may agree between themselves to transfer a right in exchange for money, that is, that one of the parents will violate the visitation arrangement and pay the other to take care of the child completely and exercise full custody (or one will violate the restraining order and will come to the house from he was expelled in order to watch the child, despite the fact that this may be the basis for imprisonment[66]) despite what the court decided; but then we can assume that the sides will not later come before the family court in a tort action alleging breach of the visitation agreement, since the infringement was mutually agreed upon. Therefore, in such a case, the transaction would best be characterized as a private sale between the sides, which characterizes the property rule.

And note: there is a difference between the first, second, and third circles, in themselves and with regard to the ability to transfer the rights; but in each of them, tort law makes no attempt to interfere in any way in family law or to change anything, either actually or rhetorically. In the next two circles, this will not be the case.

[66] According to § 7(b) of the Family Violence Prevention Law, *supra* note 50.

D) Fourth Circle: Civil law criticizes the failure to give remedy in family law but does not interfere to change the personal status of the plaintiff

This circle includes cases in which there is no real interaction between the systems of law, family law and tort law, but allowing a tort remedy in effect criticizes the way that family law has dealt with the issue. The classic example of this is divorce of a woman against her will in the Muslim sector. This is a critical interaction: one court of the state (the family court), which applies one set of laws (tort law), in effect criticizes another court of the state (the Shari'a Court), which applies another set of laws (the personal Shari'a law). This is a delicate and possibly abnormal situation in which the "left hand" of the state criticizes its "right hand," but without changing or attempting to change the status that the Shari'a Court determined and without interfering with the personal law that applies there.

As mentioned, according to Islamic law, a husband can divorce his wife against her will. The marriage is dissolved, and the divorce is valid. The "left hand" which criticizes this is tort law. When tort law allows sanctions to be enacted against the husband who divorced his wife against her will, it is in effect criticizing the "right hand" of the state – the personal-Islamic law that applies in the Shari'a court. However, tort law does not manage to change the personal law or the status of the woman. They do not claim to do so, and they cannot do so.[67]

Therefore, the interaction between the courts is only at the level of critique. The same behavior is valid, though not necessarily lauded, from the perspective of status, but invalid from the perspective of tort law and criminal law. This situation allows, in effect, three different decisions to be reached by three different courts of the state: the Shari'a Court's decision that the divorce is valid; the criminal court's decision that this is a crime; and the family court's decision that the woman should receive tort compensation.

It seems that the fourth circle includes situations similar to the liability rule in favor of the plaintiff, perhaps more than the other circles. The tort remedy is a secondary remedy, which does not compete or follow-up as in the third circle, but rather serves as a sort of consolation prize which fills the vacuum created by the (religious-personal) family law. This remedy, therefore, comes from a place of frustration and possibly even rage: tort law fills that vacuum and allows that consolation remedy where family law not only did not provide the desired solution, but in fact, from social civil-tort perspective, failed. The liability rule does not mean frustration, but rather an express normative *ab initio* decision of society according to which the damaged party should not, under the circumstances, be given a stronger remedy. This is also the situation in our case, except that the family court, by giving damages, is in effect saying to us, in something of a indirect way, that really, a stronger remedy is deserved, but it cannot be given since the religious family law reaches a different result, and, out of society's frustration, the family court then provides for a weaker remedy for the damaged party.

Calabresi and Melamed illustrate the rules that they present in a civil legal system in which there is one clear, uniform decision that in some cases the secondary, rather than the primary, remedy should be given. There is uniformity and understanding and not a "war" between those in charge of the primary remedy and those in charge of the secondary remedy. In the fourth circle, the situation is slightly different on this point. In effect, the family court's decision to grant the secondary remedy comes to express criticism, even harsh criticism, of personal law or, more precisely, against the state that applies the religious law, as if to say: the personal law does not grant the remedy and tells the husband that his actions are valid. But on the tort level, his actions are not valid, and that is why the secondary remedy, which is the compensation, should be granted. This is not the carefully thought-out decision of one, unified legislator, examining the decisions of

[67] Indirectly, it is possible that as a result of this action, the husband will choose to remarry his ex-wife in exchange for her dropping the action, but this does not change her original status of a divorce, and according to Islamic law, such remarriage is not automatic and is not possible under all circumstances, but rather only under certain circumstances and conditions. A further discussion is beyond the scope of this article.

the two systems simultaneously and deciding that when a husband divorces his wife against her will and the divorce is binding according to personal Shari'a law, damages will be awarded. But the effect is the same. The court discussing the secondary remedy in effect criticizes the decision of a different court not to award the primary remedy, by awarding the complementary remedy, which, in effect, contradicts the results of the decision of the personal law. The full picture of the law is built in stages and patches, through disagreement between systems of law and courts, unlike the examples of Calabresi and Melamed, where there is one system of law, making the situation much simpler.

However, the situation in this circle might be seen in a different way, in which the fourth circle exactly follows the liability rule's framework: in both, society made the normative decision, *ab initio*, that the entitlement should not be protected by the stronger remedy but rather by the weaker one. This was not done out of frustration, but, on the contrary, from a desire to give the plaintiff a certain consolatory remedy via tort law (and criminal law, too), when society itself didn't recognize the stronger remedy. This isn't a case of the "left hand" criticizing the "right hand," but of society using its two different hands to decide that the remedy shouldn't be given by one hand, but should be given by the other, granting a weaker protection of the entitlement, but still a protection. According to this analysis, we see the situation not as one court criticizing another or one system of laws criticizing another, but as one process, coordinated in two steps, exactly like the liability rule's framework, in which the damaged party has no choice but to accept what society gives him, i.e. the weaker protection of his entitlement. The compensation will not make the woman married again and will not change her status, but they do provide secondary protection of her entitlement.

In effect, according to this understanding, there is a certain sale of the entitlement, as in the liability rule in favor of the plaintiff. According to the personal law, the woman is divorced, and this fact cannot be changed, not by the Shari'a Court and certainly not by the family court via tort law, which has no authority to make any rulings related to personal status. Society in effect allows a woman to be divorced against her will according to the personal-religious law, and thus does not protect a woman on the plane of status, but it does protect the entitlement on the plane of tort compensation. However, the law in effect tells the husband that he has the right, under religious law, to divorce his wife against her will, but the realization of this right may cost him money, if tort law states that the realization of his right constitutes a tort against the wife. Thus in effect the law presents the cost of sale in practice, and, in the end, sets a price tag. While the husband does not really want this transaction, and the parties did not reach this transaction out of their free will, the state, which itself does not encourage divorce against a wife's wishes, administrates it in all of its stages. Ever since the first action for divorce of a wife against her will was recognized decades ago, Muslim husbands are assumed today to know that if they divorce their wives against their wills, they are entering into a possible transaction of payment for the realization of this right, and the family court will actually set the price of this transaction according to tort law.

In the case of divorcing a woman against her will, remedy is offered for the past allowing the woman to start a new economic chapter of her life, but the remedy does not replace a solution on the question of status, and presumably there are many cases in which the woman would prefer the primary remedy, which is the ruling of the Shari'a court that she is not divorced and that her economic and social-status rights as a married woman continue to exist. I will mention that under the liability rule in favor of the plaintiff, there are cases in which the primary remedy is possible, but that court of the legislator decides not to provide it, and this is the classic case of the rule;[68]

[68] For example: enforcement of a contract when the enforcement would be unjust under the circumstances, or when the contract is for personal service (a type of contract which the legislator chose not to enforce) when enforcement is technically possible; an injunction against a nuisance or libel, when the injunction can be given since there is value to preventing the action and the action has not yet been taken, but the injunction is not given.

but there are also cases in which the primary remedy really is impossible, so that all that is left is the secondary remedy.[69]

It is true that tort law does not really approve of the actions of the husband in this circle. From a systemic perspective, it is actually the religious law that validates his actions. Tort law simply gives the woman a weaker remedy in place of the stronger one. In any case, society is the one that approves of the action via the personal law, and society is the one who grants compensation following this action via tort law. This is a case of an *ex post* transaction (absolutely not an *ab initio* one) under the auspices of the court, and therefore a certain similarity exists between the fourth circle and the liability rule in favor of the plaintiff: the primary remedy is not given, and the situation is acceptable to the personal law. Now there is a chance to receive the secondary remedy which means setting a price tag for the action that was acceptable from the perspective of the personal law but constitutes a tort on the plane of the secondary remedy. Thus, we see the family court as signing off on the transaction exchanging the right on the plane of status for compensation, by ruling that the action is, in fact, tortious, and it has a price tag under tort law. If the family court could express itself regarding status, it is very possible that it would oppose the transfer of the entitlement in the first place. But it does not have that authority, and it cannot have its say; authority belongs exclusively to the religious court and the religious law on matters of divorce. Therefore, all that is left for the family court to do is to allow the transaction *ex post*.

E) Fifth Circle: The goal of the civil-tort remedy is to try to change the personal status under family law[70]

1. Tort actions for *get* refusal discussed in family court in cases in which the husband violated a decree of the rabbinical court that he must grant a *get* (2004 and on)

The fifth circle includes the cases of the most active interaction between family law and tort law, one which not all see as a positive or even legitimate step. Here, it is difficult to stick to the alternative analysis suggested in the previous circle, which saw the situation as one coordinated process with two arms and in two stages. In this circle, the issue is more complex.

This circle includes the sort of cases in which the civil remedy is sought because the plaintiff wants not only to criticize the family law, or to receive a secondary remedy or a consolatory remedy, but to use tort law to *circumvent* family law. The hope is to try to get the remedy of status under family law, through the financial pressure that the civil compensation that is awarded will create. In this way, one system of law, tort law, discussed in family court, grants the secondary remedy of compensation. Via this compensation, the plaintiff tries indirectly to get the primary remedy of status, which the religious court has not given her thus far. The damages do not directly change the status, but there is a chance that they may have a possible indirect effect on that status.

Most of the civil actions filed by women refused *get*s in the Jewish sector fall into this category. The compensation is intended to create "round-tripping:" the woman will forego the compensation in exchange for the *get*. The financial pressure created by the secondary remedy is intended to bring about the primary remedy, though not through the legal system, since the personal law leads the woman to a dead end. Although the rabbinical court has issued an "obligation" to grant a *get*, so long as it does not enforce this (and in most situations, it does not reach the level of being willing to enforce the decision) the couple does not divorce, and their status does not change. The husband refuses to give her a *get*, and from the perspective of the

[69] For example, if enforcement of the contract is not possible under the circumstances: the contract is unenforceable; enforcement of the contract means forcing a party to give or receive a personal service, etc. In such cases, we turn, necessarily, to the secondary remedy. If the libel has already been published and publication cannot be prevented, all that can be done is to ask for compensation.

[70] The fifth circle according to the Calabresi & Melamed's framework is to be published as "Tort Compensation for Women Refused a *Get* – The Next Generation" MISHPATIM (HEBREW UNIV. L. REV.), forthcoming 2011, in Hebrew.

personal law, the woman is not divorced. The religious court anyway cannot give her a *get* in the place of her husband or declare her divorced without the husband's having given her a *get*, and therefore compensation may be used as an effective form of leverage.

There are, in effect, two transactions here. One transaction is under the auspices of the family court, and the second transaction is a private one between the parties. The first is similar to that of the first circle: the personal law is on the side of the husband, so that the woman cannot receive the primary remedy. But the family court activates the secondary remedy and sets, *ex post*, a price tag for the violation of the entitlement. It cannot change the status (although it would perhaps like to do so), and therefore it makes due with what it has the authority to grant – compensation as a secondary remedy. But the difference between the fifth and fourth circles is in the goal of that compensation and in the dynamic that takes place after that transaction under the auspices of the court. The "round-tripping" (a problematic contract, as we will see, according to the personal law since it may create an unlawfully coerced divorce – *get meuseh shelo kadin*) is not a part of the agreement under the liability rule in favor of the plaintiff. This transaction, in any event, is not performed under the auspices of the family court. The court does not encourage it, sign it, rubber-stamp it, give it the status of a judgment, and often does not even know about it. Within that transaction, a private barter is made between the parties, following the husband's re-assessment of his situation, particularly in cases in which the refusal to grant the *get* is done for financial reasons only, i.e., the husband wants to extort money from his wife in exchange for the *get*. If the husband calculates that the price tag set by the family court on the plane of the secondary remedy is too high and decides that it is no longer worthwhile for him, considering the costs and the benefits, to continue to withhold the primary remedy from his wife, he will attempt to arrange a transaction in which the wife will waive the compensation awarded to her by the family court as a secondary remedy, and in exchange, he will give her the primary remedy. To illustrate, let us assume that the husband hoped to extort the half of the apartment which belongs to the wife, at a value of $100,000, and this is the primary reason for the *get* refusal, rather than ideological reasons or simple revenge. When a judgment is issued against him for $150,000 worth of damages, the refusal is no longer economically rational. Therefore, he has the incentive to make that private deal, under which the woman will waive the $150,000 worth of damages in return for his dropping the financial demands he was making in the rabbinical court as conditions to granting the *get* and granting his wife the *get*.

In effect, the husband is assumed to know that if he refuses to give the *get*, he may be "covered" by the personal law, but this right has a price, exactly like there is a price for continuing to pollute or create a nuisance, and that price is set (albeit *ex post facto*) by the court and not voluntarily by negotiations between the parties. The second transaction between the parties – the financial exchange – is already, as mentioned, a later, personal move, not under the auspices of the family court.

Therefore the fifth circle is generally similar to the fourth circle, but it is more complex because of the subsequent private exchange transaction that follows the first transaction conducted under the official auspices of the family court.

From an economic perspective, it is possible that the private exchange transaction is precisely what society wants to achieve, and that the aggregate welfare is increased if the husband gives his wife the *get* and she waives her right to damages. Nonetheless, the situation is complex from a halakhic perspective.

The pressure created by the private exchange transaction may cause the *get* to be considered unlawfully coerced, and thus void, due to the "force" applied by the money. If this is the case, then, should the woman remarry, she would be considered married to two men, and if she should have children, they would be considered bastards (even if she did not "remarry").[71] And how

[71] *See* Kaplan & Perry, *supra* note 49; Lavi, *supra* note 49; Rabbi Shlomo Dichovsky, *Tze'adei Achifa Mamoni'im Keneged Sarvanei Get* [*Monetary Enforcement Measures Against Recalcitrant Husbands*], 26 THUMIN 173 (2006). For

would this be discovered, if the spouses came to the religious court after reaching an agreement and never told about the agreement reached as a result of the civil action? It is possible that a friend or relative might find out, and it is possible that following a later dispute between the parties, for example, over issues of custody or child support, the husband or a friend might want revenge against the wife and let the religious judges know about the contract. They might, in turn, use their "doomsday weapon:" retroactively invalidating the *get*. In a situation like this, the woman would presumably claim that the agreement is void and insist upon her right to compensation, but this is clearly not the situation that she had hoped to achieve.

But here we can ask why the second transaction, the private exchange, should affect the legitimacy of the entire process. In other words: why should this halakhic problem of a concern of an unlawfully coerced *get*, which I do not treat lightly, but which arises only from the second, private transaction, *ex ante* invalidate the first transaction administered by the court? How is this different from the fourth circle, in which the legitimacy of the process was not questioned?

It has been argued that this process fans the flames of the struggle between the courts by allowing the family court to use its lawful jurisdiction over civil matters to indirectly interfere in actions for *get*, authority over which is explicitly denied them under Israeli law.[72] In effect, the claim is that the two transactions cannot really be differentiated, and that they both exist on one continuum since this was the original goal of the woman, and the family court knew this perfectly well and simply turned a blind eye to this fact when it issued an ostensibly "purely" tort decision. It has been also argued that this is an infringement upon the principle of mutual respect between the courts: when the family court indirectly interferes in questions of personal status by granting damages that lead to financial coercion of the husband and the granting of a *get* that is actually unlawfully coerced, it is a bite into the authority of the rabbinical court and a trespass into territory that was not meant to be controlled by tort law.[73] It has also been argued that granting compensation has been an attempt on the part of the judges of the family court to advance a blatant agenda for the benefit of women refused a *get*, even to the point of fighting with the rabbinical courts as part of the struggle over jurisdiction that in any case exists between the parties.[74] The High Rabbinical Court of Appeals even ruled that the very filing of a civil action will stop discussion relating to granting the *get* in the rabbinical court, and the proceedings will resume only after the action has been withdrawn by the wife.[75] The rabbinical courts even think that an attorney who files such an action should be held liable for malpractice, since he led the woman to a dead end: he exposes her to the dangers of a forced *get* and leaves her with the worst of both worlds after she has waived her right to damages.[76] Therefore, there are some who cast aspersions on the very legitimacy of this secondary remedy. Similarly, there are those who think that the authority to

---

a view that there is room for tort lawsuits despite the fear from a coerced *get*, see Yifat Biton, *Inianim Nashi'im, Nituach Feministi Ve'Hapa'ar Hamesukan Beineihem – Ma'aneh Le'Yehiel Kaplan Ve'Ronen Perry* [*Feminine Matters, Feminist Analysis and the Dangerous Gap Between Them – A Response to Yehiel Kaplan and Ronen Perry*], 28 TEL AVIV U.L. REV. (EIUNEI MISHPAT) 871 (2005) (seeing the issue from a feminist perspective); Benjamin Shmueli, *Pitzui Neziki Le'Mesuravut Get* [*Tort Compensation for Abandoned Wives* (*Agunut*)], 12 HAMISHPAT [College of Management L. Rev.] 285 (2007) (seeing the issue from a mixed-pluralistic approach to the analysis of the goals of the law of tort).

[72] *See, e.g.*, the speech of Rabbi Uriel Lavi, *Does the family court Act with Restraint when it Decides Damages against Husbands who Refuse a Get?*, *in* Family and Society Conference on the topic "Global, Regional, and Local: Law, Politics, and Society in Comparative Perspectives," 12.25.08, Hebrew University, Jerusalem [hereinafter Rabbi Lavi's speech]; the speech of Rabbi Eliyahu Hayshrik, *Tort Awards and their Effect on Divorce Law*, *in* the course on the subject "Family Law and Inheritance Law," Bar Association Tel Aviv District, Tel Aviv, 2.17.09; Rabbi Eliyahu Hayshrik's speech, *Nor Shall they Learn War Anymore*, *in* 9th Annual Conference of the Israeli Bar Association, Eilat, Israel, 6.1.09.

[73] *Id.*

[74] *See* Rabbis Lavi's speech, supra note 72.

[75] Rabbinical court decisions of the High Rabbinical Court, case no. 7041-21-1, 3.11.2008. Judges Lavi and Hayshrik supported the decision. *See* their speeches, *supra* note 72.

[76] *See* the above rabbinical decision, the opinion of the judge Rabbi Elgrabli. *See* also the speeches of Rabbis Lavi and Hayshrik, *supra* note 72.

conduct the tort action should be transferred to the rabbinical court, and there are even those who claim that this is really a matter of divorce, which is already under the exclusive jurisdiction of the rabbinical court.[77]

There are scholars who believe that it is possible, in principle, to award this secondary remedy in family court, and that this is legitimate, but only if the damages are limited and minimized, since it is specifically high damages that risk causing financial coercion and a coerced *get*.[78] But let us not forget that the judges in family court are deciding on tort actions, found under their exclusive jurisdiction under the Law of family court and, despite all claims against them, they have no option of refusing to conduct these cases because of a possible pressure that the judgment may create on the plane of familial status.[79] This also does not involve one agenda or another – the judge does not choose which cases to accept; he is bound to conduct all actions filed with the courts, and he does not encourage sides to file such actions.

Beyond that, the motivation for the action is not always revealed. As has been mentioned, there are cases in which the woman is interested only in damages and not in the *get* (and then the action actually belongs to one of the other circles). There are also cases in which the damages will not exercise enough pressure, and husband will continue to refuse, leaving the woman interested in the damages despite her original intention, or that the deal will fall through for other reasons. Some husbands who refuse *gets* do so for ideological reasons, some for economic reasons, and some for a combination of the two. Some of them may continue to be stubborn even after having been obliged to pay damages. The second deal, the private exchange, may not happen, for example, since the husband demands not only that the damages decided against him be waived in exchange for the *get*, but that the wife also pay him a large sum of money, give him her half of the apartment, or provide some other settlement, and the wife refuses. The husband might also die in the interim, so that the marriage is dissolved and the deal is no longer relevant. In all of these cases, the sides will never come to the "private" arrangement, just as we saw in the other circles.

But even if it is clear beyond any doubt that the damages are intended to pressure the husband into giving the *get*, and even if it is clear that the chance of achieving this goal is very high, nevertheless I believe that the alleged agenda of the Family Court judges who grant damages in such suits is irrelevant so long as they rule in a professional manner within the bounds of the authority granted to them. They, from their perspective, must see only the first transaction that arises from the liability rule in favor of the plaintiff: even if the personal law approves the situation in which the woman is, in effect, stuck in the marriage, the family court can set a price tag on refusal if it is tortious. The tort is built on the decision of the rabbinical court itself, obliging the husband to divorce his wife, a decision which the husband is not following and the court is not forcing him to follow. Therefore, on the plane of status, there is no change, which means that the primary remedy is not being given. All that is left for the family court is to examine whether this refusal constitutes a tort. When it so rules, and as it has indeed ruled in a series of decisions,[80] and as has been accepted in the legal literature,[81] the path is open to awarding damages as a secondary remedy. The framework of the liability rule in favor of the plaintiff, therefore, exists in a certain manner. Granted, if we would ask the family court judges at the beginning, they would perhaps not support this transaction, since from their (civil-secular law) perspective a person is not allowed to mentally abuse his wife in this manner or any manner, and the entitlement seems more similar to an inalienable entitlement. But since their opinion is not, in fact, canvassed on this subject, and since from the perspective of the rabbinical court, the process is valid, all that is left for tort law discussed in the family court to do is to allow this transaction *ex post facto*, which means setting a

[77] Dichovsky, *supra* note 71, and the speeches of Rabbis Lavi and Hayshrik, *supra* note 72.

[78] Kaplan & Perry, *supra* note 49. Dichovsky, *supra* note 71, supports the result, but sees such actions and such awards as legitimate only if jurisdiction is given to the rabbinical court, and not the family court.

[79] *See*, *e.g.*, FamC (Jer.) 19270/03, *supra* note 47, section 4; FamC (Jer.) 6743/02, *supra* note 47, section 10.

[80] FamC (Jer.) 19270/03, *supra* note 47; FamC (Jer.) 6743/02, *supra* note 47; FamC (Rishon LeTzion) 30560/07, *supra* note 47.

[81] Biton, *supra* note 71; Shmueli, *supra* note 71.

price tag for this entitlement. Therefore, this is a sort of liability rule in favor of the plaintiff, built from two stages rather than a single harmonious stage by the same court, but nevertheless more similar to the rule than different from it. Everything that happens thereafter, i.e. after the exchange is made, is a private matter between the parties, and while it may indeed affect the validity of the *get* in the rabbinical court, it does not injure the legitimacy of the process of the first transaction under the auspices of the family court in any way. That is a completely valid transaction under the law, and the framework of the liability rule in favor of the plaintiff can help to clarify this fact.

Moreover, even if the suit itself causes antagonism in certain circles, it cannot be blocked. As mentioned, immunity from actions brought by a spouse was repealed in Israel at the end of the 1960s.[82] Similarly, I see no room for the civil action to be examined or blocked based on the motive for bringing it as long as there seems to be proof of damage resulting from a tort as required by law; that is, if all the bases of the action are proven by a preponderance of the evidence.

On a superficial level and officially speaking, this is really a case of compensation in a place when there is no chance of receiving the *get*, just like the fourth circle. But in this circle it is particularly difficult to say that this is one coordinated process of the law, one unit, which allows a woman to receive damages when she is unable to receive her *get*. It is obvious that this second, private, transaction which uses the first transaction conducted under the auspices of the family court, attempts to pressure the rabbinical court via the remedy received in the family court and to change the personal law via tort law.

The compensation is, in effect, a non-primary remedy in this sort of case and does not, actually, interest the plaintiffs in and of itself. Here, the woman wants the *get*. The goal of the damages is only to play a role in the exchange deal and to serve as a channel for the financial pressure. But it seems that this fact should not detract from the legitimacy of the process. In addition, if the husband does not request a private exchange transaction, or if such an exchange transaction fails at some point in the process, the woman can obviously enforce the decision and carry it out, like any other tort decision, and then the remedy obviously has independent significance.

The fifth circle therefore invites the kind of cases in which there is no desire for the tort compensation itself, and therefore one might say that it is not about a secondary remedy protecting an entitlement on a less-preferred plane, as per the theory of Calabresi and Melamed on the liability rule in favor of the damaged party, but rather a tool to achieve the primary remedy. It could be simply said that the fifth circle follows Calabresi and Melamed's liability rule like in the fourth circle. Here, too, we see the family court as the one that finally signs the deal realizing the status entitlement in exchange for the compensation. The family court applies tort law and does not attempt or claim to change the personal status. It simply rules that the actions of the husband constitute a tort and carry a price tag under tort law.

If the husband then wants to act in order to change the results of the transaction, since the price is too high for him, this is already another, later stage. The arguably problematic extra-legal transaction of the barter of the tort damages in return for the *get*, takes place outside the family court. Indeed, the family court plays no role in signing, sanctioning or legitimizing it. Further, the court cannot be aware that such would be the inevitable consequence since, as mentioned before, the husband may not cooperate, or the wife may prefer to keep, rather than barter, her settlement.

In any case, it can be said that the process of the exchange deal that happens after the judgment is given (if it happens) seems to diverge slightly, but not much, from the liability rule in favor of the plaintiff; even though the basic structure of that liability rule still exists, there is a secondary remedy that is being given, as in the fourth circle, in a case in which the primary remedy could not be given. It is also possible to see it as a sort of independent protection of the entitlement, albeit

[82] *Supra* note 4.

not an independent remedy that is realized and enforced in fact. But in the end, it seems clear to me that the fifth circle also, actually, involves a transaction under the auspices of the court very similar to the liability rule. According to the personal law, the woman is not divorced and the couple is married. But the law sets a tort price tag at the level of the secondary remedy on this infringement by the husband on the right of the woman to divorce, as arises from the decision of the rabbinical court that orders the husband to divorce his wife and which was disobeyed. Therefore, I believe that notwithstanding all of the problems on the various planes, in the end the liability rule in favor of the plaintiff can form a basis for granting full legitimacy to a process based in the fifth circle, and as mentioned, the follow-up private exchange transaction has no relevance to this issue.

In summary, it can be said that this point might constitute a possible innovation by adopting the general approach of Calabresi and Melamed regarding civil actions in the family context: giving a certain degree of tort-law legitimacy, albeit only in some cases, to a controversial process. The motive for the process of women who are refused a *get* is less relevant, so long as the process itself is supported by recognized tort theories and can draw legitimacy from them to be seen as a valid tort process.

Another possibility is to see the fifth circle as a new liability rule, in which the use of the secondary remedy is meant to achieve, in an indirect way, the primary remedy. This rule may be exclusive to family affairs. This rule can be added to the existing rules formulated by Calabresi and Melamed, and an examination can be made to see if it is characteristic of other sorts of actions and not just intrafamilial tort actions.

In effect, a new liability rule in favor of the plaintiff has been created here, a rule that can be seen as completely independent or at least as a unique product of the existing liability rule (rule 2). The general framework that Calabresi and Melamed formulated regarding granting the secondary remedy when the primary remedy cannot be achieved may grant legitimacy to the development of such a new rule. In other words, despite the problems, such as lack of mutual respect among the courts and a fear of an unlawfully coerced *get*, there is civil-tort legitimacy to the development of a new rule under which tort law provides a secondary remedy, which indirectly serves to achieve the primary remedy. The new rule created here is also a type of liability rule in favor of the plaintiff. The indirect goal, achieving the primary remedy – the *get* – through the "back door," does not need to disturb the existence of the basic process of turning to the secondary remedy – the damages – in the first place. If so, the use by women refused a *get* of the secondary remedy to receive the primary remedy may spark antagonism and be seen as illegitimate in circles close to the rabbinical court, but alternatively, it can be seen as a *product* of the liability rule in favor of the plaintiff, which can serve to justify such a process.

Perhaps one can even say that even in the classic case of the liability rule in favor of the plaintiff in certain cases, granting the secondary remedy will actually lead to the achievement of the primary remedy, at least when the matter depends on the tortfeasor. The tortfeasor may prefer to stop the damaging activities (e.g. by moving to another place, in the case of the nuisance, or by preventing the continued publication of the libel) in exchange for the damages being waived.

That was the situation until 2008. In reality, things have become even more complex since that time. I will now move on to examine the significant developments that occurred in Israel in 2008 in the framework of the fifth circle.

2. Developments (2008): Tort actions for *get* refusal for the period before the "obligation" to give a *get* and also when there is no "obligation" but only decrees of a lower level

Orders directing spouses to cooperate with the process of the *get* can be of varying levels of severity depending on the relevant ground for divorce.[83] The most severe holds that a party is

[83] *See* Kaplan & Perry, *supra* note 49, at 816.

compelled to give or accept a *get* (*kfiah*) [hereinafter compulsion decree]. When a rabbinical court issues a compulsion decree against a husband and orders him to give his wife a *get*, coercive measures, including fines and imprisonment, may be used to compel him to give the *get* without affecting the *get*'s validity.[84] When a rabbinical court decree is on the level of compulsion, no problem arises for our issue, since coercion, even of a purely financial nature, has been decreed legitimate. Nonetheless, only a handful of compulsion decrees are issued each year.

The next level of a decree a rabbinical court may issue is "an obligation to realize a *get*" (*khiyuv get*) [*hereinafter* obligation decree]. Under this decree, the husband is obligated to give, or the wife is obligated to accept, the *get*. The practical implications of such a decree are very limited and may include an enlarged sum of spousal support for the wife. However, the sum must not be too large or else it will be considered a fine that renders the *get* void.[85] A decree stating an obligation to give or accept a *get* is enforced primarily through social or psychological measures that include community pressure.[86] In these cases, the financially coercive nature of the tort action remains problematic from the perspective of the rabbinical court.

The other rabbinical court decisions, "religious commandment" (*mitzvah*), and "recommendation" (*hamlatza)*, whose level is lower than that of an obligation, mean in effect that the rabbinical court is not obliging the husband to grant a *get* and certainly will not force him to do so. However, even though these decisions have a lower status, this doesn't mean that they are entirely "weak." Rabbinical decrees of "religious commandment," commanding a man to divorce his wife, are based on halakhic considerations intended to create for the husband a religious command to obey the sages. Failing to obey this command will make the man a sinner, if only in the religious sphere, with the accompanying implications (such as rendering him unable to serve as a witness in religious court), but from the perspective of the secular family law, he has no duty to divorce her. Finally, a rabbinical decree at the level of "recommendation" means that the rabbinical court advises the husband to follow the right and proper path according to halakha, which is to give his wife the *get*, but the husband has no duty to do so. If he fails to do this and does not divorce his wife, he is not following the sages, but he is also not considered a sinner even on the religious level, and is not considered to have any obligation to grant the *get* under the secular family law. Thus, these two types of decrees have limited practical impact.

How are these levels of rabbinical decrees relevant to our question, the question of tort actions against recalcitrant husbands, and how can this affect the comparison to the liability rule in favor of the plaintiff?

The first tort actions against recalcitrant husbands, beginning in 2004, were recognized in cases in which there was an obligation decree.[87] Despite the criticisms on the subject from various factions close to the rabbinical courts, in these cases it was easier to say that this was a tort: the husband had been obliged by the rabbinical court to divorce his wife, and he violated this obligation. If the wife proves causation, i.e. that damage was caused to her as a result of the violation, then her action would succeed.

---

[84] *See* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, *supra* note 40; Be'eri, *supra* note 48. According to traditional Jewish law, additional means may also be taken, such as corporal punishment and even threat of death. *See also* MOSES MAIMONIDES, MISHNEH TORAH: HILCHOT GERUSHIN: THE LAWS OF DIVORCE ch. 2 para. 20 (Eliyahu Touger trans.,1995). According to Maimonides, the true will of every person is to do what is right. If a person refuses to do so, it is not his true will. Coercing the husband to give the *get* under such circumstances allows his true will to be executed. *See id.*

[85] *See* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, *supra* note 40; Be'eri, *supra* note 49. If such a decree is issued against the wife, she loses her right to spousal support.

[86] These means were satisfactory when the Jewish community was unified and observant and rabbinical authorities enjoyed strength and reverence among the community. However, these conditions do not apply to most of Israeli population at large today.

[87] FamC (Jer.) 19270/03, *supra* note 47; FamC (Jer.) 6743/02, *supra* note 47; FamC (Rishon LeTzion) 30560/07, *supra* note 47.

But in the year 2008, the border between the two aspects was breached, in two different cases. One of the actions involved a case in which the rabbinical court had given a "religious commandment" decree, rather than an obligation decree.[88] The case presented for the first time the question of whether a rabbinical decree of this sort was sufficient to justify a tort liability, and the question was answered by the court in the affirmative.

Seemingly, this is a problem on the first plane, of first-order legal decisions, without even getting into the classification of the liability rule. If the rabbinical court did not decide that the husband had the duty to divorce his wife, there seems to have been no decision on the plane of the entitlement, to decide that the wife has the right to divorce and the husband is infringing upon this right. However, in my opinion, this is not the case, and the results of the decision can be supported if we understand the rationale behind the "religious commandment" decree, and even the "recommendation" decree. The family court operates on the secondary strand of damages. All that it needs to examine is whether the actions of the husband, on the level of the personal law of status, constitute a tort, and thus are invalid from the perspective of tort law. A husband who does not obey the instructions of the rabbinical court and does not divorce his wife, even in cases that involve a commandment or recommendation to divorce and not an actual obligation, is in effect disobeying the rabbinical court. From the perspective of the personal law, he should divorce his wife, but for various reasons, the rabbinical judges do not bring the decree they issue to the level of a compulsory obligation. True, an obligation decree serves a real beacon, making it clear that the husband must divorce his wife and that failure to do so means violating his obligation. But this same rationale is the rationale, from a halakhic perspective, in the cases of a commandment and recommendation too – the husband should divorce his wife, and this fact is common to all the level of decrees. When he failed to do and caused damage to his wife, the family court must see whether he violated a duty of care towards her and whether her damages were caused as a result of that violation. There are cases in which this is possible, as in the case discussed in 2008.[89] Therefore, this decision as well, while it does stretch the border even further in terms of the tensions between the courts, receives a firm theoretical basis from the liability rule in favor of the plaintiff. A commandment-level beacon, and perhaps even a recommendation decree, give less light than the obligation-level beacon, but from the perspective of tort law, there are cases in which they give enough light to spot a civil tort, based on the Jewish law itself which sees rabbinical decrees on the level of commandments or recommendations as also important, and which sees all of these decrees, in the end, as having a similar rationale: the husband should divorce his wife.

The other significant decision from 2008 was rendered in a case in which there was an obligation decree. In that case, the court ruled that damages could be awarded even for the period before the date of issuing that decree in the rabbinical court if it was proved, as it was in that case, that the negligence started before the official date of the obligation decree.[90] That is, if rabbinical court decrees of an obligation to divorce were given in 2005, but the woman could prove that the negligence of her husband towards her, as expressed in mental abuse against her, started before that rabbinical court decision to issue the obligation decree, then damages would be calculated from the beginning of the period of negligence instead, as had previously been held,[91] from the beginning of the period of the obligation.[92] Granted, here there is no problem on the initial level of

[88] FamC (Tel Aviv) 24782/98, *supra* note 47.

[89] Thus also the decision of Judge Weizman in an *obiter dictum* in FamC (Kfar Saba) 19480/05, *supra* note 47 (a claim brought against the husband's estate), although he limited it to particularly severe cases.

[90] FamC (Jer.) 6743/02, *supra* note 47.

[91] FamC (Jer.) 19270/03, *supra* note 47.

[92] At the same time, from the perspective of the scope of damages, the case was in the end rather similar, since Judge HaCohen in FamC (Jer) 19270/03, *id.* granted damages of around 200,000 NIS (about 50,000$) for each year of being stuck in the marriage from the time of the issuing of the obligation decree (there, around two years), while Judge Greenberger in FamC (Jer) 6743/02, *supra* note 47, gave only a quarter of this amount per year, but given that he allowed the tort to be proven before the obligation decree, in that case, there were around nine years of being stuck in the marriage (instead of two years from the obligation), so that the sum that was awarded was similar in both cases.

first order legal decisions, since there is an obligation to divorce such that there has been a decision that the wife has a right to divorce. The beacon exists, and clearly, there is an obligation to give a *get* and the husband violated it. But the problem seems to exist in the very act of awarding damages for the period before the obligation decree was issued, where there is no beacon at all. Can a beacon shed light retroactively?

In my opinion, in this case it is also possible to justify the developments on the basis of the liability rule in favor of the plaintiff. In effect, the very recognition of the husband's actions as tortious is simple, since an obligation to divorce exists, and on this point, the situation in much more simple than the case in which there was a commandment decree, and not an obligation. The ability to "go backwards" and examine when the tort started *de facto*, under the assumption that the rabbinical court decided the obligation only *ex post facto*, actually after several years of the tort, seems a completely natural remedy from the perspective of tort law. Tort law is uniquely situated to provide such remedy because it concerns itself almost exclusively with an examination of past actions judged by reference to the relationships between and, consequently, duties owed between individuals. Such actions are more often adjudicated by reference to context than by reference to statutory or contractual obligations. This doesn't mean to say that this is possible in every single situation. The burden is obviously on the plaintiff to prove that the tort began before the date that the obligation decree was issued. This is sometimes possible, since in many cases the obligation decree is given in cases that have passed all possible last resorts, and the husband evaded divorcing his wife for various excuses for a number of years, in effect committing an ongoing tort. The beacon lights up and spotlights the past as well. The obligation itself may not be able to be made earlier in time, and even if this was possible, it would be meaningless in practice since the wife cannot be retroactively declared to have been not married for the period of the offense; but "going backwards" is possible under tort law. It is, in fact, one of the fundamental tenants of tort law, and here it is meaningful too, where the scope of the damages commensurate with the longevity of the tort. The obligation decree is very helpful in aiding the family court in deciding that a tort does exists. Therefore, the obligation decree remains a beacon. The question of when the tort began is a separate question that should not interfere with the first question. On the contrary, there are cases in which one can rely on the decisions of the rabbinical court itself, which reflect the sad reality of emotional damages being inflicted for years before the official obligation decree, to support the claim that the tort began before it. This was actually done in some of the cases discussed before the family court.[93] Therefore, in these cases as well, a decision under the proper circumstances that the tort began before the date of the obligation decree matches the liability rule in favor of the plaintiff, and the rule can serve as a good theoretical basis for it.

These last two cases, of a possible ruling of damages in a cases of a religious commandment and recommendation decrees, or for the period before the issuance of an obligation decree, thus fit into the category of the liability rule in favor of the plaintiff and do not fall into the stage of deciding between entitlements. The right of the woman to divorce exists in both these cases. Granted, the judgments in both these cases have added fuel to the fire of conflict between the courts. But if I ignore these disputes and analyze these situations in accordance with tort law research only, I believe that tort law in general, and the framework of the liability rule in favor of the plaintiff in particular, can certainly support these developments and give them real legitimacy.

To summarize the fifth circle, it can be said that this circle contains possible innovations in the general adoption of Calabresi and Melamed's ideas on the liability rule in favor of the plaintiff in intrafamilal tort actions: giving theoretical-tort legitimacy to a process that is generally controversial from a societal perspective, and particularly with regards to the latest developments (i.e. compensation in the case of a religious commandment or recommendation and not an

---

Obviously, this stems from the fact that there are no tables for the calculation of non-monetary damage under tort law, and each judge can award as he sees fit on this issue.

[93] *See* FamC (Jer.) 19270/03, *supra* note 47, although Judge HaCohen did not grant damages in that case for the period before the obligation; FamC (Jer.) 6743/02, *supra* note 47.

obligation, or for the period before the obligation). The motivation for the actions of women refused a *get* is less relevant, so long as the process itself is supported by accepted tort theories and can draw legitimacy from them and be granted the label of a valid tort process. The purchase of the entitlement by one from another via direct negotiation between them would certainly not raise any objections from Coase, Calabresi, or Melamed, particularly given that the transaction costs are relatively low, the sides are known, defined, and limited in number, and there is no risk of certain sides objecting and not being willing to pay for the entitlement. This is exactly the result that they would want!

And it should be recalled – the entire process presented in the fifth circle is not intended to prevent an unlawfully coerced *get*. This problem continues to exist from a halakhic perspective in any case. The question is whether the fifth circle has any legitimacy in terms of process.

As mentioned, at the moment this sort of action, the fifth circle, is on the front lines of the civil-tort actions in service of the family unit. As such, adoption of the liability rule in favor of the plaintiff's path could have great importance in the justification of fundamental acknowledgment of this sort of action. This is particularly true as these actions have thus far been recognized only by the family courts and have not been discussed in any appeals circuit, so that there is no binding precedent on the subject.

F) Summary

The analysis of these circles presented in this Section indicates that in some of them, the tort remedy does not, in fact, serve as a classic secondary remedy as in the case of the law of nuisance. This seems to be the case both because the questions seem to involve two different legal systems and sometimes even two different courts and also because sometimes there are not really two remedies, primary and secondary, one versus the other, but rather sometimes the primary remedy cannot be achieved or has been achieved, leaving only the tort compensation remedy on the table. But it can definitely be said that at least in some of these circles, there is similarity to the liability rule in favor of the plaintiff, and even in those circles in which the discussion of particulars is different from Calabresi and Melamed's discussion of nuisances, the skeleton is similar and the rationale, fundamentally, is the same.

These are, in effect, five difference nuances of the liability rule in favor of the plaintiff, which do not necessary conflict with the liability rule, but rather in principle draw from it and, as mentioned, the primary goal was to understand the various types of intrafamilial tort lawsuits by examining them against the liability rule in favor of the plaintiff. Therefore, it seems possible to match the general idea of the liability rule in favor of the plaintiff with intrafamilial tort actions, as well.

The adoption of approaches such as those of Calabresi and Melamed regarding the liability rule in favor of the plaintiff does not necessarily need to be done down to the smallest details. Sometimes it is more than enough to adopt basic legal rules in order to reach an understanding of new cases and even to create new legal rules that will match the new cases more specifically. I will discuss possible developments in the framework of the circles compared to the liability rule in the next Section.

V. DO THESE CIRCLES ALLOW FOR PROGRESS?

It is possible to point out several possible developments in the framework of some of the circles presented in the previous Section and to examine them as well according to the liability rule in favor of the plaintiff, and thus perhaps to justify some of these developments. In this Section, I will present the possible developments generally, to show that intrafamilial tort actions are not static but developing, and that the framework of the liability rule in favor of the plaintiff can help us to understand and even to justify some of them.

A. In the first and third circle: New civil actions of children against their parents

The third circle involves civil actions that are based on findings and judgments made under family law, and one of the kinds of actions that belongs to this circle is an action for compensation for a parent whose child was kidnapped against the parent who did the kidnapping. This circle can, in my opinion, someday include new kinds of actions as well. Thus, for example, it might be possible to recognize civil actions by kidnapped children against their parents for the latter's violation of duties set under family law which caused damage to the children. Thus, if the child can prove that she herself was damaged by violation of a visitation arrangement or by kidnapping, her action against the parent that violated the arrangement or did the kidnapping should be recognized. And that action, like the action of the parent from whom the child was kidnapped, can be based in the judicial findings reached under family law in the family court. There is no reason not to recognize the action of a child against a parent in this case, and not only the action of one parent against the other, if the child proves that damage was caused to him, and subject to certain limitations presented in various decisions.[94]

Similarly, there seems to be nothing to prevent also recognizing actions of children against their parents for emotional damage caused to them following arguments between the parents or ugly divorces. This is also the first circle in which there is no interaction between the systems or law or the judges. The child can sue as a direct victim, or at least as a secondary victim.[95] If he sues as a secondary victim, he will need to prove significant emotional and mental harm (not just any level of harm) and must meet a variety of limitations and conditions.[96] Even if he is seen as a direct, rather than secondary, victim, it will be possible to set criteria for this action, one of which may be recognition of the action only in particularly severe and serious cases.[97] Such an action would, of course, be subject to policy considerations, including the fact that these are extremely common damages and there is a real fear of a slippery slope, of irreparable damage to familial relations and of damage to the individual freedom of the couple to separate or divorce. It is hard to ask the couple to separate smoothly, completely without arguments, disagreements, or fights. But it is possible that if particularly severe circumstances are involved, recognition of such an action should be allowed. As mentioned, the question needs separate elucidation and expansion.

B. In the fourth circle: An action filed by a wife against her husband for monetary and non-monetary damages resulting from bigamy or polygamy

The fourth circle, as previously noted, includes actions of wives against their Muslim husbands for divorce against their wills. In this circle, I attempted to show that tort law, by the very act of awarding damages, criticizes the personal law that accepts such behavior as valid, and thus, in effect, the family court criticizes the Shari'a Court or, to look at it differently, the law acts complementarily on two different planes and grants a secondary remedy on the tort plane when the primary remedy on the status plane cannot be given.

Similarly, it is very possible for actions of wives against their husbands for polygamy or bigamy to be recognized.

---

[94] For such reservations in Israeli case law *see* C.A. 2034/98, *supra* note 9.

[95] According to the conditions and restrictions that were determined in the case law: Permission for C.A. 444/87 ElSucha v. The Estate of Dahan, [1990] 43(3) IsrSC 397; C.A. 754,759/05 Levi v. Shaarei Tzedek Medical Center [unpublished, 6.5.07]; *See* also Susan Maidment Kershner, *Children v. Parents: A New Tort Duty-Situation for Psychiatric Injury?*, 35 ISR. L. REV. 79, 79 (2001). Most of these conditions and restrictions were determined following the English case law: Owens v. Liverpool Corp. [1939] 1 K.B. 349, 400; McLoughlin v. O'Brian [1982] 2 All E.R. 298 [H. L.]; Alcock v. Chief Constable [1991] 3 W.L.R. 1057; White v. Chief Constable [1999] 1 All E.R. 1. For the status in the United States *see*: Greenberg v. Stanley, 143 A.2d 588, 590 (N.J. Super. 1958), aff'd in part, rev'd in part, 153 A. 2d 833 (N.J. 1959); Harless v. First National Bank 289 S.E. 2d 692 (1982); Thing v. La Chusa, 771 P. 2d 814, 815 (Cal. 1989); Courtney v. Courtney 413 S.E. 2d 418 (W. Va 1991); Restatement (Second) of Torts § 436(3) (1965); DAN B. DOBBS, THE LAW OF TORTS 841 (2000); PROSSER & KEETON, *supra* note 63.

[96] *See* Elsucha, *supra* note 95, and McLoughlin, *supra* note 95.

[97] As has been ruled in the Israeli common law regarding emotional neglect. *See* C.A. 2034/98, *supra* note 9.

Regarding Muslim husbands, the personal law does not interfere in this case, since polygamy is, in principle, permissible according to Shari'a law. A woman whose husband takes an additional wife can attempt to file suit like a woman divorced against her will. She can sue for loss of financial support, non-monetary damages of pain, humiliation, or loss of her husband's attention due to his focus on the new wife. Here, too, it is possible to expand on the question extensively elsewhere and to examine whether tort law would actually allow such actions in practice, but on the fundamental level, there is no reason to reject that possibility. Here, too, polygamy and bigamy are criminal offenses,[98] and it seems that in principle, it should be able to constitute a ground for a tort action too.

C. In the first and fifth circle: Actions of women refused a get in cases in which the rabbinical court has issued no decree instructing the husband to divorce his wife

For the purposes of examining additional possible and significant developments in the field of tort action by women refused a *get*, and comparing these developments to the liability rule in favor of the plaintiff, this time within the fifth circle, let me return to the subject of the levels of rabbinical court decrees ordering the husband to divorce his wife. As surveyed above in the fifth circle, tort actions of women refused a *get* have thus far been recognized in cases in which there was an obligation decree or in the intermediate cases of a religious commandment decree or for the period before the obligation. Can we take one large step further and recognize civil actions even when there has been no rabbinical decree (yet or at all, even not in the degree of recommendation), and maybe even when no divorce case has been filed with the rabbinical court? In such a case, the family court seemingly has no evidence that the husband has refused to give a *get*, since the rabbinical court still has not reached a decision on the question. Can the tort of negligence, which is an independent tort, find negligence of the husband despite the fact that the rabbinical court has not ruled on the case?

Soon this question will no longer be merely theoretical. Several appeals for summary dismissal in cases in which there has been no decree ordering divorce have been rejected for the interim, and it has been ruled more than once that lack of a decree in and of itself is not sufficient to dismiss an action.[99] Several such actions are, therefore, currently pending before family courts in Israel, and if they are not settled out of court or withdrawn, decisions on the subject are expected.

At first glance, it doesn't seem possible to rule that we can turn to the field of torts and use the remedy of compensation as an alternative remedy when the husband's actions have not been enough to make the rabbinical court order a decree that means a duty to divorce, or even a *mitzvah* or recommendation.

In such a case, there seems to be no beacon at all, and the family court is, in any case, not authorized, under any of its functions, to declare, even incidentally for the purposes of a tort action, that some halakhic obligation exists for a husband to divorce his wife. The problem is substantive, as it is relevant to the first order legal decisions, seemingly in a manner that cannot be corrected, at least not under the framework of the liability rule in favor of the plaintiff. Thus, it seems at first glance that it is impossible to use the liability rule to justify as the basis for such additional developments. As mentioned above, in the developments from 2008, there was either a beacon in the form of an obligation decree and the question was only when damages could be

[98] § 176 of the Israeli Penal Law, *supra* note 45 . Regarding Jewish husbands, this is generally impossible even according to the personal law since, according to the ban of Rabbeinu Gershom, which spread to most sects, a man may not marry more than one woman, unlike the basic law before the ban. Permission is occasionally given to husbands to marry a second wife, sometimes because of a woman's refusal to accept a *get* (such a remedy is impossible in the opposite situation, since according to the Jewish halakha a woman cannot marry two men, although according to the basic law a man can marry more than one woman). In a case of such permission, there is also no criminal offense, and presumably there would also be no tort.

[99] *See* FamC (Jer.) 22061/07 Ch.G.B. v. L.B.A. (unpublished, decision from 7.7.08); FamC (Jer.) 22511/08 K.Y. v. K.A. (unpublished, decision from 5.19.09, section 10b).

awarded for the period prior to it, or else there was a beacon of a lower level, rather than an obligation.

On the other hand, the civil action for damages can perhaps be seen as an action for complementary remedy. The substantive remedy that the woman wants is indeed the ruling of a duty to divorce, but this is not sufficient to exclude the possibility of a secondary and separate remedy: compensatory damages. The religious law does not grant civil actions. As a result, tort law works in a vacuum and is not dependant on what is happening in the realm of status. Therefore, the action for damages is possible whether or not a decree for divorce has been issued. Under certain circumstances, this will be possible via the tort of negligence.

Negligence constitutes an independent ground for tort, which does not necessarily rely on a violation of legal duty or on a violation of standards. Thus, for example, if a bridge collapses, it is in principle possible to charge the negligence of the contractor and the engineer even if they met standards and even if they did not violate any legal obligation. Therefore, the negligence of the husband can be examined even when there is no rabbinical court decree expressly stating that he has an obligation to divorce his wife and even when no rabbinical decree has been given at a lower level. It is clear that the existence of an obligation decree or even lower would make it easier to rule that the husband's failure to meet the requirements of the decree make him negligent. The obstacle of proving negligence in the absence of such a decision is not slight, but it is possible that there are cases in which it is surmountable.

But even if this viewpoint is adopted, allegedly it does not seem to be based on the liability rule in favor of the plaintiff, but rather on the general principles of tort law and on the fact that tort law exists as an independent branch of law that can decide for itself and on its own whether a tort exists in the examined relationship.

But there is no reason to despair. In my opinion, there is room to recognize such actions even when there has been no rabbinical decree, in three different cases.[100] Each of the cases will be examined against the framework of the liability rule in favor of the plaintiff.

The first kind of cases are those in which we can turn to the familiar path of spousal abuse[101] while detaching ourselves from the claim of refusal to grant a *get*, since in any case, there is no particular tort of refusal to grant a *get*. Therefore, if the woman can prove physical, emotional, or sexual abuse in the course of the marriage, she can receive damages from her husband, and the refusal to grant a *get* is irrelevant. Whether she afterwards makes a private exchange deal or not, is none of the family court's business.[102]

In effect, such an action can be categorized under the first circle of actions, in which there is no inherent connection between the plane of family law and status and that of the tort action. It is possible that the exchange deal is the primary motivator, but examination of motives, as mentioned, is not in the purview of the court, and this private exchange transaction might not take place. Since in any case there is no particular tort of *get* refusal, there is no reason not to choose this path if the abuse meets the bases of the negligence tort, and as mentioned, negligence applies in Israel even to intentional actions.[103] However, to reach real results that will incentivize the husband to reach the exchange deal, relatively high damages will need to be awarded for that

[100] All of which obviously do not solve the problem of the coerced *get*. All that I wish to say is that in these three cases, it is fundamentally possible to award tort damages.

[101] FamC (Jerusalem) 18551/00, *supra* note 55, and the appeal: FamA (Jerusalem) 595/04, *supra* note 55.

[102] The fear of an unlawfully coerced *get* seems to be diminished in this case, since, as mentioned, the tort action is not connected to the refusal to give the *get*. However, when the exchange takes place, that connection will be made and the fear of an unlawfully coerced *get* will return. However, I will again mention that the goal at this stage is examine whether there is room, from the perspective of tort law, for such actions, and not to examine the possibilities for circumventing the problem of a coerced *get*. That problem is built into the fifth circle and is problematic one way or another.

[103] C.A. 2034/98, *supra* note 9, section 13 to Justice Englard's judgment.

spousal abuse, beyond what have been awarded thus far for abuse on its own, since otherwise the husband will have little reason to initiate or to agree to the exchange transaction.

For the first type of cases, it is therefore possible to recognize tort actions, if they rely on another violation of the right. This is not a violation of the right to divorce (even if that is the real motive for the action), but rather a violation of another right – the right to bodily and mental integrity, for example.[104] Therefore, this is not a problem of first-order decisions, but rather a question of remedies and liability rules, so the basic problem goes above the daily agenda. At the same time, such an action belongs, as mentioned, to the first circle, in which the framework of the liability rule in favor of the plaintiff is less relevant, since the entitlement of a wife not to be abused by her husband is inalienable. The framework is less relevant in the first circle, but in practice, there is no special need for this framework in this circle since, as we have seen, the actions in this circle have an independent dynamic. The innovation of the framework and its contribution occur primarily in the fourth and fifth circles. Therefore, from the tort perspective, it should be possible to recognize actions of this first type and, in practice, the wife's attorney will discuss with her whether the husband abused her at any point in the marriage, in order for her to be able to file action for such abuse (without questions of time limitation), and this can be a good starting point for a tort action, which can result in a private exchange transaction.[105]

The second kind of cases include those of emotional abuse arising from behavior related to the *get* refusal, rather than from the refusal itself. In fact, in some of the cases discussed by the courts, the husband behaved particularly shamefully, dragging his wife from rabbi to rabbi and promising her that *this* time, he would give her the *get* if the rabbi ordered him to do so, over and over, each time violating his promise.[106] Such behavior may in and of itself constitute emotional abuse. While it is connected to the subject of the *get*, compensation would not be given for failure to give the *get*, but rather for the behavior related to the process. Such an action, as well, belongs to the first circle. The action belongs, *factually*, to the topic of *get* refusal, but *legally* it is not related to the personal law, to the proceedings in the rabbinical court, or to the decision or lack of decision there. The result here is the same as in the first kind of cases, although here it is more "transparent" that the motive for the action is the *get* refusal and not the abuse itself.

The third kind of cases is problematic. These would be cases in which the husband did not abuse his wife, but, for example, she left, and the marriage *de facto* was dissolved a long time ago. Nonetheless, the husband continues to seek reconciliation after long years of separation.

Here, it is hard to find any beacon to illuminate the entitlement on the plane of first order decisions, and it is hard to find another entitlement that was violated and which can base the action. Here, allegedly we must call a spade a spade – this is a tort action for the very act of refusing to give a *get*, not for the circumstances surrounding this and not for the abuse in the relationship, and there has been no rabbinical court decree on the subject, at any level. There seems to be no choice but to say that at least under the framework presented by Calabresi and Melamed, this sort of case does not pass the first stage of first-order decisions, since it has not been decided by the authorized court – the rabbinical court – that the wife has a right to divorce, so that it is impossible to sue the husband for his violation of this right. Here, it seems possible to argue that so long as the woman has not exhausted her right to receive the primary remedy in the rabbinical court, and so long as she has not been refused protection of her right to autonomy, to re-marriage, and to having children via the primary remedy, she should not be allowed protection of the entitlement via the secondary remedy under the liability rule, since she has still not passed the

[104] *E.g.*, sexual humiliation. *See* FamC (Tel Aviv) 24782/98, *supra* note 47.

[105] Here, too, as mentioned, I do not ignore the possible later problem relating to the validity of the *get*, as in all the cases of tort actions for *get* refusal in the fifth circle. In practice, this action belongs to the first circle, but if that private exchange deal is made, the problem on the halakhic plane will be identical to that of the fifth circle – the fear of an unlawfully coerced *get*, since it is almost certain that the rabbinical courts will understand the motive behind filing the action and behind the exchange deal.

[106] *See, e.g.*, FamC (Jer.) 19270/03, *supra* note 47; FamC (Jer.) 6743/02, *supra* note 47.

first barrier of proving that she has an entitlement in the first place. So long as the rabbinical court has not reached a decision regarding granting or failing to grant the primary remedy under the personal law, circumvention of this law should not be allowed via financial pressure using the alternative secondary remedy. Only when there is a clear decision of the rabbinical court in regard to the primary remedy of status, maybe even at a lower level of decree (*mitzvah* or recommendation), can the liability rule be activated and the secondary protection of the entitlement can be referred to, by granting the remedy of compensation. Therefore, according to the Calabresi and Melamed framework, the woman seems to be unable to access the path of the secondary remedy until a decision has been reached regarding the determination between entitlements. If we compare this to contract law, this would be akin to a situation in which the court would award the secondary remedy of damages before it even began to discuss the primary remedy of enforcement. Thus, the fifth circle can be problematic in such a situation because it basically means referring to the secondary remedy before a decision has been reached on the primary remedy. But here, too, it is not clear that the *necessary* outcome is an inability to sue or a necessary unsuitability to the framework of the liability rule in favor of the plaintiff.

It seems to me that, in any event, there needs to be a point in time at which, from an objective civil perspective, a husband who does not give his wife a *get* must be seen as negligent, without allowing him to continue to claim that he wants reconciliation and allowing him to live in the dream, even if he honestly and subjectively believes it, that his wife will come back to him. This is true even if we don't seem to have a beacon in the form of any rabbinical court decree.

But perhaps here is just the place for the necessary changes that will lead to a certain upheaval in the exact adoption of the liability rule's framework, while nevertheless keeping its rationale in principle. There are cases in which the defense of the entitlement should be allowed via the secondary remedy, despite the fact that there has been no decision on the primary remedy, and despite the fact that we know that in a large number of the cases the goal is to try to attain the primary remedy via the indirect exchange transaction. Here too we must set a sort of "basic evidence" – a sort of beacon whose light is relatively weak, but which might nevertheless be sufficient in some of these cases. What is this beacon? If the woman has not even referred to the rabbinical court or started any process, even the process of opening a divorce case, it is hard to see the possibility of turning to the secondary remedy. If the woman took that step, opened the file, filed the action for divorce, and if the action is not fictitious, i.e. intended only to achieve certain procedural advantages, but is truly motivated by a desire to divorce, and the proceedings are going slowly, and the husband, in bad faith, repeatedly requests reconciliation despite the fact that it is clear that this will lead nowhere and they will never live together again, and the discussions keep being postponed, there might be room, after a certain amount of time has passed from when the case was filed (a year? two? three?), to allow her to turn to the secondary remedy. This doesn't mean that the remedy will be granted. The tort requirements must be met, which is not simple, but the path will at least be open to an attempt to sue.

A few civil constructions may support this result. Firstly, it can be argued from the tort perspective that negligence is examined as an independent civil tort that is not necessarily dependant on the personal law, and a husband who asks for reconciliation that has no chance of being granted, while not freeing his wife from her bonds, is violating his duty of care towards her, at least after some years of real separation.

When we carefully examine the duty of care towards a spouse, it mandates, as is acknowledged in Israeli case law, mutual respect, dignity, and granting at least some autonomy,[107] since husband and wife are no longer considered to be "one unity/person of law," as was the case in English law. Of course this duty does not include the obligation to fulfill all of the spouse's desires and wishes; however, I do think that a husband who is not ready to give his wife the *get* and does not release her from the marriage's chains, and who thus makes her married against her

[107] FamC (Jerusalem) 18551/00, *supra* note 55, and the appeal: FamA (Jerusalem) 595/04, *supra* note 55.

will, stuck in a marriage she does not want, does violate his duty of care. This husband does not consider his wife's interests at all. He harms the marriage bond and in most cases necessarily harms the family as a whole. He made a commitment to his wife in his religious marriage and in the Jewish marriage bill (the *Ketubah*) to provide for all of her needs, even the emotional ones. There is no need to expand on the nature of this relationship to reach the conclusion that such blatant inconsiderateness constitutes a violation of these duties, at least after a period of a certain number of years has passed from the time that the partner turned, first to her husband and then to the religious rabbinical court, to receive the remedy. The rules of negligence necessitate such a result even without a real beacon in the form of an obligation decree. There is no doubt that such a beacon would be very helpful and shorten the process since it would create a presumption that when the husband violated this obligation (and perhaps the same is true of a religious commandment or recommendation decrees), he acted tortiously. But one can reach the conclusion of a breach of the duty of care that exists between a husband and wife even in cases in which no such presumption exists if the wife can prove this "basic evidence" and meet the requirements of proving all the components of the negligence tort.

This view can receive a certain amount of support (although in my opinion, the claim stands without such support) from a school of thought in Jewish law – the opinion of Rabbeinu Yeruham – which admittedly has not been completely adopted but which is followed by certain panels in the religious court. This school recognizes that when the husband asks, hopelessly, for family harmony, in a situation in which no family harmony has existed for years and there is no real possibility of its being achieved, and the woman proves this, the level of the rabbinical court decree will climb to the highest level – compulsion decree. It seems that this result ensues from the fear that if the couple is separated for a long time, the chances increased for them to live in a sin with other partners although they are still married.[108] In such a situation, there is no problem of a coerced *get*, and even the tort action does not constitute unlawful coercion, but rather is legitimate, since after the granting of a coercion decree even certain kinds of physical coercion are possible. Thus even Jewish law recognizes, according to this known school of thought, that a hopeless request for family harmony when there is no chance of re-achieving such harmony can in and of itself validly lead to dissolution of marriage via coercion. This can also be seen as an illumination beacon, which says: an unrealistic (from objective perspective) request for family harmony (even if the husband truly believes reconciliation is possible to achieve) must receive a proper reaction from the personal law, and therefore also a proper reaction from the tort law.

Secondly, it can be argued that such a husband who does not divorce his wife despite the fact that the marriage has *de facto* been dissolved for some time, but rather who continues to request reconciliation and family harmony, is not acting in legitimately good faith, even if he believes that his wife will return to him someday, after years of separation and of her living with another partner, for example; certainly, he is not acting in good faith if he himself lives with another woman. Such a situation requires, or at least permits, that a tort remedy should be granted against him. For in Israeli law, the principle of good faith (bona fides) applies not only in contract law but also in tort law, as well.[109]

Thirdly, our issue can also be compared to civil family law. A recently passed amendment to The Property Relation Law in Israel means that in practice sometimes the financial aspects of the bond can be dissolved even when there is no *get*, when one of several situations exists, such as proving a real break between the couple; living separately for a certain amount of time (nine months out of a year); or domestic violence has been found to exist (evident through the issuance

---

[108] MEISHARIM**,** part 8, section 23. For application of this rule, *see* for example Rabbinical Court Decisions (P.D.R.) 11, pp. 89-95, in the District Rabbinical Court of Tel Aviv-Jaffa, before the judges Rabbis Tzimbalist, Azulai, and Dichovsky; case 26259-21-2 in the District Rabbinical Court of Tiberias, before the judges Rabbis Lavi, Bazak, and Ariel, given 3.17.08, in which they applied this rule to a women; case 7479-21-1 in the District Court of Tel Aviv, before the judges Rabbis Prover, Bibi, and Atias, given 11.18.07. *See also* the speeches of Rabbi Hayshrik, *supra* note 67.

[109] By virtue of paragraph 61(b) to the Law of Contracts (General Part) 1973, S. H. 1973, 118, 694.

of restraining order, arrest or indictment). This financial disentanglement is permitted even if the rabbinical court still has said nothing on the subject and issued no decree. Israeli civil family law today, then, allows for a financial dissolution of the connection even before a *get* or a rabbinical court decree ordering an obligation, religious commandment, or recommendation to divorce, when one of these presumptions exists.[110] These constructions seem to lead to a mismatch between the personal law, which decides the question of whether the relationship should be dissolved or not, and the civil law (although possibly it does not contradict the approach of Rabbeinu Yeruham). However, this analogy illustrates this legitimacy – this is not the same as a "secular divorce," but rather a secular understanding that for the purposes of certain civil aspects, like division of property, the relationship is already *de facto* over. In effect, there is precedent for such an idea: the fourth circle, which, as mentioned, deals with divorce of a woman against her will in the Islamic sector. There, too, tort law sees as tortious a behavior which the personal Shari'a law sees as legitimate (and the behavior also constitutes a crime under Israeli criminal law). I also suggested that actions for bigamy and polygamy also be entered into this circle. There is nothing stopping us from applying the same idea to the fifth circle. The fact that in a later stage the civil judgment will be used for a private exchange deal should not change this issue.

All of these explanations, as a whole and each individually, are intended in effect to point out that there really is a decision on the plane of the entitlements, and therefore it is still possible in principle to reach the second stage of Calabresi and Melamed's liability rule even in the third sort of cases; although at first glance, it appeared as though the third sort of cases could not be validated in the framework of a tort action when no rabbinical decree has been issued. And note: this is not intended as a call to recognize tort actions for *get* refusal in all cases when the rabbinical court has not (yet?) expressed its opinion. It is intended only to illustrate that the liability rule in favor of the plaintiff can be applied in these situations, if it is possible to indicate a civil understanding that justifies a tort of negligence that can decide between the entitlements for the purposes of the tort action only, exactly as the amendment to the Law of Property Division does for the purposes of division of property and dissolution of partnership in property only. In neither case is this a "civil divorce." Rather, it is a recognition that the marriage has dissolved *de facto* (in our case, generally many years ago), even though there has been no *get* and no obligation, religious commandment, or recommendation decree that a *get* be given.

Finally, I can suggest another way to analyze the question of tort action for *get* refusal. The situation can be analyzed against Calabresi and Melamed's framework one level up – as a question of whether the right of the woman to divorce is alienable at all and whether it can be sold in exchange for the compensation's being waived.

At first glance, it seems that a woman's right to divorce should be seen as an inalienable entitlement that cannot be sold or bartered for via the financially coercive tort judgment. However, such a conclusion ignores the actual reality in the rabbinical courts. These courts really and truly try, even though they are criticized for it, to pressure the husband to give the *get* within the framework of what is permissible under halakhic while avoiding the risk of a coerced *get*. As part of these efforts, they pressure women, in certain cases, to pay money to their husbands so that the latter will agree to give the *get*. This is extortion on the part of the husband, and the rabbinical courts sometimes cooperate with this problematic process, out of lack of alternatives, and out of an understanding that sometimes there is no other choice since the court cannot give the *get* in place of the husband, and sometimes the wife has reached a dead end. The halakha allows the rabbinical court, as the party considered able to coerce (that is, to enforce) the *get* lawfully, under a certain framework, to validate this process without the *get*'s being considered unlawfully coerced. This process makes it clear that the *get* is, in effect, purchased, and the right to divorce is not an inalienable entitlement.

[110] Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1973-4) (Isr.) (amendment no. 4) 2008, LSI 2186, 18 (11.12.08).

Another option is to look not at the right of the woman to divorce from a legal-halakhic perspective, but at her civil right to autonomy and freedom. If we look at this right, it is clearly an inalienable type of right that cannot be transferred. Just as someone cannot sell himself into slavery or agree be abused, as these are inalienable rights, a personal cannot waive his right to freedom and autonomy; even though some marriages in the world, such as Catholic marriages, really mean that – although in such cases, there is *ab initio* agreement between the sides. When the husband withholds from his wife her freedom to marry another person, a right recognized as fundamental under international law, he is violating the rule of inalienability, the third rule that Calabresi and Melamed presented. The compensation for the husband is the continuance of the marriage, and for example, enjoyment of the very pain caused to his wife by her being trapped in the marriage, revenge against her, or continued financial pressure upon her. On the other hand, it can be argued that society gave authority only to the rabbinical court to act here under the personal law and to withhold, under certain circumstances, such freedom and autonomy. That is to say, that the right to re-marry is not an absolute right, and in fact Israel qualified its acceptance of that international right precisely because of the application of religious law to matters of marriage and divorce.[111] This reservation is in accordance with the law. But perhaps this is precisely the place to integrate the civil law beside the religious law and the secondary remedy beside the primary remedy that is currently not attainable. The civil law cannot, in fact, give the woman a *get*, and it does not claim to do so, but it can give her compensation if her autonomy is violated, and even if the rabbinical court has not reached any decision on her case, the very passage of time can indicate that failure to dissolve the marriage will be considered a tort in the eyes of the civil-tort law. As mentioned, an analogy to the fourth circle (of women divorced against their wills) also indicates that there does not need to be equality between the personal law and the tort (and criminal) law. Here the woman is not, in fact, divorced, and no decision has been reached in her case in the rabbinical court, but from the tort perspective, she deserves compensation. This is not a contradiction. Just as in the fourth circle, here too, tort law is enlisted to "fix," in the name of society, to a certain degree, the flaws created by the personal law. Unlike Catholic marriages, in which the inability to divorce is known about from the beginning, and the woman enters into the marriage with full knowledge and consent (sometimes, from lack of other options from a societal perspective), the situation under Jewish halakha is different; and there have even been suggestions on the halakhic plane to free women refused a *get* and trapped in a marriage via a condition according to which the marriage will be considered a "mistaken purchase," since had the woman known that her husband would not divorce her, she would not have agreed to the marriage in the first place, and there are those who have relied for this purpose on the obligations in the *ketuba* (Jewish marriage document).[112] I believe that this analysis should not be completely rejected, even though it may be problematic.

In any event, at the moment, such actions are still pending and there has been no final decision on the subject.

---

[111] The reservation was intended not to allow the right of marriage to couples who are halakhically ineligible to marry, those who have no religion, intermarriages, and those interested in civil marriage (rights that exist in other places in the world where Jews marry). But in practice, the reservation also allows discrimination against women by withholding the right, this time by the individual (the husband), even in "regular" circumstances in which there was no original intention to deny the right, since the husband controls the giving of the *get* under the personal law. Thus for example, Israel qualified its acceptance of the International Covenant on Civil and Political Rights: "With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned. To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law." *See* http://untreaty.un.org/humanrightsconvs/Chapt_IV_4/reservations/Israel.pdf.

[112] For suggested solutions *see, e.g.*: IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNOT IN AMERICA (1993); AVIAD HACOHEN, THE TEARS OF THE OPPRESSED: AN EXAMINATION OF THE AGUNA PROBLEM: BACKGROUND AND HALAKHIC SOURCES (Blu Greenberg ed., 2004); Talia Einhorn, *Jewish Divorce in the International Arena, in* PRIVATE LAW IN THE INTERNATIONAL ARENA – LIBER AMICORUM KURT SIEHR 135, 140-44 (Jürgen Basedow et al., eds., 2000).

In summary, if we understand that status under family law can be separated from tort damages, then we can also understand the opinion according to which the trend of actions against recalcitrant husbands can be legitimate even when there has been no rabbinical judgment whatsoever, so long as negligence is properly proven.

VI. CONCLUSION

Calabresi and Melamed presented a framework regarding two alternative forms of protection for a single legal entitlement, a primary remedy and a secondary remedy, and a reference to the liability rule in favor of the damaged party, under which the secondary remedy is given when society does not grant the primary remedy.

It can be assumed that Calabresi and Melamed did not necessarily consider situations such as intrafamilial tort actions when they formulated their rules, but simply laid a certain theoretical foundation, which they illustrated primarily with regards to nuisances, and left the discussion of details to various examples in the field. But the goal of the comparison made in this Article is not only to explore whether this framework is suitable for family issues and to the relationship between intrafamilial tort lawsuits and family law. Rather, the goal is to develop an infrastructure to understand these kinds of actions, which are becoming increasingly common in Israel, an infrastructure that may be suitable to other countries as well, particularly those in which there is a system of religious courts. The discussion of intrafamilial tort actions via the framework of Calabresi and Melamed sheds light on this picture from a unique perspective, through the prism of different layers of rights. The liability rule in favor of the plaintiff serves to lay the foundation for understanding how tort law, in form of giving a secondary remedy, fills a vacuum created by family law when family law fails to provide the primary remedy. This framework also serves as a mold to create possible similar new "local" rules, which belong exclusively to the question of intrafamilial tort actions, and to provide legitimacy to such new rules from the direction of tort law. Indeed, one of the innovations of the fifth circle is seeing it as a new, independent rule to be added to that of Calabresi and Melamed, or at least as a unique product of one of the existing rules – the liability rule in favor of the plaintiff.

This claim to legitimacy derived from tort theory may serve as a good answer for those who claim, explicitly or not, that the decisions of the family courts on the civil actions of women who have been refused a *get* are done on the political basis of wanting to advance women's rights in general or even to goad the rabbinical courts. The framework of the liability rule in favor of the plaintiff is part of a central basis for an economic approach in tort law. It has no political agenda, either feminist or anti-religious, but rather a completely non-suspect civil-economic agenda. It is "permissible" for women who have been refused a *get* to "take advantage" of tort law to serve their goals regarding family law.[113] Beyond a general understanding of the "power struggle" between tort law and family law, this may be a major innovation arising from Calabresi and Melamed's liability rule in favor of the damaged party: the ability to squelch some of the complaints about politics in the family court's decisions.

This innovation may strengthen the basic recognition of actions against recalcitrant husbands. This recognition certainly needs significant support from the theoretical framework of tort law, especially since today these cases have been recognized only by the lowest courts, i.e., the family courts, and since more than a few commentators have challenged its legitimacy.

An even larger innovation may be not only strengthening the current decisions of the family courts from 2008, which in any way do not constitute precedent, in which civil actions have been recognized in cases in which the rabbinical courts have already ruled (even in a degree of less than obligation) that the husband must divorce his wife, and in which damages have been given for the period before the decree. The even greater innovation is in encouraging future development under

[113] Under the proper circumstances, reverse actions are also possible – of husbands against wives who refuse to accept the *get*, and one such action is actually being conducted in Israel today. *See supra* note 47.

which, subject to proper proof under negligence law, actions against husbands who refuse to grant *get*s can fundamentally be recognized even in some cases in which the rabbinical court has reached no judgment and issued no decree. If it is possible to prove negligence on the part of the husband, even when no rabbinical court decision has (yet?) been reached regarding his obligation (or religious commandment or recommendation) to divorce his wife, such an action can, in principle, be recognized in some cases, based on an analysis of the rule of negligence and a certain suitability to the liability rule in favor of the plaintiff. This is the primary innovation that arises from the comparison, but also in other circles and other kinds of actions, some by children against parents, various possible developments can be pointed out.

We have therefore discovered that Calabresi and Melamed's framework is fundamentally applicable to tort-civil actions in the family, even in the complex Israeli reality.

This framework can help us understand the picture of the relationship between the legal systems and the court systems in Israel, and maybe even serve as a prototype for new rules that match, in certain aspects, this specific sort of case. Granted, if we examine the framework exactingly against the five circles, it seems that there is a mismatch in some of these circles to the details of that framework. This results, first and foremost, from the existence of two systems of law and two instances that deal with intrafamilial actions, combined with the Israeli reality in which a significant portion of family law – everything related to marriage and divorce – are also based on the personal-religious law, the application of which does not always match the tort (and criminal) law of the state. Family law and tort law are separate fields that operate on planes that are sometimes complementary and sometimes alternative. For everything relevant to marriage and divorce – primarily the fourth and fifth circles presented here – family law operates on the plane of status, while tort law operates on the plane of damages. The status under family law is set according to the personal religious law. In parallel, tort law allows a woman to receive compensation for torts committed against her by her husband. The interactions between the systems vary. The transferability of rights can also be more limited than in other systems of law, such as nuisance law, particularly with regards to rights related to personal status.

The details of the framework of the liability rule in favor of the plaintiff, then, do not always exist in the five circles that were presented. But despite this and in spite of this, all of the circles involve protection of rights on two different, alternative levels just as in that framework. The skeleton of Calabresi and Melamed's rationale applies to our case – the understanding that tort law and family law are not necessarily as separate as they perhaps appeared at first glance; nor are they necessarily in conflict, as perhaps is claimed by those who encounter the issue for the first time specifically through the case of women refused a *get*, particularly in the fifth circle, which has recently become the most common and the most widely known. Here, there is an understanding that the same entitlement can be protected from different directions and from different perspectives. Sometimes there really is a hierarchy between the types of protection of the right, with the primary remedy on one level and the secondary remedy on another level, just as with the liability rule. Sometimes, the relationship will be different, sometimes there is no real possibility of achieving the primary remedy in the first place, but the basic rationale continues to exist in some form and therefore there is room for a comparison. Even the incentive for sides to sometimes conduct their own negotiation to sell the rights of one to the other is relevant and even legitimate, even if at first glance it could be thought that the family field is not the proper or fitting place for such transactions and that, specifically in this area, rights should not be at all transferable, even for appropriate monetary consideration.

Some of the circles do not really need a theoretical basis like the framework that Calabresi and Melamed presented, and in those circles, the framework served primarily to present the issues in an orderly fashion. It is specifically the more delicate developments, in which some sort of conflict exists between the religious court, Shari'a or rabbinical, and the family court, and between the personal law and tort law – it is specifically such cases that can ground themselves more securely in the liability rule in favor of the plaintiff. In the first, second and third circles, an independent

dynamic exists, and there is no conflict between the instances and the systems of law. The fundamental suitability of the liability rule to the fourth and fifth circles, and particularly to possible developments in these circles, is the innovation and is what might give these developments a theoretical-tort basis that perhaps the judges of the family court are looking for.

Calabresi and Melamed attempt to unite issues that seem, at first glance, disparate, belonging to different fields – the primary remedy that protects property and the secondary remedy that gives tort compensation for an infringement on property – and believe that the correct economic approach must lead to such a conclusion.[114] This uniting may seem somewhat artificial when it involves family law and tort law, both from a global perspective and also, and particularly, in light of the way that the courts and laws are divided in Israel specifically. But an examination of Calabresi and Melamed's framework also taught us that not all intrafamilial tort actions raise the familiar conflict between the religious court and the family court as might have been thought. Sometimes there is "family harmony" between the courts. In the first circle of actions, for example, and really in the second circle as well, there is no interaction among the different legal systems and among the different courts. In the third circle, there is a positive and even productive interaction, and in effect, the legal systems and sometimes even the courts work by each complementing the other. The fourth circle, and particularly the fifth circle, invite those more delicate situations that not only provide an example of the conflict of jurisdiction and law between these courts, but have even exacerbated it in recent years.

I can only hope that the application of Calabresi and Melamed's framework regarding the choice between different forms of protection for the same entitlement, i.e. the liability rule in favor of the plaintiff, is successful in leading all those involved in the field to understand that, even in these "problematic" circles, there is a civil-theoretical infrastructure, which gives these processes purely professional legal legitimacy, clean of any political approaches.

[114] Calabresi & Melamed, *supra* note 2, at 1089.