The Tort of Get Abuse

How damage litigation has changed the course of family law in Israel

Susan Weiss, Adv

Executive Director, The Center for Women's Justice

2011

The Center for Women's Justice
Emek Refaim 43 * Ierusalem * www.cwi.org.il

THE TORT OF *GET*-ABUSE

HOW DAMAGE LITIGATION HAS CHANGED THE COURSE OF FAMILY LAW IN ISRAEL

Prepared by Susan Weiss

with Elana Maryles Sztokman

The Center for Women's Justice, Jerusalem

May 2011

Sponsored by

The Institute for Jewish Ideas and Ideals

CENTER FOR WOMEN'S JUSTICE
מרכז צדק לנשים

43 EmekRefaim St.
Jerusalem 93141
972-2-5664390 (tel.)
972-2- 5663317 (fax)
www.cwj.org.il
cwj@cwj.org.il
Israeli NGO: 580430973

TABLE OF CONTENTS

BACKGROUND: *GET* REFUSAL AND ISRAELI LAW

The Center for Women's Justice (CWJ) is a public interest law organization dedicated to defending and protecting the rights of women in Israel to equality, dignity and justice under Jewish law. CWJ files strategic lawsuits, advocates creative halakhic approaches, and engages the media and policy makers in order to promote systemic solutions to complex religious dilemmas that challenge the status of Jewish women: the *agunah* (woman denied divorce), *mamzer* (child born to adulterous women), and converts (usually women).

CWJ was established in 2004 by veteran attorney Susan Weiss with the understanding that systemic resolution of these complex religious dilemmas will not come by solving individual cases, nor will it come at the initiative of the rabbinic courts. CWJ is of the belief that change will come when public's awareness is aroused to damage being done to women, and when civil courts accept the responsibility of redressing violations to human rights being perpetrated in deference to religion.

CWJ is leading the pursuit of social justice by initiating litigation on behalf of women with the aim of setting legal precedents and achieving systemic solutions to the religious dilemmas that compromise democracy and threaten the Jewish future. The Litigation Project aims to economically empower Israeli women who have been disadvantaged as a result of being subject to rulings of increasingly fundamentalist rabbinic courts and their administrative bodies. To "force the state back in," CWJ files precedent setting cases in civil courts all over Israel on behalf of these women.

When tackling complex religious dilemmas such as the *agunah*[1],*get* refusal[2], *mamzer*,[3] and conversion, in which strict application of Jewish law conflicts with civil rights, one of the key strategies that CWJ has adopted is a Public Interest Litigation Project to change the way Israeli courts respond to these issues. Through this project, CWJ has succeeded in forcing Israel's civil courts to articulate a clear response to rabbinic court decisions which unequivocally compromise human and civil rights.

One of the most important goals of CWJ's Litigation Project is to establish the tort of get refusal as an accepted cause of action under Israeli law. In 2000, CWJ's founder Attorney Susan Weiss convinced a family court to rule, in an interim decision, that refusing to give a get was a tort; before 2000, there was no case law or statute which established this. These unique claims allow women to sue husbands who deny them a religious divorce (a get) for civil, monetary damages. By acknowledging tort claims, Israeli family courts are promulgating that get refusal is not a religious right, but rather a civil wrong.

TORT LAW AND WOMEN'S JUSTICE IN ISRAEL: A BRIEF HISTORY

A "tort" is a wrongful act that causes injury for which the law awards monetary damages. The Tort Ordinance of the State of Israel defines what acts are torts under Israeli law. This list includes traditional, as well as more modern, conceptions of what is a "wrongful act" worthy of compensation, including: intentionally inflicting physical threat or harm (assault and battery);

[1]Hebrew for a woman anchored by marriage to a man who is missing, incapacitated or otherwise unable to give her a bill of divorce.
[2] Cases where a husband refuses to grant his wife a religious divorce, thereby entrapping her in their marriage.
[3]Hebrew for a child born as a result of the mother's extra-marital union.

imprisoning someone against her will (false imprisonment); doing something expressly prohibited by statute. It does not include "*get*-refusal", i.e., the damage inflicted on women by husbands who refuse to grant them a divorce.

As a veteran divorce attorney, Susan Weiss had many such clients, women who needlessly suffered from years of being trapped in unwanted marriages, and decided to petition the family court to award damages to these women. In the mid 1990's she asked a leading women's law organization to initiate such a case. They refused, having received advice from professors of tort law at TAU Law School that there was "no cause of action" for *get*-recalcitrance under the Tort Ordinance. According to the TAU experts, family courts would reject a claim for damages for *get*-refusal since it did not fall squarely within the language of the tort statute, and since there was no precedent for such claim. If there were no "words" for the alleged wrongdoing either in a statute or in the case law, the damage claim would not be recognized under law—i.e.: "there is no cause of action" for *get*-refusal.

Experts notwithstanding, in 2000 Attorney Weiss filed a claim on behalf of a woman against her husband who had withheld a *get* from her for 10 years. In 2001, Judge Greenberger (Jerusalem 3950/00) (J. B.-Z. Greenberger 2001) found the first "words" to support her tort claim. Denying a motion to dismiss the complaint, Greenberger held that *get*-refusal is a "cause of action" in tort since it is a violation of a woman's personal autonomy protected under the *Basic Law: Human Dignity and Freedom*. Similar law suits followed. A few months later, Judge Philip Marcus (Jerusalem 9101/00) denied a motion to dismiss a claim for damages for *get*-refusal, ruling that *get*-refusal is a tort because it breaches the statutory duty to obey court decisions under section 287 (a) of the Criminal Law Ordinance. In both cases, the court avoided having to rule on the facts of the cases before them, since both husbands delivered Jewish bills of divorce to their wives in exchange for dismissal of the claims.

In December 2004, Judge Menachem HaCohen (Jerusalem 19270/03) decided the first case on its merits, awarding a wife 425,000 NIS in damages. He held that *get*-refusal was a "tort" because it was unreasonable behavior that fell under the rubric of negligence (section 35 of the Tort Ordinance), not because it contravened a Basic Law or a criminal statute. HaCohen posited that if a rabbinic court ordered a husband to give his wife a *get*, the husband violated a "duty of care" to his wife when he disobeyed that order.

CWJ has systematically expanded this remarkable precedent. In 2004, a court awarded actual damages (425,000 NIS – about $110,000) to a woman whose husband refused to give her a get. In July 2008, another court held, in an interim decision, that a woman could sue family members who aided and abetted her husband's get refusal. In the same month, damages (500,000 NIS, about $130,000) were awarded which also compensated a woman for the period prior to a rabbinic court decree ordering a get as well as for the period following the decree. Lastly, in December 2008, CWJ convinced a court to award damages (700,000 NIS, or $180,000) even when a rabbinic court had specifically refused to issue such a decree.

In 2006, Judge Tzvi Weitzman (Kfar Saba 19480/05)) followed suit and ordered the estate of a man to pay his estranged wife 711,000 NIS. Weitzman held that a man had a "duty of care" to his wife even if a rabbinic court had not directly ordered him to give a *get*, but simply recommended that he do so (*mitzvah*).

In 2008, four family court judges issued rulings that further honed the emerging cause of action. In a case brought against a husband, his mother, two brothers, and a sister, Judge Nili Maimon (Jerusalem 19270/03) issued an interim decision holding that claims could be brought against persons who aided and abetted *get*-refusal. Judges Greenberger (Jerusalem 006743/02) and Sivan (Tel Aviv 19270/03) issued damage awards against recalcitrant husbands (550,000 NIS and 700,000 NIS, respectively) and held that the court could award damages for *get*-refusal

even when the rabbinic courts had not yet ordered a husband to give a *get*. Judge Kitsis demurred (RishonLe'Zion 19270/03), holding that damages should be awarded only subsequent to rabbinic order.

EXPANDING THE USE OF TORT LAW FOR WOMEN'S JUSTICE

Since its founding in 2004, CWJ has filed over twenty-five damage claims with the purpose of establishing these cases as normative. In general, family court judges have been reluctant to decide cases filed for damages for *get*-refusal . They are still not sure on which words of the Tort Ordinance to hang the claim for damages, if at all. What name should the family court judges give this new tort? (CWJ prefers "*get*-abuse.") What's more, these tort claims require family court judges, many of whom are observant Jews, to step on rabbinic toes. Civil court judges yield collegially to the policy of "reciprocal deference." They don't want to usurp the jurisdiction of the rabbinic courts, preferring to: "Render unto Caesar the things which are Caesar's, and unto God the things that are God's." More substantively, the judges worry that if they award damages, rabbinic courts will disqualify any future *get* on the grounds that the husband has not given the divorce of his own "free will," rendering any subsequent divorce as "forced," and invalid. Many family court judges protract cases for years in the hope that the husband will give a *get*, and that the wife, in exchange, will withdraw her claim.

Some notable statistics are:

- In the majority of cases, husbands have given a *get* in exchange for a waiver of the tort claim within 1.3 years of the filing of the claim, having refused an average of 10 years to give the *get*
- Most of the women CWJ represents have been living apart from their husbands and embroiled in litigation for a period that was longer than the time that they lived together
- In cases in which women succumbed to pressure from the rabbinic courts to dismiss their damages cases, none of the women have received a *get*.
- Damage awards of CWJ clients range from 450,000 NIS to 700,000 NIS.

Currently, sixteen tort cases that were filed by CWJ are pending in family courts all over the country. Two of these cases involve suing the State, in addition to the recalcitrant husband, for its negligent supervision of rabbinic court judges. Two additional CWJ tort cases are before the District Court and the Supreme Court. Before the former, CWJ is arguing against a husband's appeal of the family court decision that awarded his wife 700,000 NIS in damages; before the latter, CWJ is appealing decisions of the lower courts that held that CWJ's clients were required to pay filing fees amounting to 1% of the amount of damages claimed.

The following are translations of five decisions in which Susan Weiss and CWJ achieved important precedents that have changed the legal landscape for Jewish women in Israel.

Of the 14 women who received a get after they filed for damages, the average wait for the get after filing for damages was 1.25 years. The least amount of time a woman waited for a get after she sued for damages was three months, and the longest amount of time that she waited for a get was two years.

TORT 1 (J. GREENBERGER, JER. FAM.CT. CASE 0395/00)

BEFORE THE HONORABLE JUDGE BEN-ZION GREENBERGER: 23.1.2001

Re: Jane Doe
By Her Attorney Susan Weiss, Esq. Plaintiff
v.
.1 John Doe A
Te'enah Ackerman, Esq. (Guardian at Law)
.2 John Doe B
By His Attorney, IditYafet, Esq. Defendants

DECISION

1. This concerns a motion for summary dismissal of the claim brought against the Defendants on account of injury that the Plaintiff suffered, she alleges, on account of the recalcitrance of Defendant 1 to give her a *get* [a Jewish document of divorce] in accordance with the laws of Moses and Israel, even though he was required to do so in a Rabbinic Court, and on account of the assistance and encouragement of Defendant 2 (the father of Defendant 1) in support of this recalcitrance.
2. The motion for summary dismissal is based primarily on two arguments: First, that there is no cause of action in tort in the State of Israel with respect to the recalcitrance of a husband to give a *get*; and second, that this concerns a subject that by its nature and substance lies in the exclusive jurisdiction of the Rabbinic Court, because only the Rabbinic Court has jurisdiction to adjudicate "matters of marriage and divorce of Jews in Israel who are citizens and residents of the State" (Paragraph 1, **Rabbinic Courts Jurisdiction [Marriage and Divorce] Law** , 5713 - 1953)

CAUSE OF ACTION IN TORT

3. The controlling question at this stage of the adjudication of the claim is whether the claim states a cause of action. The familiar rule is that a claim will not be dismissed for lack of a cause of action unless it is absolutely clear that, even if all of the allegations of the claim are proven true, there is no possibility that the claim will be successful. If there is any possibility whatever - no matter how slight - that the Plaintiff will prevail in her claim, the motion must be denied.
4. The question before the Court has in fact never been decided in the State of Israel. However, the phenomenon upon which the claim is based is familiar and widely known. A great deal of ink has already been spilled, not only in the Israeli legislature and in the State of Israel but over many generations in Israel and the Diaspora, and enormous efforts have been invested, in the attempt to find appropriate solutions to release the many women who are shackled by marital ties that they wish to sever but who confront one, single obstacle:

The controlling question at this stage of the adjudication of the claim is whether the claim states a cause of action…The question before the Court has in fact never been decided in the State of Israel.

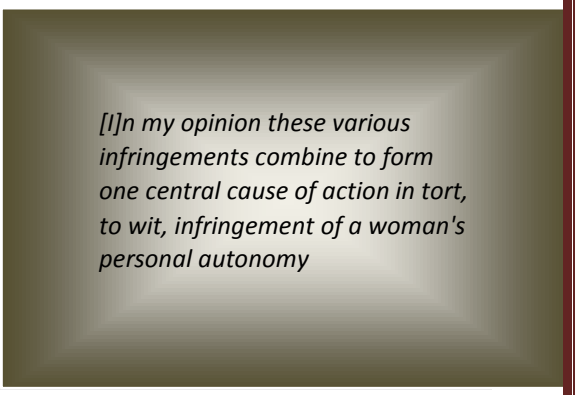
the recalcitrance of the husband to give the desired *get*.

5. In 1995 the **Rabbinic Courts (Enforcement of Divorce Judgments) Law**, 5755-1995, was enacted, providing the Rabbinic Courts a variety of tools for the imposition of sanctions on the recalcitrant husband in order to motivate him to desist from his recalcitrance. This law reflects the powerful desire of the legislature - as well as of the Rabbinic Courts, which participated actively in the preparation of the law - to attempt to solve this dismal problem while preserving the principal of applying *halakhah*[Jewish law] in all that pertains to marriage and divorce.
6. What if the husband persists in his recalcitrance? If despite the issuance of a Rabbinic Court decision mandating the giving of a *get*, and despite the power of the Rabbinic Court to impose sanctions on the husband, he stubbornly fails to give a *get*, and a great deal of time passes during which the wife suffers, without a real partner, without marital life, without any possibility of bringing children into the world and raising them in a normative family, and without any possibility of remarrying and determining her future - are we then dealing with compensable injury under our legal system?
7. The required answer, at least prima facie and at this stage of the proceedings, is that the Plaintiff should be allowed to prove her claim and that the claim should not be summarily dismissed.
8. Although the attorney for the Plaintiff has assembled in her briefing assorted arguments as to the possible causes of action that are available to her, such as breach of a statutory obligation, false imprisonment, deprivation of a woman's right to marriage and children, and others, in my opinion these various infringements combine to form one central cause of action in tort, to wit, infringement of a woman's personal autonomy caused by depriving her of her ability to determine the continuing course of her life with respect to those issues that are central to the life of any woman.

   The framework for my conclusion can be found comprehensively and in depth in the remarks of the Honorable Judge Or in Civil Appeal 2781/93 **Miasa Ali Da'aka v. Carmel Hospital**, Haifa (58 Dinim Elyon 174); and in light of the importance of his remarks to our matter, I permit myself to quote them at length:

THE RIGHT TO AUTONOMY-GENERAL

15. The point of departure for the discussion lies in the recognition that every person has a basic right to autonomy. This right was defined as the right of every individual to make decisions regarding his actions and desires on the basis of his own choices, and to act in accordance with these choices. The right to autonomy is, in the words of that definition, "his or her independence, self-reliance and self-contained ability to decide…" See, F. Carnerie, **Crisis and Informed Consent: Analysis of a Law-Medicine Malocclusion**, 12 Am. J. L. and Med. 55 (fn. 4)…This right of a person to shape his life and his destiny encompasses all of the central aspects of his life - where he will live, what work he will do, with whom he will live, and what he will believe. It is central to the condition of each and every individual in society. It is a necessary expression of the value of each and every individual in the world



unto himself. It is essential to the self-definition of each individual, in the sense that the entirety of the choices of each individual defines the personality and life of the individual…

17. Recognition of a person's right to autonomy is a basic ingredient in our legal system, as the legal system of a democratic country (see R. Gavison, **"Twenty Years Since the Rule of Yardor- The Right to be Elected and the Lessons of History,"** A Tribute to Shimon Agranat 151 (5747/1987); High Court of Justice 693/91 **Efrat v. The Person in Charge of the Population Registry in the Interior Department**, Dec. 47(1) Piskei Din 749, 770). It constitutes one of the central expressions of the constitutional right of each person in Israel to dignity, which is grounded in the Basic Law: Human Dignity and Freedom. Indeed, it has already been held that one of the expressions of this right to dignity is "… the freedom of choice of each person as a free creature," and that this reflects the concept according to which "…. each person…is a world unto himself" (remarks of President Barak in High Court of Justice /7357/95 **Barki Pate Hemfris (Israel) Ltd. v. State of Israel**, Dec. 50(2) Piskei Din 769, in section 3 of his decision). As President Barak noted, "autonomy of personal will is a fundamental value in our law. It is grounded today in the constitutional protection of human dignity" (High Court of Justice 4330/93 **Ganam v. Office of Attorneys**, 44 Dinim Elyon 435, in section 14 of the decision). Regarding the meaning of human dignity in this context, President Shamgar spoke in Civil Appeal 5942/92 **Doe v. Roe** et al., 48(3) Piskei Din 837, saying (on p. 842) that: "Human dignity is reflected, inter alia, in the ability of a human being as such to form his personality independently, as he wishes, to express his aspirations and to choose how to achieve them, to make his volitional choices, not to be subject to arbitrary compulsion, to be treated decently by every authority and every other individual, and to enjoy the equality of human beings". . . .

18. The right to autonomy is a "framework right" (see Barak, Judicial Commentary - Statutory Commentary (Jerusalem, 1994), pp. 357-358. Accordingly, this right serves as the basis for the derivation of many specific rights. Thus, for example, the right of an individual to choose his family name has been derived from it (Efrat, supra). The right of a criminal accused not to be present at his trial if he does not want to be has been derived from it (**Barki Pate Hamarfis**, supra). It is given great weight in resolving the question of whether a guardian should be appointed for a person (see, Civil Appeal 1233/93 **Cohen v. State Legal Advisor**, 42 Dinim Elyon 264, in sections 4 and 5 of the decision of Judge Strasberg-Cohen). The basic right of every person to freedom of movement in Israel has been derived from it (see section 74 of the decision of President Barak in High Court of Justice 5016/96 **Horev v. Minister of Transportation**, 51 Dinim Elyon 414). It served as well as the grounding for the right of a person to choose as he wishes an attorney to represent him in court (**Ganam**, supra). It was given great weight as well in resolving the question of whether and to what extent the adoption of an adult must be recognized, on the basis of the approach that "in an era in which 'human dignity' is a protected basic right, effect must be given to the aspiration of a person to fashion his personal condition" (remarks of Judge Benish in Civil Court 7155/96 **IlanYisraeli v. Government Legal Advisor, 51 Dinim Elyon** 873 in section 10)…" (pp. 41-43).

9. A person does not have the ability to shape his life however he wants, and life poses varied, and sometimes painful, limitations to a person, which prevent him from realizing all of his

desires. Not every such impediment constitutes an infringement of the person's dignity and freedom for which the law can create a judicial/constitutional remedy. However, there are cases in which the infringement is so severe that if it is possible to remedy it by judicial intervention, or at least to compensate the aggrieved party, the court will not hesitate to intervene. Cf. Criminal Appeal 115/00Arik **(Moris) Taib v. State of Israel** (58 Dinim Elyon 174), in which the following is said:

> Every woman, every person, is entitled to write the story of their life as he or her she wishes and in accordance with their choice - as long as he or she does not trespass into the domain of others - and this is the autonomy of free will. Should a person be compelled to follow a path that he or she did not choose, the autonomy of free-will will be infringed. Indeed, it is our fate, human fate, that we constantly act and refrain from acting not of our free will, and in this way autonomy of our will is found lacking. But when autonomy of free will is profoundly infringed, the law will intervene and speak. The scholar Joseph Raz wrote on the subject of the autonomous person, and among other things he told us:
>
> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives. A person whose every decision is extracted from him by coercion is not an autonomous person. Nor is a person autonomous if he is paralyzed and therefore cannot take advantage of the options which are offered to him. (Joseph Raz, Autonomy, **Toleration, and the Harm Principle, Issues in Contemporary Legal Philosophy**, Ruth Gavison ed., Clarendon Press (Oxford, 1987), 313, 314). (P. 28)

10. In our case, I am convinced that the right of a woman to determine for herself when she wishes to sever marital ties and when she wishes to remarry, her wish "to write the story of her life as she wishes and in accordance with her choice," is a basic right that will certainly find its place by virtue of the aforesaid framework. The aspiration of a woman who wants a divorce to fashion her personal condition as a free person determining her own fate merits every defense as an inseparable part of her dignity as a person.

11. The following are the remarks of the late Prof. A. Rosen-Zvi, which he delivered before the Committee on Constitution, Statute and Law (Protocol No. 240, 8.11.94, p. 10) in the context of a deliberation that took place in connection with the proposal of the **Rabbinic Courts (Enforcement of Divorce Judgments) Law** 5754-1994:

> In my opinion, the basic concept of human dignity and the sanctity of the life of a human being as a free person absolutely cannot be reconciled with recalcitrance to give a *get* or with *Aginut* [the condition of being unable to remarry because of such refusal], a

In our case, I am convinced that the right of a woman to determine for herself when she wishes to sever marital ties and when she wishes to remarry, her wish "to write the story of her life as she wishes and in accordance with her choice," is a basic right that will certainly find its place by virtue of the aforesaid framework. The aspiration of a woman who wants a divorce to fashion her personal condition as a free person determining her own fate merits every defense as an inseparable part of her dignity as a person.

priori, and does not tolerate a situation of dependency in which one party limits the other and creates impossible consequences for her. The situation of *aginut*, in which the *get*-recalcitrant leaves a woman, infringes her basic dignity. This is not only a halakhic feature to which Rabbi Ovadiah Yosef gave consummate expression; there is a striking expression in the view of the MaHaRSHa at the end of Tractate Yebamot, who writes: "Where there is the creation of *aginut*, there is no peace, and the entire Torah was given only in order to make peace." In other words, a situation of *aginut* undoes in this respect the basic purpose for which the Torah was given. These are words expressing the universal concept of peace, freedom and human dignity.

12. A still sharper expression of the severe infringement that occurs in the life a woman whose husband refuses to give her a *get* can be found in the expression on the subject by one of the greatest decisors of the twentieth century, Rabbi Y. E. Henkin. In his book **Edut le-Yisrael** Rabbi Henkin says as follows:

> …and whoever withholds a *get* because he is illegally demanding payment is a thief, and worse, for he [falls into] a sub-category of shedding blood. P. 144 (quoted as well in Writings of the Gaon Rabbi Y. E. Henkin, vol. 1, p. 115b.
>
> We are thus dealing with so severe an infringement in the eyes of *halakhah* that it is viewed not only as a spiritual, emotional and psychological infringement, but as the actual shedding of blood; and these words are well said.

13. It follows that the aspirations of Israeli society for human dignity and freedom, which are embodied in the Basic Law: Human Dignity and Freedom, and in the Torah of Israel itself - the Torah that determines the fundamental values of family life not only in Jewish religion but in Israeli law, as well - require the conclusion that creation of a state of *aginut* negates a woman's dignity and freedom.

14. The infringement of the autonomy of a woman that results from her being placed by her husband in a state of *aginut* is, in my opinion, compensable injury in accordance with the Tort Ordinance. I will quote once again from Judge Or in the Da'aka decision: The basic right of the Appellant as a person to dignity and autonomy has been infringed. Does this fact suffice to afford the Appellant a right to compensation, even if she has not suffered bodily injury . . .? The first question that must be considered in this context is whether the injury involved in an infringement of the dignity and freedom of the Appellant is "injury" in the sense of the Tort Ordinance. In my opinion, this question should be answered affirmatively. The term "injury" is defined in Section 1 of the Tort Ordinance (revised version). This definition is broad and addresses:

It follows that the aspirations of Israeli society for human dignity and freedom, which are embodied in the Basic Law: Human Dignity and Freedom, and in the Torah of Israel itself - the Torah that determines the fundamental values of family life not only in Jewish religion but in Israeli law, as well - require the conclusion that creation of a state of aginut negates a woman's dignity and freedom.

"Loss of life, loss of property, convenience, bodily welfare or reputation, or a diminution of any of them, and any similar loss or diminution".

In the framework of this definition, protection is provided to many intangible interests. Thus,

compensation is afforded for non-property injury – for example, pain and suffering – involved in bodily injury that the injured party has suffered. In view of the evident breadth of this definition, it has been held that infringement of bodily convenience, and emotional distress, even without any physical expression, and even if not associated with any physical infringement, can be compensable injury in tort (Civil Appeal 243/93 **Municipality of Jerusalem v. Gordon**, 39(1) Piskie Din 113, 139). According to this approach, the Tort Ordinance also protects "the interest of the injured party to his mental health, convenience and contentment" (ibid., p. 142). We have therefore held that one who has been harassed as the result of a criminal proceeding that resulted from the negligent initiation of an erroneous criminal proceeding against him has a right to compensation on account of this infringement by the prosecutorial authority (ibid.).

In a series of decisions rendered after that same episode, courts followed suit and ordered compensation on account of infringements of intangible interests of tort plaintiffs. Thus, it has been held that the moral injury and mental anguish caused the owner of intellectual property rights as a result of infringement of his rights is compensable injury (see the decision of the Vice President, Judge S. Levine, in Civil Appeal 4500/90 **Hershko v. Orbach**, 49(1) Piskei Din 419, 432). It has also so been held with respect to infringement of human dignity and freedom entailed in involuntary and unlawful hospitalization in a mental hospital (decision of Judge Netanyahu in Civil Courts 558/84 **Carmeli v. State of Israel**, 41(3) Piskei Din 757, 772). Similarly, it has been held that the suffering caused a woman that is entailed in the fact that her husband divorced her against her will constitutes compensable injury (see the decision of Judge Goldberg in Civil Appeal Courts 1730/92 **Masrawa v. Masrawa**, 38 Dinim Elyon 369, in section 9 of the decision.)

The same is true of injury to human dignity and feelings, which constitute the principal impetus for the imposition of damages in the wrongs of assault and false imprisonment (see **McGregor on Damages** (London, 1988) at p. 1024, 1026).

I believe, against this background, that infringement of human dignity and the right to autonomy that is entailed in the performance of a medical procedure without informed consent should be seen as compensable injury in tort law. Unlawful infringement of personal feelings as a result of not honoring a person's basic right to shape his life as he wishes constitutes an infringement of the welfare of that person, and it is encompassed by the aforesaid definition of "injury." This is the case whether we view it as an injury to a person's "convenience" or as a "similar loss or diminution," in the words of the definition of injury in paragraph 2 of the Order. Indeed, we have noted the centrality of the right to autonomy in the shaping of a person's identity and fate in the society in which we live. We have seen the importance of this right to one's ability to live as a thinking and independent individual. The conclusion follows that this right is a critical, inseparable part of a person's interest in "his life, convenience and contentment" (Gordon, supra, at p. 42), the infringement of which can entitle him to tort compensation. The remarks of Crisp in his article "**Medical Negligence, Assault, Informed Consent, and Autonomy,**" 17 J. Law & Society 77 (1990) are appropriate in this regard:

> One's well-being is constituted partly by the very living of one's life oneself, as opposed to having it led for one by others. The fear that we have of paternalism does not arise merely from the thought that we know our own interests better than others, but from the high value that we put on running our own lives (at p. 82).
>
> Indeed, a person is not an object. The right of every competent person is that the community and its members will respect his wishes with respect to those matters that are important to him, as long as he does not infringe upon others (Criminal Appeal by Special Permission 6795/93 **Aggadi v. State of Israel**, 48(1) Piaskei Din 705, section 7). This is required by the recognition of the value of the person and by the fact that every person is a free agent. Violation of this basic right other than pursuant to lawful power or right infringes severely the welfare of the individual and creates compensable injury in tort.(Pp. 44-45)

15. It is true that there are many questions that will have to be resolved in the adjudication that will be conducted: for example, whether we in fact have here a *get*-recalcitrant, and when in general the refusal of a husband to give a *get* becomes "recalcitrance" that entitles the wife to damages; whether the sought-after remedy, i.e., monetary damages, will be considered by *halakhah* to be coercion of the husband that may complicate the very possibility of a *get* being given altogether, because of halakhic problems relating to the halakhic law of a "forced *get*"; etc. But these questions do not influence my present decision. On the face of matters, there is a Rabbinic Court decision dated 11 Tamuz 5754 requiring the husband to give a *get*, and accordingly, it at least appears, we are dealing with a *get*-recalcitrant. The problem of a "forced *get*," as serious as it may be, likewise is not relevant when the sole question is whether there is a cause of action in tort, since the question of the injury that has already been caused to the wife after six years of refusal exists in any case. Moreover, the problem of a forced *get* is not necessarily an element of the tort question at all; take, for example, the tort claim brought by a wife after she has already been properly given a *get*. In such a case it is undisputed that there can be no problem of a forced *get*, and the question of the existence of a cause of action in tort would be presented to the same extent and with identical force.

16. The aforesaid is sufficient to lead to the conclusion that the claim should not be dismissed, and that on its face the claim states a cause of action.

THE QUESTION OF JURISDICTION

17. The argument of lack of jurisdiction must likewise not be accepted. The wife in her claim does not ask this Court to require the husband to give a *get* or to implement any sanctions against him to force him to give his wife a *get*. This Court is not intervening at all in the act of giving the *get*, and the wife is not asking the Court to intervene in this act; the claim is for monetary compensation only and this on the basis of a cause of action in tort and tort alone. Insofar as the argument is that the wife was caused injury as a result of her husband's conduct, the fact that the injurious conduct relates to the failure to give a *get* does not relegate the tort cause of action to the domain of "matters of marriage and divorce of Jews in Israel who are citizens and residents of the State" which is the exclusive jurisdiction of the Rabbinic Courts, even if the failure in the non-execution of this "act" is an event that is itself subject to the jurisdiction of the Rabbinic Court.

18. In conclusion, I hereby deny the motion for summary dismissal.

Given and announced today, 28 Tevet 5761, 23.1.01, in the absence of the parties.

Ben Zion Greenberger, Judge

Decision Summary

This is an interim decision in a motion to dismiss a case for damages for get-refusal.

In this case, a 36-year-old haredi woman sued her husband for damages for refusing to give her a get for 11 years. She also sued her father- in- law who had been accompanying his son to hearings at the rabbinic courts and actively encouraging him not to give a get so long as his wife refused to waive her rights to the house and child-support. The attorney for the defendants moved to dismiss the case, claiming that there were no grounds under Israeli Tort Law forget-refusal.

Judge Greenberger denied the defendants' motion to dismiss and set the ground for the new tort, holding that get-refusal is a violation of the Israeli Basic Law: Human Dignity and Freedom. He held that get – refusal is a violation of a woman's right "to determine for herself when she wishes to sever marital ties and when she wishes to remarry, her wish 'to write the story of her life as she wishes and in accordance with her choice'... The aspiration of a woman who wants a divorce to fashion her personal condition as a free person determining her own fate merits every defense as an inseparable part of her dignity as a person."

On the same day that the judge gave this landmark decision, the wife waived her rights for damages and received her get. She did not give up any interests she had in the marital home or in child support. Today she is happily remarried.

This is the first time the question of get refusal as a tort has been addressed. The judge held that it is an infringement on a woman's autonomy and dignity in violation of Basic Law: Human Dignity and Freedom. He also says that these principles are embodied in the Torah.

TORT 2 (J. HACOHEN, JER. FAM.CT. CASE 19270/03)

BEFORE THE HON. JUDGE MENACHEM HACOHEN: 21.12.2004

Re: Jane Doe
By Her Attorney Susan Weiss, Esq.Batsheva Sherman
Plaintiff,
v.
John Doe A
YehudahBerkovitz, Advocate

DECISION

1. Before me is a petition for monetary compensation for damages that were caused to a wife because of her husband's refusal to give her a *get* ("Jewish religious divorce"), this being the situation even after the Rabbinic court ordered him to give a *get*. The damages for which compensation is requested are essentially non-pecuniary. And they include: anguish, shame, suffering, isolation, pain, during the years of waiting for the *get*, the loss of life's pleasures including sexual gratification, infringement on autonomy, and the loss of the possibility to marry and bear children. In addition, the Plaintiff petitioned for pecuniary damages for the losses she suffered as a result of the drawn out procedures in the rabbinic court and for the reduction in her income in the absence of a husband who could support her and her family. In the course of the [pretrial] hearing, the Plaintiff retracted her claims for compensation for her husband's mistreatment, cruelty and violence toward her, accusations that were denied by her husband. Her attorney stipulated that: "I limit the relief requested to….. the damage that was caused to the wife because she was refused the *get*".
2. It is a fact. No one disputes that the husband is refusing to give a *get* to the wife for more than twelve years, and that on January 24, 2002, the Rabbinic court decided "to order the husband to give a *get* to his wife without delay."
3. The problem of *get*-recalcitrance is one of the fundamental problems of Halakhic Judaism (Jewish Religious Law) and in Jewish family law. In the High Court of Justice File no. 6751/04 Sabag vs. the Supreme Rabbinic Court of Appeals, and others (as yet unpublished) the Hon. Judge Proksia said:

The damages for which compensation is requested are essentially non-pecuniary. And they include: anguish, shame, suffering, isolation, pain, during the years of waiting for the get, the loss of life's pleasures including sexual gratification, infringement on autonomy, and the loss of the possibility to marry and bear children.

> The problem of the *agunah* is indeed a difficult problem…As a result different legal systems throughout the Western World have given expressions to this problem within their respective legal frameworks. And they chose different paths in legislation and judicial decisions to lend a hand to *agunot* under their jurisdiction… The phenomenon of refusing to issue a *get*…and the state of *aginut* is one of the most painful and difficult dilemmas with regard to personal status of Jewish couples. This problem besets couples living in Israel as well as Jewish couples throughout the world. This phenomenon marks Jewish life and law throughout the generations. And over the years, a

> variety of solutions have been found in Israel and in Diaspora communities outside Israel…"
>
> It is imperative" to find effective solutions to this phenomenon… in order to free couples from the chains of their *aginut* and to permit them to begin new lives, and in that way to realize their right to independent lives in the area of personal status..

The Hon. Judge Rubinstein, in this decision, defines the issue as follows:

> An inadequately resolved humanitarian and legal problem of husbands refusing to issue a *get*…according to Jewish Law, a recalcitrant husband refusing to issue a *get* could potentially imprison his wife for eternity, for as long as he is alive.

Further on, the Hon. Judge Rubinstein [describes in] detail the means and sanctions that are applied by Rabbinic courts against men who refuse to issue a *get*, both in accordance with the Rabbinic Courts (Enforcement of Divorce Decrees) Law 5755-1995 and under the legal authority of Rabbinic Courts Jurisdiction (Marriage and Divorce) Law 5713-1953 , including "restrictions on leaving the country, acquiring a passport, securing a driver's license, holding office, and having a bank account" and the imprisonment of the man who refuses to issue a *get*.

(With regard to this, see the article by M. Corinaldi, in the volume, Laws of Personal Status, Family and Inheritance – Between Religion and State, 2004, Chapter 7, "The Problem of Refusal to Grant a *get* and The Means of Solving It." In this article, Jewish legal approaches to deal with this problem that have developed over the years are described, and the difficulties that Rabbinic courts confronted in dealing with this problem emerge.)

4. I will preface my remarks by saying that within the framework of the petition before me, we are not dealing with additional sanctions on the recalcitrant husband targeted at encouraging him to give the *get*. Nor is this Court involved in the means by which the *get* will be given in the future. Rather only with the direct consequences that result from the failure to issue the *get* and the right of the woman to compensation for damages. Although, in her written summation, the plaintiff petitions for daily compensation in each head of damage that she listed for the period beginning on the day the complaint was submitted to this at court and ending on the day that the *get* is issued. However, this compensation represents a [fundamental] change in her legal argument, since it is mentioned neither in the written complaint nor in the main witness' affidavit. That is, the relief petitioned for is not [compensation for] future [damages]. The relief we are dealing with involves the past – damages that were caused to the woman during the time that she waited for the *get*, until the complaint was filed. The relief, should it be granted, will not be conditioned, determined or reduced if the *get* is given afterwards. And should the *get* be given during the proceedings and deliberations of this petition—it would in no way influence my decision on the matters before me. I would add and say it is not up to me to decide (notwithstanding that I raised this issue during the pretrial hearings of this court) in the event that this

I will preface my remarks by saying that within the framework of the petition before me, we are not dealing with additional sanctions on the recalcitrant husband targeted at encouraging him to give the get. Nor is this Court involved in the means by which the get will be given in the future. Rather only with the direct consequences that result from the failure to issue the get and the right of the woman to compensation for damages

petition is accepted and as a result the husband agrees to deliver a *get* to his wife, whether or not this *get* would be a [halakhically invalid] "coerced *get*" or not.

The Factual Background

5. The couple, who observe an Ultra-Orthodox religious lifestyle, were married to each other in accordance with the laws of Moses and Israel on June 21, 1982. They have six children, three of them minors.
6. The relations between the two floundered and on May 11, 1992, at the time that their youngest daughter was eight months old, the wife submitted a petition for divorce to the District Rabbinic Court of Jerusalem (the petition is attached as Exhibit A to the complaint). Quite soon after the filing of the petition of divorce, the couple ceased living together.
7. The judicial proceedings dragged on for many years during which the couple turned – in compliance with the husband's request – to numerous rabbis in an attempt to resolve the dispute between them.
8. It should be pointed out that at the same time that the wife filed for a divorce in the District Rabbinic Court, the husband, during 1997, turned [for relief] to the Court of Justice of the Haredi (Ultra-Orthodox religious) community, and there too the dispute was deliberated. On May 19, 1998, that Court issued a decision as follows: "We call upon the husband to issue a *get* to his wife." In response to that, the defendant notified that Court that he wished to return to litigate the matter in the rabbinic court. (See Exhibits G2-G3 to the petition).
9. Over the years, the plaintiff acceded to the defendant's wishes and along with him consulted with numerous rabbis in the hope that they would resolve the dispute between them. Below is a partial list of the rabbis with whom they consulted:

    Rabbi Dov Weiss, Rabbi of KiryatSanz, who ruled that the Defendant "has no idea how to treat his distinguished spouse with respect."

    Rabbi Joshua Cohen who rebuked the Defendant with regard to his verbal abuse towards the Plaintiff, including incidents in the presence of the children.

    Rabbi Mendel Fuchs who reported that he dedicated numerous hours in the attempt to bring about domestic tranquility between the couples, but concluded that "there is no possibility of a peaceful resolution of this matter".

    Rabbi Sholom Eisenberg who declared that the Defendant is:

    A thug, mentally unbalanced, while the wife…is intelligent, G-d fearing and responsible for the education of the children in the tradition of the people of Israel…while the Defendant" is slandering the Plaintiff in all kinds of wicked, devious ways.

    After this the Defendant requested that the couple consult with Rabbi Bransdofer; after that to Rabbi Mordecai Hoffman and after that to Rabbi Jacobsen and after that Rabbi Joshua Beck at which point this last Rabbi ruled unequivocally that the husband does not have the ability to supervise the upbringing and education of the children." Quite the opposite, as it has been stated, his involvement causes damages….He lacks the understanding of how to communicate with her and

Rabbi Sholom Eisenberg…declared that the Defendant is:

A thug, mentally unbalanced, while the wife….is intelligent, G-d fearing and responsible for the education of the children in the tradition of the people of Israel…while the Defendant "is slandering the Plaintiff in all kinds of wicked, devious ways.

them…..I see no possibilities for a peaceful reconciliation or bridging the gap."

10. On July 12, 1998, the wife submitted for a second time a petition for divorce to the District Rabbinic Court. She renewed her request for support. During the deliberations that took place with regard to this request, the couple was referred, again in response to the husband's request, to additional rabbis to attempt to resolve the dispute between them as described in Paragraph 9 above.

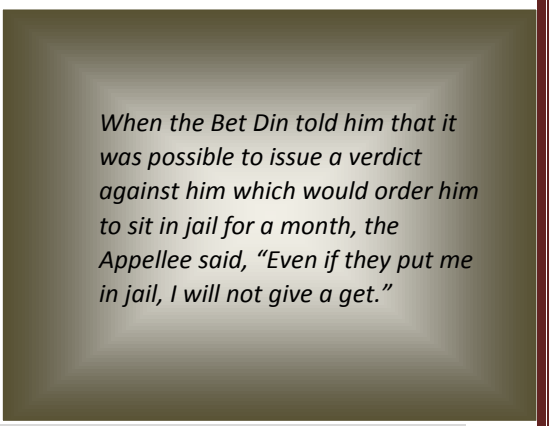
11. On August 16, 1999, the wife filed an appeal in the Supreme Rabbinic Court with regard to the amount of support that was awarded to her by the District Rabbinic Court. The dispute between the couple was transferred for adjudication to that Court. In the framework of the proceedings in the Supreme Rabbinic Court, the couple was referred again to various rabbis in accordance with the husband's request.

12. In the Court session that took place on June 3, 2001, the husband promised that if the couple went to consult with the Revered Rabbi of Amshinov, the husband would accept any decision made by the Revered Rabbi (See the decision of the Supreme Rabbinic Court, Exh. 14, attached to the Brief.) Once again, the Plaintiff acceded to the request of the Defendant and the Court issued a decision, as follows:

> In light of the declaration of the Appellee, in open Court, that he would accept any and all decisions given by the Revered and Holy Rabbi of Amshinov, the Appellant agreed to appear together with her husband, the Appellee, in front of the Revered Rabbi, so that [he may] hear both sides, and give his opinion about the dispute between her and her husband.
>
> The two appeared before the Revered Rabbi of Amshinov, who also determined that "the two sides must without a doubt divorce." At this point, the husband suggested that he would ask Rabbi Elyashiv because "I want a Torah opinion, the Revered Rabbi of Amshinov does not qualify for a Torah opinion for me." When the Bet Din told him that it was possible to issue a verdict against him which would order him to sit in jail for a month, the Appellee said, "Even if they put me in jail, I will not give a *get*".

13. On January 24, 2002, the Supreme Rabbinic Court issued a decision and in it, the following was decided:

> On the twelfth day of Sivan, 5761, our Court decided, in light of the stipulation of the Appellee, that he would [be obligated to] accept any and all decisions issued by the Honored and Revered Rabbi of Amshinov.
>
> And indeed, the Honored and Revered Rabbi of Amshinov, who spoke personally with me, told me explicitly that the couple unequivocally must divorce. And after examining all of the legal files and records, and after the Honored and Revered Rabbi of Amshinov determined that the couple must divorce, and in light of all of the information in the file and in light of the separation that has endured for many years, we do hereby obligate the husband to give a *get* to his wife without further delay, since he agreed. Since he agreed explicitly to listen to the sages' voices and in particular to the Honored and Revered Rabbi of Amshinov.



It should be pointed out that in the minority opinion, one of the Judges, Rabbi Ezra Bar Sholom, held that the fact that the couple had been living apart is not in his opinion sufficient reason to obligate a *get*, but since the husband declared that he would accept the recommendation of the Revered Rabbi of Amshinov and since the latter suggested a divorce, the husband should be obligated to honor the decision of the Revered Rabbi.

14. After approximately a year, on February 2, 2003, since the husband had not yet given his wife a *get*, the Supreme Rabbinic Court took up the disputes of the parties once again. And in the verdict that they issued, once again, they required that the husband give a *get* and imposed on the husband the sanctions and excommunications of Rabbi Tam. But, they did not apply coercion to the husband to give the *get* and did not order that he be imprisoned. This was in opposition to the minority opinion of the Chief Judge, Rabbi Solomon Dichovsky, who thought that the conduct of the husband constituted contempt and derision with regard to his wife and children and with regard to the declarations of the sages. Consequently, it is appropriate to coerce the husband to give his wife the *get* and to order his imprisonment. (See Exh. 17 attached to the complaint.) In light of this verdict, the [court imposed] an excommunication order of Rabbi Tam on the husband on February 20, 2003 (Exh. 18 attached to the Complaint). [However,] the sanctions that were imposed on the husband up and until the time of the submission of the complaint that is before me were ineffective against the husband. The husband has not given a *get* to his wife until this very day.

JURISDICTION

15. Although the Defendant did not raise any objections with regard to this Court's jurisdiction to hear and to deliberate this claim, quite the opposite, he maintained in his papers, that "the family Court has the authority to deal with the complaint." (Notwithstanding this, he maintained that the Court is not the appropriate forum for deliberating this matter) I will nevertheless, address in brief the question of jurisdiction.

16. Three of my colleagues, the Hon. Judge Marcus, the Hon. Judge Greenberger and The Hon. Judge Elbaz were called upon in the past to render the decisions with regard to the authority of this Court to deal with matters such as this one. (Fam. Ct. File no. 900/00; Fam. Ct. File no. 3950/00; Fam. Ct. File File no. 12130/03). In all three decisions, it was decided that this Court has the authority to adjudicate a woman's petition for compensation for damages that were caused to her because of the refusal of the husband to give her a *get*. The Hon. Judge Greenberger ruled that this Court has the authority to deal with this type of matter because:

[I]t is appropriate to coerce the husband to give his wife the get and to order his imprisonment. …In light of this verdict, the [court imposed] an excommunication order of Rabbi Tam on the husband on February 20, 2003….[However,] the sanctions that were imposed on the husband up and until the time of the submission of the complaint that is before me were ineffective against the husband. The husband has not given a get to his wife until this very day.

This Court in no way intervenes in the process of giving the *get* and the wife is not requesting from the Court that it become involved in that process; the petition is solely for monetary compensation and this is based on a cause of action in tort…the fact that the injurious behavior is connected to the failure to give a *get* does not place the cause of action for tort within the rubric of marriage and divorce of Jews in Israel….which is solely within the jurisdiction of the religious courts.

The Hon. Judges Marcus and Elbaz distinguished between a case such as the one before me and the decision of the High

Court **In The Matter of Marom** (Civ. App. 401/66, **Marom vs. Marom**, 21(1) PD"I 673) in which it was ruled that the Family Court lacks jurisdiction to rule with regard to compensation due as a result of the violation of a divorce agreement, since that type of claim belongs solely within the jurisdiction of the Rabbinic Court as indicated within Paragraph 1 in the Rabbinic Courts (Marriage and Divorce) Law 1953 .

In the decision of the Hon. Judge Elbaz, (Fam. Ct. File no.1230/03), the words of the learned Dr. Yechiel S. Kaplan and Dr. Ronen Peri of the Law Faculty of Haifa University, were quoted. from their [forthcoming] article "**On The Obligation of *Get* Recalcitrants for Damages**" (To be published in [Tel Aviv] 28 Legal Studies (5755). The Hon. Judge Elbaz in his decision included a summary of the relevant sections of these scholars that bear on our matter:

In their article the authors distinguish between the Marom decision and a tort case for *get* recalcitrance [arguing that] violating a [contractual] undertaking to issue a *get* is a matter [dealing with issues] of marriage and divorce since questions regarding the validity and implications of such [contractual] undertakings are such that a rabbinic court must decide that matter in light of the personal status of the parties. In contrast, in a case structured as is the case currently before us, the civil court is not called upon to determine if the man violated his [contractual] obligation to give a *get* to his wife or not. That determination, as was required in the Marom case, indeed cannot be made without weighing the principles of the personal status of each party…the starting point is that the rabbinic court already decided and ruled on the matter and held that there are grounds for divorce as a consequence of which the husband is obligated to divorce his wife. Further into the article the authors deal with the question of whether the Marom ruling might not preclude the civil court from taking jurisdiction over any claim which, if accepted, might influence the validity of the *get* in the eyes of religious law. Their conclusion is – "It is not necessarily true, in light of the principals of Jewish law, that the existence of a woman's right to make a claim for damages and compensation as a result of the *get* recalcitrance vitiates the validity of the *get*. A claim for damages is not meant to serve as a direct means of enforcing a court order for a *get*. The impact on the divorce process is indirect."

17. As the Defendant claims in his summary, that this Court is not the appropriate forum ("forum conveniens") to judge this matter. It would appear to me that in making this allegation, the Defendant intends to argue that this matter is not justiciable in a civil court, or, at least that it is not appropriate to hear the matter there..
18. In other words, is it appropriate for a civil court to intervene in a dispute whose source is in Jewish halakha? Would it not be more appropriate – as contended by the Defendant – to leave it to the Rabbinic courts to find a solution for the problem between the couple before me, and between other parties who encounter a similar problem?
19. The Plaintiff argues in her response to the Defendant's summation that the Rabbinic court cannot be the "forum conveniens" for adjudicating this suit, because it lacks authority to consider and adjudicate the claim in torts between the parties. The "forum conveniens" issue can arise only where two courts are competent to adjudicate a certain claim, which is not the case in our matter. But beyond this aspect, in my view, awarding damages

In other words, is it appropriate for a civil court to intervene in a dispute whose source is in Jewish halakha? Would it not be more appropriate – as contended by the Defendant – to leave it to the Rabbinic courts to find a solution for the problem between the couple before me, and between other parties who encounter a similar problem?

in torts in a private dispute does not constitute improper trespassing infringement on the area of expertise of the Rabbinic courts. The Rabbinic courts deal, at in one tempo way or another, with finding halakhic solutions for the phenomenon of *get* recalcitrance and with the development of halakhic tools for exerting pressure on *get* withholders to consent to grant their wives the longed for *get*. However, in this suit the Court is not trespassing infringing on this area, and it is not the purpose of the decision – should it grant the requested relief – to expedite the granting of the *get*. The object of the relief applied for is to indemnify the wife for significant damages caused her by long years of *aginut*, loneliness and mental distress that were imposed on her by her husband.

20. It is long since the courts have overcome their reluctance to intervene in family matters, even in disputes which derive by nature from the matrimonial rules of a certain religious community. Thus, in Civil Appeal 245/81 **HouriyaJamil Mahmoud Sultan v. Hassan Kamal Sultan**, PD 38(3), 169, pp. 172-173 (hereinafter the "Sultan case").

Justice Netanyahu held:

> The fact that Shari'a law recognizes certain monetary rights of hers as a divorced woman does not negate the fact that she suffered harm and injury merely by having been divorced without a cause recognized in a decision of a competent court. She is thus vested with a cause of action in torts.

One should also recall the words of President Barak in High Court of Justice File 1635/90 Zarzevsky v. The Prime Minister and others, PDI 45 1 749, pp. 856-857), that:

> Interpersonal relations in the realm of morality or society do not fall into a legal lacuna. The law covers all.

THE CAUSES OF ACTION

21. The Defendant did not file a separate motion to reject the suit for want of a cause of action. Nonetheless, in his statement of defense (section 14) he argues :

> [t]hat his actions do not constitute cause of action in tort, nor do his omission and abstention from granting the Plaintiff a *get* constitute a tort in damages, even if it were to be agreed that this conduct is improper."

22. In his summation the Defendant writes that he:

> [is] willing to admit that subjecting a woman to *aginut* in vain, for the sole purpose of causing her distress, is a tort, and that there is room for compensating the woman for this. However, our case is not like this at all. The husband truly looks forward to the day when his wife will desist from her wish to divorce him, and he is willing for his part to resume normal family life.

Interpersonal relations in the realm of morality or society do not fall into a legal lacuna. The law covers all.

If I understand the Defendant's distinction correctly, he acknowledges that causing *aginut* is a cause of action in tort in damages – provided, however, that it is accompanied by a mental element of an intention to cause the woman distress and injury. Another distinction that arises from his words is that despite his disobeying of the Rabbinic court's decision, which obligated him to grant a *get* – this is not a case of "subjecting a woman to *aginut* in vain." In relating to the

tort of negligence, the Defendant states in his summation that this tort could apply "in a case where the husband imposes *aginut* on his wife." But he once again qualifies this statement, arguing that the tort will apply:

> [w]hen the husband abandons his wife and cohabits with another woman or acts in a manner that clearly demonstrates that he no longer wants his wife or marriage with her, notwithstanding which he refuses to divorce his wife. And in such a case, the woman is certainly entitled to compensation.

However, in our matter, "the husband truly wants to reestablish domestic harmony." In other words, according to the Defendant, a *get* withholder commits the tort of negligence only if he abandoned the woman, is not interested in domestic harmony, but at the same time refuses to grant her a *get*.

23. In the three decisions issued by my colleagues, mentioned in section 16 above, they analyzed the cause in a suit of this sort, after the defendants argued that the suits that had been brought against them – were devoid of any cause of action. The first legal question that needs to be decided is whether we are concerned with a cause of action in tort in damages in respect of which compensation may be granted, and if so – which tort is involved.

24. In the aforementioned decisions, the judges noted several torts on which it would be possible to sue a husband who withholds a *get* from his wife despite being ordered or coerced to grant a *get* by the Rabbinic court. Vice President Marcus held that the suit can be founded on the familiar torts of negligence and breach of a statutory duty. Judge Elbaz concurred in this view. Judge Greenberger expressed the opinion that one another cause of action in tort in damages is involved, namely "infringement of autonomy." This finding relies inter alia on the words of Justice Or in Civil Civ. Appeal 2781/93 Daka v. The Carmel Hospital (Dinim Elyon 58, 174). (In my humble opinion, as explained hereinafter, "infringement of autonomy" was recognized in that decision as a "head of damage," and not as a "cause of action in tort in damages(".

25. Several possible torts were mentioned in the Plaintiff's pleadings: First and foremost – breach of a statutory duty, based on the violation of the Basic Law: Human Dignity and Freedom, the Penal Law, the Law for Prevention of Violence in the Family, the Contracts Law and international conventions. Additionally, the complaint mentioned the tort of negligence and the tort of "false imprisonment," and it was also argued that the causing of *aginut* is in itself a cause of action in tort in damages. Below I will discuss the torts that were mentioned in the complaint and the fulfillment of their elements in the case before me. If I find that a cause of action in tort in damages in fact exists, I will proceed to determine whether or not there were damages and the proper amount of compensation therefore.

BREACH OF A STATUTORY DUTY - GENERAL

26. In the Civil Tort Ordinance [New Version], the tort of breach of a statutory duty was defined as follows:

> 63. Breach of a statutory duty
>
> (A) A person acting in breach of a statutory duty is one who does not fulfill a duty that is imposed on him by any statute – excluding this Ordinance – when such statute, according to its correct interpretation, is intended for the good or the protection of another person, and the breach caused that person

damage of the type or nature meant by the statute. However, the other person is not entitled, by reason of the breach, to the remedy specified in this Ordinance, if the statute, according to its correct interpretation, intended to exclude such remedy.

(B) In the matter of this section, a statute is deemed to have been made for the good or the protection of someone, if, according to its correction interpretation, it is intended for the good or the protection of that someone or for the good or the protection of people in general or of people of the same type or description as that someone.

27. Thus, in section 63 of the Civil Torts Ordinance the legislator established that a breach of a statutory duty may, in certain conditions which are detailed in that section, vest the aggrieved party with a right to the remedies enumerated in the Ordinance.

28. This tort is a "framework tort," in which "the court is granted discretion in the creation of liabilities" (Englard, Barak, Heshin, The Law of Torts – The General Doctrine of Torts, 2nd edition, 5737, Part 6, p. 86). We are thus concerned dealing with a tort that is filled with whose actual content is determined anew in each and every case, with the court required to determine, through the application of considerations of legal policy, what content should be bestowed on this tort.

29. Section 63 of the Civil Torts Ordinance [New Version] enumerates, according to case law, five cumulative elements:

(a) A duty is imposed on the tortfeasor by virtue of a statute.

(b) The statute is intended for the good of the aggrieved party.

(c) The tortfeasor acted in breach of the duty that is imposed on him.

(d) The breach caused the aggrieved party an injury.

(e) The injury that was caused is of the type meant by the legislator.

(See Civil Civ. App.eal 145/80 S. Vaknin v.The Beit Shemesh Local Council and others, PD 37 (1), 113, p. 136 and on; hereinafter the "Vaknin case").

30. Ada Bar-Shira in her article "Violation of Statutory Duty" (Tort Law, and its Various Causes of Action, G. Tadeski. ed. – 1989), aforesaid paragraph 63 was analyzed, and the proper scope of [the cause of action based on a] statutory duty was discussed and it was stated that:

> Questions regarding the scope and range of the violation of a statutory duty, whom it was intended to benefit, what damage it was intended to prevent, and if there is a right to file a claim for its violation, is determined upon interpretation of the statute violated. Therefore paragraph 63 puts the burden of interpretation on the courts. This "creates the possibility for the endless creation of causes of action in tort, parallel to those obligations imposed on a person by the law… It is patently clear that this opens up wide opportunities (pastures) for 'judicial legislation' in the name of the law." (id., p. 10.).

31. From the aforesaid, it is clear that when we want to make use of "the violation of statutory duty" [as a cause of action in tort], [one should] adopt a narrow interpretation, so that the tort will not be used as a "catch-all" paragraph that will create almost absolute liability in a

way that defeats its original purpose. (Civ. App. 804/80 Sidaar Tanker Cooperation v. Hevrat Kav Tzinor. (PD 39 (1) 393, p. 438-439).

32. The Hon. Agranat, insisted on this, stating:

> ...if the matter involved an incident in which the defendant, in the circumstances as above mentioned, made an error that involved a violation of a statutory duty and this violation is the cause of action of the complaint, then it is imperative to consider, in determining 'causality,' the purpose that stood before the legislator when determining this [statutory] obligation. (Civ. App. 227/67, Motion 113/68 Abraham v. Katz, PD 22(1) p. 313, 324-325.

VIOLATION OF STATUTORY DUTY

33. The wife has argued that by disobeying the ruling of the Supreme Rabbinic Court ordering him to give a divorce, the husband violated section. 287(a) of the Penal Code that states as follows :

> A person who violates a ruling issued properly by a court or by a clerk or by any person operating in an official capacity and authorized in that matter, his judgment is – 2 years imprisonment.

34. I am not convinced that I can accept this argument. As stated above, one of the conditions for the formulation of liability within the framework of the violation of a statutory duty is that the statute which serves as the basis of the obligation was intended "for the good or for the protection" of the plaintiff (see Civ. App. 610/02 – Mifal Ha' Pais v. Lotonet Moadon Haverim Ltd.(Tak- Al 2003 (2) 3144, p. 3148; (hereinafter in the "Matter of Lotonet").

35. In the Matter of "Lotonet" it was determined, that even if it were assumed that a criminal prohibition was violated, the plaintiff must prove that the statute upon which he has based his claim was indeed intended to protect his interests. (Compare also: Daphna Levinson-Zamir, Violation of Statutory Duty, Tort Law- The Various Causes of Action, G Tadeski, ed. 1989).

36. In the Matter of "Vaknin," The Hon. Judge (his title at the time) Barak insisted on this condition, stating:

> [T]his requirement distinguishes between statutes meant for the benefit or protection of the individual, and between other statutes that were not meant for the benefit or protection of the individual. We must impose this distinction. It seems to me, that a statute is meant for "the benefit and protection of others" if the statute determines norms and types of behavior intended to protect the interests of the individual. As opposed to statutes of this kind, are those statutes that are not intended to protect the interests of the individual. Among them, we can include those statutes that are intended to protect the country, the government, and the fabric of the collective life and lifestyle of a nation.

37. Though, in the Matter of Vaknin the aforementioned condition was limited to a large extent, notwithstanding such limitation, it was determined that the court must ask itself whether "a particular statue is meant to protect the interests of the individual or not. Whether this individual stands alone or whether this individual is like other individuals." Similarly, in the matter of "Lotonet" it was decided that Mifal Ha' Pais (the state authorized lottery- s.w.) had no right to sue Lotonet for violation of the crime against lotteries, since this statute was not passed to protect Mifal Ha' Pais.

38. As for the matter before me, it seems that the prohibition set forth in paragraph 287(a) of the Penal Code, was meant to protect the collective values of the public law and order, and not to protect the interests of the individual. Therefore, and in light of the final outcome of my examination of the appropriate cause of action [upon which to base the claim before me], I will not decide whether or not it is possible to establish a cause of action [in tort for *get* recalcitrance] based on a violation of a statutory duty, i.e., the violation of paragraph 287(a) of the Penal Code.

VIOLATION OF STATUTORY DUTY- THE DUTY TO PREVENT FAMILY VIOLENCE

39. The Plaintiff claims that it is possible to view the [Defendant's] violation of the Law for the Prevention of Family Violence 5751-1991 as tantamount to a violation of a statutory duty in accordance with section 63 of the Tort Ordinance.

40. Section 3 of the Law for the Prevention of Family Violence, maintains that :

> A Request for a Protection Order and the Conditions for Issuing It (amendment 5757 (1997), 5758 (1998)). At the request of a family member, the Attorney General or his representative, the Police Prosecutor, or the Social Worker appointed in accordance with the Youth Law (Care and Supervision) 5720 (1960), the court is permitted to issue a protection order against a person if one of the following conditions are met:
>
> … (3) abuses a family member in such manner that it is continuous emotional abuse, or behaves in such manner that [he] prevents a family member from leading a reasonable and sound life.

41. It is certainly possible to say that under the circumstances of the Plaintiff's life, denying her a divorce serious impedes her ability to conduct a reasonable and sound lifestyle, and is tantamount to continuous mental abuse that has lasted for many years.

42. I accept the statements of Rachel Ackerman, a social worker who takes care of Ultra-Orthodox women whose husbands refuse to give them a *get*. Mrs. Ackerman works within the framework of a family therapy clinic called "The Institute for the Family" [that operates] within the Ultra-Orthodox sector. Mrs. Ackerman described the influence of *get* recalcitrance on Ultra-Orthodox women in these words:

> ….Women whose husbands refuse to give them a *get* cannot take any action to change their status. By being chained to their husbands, their social status is significantly flawed; and their value in the eyes of the community is low. Therefore, they feel socially segregated, deep humiliation, shame and anguish.
>
> As a result of the centrality of marriage to Ultra-Orthodox life, in the case of single women and divorcees, the community tries to find partner for them. The normative interaction between the community and the divorcees is focused on finding new husbands for them, in order to raise their social standing in the community. However, there is no conventional interaction between the women whose husbands refused to divorce them and their community. The place of those women whose husbands refuse to give them a Jewish divorce within their community is unclear. On the one hand, they are not considered part of the population of married woman. And so long as the period that their husbands deny them a divorce continues, the

As for the matter before me, it seems that the prohibition set forth in paragraph 287(a) of the Penal Code, was meant to protect the collective values of the public law and order, and not to protect the interests of the individual

gap expands between them and the married women who are involved in raising and enlarging their families. On the other hand, they are not considered part of the population of divorcees. Therefore, they cannot be offered a potential partner, and they do benefit from the rallying of the community to their support. By relegating them to this particular status, their husbands cause them to be isolated from the community they belong to. This status also entails shame and humiliation, and these women experience a loss of self-assurance and low self-esteem.(See Mrs. Ackerman's deposition that was submitted 31.3.2004).

43. In addition, and this as opposed to paragraph 287(a) of the Penal Code, there is no doubt that the Law for the Prevention of Family Violence, was intended-- first and foremost – to protect women from abuse and cruelty inflicted by their husbands.

44. In the matter of Sultan, the court held that the very fact that the statute provided a [criminal] sanction does not necessarily indicate that the intention [of the legislature was] to deny a civil remedy. Thus, the Hon. Judge Netanyahu held:

> There is no contradiction between the infliction of a criminal sentence and the denial of civil remedies. It all depends on the intention of the statutory provision. And this is a matter of interpretation, which has to be guided by policy considerations. The existence of criminal sanctions is only one of the considerations that can be taken in account.
>
> Later, this rule (precedent) was confirmed, among others in Civ, App. 2038/98 – Yitzchak Amin v. David Amin 1324, p. 1329.

45. Nevertheless, even after we determine that the statute [in question] was intended for the protection of the plaintiff, and that the husband violated the statute, it is still necessary to decide whether or not the statute, in accordance with its correct interpretation and purpose (that [in this instance] has absolutely nothing to do with the matter of *iggun*), intended to provide a civil remedy in the event that it is violated. In this case, that remedy being a cause of action in tort for a violation of a statutory duty.

46. It seems to me, that we cannot answer this question in the affirmative. The Plaintiff in this matter cannot base her complaint on the tort of a violation of statutory duty that relies on the Law for the Prevention of Family Violence .

[E]ven after we determine that the statute [in question] was intended for the protection of the plaintiff, and that the husband violated the statute, it is still necessary to decide whether or not the statute, in accordance with its correct interpretation and purpose (that [in this instance] has absolutely nothing to do with the matter of iggun), intended to provide a civil remedy in the event that it is violated. In this case, that remedy being a cause of action in tort for a violation of a statutory duty.

VIOLATION OF STATUTORY DUTY – BASIC LAW: HUMAN DIGNITY AND FREEDOM.

47. Section 2 of the Basic Law: Human Dignity and Freedom, stipulates that: "There shall be no violation of the life, body or dignity of any person as such." Clause 5 of Basic Law may also be relevant to the matter before me, and it stipulates that: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise."

48. It can be said that the infringement on the wife's dignity and freedom is extreme, since she has for many years petitioned to be released from the bonds of a relationship that she does not want, and she

finds herself obligated to a marital relationship against her will. There is no doubt that her liberty and her will as a free human being have been critically hurt in an area that lies at the very heart of her essence as an individual, in that place which is meant to reflect a persons' deepest yearnings, desires and ability to choose in a full and definitive manner. As stated by Pres. (his title at that time) Shamgar in Civ. App. 5942/92:

> A person's dignity is reflected, among others things, in his ability as a human being: to formulate his personality freely, according to his will; to express his aspirations and choose the manners in which to fulfill them; to make his rational choices, and not to be enslaved to arbitrary coercion; to be provided with fair treatment by all authorities, and by all individuals; to enjoy the equality among fellow human beings…(id., at 842).
>
> These words are valid regarding Israeli society on a whole. But it would seem to me that [that they are even more valid] with regard to an Ultra-Orthodox women, where the role of the marital relationship to her personal life is even more significant, and impacts on her dignity and status within the community to which she belongs.

49. There is therefore no doubt that the refusal to deliver a *get* is tantamount to a violation of the values protected by the Basic Law: Human Dignity and Freedom, among them: dignity, freedom of choice, the right to self-fulfillment, personal autonomy, societal rights, and the right to marry and bear children.

50. However, one cannot issue an award for damages for a violation of a statutory duty based simply on the declaration that the refusal of a husband to give his wife a *get* is an infringement on his wife's dignity and freedom. In order to [make such an award], it is necessary to examine whether or not it is appropriate to make use of this cause of action within the specific statutory framework of the Basic Law: Human Dignity and Freedom.

51. As stated by Justice Or in Civil Appeal 2781/93 Daka v. The Carmel Hospital (Tak-Al 99(3), 574, p. 626; hereinafter the "Daka case"):

> The development of causes of action that relate to the violation and infringement of basic rights is a complex subject that is now taking only its first steps in Israeli law. The recognition of the existence of constitutional causes of action raises a multitude of difficulties and questions that have not yet been probed and discussed in the rulings of the courts and in the scholars' writings, such as which rights will be an object of protection through constitutional causes, what are the tests for the protection of these rights, which reliefs are appropriate for the infringement of a constitutional right, and the like.

[O]ne cannot issue an award for damages for a violation of a statutory duty based simply on the declaration that the refusal of a husband to give his wife a get is an infringement on his wife's dignity and freedom. In order to [make such an award], it is necessary to examine whether or not it is appropriate to make use of this cause of action within the specific statutory framework of the Basic Law: Human Dignity and Freedom.

52. In Dafna Barak-Erez's book Constitutional Torts (Bursi Publishers, 5754), the possibility was discussed of regarding a governmental act that infringed human rights as the commission of a constitutional tort that will be analyzed with the tools of the Civil Wrongs Ordinance, as part of the tort of negligence (cf.: Aharon Barak, Protected Human Rights and Private Law, Klinghoffer Book, 1993, 163).

53. However, it seems that at this point in time, recognition of such a constitutional tort, in the relations between two individuals – is still is a long way off. I will add that the rights which are protected under the Basic Law: Human Dignity and Freedom can serve as a directing and guiding tool in the interpretation and analysis of the existing torts.

NEGLIGENCE

54. In my opinion, the Defendant's refusal to grant his wife a *get* falls within the tort of negligence, based on its interpretation in torts, and this tort is able to subsume the case before me.

55. Section 35 of the Civil Torts Ordinance [New Version] 5728-1968 prescribes:

> If a person did an act which a reasonable and prudent person would not have done in the same circumstances, or did not do an act which a reasonable and prudent person would have done in the same circumstances… this constitutes negligence; and if he was negligent as stated in relation to another person towards whom he has a duty in those circumstances not to act as he did, this constitutes negligence. And a person who by his negligence causes an injury to another, commits a tort.

The tort of negligence is founded on three elements:

Existence of a duty of care on the part of the defendant, breach of the duty of care by the defendant, and the existence of an injury that was caused to the plaintiff due to the breach of the duty of care.

56. In the law of torts, as distinct from criminal law, negligence is an objective element that relates to a deviation from what the court regards as the proper standard of conduct, irrespective of the tortfeasor's state of mind at the time of this deviation. Although in the past Prof. Tadeski expressed the opinion that it is doubtful whether liability can be imposed for a deliberate act in the framework of the tort of negligence. Tadeski, Bodily Injury Without the Use of Force and "Malicious Negligence," Hapraklit 13 (5727) 170), this approach was rejected both in the literature (see: Amnon Rubinstein and Daniel Friedman, "Public Servants' Liability in Torts," Hapraklit 21 5725, p. 61, and also: M. Weisman, Actions for Negligence in Torts, Jerusalem) and by the Supreme Court (see: Civil Appeal 593/81 Ashdod Motor Enterprises v. Tsizik, PDI 41(3) 169, and Civil Appeal 515/63 Nagar v. Dahari, PD 18(2) 169, where the Supreme Court deemed a conscious and active act to be negligence for purposes of the Civil Wrongs Ordinance).

57. It is precisely on the fundamental issue before me – the imposition of damages on a *get* withholder – that the scholars Dr. Ronen Perry and Dr. Yehiel Kaplan expressed their opinion that recourse may be had to the tort of negligence in an action for compensation by a woman against her husband who refuses to grant her a *get*, even though the negligence is malicious negligence (Kaplan & Perry, Lecture on the Liability in Torts of *Get* Withholders, Haifa University Seminar on New Trends in Divorce Laws – May 18, 2004).

58. The aforementioned Civil Appeal 593/81 included a discussion of the principles of interpretation of the tort of negligence, as delineated over the years in case law and in the legal literature:

It was already held in the past that "negligence is an ongoing principle that is applied to life's most diverse conditions and problems…" (Justice Agranat in Civil Appeal 224/51, PDI 7 674); "…It has been held already previously that it is not always possible to find a full answer in the test of foreseeability, and it is therefore incumbent on the interpreter to stress the social and moral element of the matter under consideration" (Justice Vitkon in Civil Appeal 360/59, PDI 14 206; "The court must balance between the interests that merit protection, and in this the court is vested with a normative and creative function" (Justice Barak in Criminal Appeal 186/80, PDI 35(1) 769. In the aforementioned Criminal Appeal 186/80, it was said by the same justice (at p. 779) that "The categories of negligence are never closed, never rigid and never immutable, but are rather determined based on the sense of morality and societal and social justice and society's changing needs." And again: "Of course, following a change in societal attitudes, certain interests lose their importance while other interests come to the fore. As a result, a change occurs in the categories themselves" (Justice Barak in Civil Appeal 145/80, PDI 37(1) 113); "And therefore (in those cases in which case law has still not been decided), one can only rely on the circumstances in each and every case, in order to bestow content on this concept based on the sense and the societal needs mentioned above and based on judicial policy" (Justice Goldberg in Civil Appeal 190/81, PDI 38(2) 54)… When setting ironclad rules for determining the existence of liability on the tort of negligence, the court does not act in an arbitrary manner but balances between different interests.

59. In the article by Rubinstein& Friedman, it is said that negligence is:

Conduct that falls beneath a certain standard set in law. The test is solely objective and factual. The court measures the defendant's conduct against an objective criterion that is generally termed the criterion of the reasonable person" (ibid., pp. 66-67).

According to the test of the "reasonable person," the Defendant breached the duty of care imposed on him vis-à-vis his wife and deviated substantially and deliberately from the proper standard of conduct, in that he has refused for many a long year his wife's request for a divorce and has led her on for many a long year, dragging her from one rabbi to the next, all of whom have expressed their opinion – that this couple must divorce, and in particular – in having violated the decision of the Rabbinic High Court which obligated him to grant his wife a get. There is no doubt that any reasonable person would have foreseen that this conduct would cause emotional damage to the woman and injured her dignity.

60. According to the test of the "reasonable person," the Defendant breached the duty of care imposed on him vis-à-vis his wife and deviated substantially and deliberately from the proper standard of conduct, in that he has refused for many a long year his wife's request for a divorce and has led her on for many a long year, dragging her from one rabbi to the next, all of whom have expressed their opinion – that this couple must divorce, and in particular – in having violated the decision of the Rabbinic High Court which obligated him to grant his wife a *get*. There is no doubt that any reasonable person would have foreseen that this conduct would cause emotional damage to the woman and injured her dignity.

61. The husband owes his wife a duty of care. He acted negligently in breaching this duty of care when he could have foreseen the damage that would be caused, as a result of the breach, to the woman's dignity, to her standing in society, to her freedom and to her soul.

62. In the conclusion that the husband owes a conceptual duty of care to his wife, significant weight is given to the relationship between a husband and wife, which is one of dependence and closeness. In a relationship of this kind, it is expected that special care will be taken of the spouse's feelings and wellbeing, more than is expected in the case of a stranger.

63. In conclusion of the subject of torts in damages, I will note that in the decision of my colleague Judge Nili Maimon in Family File (Jerusalem) 18551/00 K.S. v. K.M., the opinion was expressed – in which I join – that a special tort in damages should be established that would provide an answer to physical and mental abuse in the family .

Judge Maimon wrote there that:

> Establishing a special tort… including treatment of the question of the damage and the compensation, will provide a better answer in the struggle against this serious phenomenon and form part of the web of war on this perverted social phenomenon, together with the Law for the Prevention of Violence in the Family 5751-1991 and the Law for the Prevention of Intimidation 5751-1991.

THE DAMAGES AND THEIR AMOUNT

64. Having found that a tort exists, it is necessary to examine the damages claimed by the Plaintiff and to assess the proper compensation for their causation.

65. In her summation the Plaintiff petitions in respect of pecuniary heads of damage and in respect of non-pecuniary heads of damage

66. As to the first category, she requests compensation for the protraction of the legal proceeding in the Rabbinic courts, the many expenses which she incurred on legal fees, loss of workdays and travel expenses, and compensation is also requested for the loss she suffered as the sole breadwinner, since the Defendant has deprived her of the possibility of remarrying.

67. As to the compensation under the non-pecuniary heads of damages, the Plaintiff petitions for compensation in respect of the period in which a *get* was withheld from her, starting from May 11, 1994 – two years after she first filed for divorce, and up to the date of filing of the suit, since a "reasonable person" could foresee that his refusal to grant his spouse a *get* two years after the day on which she requested this would be likely to cause her suffering and anguish. It is also mentioned that, in actual fact, the couple have not been cohabiting since the date of filing of the action for divorce – May 11, 1992, and that in the majority of Western countries, "a period of separation of two years – is cause for divorce."

68. Below are the damages which the Plaintiff is claiming:

(a) Injury to the right to marry – NIS 500,000.

According to her, as long as the Defendant refuses to grant her a *get*, she will be unable to remarry. The right to marry is recognized as a cherished right in law, and injury thereto entitles to compensation.

(b) Injury to the right to bear children – NIS 200,000.

As long as the Defendant refuses to grant her a *get*, she will be unable to bear children from another man, and also this right of leaving offspring is a recognized right, injury whereto entitles to compensation.

(c) Injury to the right to sexual enjoyment – NIS 500,000.

As long as she is not delivered a *get*, she will also be deprived of the enjoyment and satisfaction provided by conjugal relations.

(d) Social isolation – NIS 350,000.

Due to her indefinite standing in the Orthodox community in which she lives – "not married and not divorced" – she suffers from social isolation, distress and pain and is unable to hold any contact with members of the opposite sex.

(e) Injury to the wife's reputation – NIS 100,000.

Due to a *get* being withheld from her, her character is being defamed in the community and her and her children's social standing has been harmed.

(f) Infringement of autonomy – NIS 350,000.

Due to the husband's refusal to grant her a *get*, she feels she is not in control of her future.

(g) Shame, suffering, pain and humiliation – NIS 300,000.

These feelings are caused to her directly by the Defendant's continuing refusal to grant her a *get*, and they are inflicting on her extreme mental damage. She is also petitioning for daily compensation, from the day of filing of the suit to the day of arrangement of the *get*, for each of the heads of damage (excluding the first one – compensation for the legal proceeding).

69. Beyond all this, the Plaintiff is demanding "aggravated damages" in the amount of NIS 200,000. Accordingly, the total compensation claimed under the heads of damage, including aggravated damage, up to the day of filing of the suit, is NIS 3,044,000, and the daily compensation requested, from the day of filing of the suit to the day of arrangement of the get, stands at NIS 2,433 per diem.

70. As stated in section 4 of this decision, the daily compensation that is being requested constitutes a clear change of front. This relief was not mentioned in the statement of claim and in the affidavits in chief, and therefore I will not consider it.

71. There is no room for awarding the wife compensation for the two types of pecuniary damage claimed by her – compensation in respect of the legal proceeding and compensation in respect of lost income. Her remedies for these damages are to be found within the framework of legal costs in the proceedings that took place in the courts, and in her claim for alimony.

72. In relating to the rest of the contended damages – the husband maintains that there is no room for granting compensation in respect thereof: Injury to the ability to marry – The Defendant repudiates his liability to pay under this head of damage. According to him, the Plaintiff having chosen to marry him, she has realized her right to marry, hence she cannot sue him on this head of damage. The Defendant notes that had he divorced her and spread false stories about her, or harmed her chances of remarrying, there would have been room then for considering this head of damage.

Injury to the ability to bear children from another man – According to the Defendant, had the Plaintiff desired additional children, the Defendant would not have denied her this, and it was she who decided to separate from him. It is unreasonable that she should now sue him for this loss, when it is she who is responsible for this omission.

Injury to the ability to enjoy conjugal relations – According to him, the restriction on having sexual intercourse with any strange man, apart from her husband, obligated the Plaintiff upon her marriage to her husband, an act which she did of her own free will .

The *get*, once it is granted, will lift the prohibition that was imposed upon her marriage, and therefore he should not be regarded as having caused this head of damage, since he, for his part, was willing to fulfill the commandment of intercourse with his wife, and it was she who refused to do so.

Social isolation – According to the Defendant, his wife does not suffer from social isolation due to her choosing voluntarily to live separately from him, since even when they lived together, in love and companionship, they did not go out to coffeehouses and to the theater in the manner of secular people.

Injury to reputation – According to the Defendant, he is not the cause of the Plaintiff's feeling that she does not control her future, insofar as she feels this way.

Intangible heads of damage (shame, pain and suffering, humiliation) – According to him, he is not the cause of the Plaintiff's feelings, insofar as she feels any suffering, shame or humiliation. The Plaintiff failed to prove her suffering, even though she was given her day in court.

Aggravated damages – According to the Plaintiff, there is no rhyme, reason or logic for penalizing him and obligating him to pay aggravated damages to the Plaintiff, since his rights as well were violated – i.e., the Plaintiff rebelled against him and is not treating him as a husband, while he is attempting to restore the ruins of his home and to reestablish the family sanctuary, and it is therefore requested to reject the demand for aggravated damages.

In conclusion, the Defendant contends that the Plaintiff filed her claim for damages without setting out the heads of damage and their amounts as required. Furthermore, he contends that he was unable to plan his defense, and the suit should be rejected for this reason. Additionally, he argues that no hearing was held on the merits, and that the Plaintiff has not proven her claim. The Plaintiff did not even submit an opinion regarding her medical and/or mental state, and none of her contentions was substantiated. The only opinion submitted by the Plaintiff is that of a social worker, and it is merely an academic opinion without any connection to the specific case. The Plaintiff also did not bring any proofs regarding the heads of damage contended by her that would have enabled the Defendant to defend himself against them. The Defendant also disputes the amounts of the claimed damages, which are unmatched and merely testify to the Plaintiff's intention of harassing him. The Defendant contends further that the Plaintiff's demand to obligate him to pay continuing compensation for each additional day during which she remains his wife, unquestionably creates pecuniary pressure on him to divorce her, and she is thereby causing an artificial *get*. In these circumstances, the Defendant believes that the suit should be rejected, and that the court should not even have considered the fundamental question arising from the suit, namely – whether the family court is called upon to award compensation in the case of a husband who withholds a *get*.

73. We see, thus, that all the damages in the suit before me are non-pecuniary damages. The Civil Wrongs Ordinance recognizes this type of damage as well as a compensable damage. The term "damage" in section 1 of the Civil Wrongs Ordinance [New Version] is defined in a broad manner and relates to damages of many types, including those of a non-pecuniary nature:

> Loss of life, loss or an asset, comfort, physical welfare or reputation, or impairment thereof, and any such loss or impairment.

74. In the framework of this definition, protection was conferred on numerous intangible interests. Thus, compensation is granted in respect of non-pecuniary damage – e.g. pain and suffering – that is entailed in physical damage that was caused to the aggrieved party. In view of the broad fabric of this definition, it was held that injury to physical comfort, suffering and fear – even if they lack physical expression, and even if they are not accompanied by any physical injury – could constitute a compensable damage in torts (Civil Appeal 243/83 The Jerusalem Municipality v. Gordon, PD 39(1) 113; hereinafter the "Gordon case").

75. According to the approach expressed in the Gordon case, the Civil Wrongs Ordinance also protects "the aggrieved party's interest in his life, comfort and happiness" (ibid., at p. 142). Thus, it was held that anyone who suffered annoyance as a result of a mistaken criminal proceeding that was brought against him negligently, is entitled to compensation in respect of this injury from the prosecuting authority (ibid., ibid.).

76. In a series of decisions handed down in the wake of the Gordon case, the courts took the same route and awarded compensation in respect of injuries to intangible interests of claimants in torts. Thus, it was held that the emotional damage and anguish caused to a copyright owner due to the infringement of his right is a compensable damage (see the decision of Vice President Levine in Civil Appeal 4500/90 Hershko v. Orbach, PD 49 1 419). It was likewise held that the injury to a person's dignity and freedom inherent in his unlawful, forced hospitalization in a hospital for the mentally ill is a compensable pecuniary damage (Civil Appeal 558/84 Carmeli v. The State of Israel, PD 41(3), 757), and in the aforementioned Daka case, also infringement of autonomy was recognized as a compensable head of damage.

77. As in the case before me, it was held in Civil Appeal 1730/92 Matzrawa v. Matzrawa (Dinim Elyon 38 369) that the suffering caused to the wife, inherent in the very fact that her husband divorced her against her will, is a compensable damage. Justice Goldberg held in that matter that in the absence of evidence concerning tangible damage, and when there can be no doubt that damage was caused, an estimated compensation should be awarded for general damage. That matter concerned a woman's claim for damages against her former husband who had divorced her against her will.

    Contrary to the provision of section 181 of the Penal Law 5737-1977, no evidence was brought by the Plaintiff regarding the damage that was caused to her by this. Justice Goldberg held that, despite this fact, there could be no doubt that the Plaintiff had been caused suffering due to this forced divorce. Justice Goldberg ruled, in these circumstances, that:

    Even in the absence of evidence regarding tangible damage that was caused to the Plaintiff, the court should have awarded estimated compensation for general damage that was undoubtedly caused to her by the respondent having dissolved the bond of marriage against her will" (paragraph 9 of the decision).

    Justice Goldberg therefore accepted the plaintiff's appeal, as it pertained to the cause in torts on which she based her suit, and estimated the general damage that had been caused to her by her divorce at NIS 30,000. The principle arising from this decision is – as described in the Daka case – that there is often no need of evidence regarding the general damage and its scope, since the existence of the damage and the scope thereof follow from the very breach of the duty by the tortfeasor.

78. In my view, this principle should be applied in the matter before me. The Plaintiff petitioned in respect of several heads of damage, and even though none of them can be measured or quantified in exact monetary terms, it is clear to me that these damages were in fact caused to her. The Plaintiff also demanded aggravated compensation, in view of the special circumstances in which the tort was committed.

79. In the aforementioned Family File (Jerusalem) 18551/00 K.S. v. K.M., my colleague Judge Nili Maimon stated:

> The rights which, if breached in any way, should give rise to a right to compensation are 'the positive substantive rights.' These are the individual's most basic rights, and recognition thereof forms part of every person's recognition of his self-worth… Applicable to an injury to these rights are the English principles of 'general' and 'aggravated' damages. The compensation will be based on an estimate of the extent of the injury to the individual's feelings, against the background of the circumstances of the case. In view of the nature of the injury to rights of this sort, one cannot expect exact proof of the damage such as the proof that is required in relation to the constructive damages – whether physical or economic. (D. Barak-Erez, Constitutional Torts, 276, 277).

I have not the slightest doubt that the wife was caused all the seven non-pecuniary damages for which she is petitioning.

See: Opinion of Adv. Yifat Biton in her doctoral theses, as to the setting of aggravated damages for an injury to feelings in the case of discrimination against women. Yifat Biton – A Rereading of the Law of Torts from a Feminist-Social Viewpoint .

The author suggests designating an injury to feelings as a recognized head of damage in the case of discrimination and exploitation of power gaps against women, and when assessing the intensity of the damage caused to the plaintiff, to apply various indices that will be of help to the court. This applies in our matter as well, to an injury to feelings due to humiliation, degradation, infringement of autonomy and injury to dignity, and the following are her words:

> In the first stage, injury to feelings should be defined as a recognized and important head of damage in the law of torts. This definition derives from the collection of relevant feelings described above as originating in acts of humiliation and/or exploitation of power gaps by one person against another, among them feelings relating to injury to dignity, infringement of autonomy, mental suffering, humiliation, shame, distress, insult, frustration, undermining of one's confidence in and perception of the self and injury to one's self-esteem, both as an individual and as part of a group. The use of these indices will enable the court first and foremost to identify and conceptualize the type of damage before it, from among the range of strong feelings detailed above. In the

The author suggests designating an injury to feelings as a recognized head of damage in the case of discrimination and exploitation of power gaps against women, and when assessing the intensity of the damage caused to the plaintiff, to apply various indices that will be of help to the court. This applies in our matter as well, to an injury to feelings due to humiliation, degradation, infringement of autonomy and injury to dignity

second stage, when assessing the intensity of the intensity of the damage caused by the defendant's acts, the court will be able to apply different indices that may aid it in identifying the scope and intensity of the damage. Thus, for example, account will be taken of the extent of the injury to the aggrieved party, as described by him, the nature of the right of the aggrieved party that was injured, the characterization of the right as constitutional-substantive, the manner of the injury to the right – e.g. was it done in the presence of others apart from the aggrieved party, the tortfeasor's intention to injure the aggrieved party, the severity of the defendant's acts or omissions and the degree to which they deviate from reasonable conduct, the degree of economic, social or cultural strength of the defendant vis-à-vis the plaintiff, and any other consideration which the court will deem right and just in the circumstances of the case, for the purpose of assessing the scope and extent of the damage that was caused to the aggrieved party. These indices could all comprise an important index for assessing the extent of the injury to the aggrieved party, which in fact defines his "damage" and is correlated to an assessment of the appropriate compensation for this damage. Simultaneously, these indices could serve as a basis for determining whether to grant aggravated damage to the aggrieved party in the case under consideration. The fitting rule is that compensation for an injury to feelings should be awarded as a matter of course, based on a growing understanding of the social and moral importance of the interests that are protected in the framework of this head of damage. Side by side, the plaintiff will be required to prove that in his case, it will be right to award him also aggravated damages due to the special and humiliating character of the injury to him, which increased his damage. In a paraphrase on the words of President Barak on the subject of compensation for the non-property interest in the case of defamation, the court will be able to say in each and every case thus: "Indeed, the non-property damage is a compensable damage, often it is a substantial damage, and the aggrieved party is entitled to actual compensation and not only to a consolation award… The court must make an effort, while examining each case on its merits, to assess the scope of the injury… and to set such compensation as will place the aggrieved party as nearly as possible in his condition before…" (ibid., at p. 338).

80. I have not the slightest doubt that the wife was caused all the seven non-pecuniary damages for which she is petitioning. At the same time, I will say that the injury to her right to bear children is negligible, considering that she has given birth to six children and this is not a case of a woman without offspring who is being refused a *get*. In her evidence in chief the Plaintiff relates:

> The fact that I am an *agunah* affects and impacts all areas of my life, it makes my life much more difficult and burdensome even than if I had been divorced. The fact that I am an *agunah* causes me great shame, an injury to my feelings, unbearable suffering and pain and a sense of helplessness…I do not have the standing of a married woman, while on the other hand I am also not divorced. My ambiguous standing harms me emotionally and practically… Every family function was a continuing nightmare for me. I was forced to *get* organized alone with six small children…I see with envy how every other woman shows up with her spouse… Only I, I have stepped out many times in order to cry without being observed…My husband demanded of me countless times to go with him for counseling and he promised to act according to their guidance. Again and again I was tempted into believing that he would actually do so…I was forced to expose myself, my life story and my marital troubles before strange people and rabbis. With superhuman efforts I

> overcame the shame and unpleasantness involved in this, and all for nothing"…

The parties' twenty-year-old son testified in court regarding his mother's social isolation, and that "most nights she cries in bed."

81. The Rabbinic High Court was itself aware of the damages that had been caused to the wife by the husband's conduct, and it stated in its decision from February 2, 2003, in which it once again orders the Defendant to grant the wife a *get* and imposes on him the excommunication ordained by Rabbi Tam, that the husband, by his conduct, is causing the wife "degradation and humiliation." And that he is a person "who abuses his wife and children while cloaking himself in a mantle of righteousness." I will add that the husband himself admits that a woman from whom a *get* is withheld is deserving of compensation, but he maintains that in our matter, since he is interested in reestablishing domestic harmony, as distinct from the case of a *get* withholder who has also abandoned his wife, cohabits with another woman but refuses to divorce the former (and in the Defendant's words: "subjecting the woman to *aginut* in vain") – he should not be obligated to pay compensation. With all due respect, I cannot accept this distinction. Even should we say that the husband does not intend to injure his wife, nevertheless, his refusal to heed the decision of the Rabbinic High Court which ordered him to grant her a *get* constitutes, as explained above, the tort of negligence, obligating him to pay compensation for the damage which he has caused his wife.

82. The Defendant has consigned the woman to loneliness and to lack of intimate marital relations and sexual intercourse with a member of the opposite sex. The Plaintiff has severely harmed the Plaintiff's autonomy and her right to realize herself and injured her dignity and liberty, while causing her extreme mental damage. In the aforementioned Family File (Jerusalem) 3950/00, Judge Greenberger says, regarding the potential damages of a woman who is being refused a *get* :

> Despite the rendering of a decision by the Rabbinic court that obligates the granting of a *get*, and despite the power of the court to impose sanctions on the husband, the husband persists in withholding a *get*, and time passes during which the woman suffers, without a true partner, without a shared life, without the possibility of bringing children into the world and raising them in the bosom of a normative family, and without any possibility of remarrying and determining her future…

The Defendant has consigned the woman to loneliness and to lack of intimate marital relations and sexual intercourse with a member of the opposite sex. The Plaintiff has severely harmed the Plaintiff's autonomy and her right to realize herself and injured her dignity and liberty, while causing her extreme mental damage.

83. The right to autonomy was defined in the aforementioned case of Daka v. The Carmel Hospital as:

> The right of every individual to decide regarding his actions and desires according to his own choices and to act in accordance with those choices… The right of a person to shape his life and fate encompasses all the central aspects of his life – where he will live, in what he will engage, with whom he will live, in what he will believe, and is central to the being of each and every individual in society. It reflects a recognition of the worth of each and every individual as a world in his own right, It is vital for the self-definition of every individual, in the sense that the

> sum total of each individual's choices defines the personality and life of that individual…

84. The Defendant placed the Plaintiff in a difficult mental state of helplessness and absolute dependence on him as to the termination of the matrimonial bond, while entrapping her in a no-win situation: Her agreement to apply over and over again to an "arbitrator," to a "mediator" or to some rabbi will prolong her suffering, distress and *aginut* and will not bring her relief. But on the other hand, her refusal to do so is liable to cause the Rabbinic court to designate her as "one who causes her own *aginut*," as the court in fact ruled in one of its decisions (after the husband was ordered to grant a *get*!), because:

> It is the wife's insistence on not exhausting other ways that offer a reasonable prospect of releasing her from her *aginut*… that is leaving the wife an *agunah*.

85. Granted, there is no room for imputing to the Defendant the commission of the tort of "false imprisonment" – one of the alternatives suggested by the Plaintiff. However, there is no doubt that in actuality the Plaintiff is imprisoned and confined by the Plaintiff, without the ability to break out and extricate herself from a matrimonial bond which she no longer desires. Before us is a clear case of social and psychological imprisonment. The Defendant added insult to injury, and side by side with his stubborn and continuing refusal to grant the woman a *get*, led her on, deceived her and "gave her the runaround." Countless times he awakened in her hope, when he promised her that they would apply "for the very last time" to another, final rabbi, with whose ruling he undertook to comply, without however having any intention of fulfilling this promise. When that rabbi as well would rule in favor of a divorce, the Defendant would resume his recalcitrance, while suggesting another halakhic authority – and so on and so forth. It is easy to imagine the Plaintiff's disappointment, the distress, humiliation, degradation and pain that she felt in every such proceeding, which repeated itself numerous times.

86. I cannot accept the Plaintiff's argument that the compensation under the different heads of damage should apply starting from May 11, 1994 – two years after the filing by her of the first action for divorce. Since I have held (sections 60-61 above) that the appropriate tort in our matter is the tort of negligence, and that the husband acted negligently, in breaching the duty of care toward her, while deviating from the proper standard of conduct of a reasonable person, who would have obeyed the decision of the Rabbinic court which obligated him to grant a divorce, and who would have foreseen the damages that would be caused to his spouse due to his conduct and failure to obey the court's decision, the Plaintiff is entitled to compensation for the period from the handing down of the decision of the Rabbinic court, which obligated the defendant to grant the Plaintiff a *get*, and up to the day of filing of the suit. It cannot be said that the husband committed the tort of negligence prior to the handing down of the Rabbinic court's decision, and the negligence prior to this date should perhaps be attributed to another party .

PUNITIVE DAMAGES AND AGGRAVATED DAMAGES

87. In Civil Appeal 140/00 Estate of the Deceased Ettinger and others v. The Company for the Restoration of the Jewish Quarter in the Old City of Jerusalem Ltd. and others, Tak-Al 2004(1), 2452, pp. 2491-2493, Justice E. Rivlin summed up at length the purposes of the tortious relief in general, and the purposes of "punitive damage" in particular:

…The tortious relief is not declaratory or punitive, but a remedial relief that is intended to remove the damage and to make it good (Civil Appeal 1977/97 Yosef Barazani v. Bezeq Israeli Company, PD 55(4) 584; Barak, in his aforementioned article)… The object of the compensation is to place the aggrieved party as nearly as possible, by means of the payment of money, in the same situation in which he was placed at the time of the tortious act, without the tortious act. This object meshes with the principle that a person owes compensation only in respect of the damage which he caused. This principle is given expression in the conditioning of liability in torts on the existence of a damage that was caused to the aggrieved party and of a causal connection between the tortious act and that damage. At the same time, there are legal systems that recognize the relief of punitive damages (exemplary damages, punitive damages, vindictive damages), i.e. – damages which the tortfeasor must pay the aggrieved party in an amount that does not reflect an estimate of the damage which the tortfeasor caused the aggrieved party through a tort, but come to punish the tortfeasor for his harmful conduct, thereby expressing disgust with him" (A. Barak, The Law of Torts – The General Doctrine of Torts (edited by G. Tadeski, 2nd edition (1976), 579). Punitive damages are distinguished from aggravated damages, which also take into account the gravity of the tortfeasor's conduct, but reflect 'a true estimate of the damage that was caused [to the aggrieved party], when this damage was aggravated by the tortfeasor's improper conduct' (ibid., at p. 579; see also Khodaparast v. Shad [2000] 1 W.L.R. 618; Vorvis v. Insurance Corp. of British Colombia (1989) 1 S.C.R. 1085; A. Beever, 'The Structure of Aggravated and Exemplary Damages,' 33 Oxford J. L. Stud. 89 (2003)… Punitive damages thus do not rely on a 'remedial' or 'corrective' basis. Their underlying rationale is punitive and deterrent (see Hill v. Church of Scientology of Toronto (1995) 2 S.C.R. 1130, 1208). It is worth noting that the award of punitive damages usually focuses on intentional torts, when the tortfeasor's conduct is deserving of censure. Different legal systems have recognized the possibility of awarding punitive damages also in actions based on the tort of negligence, but the courts generally do this sparingly and in exceptional cases… The Privy Council recently ruled, in an appeal against the New Zealand Court of Appeals, by a majority of three to two, that, in principle, punitive damages may also be awarded in cases of unintended or unconscious negligence, provided the basic condition of outrageous conduct is fulfilled. The minority opinion saw great importance in the state of mind of the tortfeasor, based on the perception that the purpose of damages of this type is to punish, and not to express the court's displeasure with the conduct (A. v. Bottrill [2002] 3 W.L.R. 1406; Andrew Phang & Pey-Woan Lee,

I cannot accept the Plaintiff's argument that the compensation under the different heads of damage should apply starting from May 11, 1994 – two years after the filing by her of the first action for divorce…[T]he Plaintiff is entitled to compensation for the period from the handing down of the decision of the Rabbinic court, which obligated the defendant to grant the Plaintiff a get, and up to the day of filing of the suit. It cannot be said that the husband committed the tort of negligence prior to the handing down of the Rabbinic Court's decision, and the negligence prior to this date should perhaps be attributed to another party.

'Exemplary Damages – Two Commonwealth Cases' [2003] C.L.J. 32 ". (Punitary Damages and Aggravated Damages).

88. In Civil Case 1056/00 Inheritors of the deceased NiliDavush& Others v. Tel Aviv Municipality- the Fire Department & Others, tak-mach 2003(3) 8890 the following claim was made with regard to awarding punitive damages:

> …In our [legal] system, it is not acceptable to award punitive damages for negligence, even severe negligence, if the damage was caused without malice (Civil Appeal Case 81/55 Kochavi v Becker 11(1) Piskei Din 225, 234; Civil Appeal Case 277/55 Rabinovitz v. Sela 12(2) Psak Din 1261). Therefore, punitive damages may be awarded in cases of such malicious torts as battery and slander in order to induce the tortfeaser and his likes to act in a normative and restrained manner. Intentional actions of malicious behavior at times justify the wielding of tools of deterrence such as punitive damages. However these are the exceptions, and not the rule regarding ordinary negligence cases or other causes of action that are not malicious.

89. Israeli courts have recognized the possibility of obligating tortfeasors to pay punitive damages. Already in Civ. App. Case 216/54 Schneider v. Glick, 9 Psak Din 1331, it was determined that:

> The defendant's attack on the respondent was malicious, without an immediate provocation. It was done recklessly and with the intent to publicly humiliate the respondent. The court can take into account particular factors, such as the evil intentions of the attacker and the shame experienced by the victim when determining punitive damages… In consideration of all these factors we find that the circumstances justify imposing a substantial amount as general damages… (Idem, p. 1335).

Judgments repeatedly maintained that Israeli courts have the authority to award punitive damages. (See Civ. App. Case 81/55 Kochavi v Becker 9 Piskei Din 225, 234; Civil Appeal Case 670/79 "Haaretz" Newspaper Publishing House Inc. v. Mizrachi, 42(2) Piskei Din 169, 205). Although this approach was criticized (Englard, Barak &Heshin in their aforementioned book, pp. 583-584, and see also the ruling of Judge Kister in Civ. App. Case 71/72 Meir v. Jewish Agency for Israel Administration, 28(1) Psak Din 393).

90. Regarding the purpose of aggravated damages and their nature, it was well said by the Hon. Judge Nili Maimon in her aforementioned judgment of Jerusalem Fam. Ct. Case 28551/00, in which she ruled aggravated damages for a woman injured when her husband attacked her and abused her:

> Aggravated damages are awarded when the damage isn't pecuniary, such as when the harm is to one's reputation or feelings. In these kinds of damage awards, one must take into account the malicious behavior of the tortfeasor and the expressions he used. Here, as well, it is necessary to take into account the severity of the offender's actions in order to increase the amount of the damages awarded (Civil Appeal Case 802/87 Nof v. Avineri, 45(2) Piskei Din 494, 489 …)

When dealing with aggravated damages, the injury is not "pecuniary," but rather an injury which hurts the victim's reputation or feelings. Therefore the amount of damages awarded are by their nature "at large," i.e.: their monetary valuation cannot be exactly determined. In assessing these damages, it is necessary to consider the particular circumstances in which the grievance took place, such as the maliciousness of the defendant's behavior and the expressions he used. These circumstances are relevant since they affect the extent of

damage done to the injured party. The extent of the pain experienced by the offended party, his hurt feelings and damaged reputation, are measured at times by the severity of the offender's actions and words. In spite of this similarity between the types of damages, they are distinct from one another. Exemplary (punitive) damages assume that the amount awarded to the injured party is not tantamount to an accurate evaluation of the damage done, but is meant to fulfill punitive purposes; whereas, with respect to aggravated damages the amount awarded is thought to be accurate, but exaggerated (aggravated) by the unworthy activities constitutes only a compensation for the damage done. (Y. Englard, A. Barak & M. Heshin, Torat HaNezikin HaKlallit: ed. Tadsky, p.579)

These things were said concerning defamation of character. They are also appropriate to the circumstances of the case before us. They are appropriate regarding the emotional damages, hurt, and loss of emotional well-being experienced by the injured plaintiff, for which she should be compensated and, in evaluating the damage done, it is necessary to take into account the inappropriate behavior of the defendant towards her ".

91. In Civ. App. Case 1370/91 Minazareth v. Havivi 84(3) Piskei Din 535, regarding the award of aggravated damages on account of slander, it is stated that :

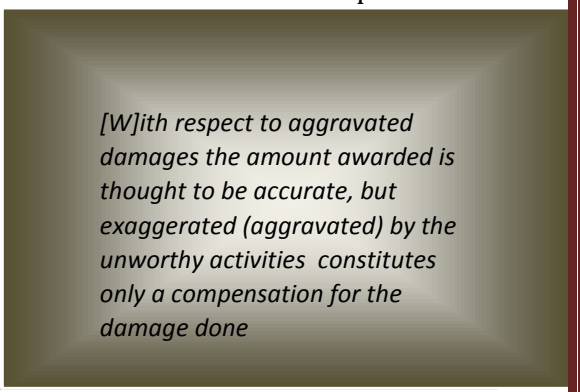
> Its purpose is to serve as a general deterrent and educational tool. (Civ. App. Case 30/72 Friedman v. Segal, 27(2) Piskei Din 225 p.224; and Civ. App. Case 802/87 Nof v. Avineri, 45(2) Piskei Din 489 p. 494). To the offender (the tortfeasor), the award of aggravated damages has a punitive character, since he is obligated to pay the injured party a larger sum than needed to correct the damages he caused. This is in contrast to the injured party who is rewarded. Before awarding aggravated damages, the court must be convinced that he (the injured party) isn't himself guilty of the crime of which the offender is expected to be punished…

In Civ. App. Case 30/72 Friedman v. Segal 27(2) Piskei Din 225, the Hon. Judge Etzioni presents the distinction presented by the scholar Julius Stone, between punitive and aggravated damages :

> …Prof. Stone in his article… points out that, in fact, aggravated damages include almost all the elements of compensation which are defined as punitive or exemplary, especially when dealing, .as in a case such as ours, with compensation due to defamation. As a result, he suggests eliminating completely [the notion of] punitive damages… It's obvious: whether we are talking about punitive damages or aggravated damages, we need to take into consideration the same factors when deciding about compensation; since, as we already noted, they have, for the most part, common elements, especially in a complaint regarding defamation of character."

In light of what was stated above, this is a classic case in which we should also impose on the defendant aggravated damages.

92. I would like to conclude this decision with reference to what was stated in the Jerusalem Fam. Ct. Case 00/3950, aforementioned. The following are remarks of the late Prof. Ariel Rosen-Zvi, which he delivered before the Committee on Constitution, Statute and Law (Protocol No. 240, 8.11.94, p. 10) in the context of a deliberation that took place in connection with



the proposal of the Rabbinic Courts (Enforcement of Divorce Judgments) Law 5754-1994:

> In my opinion, the basic concept of human dignity and the sanctity of the life of a human being as a free person absolutely cannot be reconciled with recalcitrance to give a *get* or with *aginut* [the condition of being unable to remarry because of such refusal], a priori, and does not tolerate a situation of dependency in which one party limits the other and creates impossible consequences for her. The situation of *aginut*, in which the *get*-recalcitrant leaves a woman… infringes her basic dignity. This is not only a Halakhic (Religious Jewish Law) feature to which Rav Ovadiah Yosef gave consummate expression; there is a striking expression in the view of the MaHaRSHa at the end of Tractate Yebamot, who writes: Where there is the creation of *aginut*, there is no peace, and the entire Torah was given only in order to make peace." In other words, a situation of *aginut* undoes in this respect the basic purpose for which the Torah was given. These are words expressing the universal concept of peace, freedom and human dignity."

A still sharper expression of the severe infringement that occurs in the life a woman whose husband refuses to give her a *get* can be found in the words of the greatest decisors of the twentieth century, Rabbi Y. E. Henkin. In his book 'Edut le-Yisrael' Rabbi Henkin says as follows:…"and whoever withholds a *get* because he is illegally demanding payment is a thief, and worse, for he [falls into] a sub-category of shedding blood." p. 144 (quoted as well in Writings of the Gaon, Rabbi Y. E. Henkin, vol. 1, p. 115b).

We are thus dealing with so severe an infringement in the eyes of halakhah (Religious Jewish Law) that it is viewed not only as a spiritual, emotional and psychological infringement, but as the actual shedding of blood; And these words are well said.

We are thus dealing with so severe an infringement in the eyes of *halakhah* (Religious Jewish Law) that it is viewed not only as a spiritual, emotional and psychological infringement, but as the actual shedding of blood; And these words are well said .

93. *In conclusion*: On account of all the Plaintiff's damages caused by the Defendant's refusal to grant her a *get*, beginning from 24.1.2002, the date on which the Supreme Rabbinic Court obligated the Defendant to give his wife a *get*, until the day the [Plaintiff] filed her complaint, 9.9.2003, I award compensation in the amount of 200,000 New Israeli Shekels per year, and therefore on behalf of the whole period (nineteen and a half months) a total sum of 325,000 New Israeli Shekels .

Additionally I obligate the defendant an aggravated damages sum of 100,000 New Israeli Shekels.

In total, the defendant must compensate the plaintiff a total sum of 425,000 New Israeli Shekels.

This sum shall be paid in 30 days, after which it will bear interest and linkage differentials, from the day of the verdict until the day of the actual payment in full.

94. The defendant shall pay the trial expenses in the amount of 10,000 New Israeli Shekels, including VAT .

Given this day, the 8th of Tevet 5765, (21st of December 2004), in the absence of the parties .

Permitted for publication without names and identifying details.

Decision Summary

This is the first case in which a judge awarded actual damages (425,000 NIS) for get-refusal.

In this case, a 45 year old haredi woman sued her husband for damages for refusing to give her a get. The court describes how, at the encouragement of the Israeli rabbinic courts, the husband dragged his wife from one rabbi to the next, each time promising to give her a get if the rabbi told him to do so, and each time reneging on his promise. After 11 years of going around in circles, the Supreme Rabbinic Court finally agreed to "order" the husband to give a get, but refused to put him in jail for refusing to do so.

Here Judge HaCohen grapples with the question of: "Is there a cause of action under Israel's Tort Ordinance for get-refusal and when does it arise?" Taking issue with Judge Greenberger, HaCohen argues that the breach of a woman's autonomy that results when a man refuses to give her a get is a "head of damage" and not a separate cause of action under the Tort Ordinance. He rejects the claim that get-refusal is a breach of the "statutory duty" (section 63 of the Ordinance) to obey court orders, claiming that such criminal statute is meant to protect the interests of the public at large and not the woman denied a get. He also rejects the claim that get-refusal is a breach of the statutory duty to refrain from subjecting your spouse to emotional violence as set forth under the Family Violence Statute, stating that such statute did not intend to cover instances of get-refusal. Instead, HaCohen draws on the work of academics Kaplan and Perry, as well as a decision of Judge Nili Maimon on the matter of spousal violence, among others, to find that get-refusal is a violation of a duty of care that a husband owes his wife once a rabbinic court has ordered him to divorce her. It is an unreasonable act that falls under the rubric of "negligence" (section 35 of the Ordinance). He alludes to the fact that, in the case at hand, "negligence prior to this date [of the rabbinic court order] should perhaps be attributed to another party."

Judge HaCohen awards the wife 325,000 NIS in damages and finds that get-refusal results in the following heads of damages: Injury to the right to marry, injury to the right to bear , Injury to the right to sexual enjoyment, social isolation, injury to the wife's reputation, infringement of autonomy, shame, suffering, pain and humiliation He also awards the wife 100,000 NIS in aggravated damages due to the egregious activities of the husband in this case.

The Wife collected the damages award in full. The marital home was transferred to her. To this day, the husband has not given her a get. She has decided not to go back to the rabbinic courts in pursuit of the get but to concentrate her energies on her family and work.

TORT 3 (J. MAIMON, JER. FAMCT. CASE 022061/07 (MOTION 054445/08)

BEFORE THE HONORABLE JUDGE NILI MAIMON, DEPUTY PRESIDENT OF THE FAMILY COURT, DISTRICT OF JERUSALEM

In the matter of **A. Doe** **B. Doe** **C. Doe** **D. Doe** Represented by attorney Ari Bahiri	**Petitioners**
v.	
Jane Doe Represented by attorney Susan Weiss	**Respondent**

1. DECISION

This is a Motion to Dismiss – with or without prejudice – the Plaintiff-Respondent's claim for damages against her husband, the Defendant 1 (from herein: "the Husband") for *get* refusal, [as well as against the] Petitioners for aiding and abetting the Husband to that end.

The petitioners, along with the Husband, are the defendants in the primary suit; they are the Husband's mother, two brothers, and sister.

The Petitioners argue that the primary suit fails to state any claim against them, whether in tort or otherwise, for which relief could be granted; that at best, they gave advice or material support to the Husband, and that they cannot be held liable for damages simply for helping another person. As they see it, the Court should encourage family members to support one another emotionally and financially. It is inconceivable that such support could amount to grounds for legal action against them.

The Husband is an adult, and has not been declared legally incompetent. Thus, he should, according to the Petitioners, bear full legal responsibility for his actions, while the Petitioners should bear none.

The Petitioners further argue that the Respondent cannot sue them for encouraging the Husband not to grant a *get* when the Beit Din has not yet ordered him to do so, but has merely directed the parties to reach a divorce agreement. Therefore, for that reason also, the Respondent has no cause of action against them.

The Respondent objects to the motion to dismiss.

According to her, anyone who aids, advises, or encourages an act or omission, or who commands, permits, or authorizes such act or omission, is liable along with the actor for such malfeasance, in accordance with §12 of the Torts Ordinance of the State of Israel [New Version] (*Pekudat Nezikin*). And it is from this standpoint that [the Respondent] argues that there are grounds, according to

Pekudat Nezikin, for a claim against the Petitioners, who assisted the Husband in his refusal to grant a *get* to the Respondent.

The Respondent argues that she can prove a causal relationship between the actions of the Petitioners and those of the Husband and his misdeeds. According to the Respondent, the awarding of damages in the circumstances in question is appropriate even when the Beit Din has not obligated the husband to grant a *get*.

2. DISCUSSION

The Respondent is correct.

First, it should be noted that summary dismissal of a complaint – with or without prejudice – should be severely restricted and implemented only in exceptional circumstances. Each person deserves the opportunity to exercise her legal rights to sue, and should not be constrained, except in extreme instances, from implementing such right to come before the court and be heard. She should be given her day in court.

With regard to the claim that advice, support, and assistance to a family member in trouble cannot constitute grounds for damages; as well as with regard to the claim that there is no causal connection between the Petitioners' alleged behaviors – even if in fact they did in occur – and the [legal liability of the Plaintiffs for the] acts or omissions of the Husband: These claims of the Petitioners must be clarified and explored in depth in a courtroom. The parameters of legal responsibility attributable to one who aids or abets another to commit an act or omission that causes compensable harm are to be found in the law – i.e., *Pekudat Nezikin*. Thus, the question at hand is whether, under the circumstances of this particular case, events occurred that would render the Petitioners legally liable for their advice to, or support for, the Husband in withholding a *get*, if indeed it was withheld. These are questions of fact to be examined at trial.

With regard to the claim that advice, support, and assistance to a family member in trouble cannot constitute grounds for damages; as well as with regard to the claim that there is no causal connection between the Petitioners' alleged behaviors – even if in fact they did in occur – and the [legal liability of the Plaintiffs for the] acts or omissions of the Husband: These claims of the Petitioners must be clarified and explored in depth in a courtroom. The parameters of legal responsibility attributable to one who aids or abets another to commit an act or omission that causes compensable harm are to be found in the law – i.e.,PekudatNezikin. Thus, the question at hand is whether, under the circumstances of this particular case, events occurred that would render the Petitioners legally liable for their advice to, or support for, the Husband in withholding a get, if indeed it was withheld. These are questions of fact to be examined at trial.

To all this, we must add that we are dealing here with family members who have a special "close relationship" one to the another with respect to "negligence" torts. Such relationship is underscored by the fact that [Israeli law] acknowledges that "parents-, brothers-, or sisters-in-law" are family members for purpose of giving Family Courts the jurisdiction to decide cases filed by a party against the parents, brothers, or sisters of his or her spouse.

This is also the case with respect to the question of whether a causal relationship exists between the actions of the Petitioners and the acts or omissions of the Husband: This question too is, at least in part, an issue of fact, and will be explored in depth, at such place and time that the trial is heard.

As to the question of damages for refusal to grant a *get* (if it is so established) in the absence of a Rabbinic court order do so:

This, too, is insufficient reason to reject the original complaint summarily, or out of hand.

Indeed, there are some scholars who adopt a "policy of pragmatism." They think that that even though a cause of action exists in tort – negligence – vis-à-vis a spouse who refuses to give a requested *get*, it is incumbent to be "pragmatic" in order to accommodate, as much as possible, the different approaches of the courts, and in our case that of the Rabbinic court presiding over the *get* with that of the civil court presiding over the suit for damages. This [pragmatic approach is crucial, according to those scholars], in light of the fear that, without a direct order from the Beit Din to deliver a *get*, should the long-awaited *get* ultimately be granted, it would be considered a *get me'useh* (an invalid "forced divorce" - Z.B.) if damages were awarded before the *get* was granted. This might cause great damage to the spouse requesting the *get*, especially if children are born to the wife after the granting of the *get me'useh*.

But then, there are other scholars who would argue against the paternalism of those who stipulate that an award of damages for *get* refusal can only be made if there is an order from the Beit Din to give the *get*; as well as against the "calculations" made in the wife's stead (and it usually is the wife), thus placing their world view as an impediment to a woman who seeks damages for the harm done to her by her husband; and thus, because of their own personal attitudes about the need for inter-jurisdictional accord and their own personal desire to prevent the consequences of a *get me'useh*, would deny a woman the opportunity to seek damages even though we are talking about her life, her preferences, her free will, her autonomy to choose her own paths – and the harm done to her privacy.

It is inappropriate to deny a Plaintiff (here, the Respondent) relief from the outset – to deny her access to a court in which she can set forth her claim for damages, when she is making a case in tort in accordance with *Pekudat Nezikin* that on its face, from a legal perspective, looks like it can be made separate from any divorce proceedings in the Rabbinic court – just out of concern for the impact that a potential ruling might have on the *get* should damages actually be awarded.

All of these matters, including the argument of the Petitioners that there is no cause of action for the claim before us because a *get* has yet to be ordered, will be resolved at trial, and are, in fact' the principle question at issue. For the sake of efficiency, there is no need at this juncture to separate out from the rest of the lawsuit the question of whether harm can occur in the absence of an order granting a *get*, since the answer to this question is intimately connected to the question of [the kind of] support given by the family members to the husband., as well as the additional question of whether assistance of this kind can give rise to damages in the absence of a decision ordering a *get*.

I must call attention to the fact that, in this case, the Beit Din has, for all intents and purposes, declared that the Respondent is an *agunah*, by noting that:

The Beit Din once again appeals to the Executive Office of the Rabbinic Courts to appoint a detective on its behalf for the purpose of locating the husband who has disappeared for an extensive period of time; and there is no information available as to his whereabouts, while the wife is an *agunah* (emphasis mine- N. M.), and it is an great mitzvah to release her from the chains of *igun*.

Also relevant is the responsum of the Elder Rabbi Chaim Pology in his book, *Chaim v'Shalom*, (section 114). There he makes the point that it is possible to order the granting of a *get* when a couple has been separated for a long time, and, in his words:

Generally, it is my position that when the Beit Din sees that a couple has been separated for a long time, and that there is no possibility of reconciliation, on the contrary, that every effort should be made to separate the spouses one from the another and to grant a *get* so that they will not commit

greater sins, etc. The court should rest assured that anyone who delays the granting of a *get* in such a situation – in order to take revenge on one another out of jealousy, hatred, rivalry, and the like – will in the future have to give account for such delay. And I am hereby setting a time limit to this matter. Should a disagreement develop between a man and his wife, and should they despair of any attempts at mediation and reconciliation, they should wait 18 months, and if after that period of time the Beit Din sees no possibility for reconciliation between them, they should each go their separate ways and [the court] should compel the husband to give his wife a *get* until he states, "It is my will to do this," and so forth.

In the instant case, the original parties have not lived together for six years, while the Husband disappeared and has remained in hiding for three of them, with the aim, according to the Respondent, of making her an *agunah*.

In her view, the Petitioners have collaborated with him, enabling him to escape and disappear, so that the question of whether the Beit Din has obligated, or not obligated, the husband to grant a *get* cannot even be determined in light of his disappearance and the support that the Petitioners have provided for that disappearance.

As mentioned above, the fundamental question – whether, prior to the ordering of a *get*, damages can be granted for the withholding of that *get* – will be addressed before the court, at the time of trial, and together with the other questions raised here that, in the interest of efficiency, will be dealt with at that time.

In short, the request of the Petitioners for summary dismissal of the complaint of the Respondent has been rejected, and is hereby denied.

The Petitioners will pay costs and attorney's fees, including tax, relating to this Motion in the amount of NIS 3000, with interest compounding until payment, as required by law.

Issued on the 4th of Tamuz, 5768 (July 7, 2008) in the absence of the parties.

The administration will deliver copies to the parties.

Nili Maimon, Judge

Deputy President

Decision Summary

This is an interim decision in a motion to dismiss a case for damages for get-refusal brought against family members for "aiding and abetting" a husband in his refusal to divorce his wife.

In this case, a 40-year-old modern Orthodox woman sued her husband for damages for refusing to give her a get for 5 years. In addition to suing her husband who had in the interim disappeared and could not be found, the wife sued her mother- in- law, two brothers-in- law, and sister-in-lawwho she claimed, in various ways, enabled and encouraged the husband's refusal.

Judge Maimon denied the defendants' motion to dismiss and held that a claim could be made against persons for aiding and abetting get-refusal and that it was a question of fact to be decided at trial.

The case went to trial against the in-laws. After the parties submitted written summation, the husband surfaced and agreed to give the get in exchange for the wife's waiver of her claim for damages.

Before: The Honorable Judge Ben Zion Greenberger
Date: July 7, 2008
In the case of
Jane Doe
Represented by attorney Susan Weiss, Plaintiff
– v –
John Doe
Represented by attorney Yaakov Shimshi, Defendant

1. DECISION

I have before me a claim filed by the plaintiff against her husband in which she seeks monetary damages for the suffering that, according to her, was caused by her husband's refusal to grant her a *get*. In her written complaint, the plaintiff details the components of the harm suffered, including economic and non-economic harm. In her written complaint, the plaintiff evaluated the harm in the amount of NIS 1,836,000, while in her written summation, the plaintiff increased and updated the amount to NIS 2,218,000.

2. The wife filed for divorce in the Jerusalem District Rabbinic Court on March 8, 1998, after nine years of marriage. Two months later, on May 29, 1998, the wife, with her children, left the marital home and went to live in her mother's house in ..., and later – in ..., near her brother's home.

3. After many court hearings and counseling sessions both inside the district rabbinic court and outside of it, the Beit Din issued its ruling on November 17, 2004, rejecting the petition for divorce. The wife appealed this ruling to the Beit Din HaGadol on January 2, 2005, and on June 5, 2006, the Beit Din HaGadol accepted the appeal and issued, unanimously, a ruling obligating the husband to grant his wife a divorce. Because it is important to understand the facts leading up to the complaint before me, I have decided to quote from the opinion of the Beit Din HaGadol in the aforementioned ruling, word for word:

DECISION

> Before us is a couple that has lived apart for about eight years. The wife left the marital home, and her key complaints are: (a) physical and emotional abuse, (b) offensive and aberrant marital relations. With regard to the abuse complaint, the husband responds that he used violence only in defense.
>
> With regard to the deviant marital relations, he maintains that this was with [his wife's] consent and [only] after they had received rabbinic permission.
>
> I have examined in its entirety the material [both] before us and in the district Beit Din file. From that vast material, and in light of the ongoing separation, and given the things we have heard and seen, it is clear that the wife is repulsed by her husband, and for good reason. Even if, at the time, she had given her consent to the aberrant behavior, in any case, this was consent granted under pressure and out of the naïve belief that if the rabbi permitted it, it was her obligation not to refuse her husband.

Although at the beginning of the marriage, the wife engaged in prohibited behavior, this was only for a short period of time. On the other hand, the husband's deviant behavior continued for a long period, and when the wife regained her wits about her, and wanted to return to a religious lifestyle in accordance with the rules of the Torah, by then she had developed a disgust and revulsion towards the person who had dragged her down into a life of lust and instinct.

Even if the wife acknowledges that [her husband] did not force himself on her, in any case, this entire lifestyle was at his initiative and part of an endless cycle of [sexual] impulse. And even if the rabbi had permitted these vile things on occasion, someone initiated them, asked [the rabbis] questions about them, and encouraged them– and that was the husband. The wife felt attacked and forced into an immoral life, without any values, and even if she did not actively resist, all these acts, including anal intercourse and inspection by flashlight were acts of humiliation, invasion, and deep psychological trauma.

Indeed, it is difficult to compel the husband [to grant a divorce] in the name of things that, according to the Gemara and the Rambam, the husband was permitted to do, but as the two sides said, there is a difference between one-time behavior to which the Gemara was perhaps referring; and besides the husband should have sensed the degree of insult and harm that the act caused the wife.

In this instance, in which we have before us a case of clear revulsion [on the part of the wife towards the husband] and for good reason; severe psychological trauma suffered by the wife as a result of sexual relations forced upon her by her husband; and aggressive behavior, even if it was not violent, we find that there are grounds to accept the appeal, in part, and to order the husband to divorce his wife immediately.

Should the husband be willing to divorce his wife, but have reasonable terms [in exchange for the divorce], the regional Beit Din will rule on [those terms].

Likewise, if the husband refuses to grant a *get*, the Beit Din is prepared to consider all manners of enforcing [this ruling], including incarceration.

(-) Chagai Izerer

I agree.

(-) Shlomo Dichovsky

I agree with my esteemed colleagues to obligate the husband to grant a *get*, and if he refuses to grant the *get*, this Beit Din is prepared to consider all manners of enforcing [this ruling], except for incarceration.

(-) Avraham Sherman

In light of the above, we rule that:

a. We obligate the husband to grant a *get*.

b. If the husband refuses to grant a *get*, the Beit Din is prepared to rule in the matter of enforcement, including incarceration. This paragraph is rendered by majority opinion.

(-) Shlomo Dichovsky, Dayan (-) Avraham Sherman, Dayan (-) Chagai Izerer Dayan

4. It should be noted that this court also previously addressed the wife's allegations regarding her reasons for leaving the home, and the suffering that she endured during the years of her marriage, within the framework of a complaint that she filed against her husband to compensate her for [his] exclusive use and possession of the marital home. On July 24, 2006, an opinion was issued (File No. 6742/02) regarding the aforementioned complaint in which the defendant was obligated to pay for the use of the marital home on the basis of an appraiser's evaluation. Among other things, the following was established in that opinion:

> [The wife's] complaints with regard to sexual violence were not denied by the defendant, and in a letter attached to the complaint, the defendant explicitly acknowledged the carrying out of "humiliating and degrading acts" and his responsibility for these acts….From what I have before me, it appears that the plaintiff continued to live with the defendant in spite of his actions, but I have become convinced that the "cooperation" alleged by the defendant arose out of [his wife's] fear of breaching the conventions and frameworks of the haredi world, and this led to the plaintiff's in fact being coerced for years into tolerating this behavior of the defendant, until she ultimately managed to free herself from the cycle of suffering, and garnered enough strength to leave home and protest these acts. The plaintiff's letter, written as a result of this departure, clearly confirms that this behavior led to the departure, and that the defendant is solely responsible for it. I hold, therefore, that in our case, the plaintiff left home for a justified reason that is directly and clearly related to the "fault" of the defendant, and that, without a doubt, the wife feared this ongoing behavior of the defendant towards her should she return to live with him, thus preventing her from the reasonable use of the home.

All of this supports the wife's claim that she left the marital home as a result of the suffering that she endured during the years that she lived with her husband, and that her leaving was justified under the circumstances.

5. Throughout the proceedings, ever since the wife filed her suit, she has repeatedly claimed that her husband's behavior during the years that they lived together caused her such great disgust and revulsion that there was no possibility of reconciliation. On the other hand, the husband stated again and again, at every hearing and every forum that he wanted to convince his wife to return to him, and that there was a possibility for reconciliation and appeasement. The record shows that in the regional rabbinic court, throughout all the years in which legal proceedings were conducted, the wife consistently and clearly refused any proposal that they return to living together. The wife, for her part, even solicited letters from, and recommendations of, important rabbis who took the position that there was no hope held out for this marriage and that the couple should divorce.

6. It should be noted that although the husband claims that his recalcitrance is rooted in his earnest faith in the possibility of reconciliation, a review of the file reveals that the husband's position is stubborn, absolutist, and uncompromising. Thus, for example, in the hearing on December 7, 2005, in the High Rabbinic Court, that is, more than seven years after the complaint was first filed and the wife left the home, the husband declared, without hesitation or qualification: "I do not want to divorce" (Beit Din transcript 12/17/2005, p. 1, line 47). Likewise, the rabbinic pleader D.R. testified as to the following in an affidavit included in the file:

> I told the husband that there is no possibility of reconciliation. The husband said that he sees the children of divorced parents at yeshiva and that his children will never be the children of divorced parents…and repeated that his children will never be the children of divorced parents…

In this affidavit, one can even hear how disparaging the husband was of the rabbinic judges, too, although in front of this court, he testified that he would obey any order he received from them. Thus testifies Ms. R:

> "I said to him, you are a hareidi man and the judges ruled that you must divorce your wife. The husband said, 'These are not rabbis, they are evildoers, I am not bound by their ruling.' "

7. The wife's attorney summarized in the following words the suffering that her client endured over the years since leaving home (plaintiff's written summation, paragraph 4.2):

> The wife similarly testified as to [her] feelings of humiliation and helplessness: "My being an *agunah* causes me great shame, emotional harm, suffering and pain that is almost impossible to bear and a sense of helplessness" (affidavit R.C, paragraph 11). With regard to her strong desire to establish a new partnership, the wife testified that: "Today I am 39 years old. I have already wasted nine years unsuccessfully pursuing my husband in an attempt to receive a *get*. I want to raise my children quietly, and to establish a new relationship after 10 years of suffering and bitterness during which I have been like a "living widow" (paragraph 9). The wife also testified that the husband damaged her position in the community: "I almost never leave the house for social events or weddings…I am embarrassed by my marital status…On the one hand, I am not a married woman, and, on the other hand, neither am I a divorcee. My unclear status harms me emotionally and in practice" (paragraphs 10 and 12).

8. The wife's brother also testified with regard to the injury caused to his sister since the separation:

> "My sister wants to get married, to raise a normal family, warm and loving, and to build her life anew, but the husband prevents this in his refusal to grant the *get*" (brother Y.R.'s affidavit, paragraph 7).

9. Before delving into the details of the suit and the legal argumentations of the plaintiff, I must address the threshold issue raised by the husband's attorney in his written summation, and also implied in his answer, which is: That the complaint laid out before this court is nothing but an additional attempt by the wife to coerce her husband into granting a *get*, and that despite the fact that in the text of the complaint there is not, of course, any request from this court to formally order the granting of a *get*, or to impose penalties upon the husband with the aim of forcing him to grant a *get* to his wife, that such relief is not within the jurisdiction of this court to grant. That the entire objective of the suit for damages with regard to the withholding of a *get* is nothing but the attempt to place heavy economic pressure on the husband so that he will acquiesce to the request of the wife and grant the long-awaited *get* in exchange for her relinquishing the entire amount of damages awarded. Hence, the husband's attorney argues that this proceeding amounts to an illegitimate intervention into issues that should be tried only before the rabbinic court.

   I will point out that this argument was raised and rejected in a number of court decisions that addressed this question. In my decision File No. 3950/00 **Female v. Male**, P"M 5761(1) 29 (2001), I held as follows:

> [T]he claim is for monetary compensation only, and this on the basis of a cause of action in tort and tort alone. Insofar as the argument is that the wife was caused injury as a result of her husband's conduct, the fact that the injurious conduct relates to the failure to give a get does not relegate the tort cause of action to the domain of "matters of marriage and divorce of Jews in Israel who are citizens or residents of the State" which is the exclusive jurisdiction of the Rabbinic Courts, even if the failure in the non-execution of this "act" is an event that is itself subject to the jurisdiction of the Rabbinic Court.

[The following of] my colleagues ruled in a similar manner: the Honorable Judge Philip Marcus, in File No 9101/00 (Jerusalem); the Honorable Judge Albaz in File No 12130/03 (Jerusalem); the Honorable Judge Menachem HaCohen in File No 19270/03 (Jerusalem); and the Honorable Judge Tzvi Weitzman in File No. 19480/05 (Kfar Saba).

Some of my colleagues also referred to the ruling of the Supreme Court in the case of **Marom** (Appeal No. 401/66, **Marom v. Marom**, P"D 21(1) 673). In that case, the Supreme Court held that the civil courts do not have the jurisdiction to rule on a case for damages for breach of a divorce agreement in which a husband promised to grant a *get* to his wife, since this sort of lawsuit it the type that is within the exclusive jurisdiction of the rabbinic court. In the case at issue, on the other hand, as in similar petitions brought for compensation for the harm caused as a result of *get* refusal, the petition does not involve the enforcement of an explicit obligation that the husband has taken upon himself to grant a *get* as part of the divorce agreement authorized in the rabbinic court, but, rather, it involves the wife's claim for damages for the injuries that, according to her, ensued from her husband's behavior. There is nothing in the **Marom** ruling that demands the conclusion that even this indirect relation between the plaintiff and the granting of a *get* gives the rabbinic courts sole jurisdiction on the matter.

And further, it is difficult to accept the claim that the rabbinic court is that [court] which should rule on a suit for damages relating to the withholding of a *get*, since there is great doubt whether the injuries claimed in this sort of suit would merit any damages according to Jewish law, which generally awards damages for emotional harm only as a corollary of physical injury. Cf. Rav Uriel Lavi, **"Arranging a *Get* After the Husband Has Been Obligated to Pay His Wife Monetary Damages,**" Tehumin 26, pp. 164-6 (5766):

> However, if the husband is obligated to pay according to the law – for example, if he physically injures his wife and the Beit Din holds him liable for the injuries, pain, and medical costs, etc. – there is no problem imposing the payment on the husband. And even if ultimately the wife waives the payment in exchange for the granting of a *get*, there is no problem with this either …However, this is not the case before us. In this case, the payment owed by the husband according to the court is for the harm he caused his wife – the years she lived as an *aguna*, but this type of harm does not fit into any category of obligations of a "tortfeaser" (*adamhamzik*) [under Jewish law]. The court's ruling is at its crux meant to persuade the husband to grant the *get*.

In these instances, when it is known from the outset that a claim brought before the rabbinic court for damages for *get* refusal is doomed for certain failure because the type of injury addressed "does not fit into any category of obligation of a "tortfeaser" (*adamhamzik*)" according to Jewish law (and I leave aside for the moment the question of whether civil torts and heads of damage set forth under Knesset legislation are binding under the ***halakha***), then, in essence, the raising of such claim is tainted by lack of good

faith. (Cf., the words of The (then) Honorable President Barak in HCJ 2232/03 **Anonymous v. Tel Aviv-Yafo Regional Rabbinic Court** (unpublished).

And, as mentioned earlier, all family courts that have handled such claims are unanimous in their conclusion that these sort of lawsuits falls within the jurisdiction of family courts, and this is my opinion, too.

10. This conclusion leads to the state of affairs that the civil court will in fact hear claims for damages caused by [the actions of] *get* recalcitrants; and even if according to the aforementioned legal analysis this is not tantamount to the direct intervention into the Jewish laws of divorce, there is no doubt that every ruling issued in such suit by this court is liable to have halakhic consequences, if and when the issue of granting a *get* becomes an actuality in the rabbinic court. It is a well-known fact that according to the *halakha* a *get* must be granted of the free will of the divorcing husband; and that any step or penalty wielded against the husband whose aim, or even result, is to pressure him into granting the *get*, in a manner in which he would not have granted the *get* were it not for those steps or penalties, gives rise to the risk of a halakhic flaw in the granting of a *get*, known as the "*get me'useh*." Recently, the Rabbinic High Court even issued an opinion (File No. 7021-21-1, on March 11, 2008, 4 Adar Bet 5768) raising in detail the problem of civil rulings that obligate *get*-recalcitrants to pay damages, for exactly this reason. My fellow judges HaCohen and Weitzman each addressed this problem in his own way, one briefly and one at length; however, I [have decided] that I will not interfere with the authority of giants in questions of pure Jewish law. Even though it seems to me that Jewish law could find a way to overcome the problem of a *get me'useh* in the situation before me, and, in particular, in light of the fact that in this case, like in other cases similar to this one, the husband has already been obligated to grant a *get* to his wife even before the tort suit is filed, as will be explained, infra, so that the tort suit certainly did not play any role in the Beit Din's decision to obligate the husband to grant a *get*.

    Nonetheless, an examination of the opinions of all the *dayanim* and *poskim* of our generation who have addressed this question until now reveals that they have unanimous expressed their opinion that a wife's claim for damages with regard to *get*-refusal is likely to turn every *get* granted into a *get me'useh*,; and, if that is the conclusion, any *get* [given would] be invalid and the wife will not achieve her goal of being freed from her husband.

    If so, the question arises of how the court should take this risk into account when adjudicating the claim. Differing opinions have been expressed by the courts that have ruled on this matter, as stated earlier, and also in academic writings on the subject; I refer to the useful articles of Y. Kaplan and R. Peri, **"On the Responsibilities in Tort of *Get*-Withholders,**" 28(3) Tel Aviv U. L. Rev 773-869 (June 2005); Y. Biton, "**Women's Issues, Feminist Analysis and the Dangerous Gap Between Them – a Response to Yechiel Kaplan and Ronen Pri,**" id., pp. 871-902; and B. Shmueli, "Tort Damages for *Mesorvot Get*," HaMishpat 12 (a volume in memory of Justice Edi Ezer), pp. 285-343 (2007).

    [I]f the court were to delay, or even limit, the scope of the suit due to ramifications that have yet to arise, in a hearing that has yet to occur, regarding the validity of a get that has yet to be given, it would be an infringement on the fundamental rights of the plaintiff to have her day in court.

    First, I will point out that at the commencement of the case before me, I raised this issue with the plaintiff and emphasized to her that if a ruling is granted in accordance with her complaint, it likely will complicate her divorce proceedings in rabbinic court due to the problem of *get me'useh*; her response, by means of her attorney, was unequivocal, that she requests that this court deal only with the tort suit and not address at all the *halakhic* problems that may arise in the future in the rabbinic court. The

plaintiff's attorney reiterates this position in her written summation.

Second, if the court were to delay, or even limit, the scope of the suit due to ramifications that have yet to arise, in a hearing that has yet to occur, regarding the validity of a *get* that has yet to be given, it would be an infringement on the fundamental rights of the plaintiff to have her day in court. In filing this lawsuit, as in every other lawsuit brought by a citizen, it can be presumed that the plaintiff took into consideration the entire circumstances and the entire consequences of this lawsuit on all aspects of her life, including, in this case, anything that might impact on her request for a *get*. While it is true that we are dealing with a complicated *halakhic* matter of which the plaintiff herself is not expected to be knowledgeable, the plaintiff is represented by counsel, and in this case – by an attorney with much experience in the subject of marriage and divorce, so that it can be presumed that she set forth before the plaintiff all the ramifications of this suit, including those that might affect the proceedings in the Batei Din. Under these circumstances, the civil court does not have the right, or the authority, to interfere with these calculations and to dictate to the plaintiff for what she must sue, when to sue, and within what parameters to sue.

Moreover, as filed, the suit does not obligate, and does not even permit, the court to weigh halakhic considerations, since such consideration have no connection to the causes for damages on which the suit is based. I accept the words of the scholar Shmueli, noted above, which appear in his aforementioned article:

Judges must deal with the case in family court as a "pure" tort claim, and rule only as to whether it is in line with the objectives of tort law and with the objectives of conflict resolution.

> Judges must deal with the case in family court as a "pure" tort claim, and rule only as to whether it is in line with the objectives of tort law and with the objectives of conflict resolution. The responsibility and authority to deal with the potential implications that these cases may have on the validity of the *get* surely belong to the rabbinic court alone. This is the "division of labor"…As such, the tort claim must be accepted even if there is a possibility of a *get me'useh*[invalid]….The issue of this claim is the emotional suffering of the wife, a claim that certainly finds support in tort law. There is no issue here of res judicata or parallel proceedings, or the like. The person who must take into considerations the implication of the tort claim on personal status is the plaintiff alone. It is the plaintiff who must weigh the implications of the warnings from Kaplan and Peri that she may suffer a net loss – meaning, that she could, on one hand, obtain a ruling obligating the husband to pay her reasonable damages; at the cost, [on the other hand], of the *get* being deemed *me'useh* by the rabbinic court should [the husband agree to give the *get*] in exchange for the waiver of the damages awarded…All these factors should be taken into consideration by the plaintiff herself, but they must not become the [controlling] policy considerations of the legislature or of this court.

As mentioned earlier, the wife declared to this court that she has taken into consideration all the relevant factors and that she requests that this court address the claim at hand only as it was filed. This in fact is the role of the court, and therefore this is the way that it will rule on the claim, just as it has been presented before it.

11. The wife's claim rests primarily on two of the civil wrongs recognized in tort:

    (1) The Breach of a Statutory Duty:

Paragraph 63 of the Torts Ordinance of the State of Israel (New Version) establishes that:

> (a) One who breaches a statutory duty is one who does not perform a duty imposed upon him according to any statutory provision – excluding this directive – while the provision, according to its correct interpretation, is intended for the benefit or protection of another person, and the breach causes that same person harm of the category or nature of the harm for which the provision was intended; however, the other party is not entitled, as a result of the breach, to the remedy explained in this directive if the breach, according to its correct interpretation, was intended to exclude such remedy.
>
> (b) Relevant to this paragraph, we see the statutory provision as if it were created for the benefit or protection of some party, if according to the correct interpretation, it is intended for the benefit or protection of people in general or a people of a certain category or class to which that party belongs.

The wife argues that by virtue of Paragraph 287(a) of the Criminal Law, according to which "one who breaches an instruction issued appropriately by the court, or a clerk, or someone working in an official and authorized position relating to that same issue, the length of his incarceration is two years," the duty to grant a *get* ordered by the High Rabbinic Court is converted into a statutory duty, and thus, the breach of such duty – which arises from not performing the duty – creates a cause for damages according to Paragraph 63, mentioned above. Although my colleague, Judge HaCohen (File No. 19270/03, supra), had second thoughts as to whether the husband's refusal to obey the rabbinic court ruling obligating him to grant a *get* can in fact fall under the regulations of Paragraph 63, above, since according to him, "The regulations set forth in Paragraph 287(a) of the Criminal Law were intended to protect the collective values of public order and the rule of law, and not to protect private interests," my opinion is that, in addition to that stated purpose, Paragraph 287(a) of the Criminal Law has as its goal to prevent the infliction of harm to those people whom the statutory duty is intended to protect. There is no question that enforcing the edicts of the Beit Din will further the public interests of obedience of court orders authorized by the state, including the rabbinic courts; however, at the same time, there is no doubt that such enforcement is also intended for the benefit of the wife into whose hands the husband is supposed to place the *get* according to that same order from the Beit Din. As such, the criteria set forth in Paragraph 63 of the Torts Ordinance have been met, which, as set forth in **the Matter of Vaknin**, Appeal No. 145/80 **Vaknin v. Beit Shemesh Local Council** et al, P"D 37(1) 113, are:

> a. A duty imposed upon the perpetrator by rule of law.
>
> b. The law is intended for the benefit of the injured party.
>
> c. The perpetrator violated the duty imposed upon him.
>
> d. The violation caused harm to the injured party.
>
> e. The harm caused is the sort of harm the legislature had in mind.

I am satisfied that it can be concluded that Paragraph 287 was established to protect the interest of the wife, as well, and not just the public interest. In the words of Judge Weitzman File No. 19480/05, supra:

> …Since we have established that the purpose of the paragraph is to protect not only the public interest but also the interests of various individuals, we can surmise that its purpose is to prevent the injuries that may ensue to

those parties in the event of such a breach. The court held similarly in the case of Sultan – in that case a Muslim husband divorced his wife without receiving a ruling dissolving their marriage. Paragraph 181 of the Criminal Law imposes a punishment of incarceration on a person who dissolves his marriage to his wife against her will and without receiving a ruling obligating such dissolution, and thus the court explained: "Once we have established that the regulations of paragraph 181 of the Criminal Law were intended not just for the general public interest but also for the benefit and protection of the wife whose husband divorces her against her will, it can be surmised that the harm which the law was intended to prevent is the harm caused to her as a result of this divorce, from the change in her status from a married woman to a divorced woman, absent a ruling of a court or authorized Beit Din obligating her to divorce…" **Appeal No. 245/81 Khuria Jamil Machmud Sultan v. Chasan Chamel Sultan**, P"D 38(3) 169, pp. 182-83.

The logic behind the court's decision in **Sultan** with regard to paragraph 181 of the Criminal Law, is no less valid with regard to Paragraph 287(a) of the aforementioned law. Because of this, the husband's refusal to obey the decree of the Beit Din HaGadol to grant his wife a *get* must be viewed as a violation of a statutory duty, with all its ramification, thus entitling the plaintiff to damages for the aforementioned civil wrong.

Indeed, the defendant's attorney argues that the decision of the Beit Din HaGadol should not be seen as an absolute and unequivocal duty to grant a *get*, because at the conclusion of the decision of *dayan* Rav Izerer, in which the obligation to grant a *get* is included, the honorable rabbi added the following: "**Should the husband be willing to divorce his wife, but have reasonable terms [in exchange for the divorce], the regional Beit Din will rule on [those terms]."** "In the opinion of the defendant's attorney, with these words, the Beit Din HaGadol allowed for the possibility to continue holding hearings in the district rabbinic court so that the husband will be able to present his terms [for the divorce] to the Beit Din. In his words, since such a hearing has not yet taken place, and his terms have not yet been ruled on, he is not obligated to grant a *get* immediately.

To my mind, this argument cannot be accepted. First, in the operative rulings that ultimately were issued, above, it was written explicitly: **"a. We obligate the husband to grant a *get*. b. If the husband refuses to grant a *get*, the Beit Din is prepared to rule for enforcement, including incarceration."** These words are clear and are not subject to interpretation. The fact that the decision of the Honorable Rav Izirer includes the comment that the husband is able to set forth his terms to the Beit Din is a statement that would be correct even if it were not stated explicitly. It is possible [for the husband] to raise any reasonable terms at the hearing set to finalize the granting the *get* in accordance with the duty imposed on the defendant in the High Rabbinic Court, but this possibility or opportunity is not a reason to stay the order imposed by the Beit Din on the defendant, nor is such an order conditional to any terms.

The fact is that since 2006, when the Beit Din HaGadol issued its ruling, the *get* has not been granted, and this situation is tantamount to a clear and extreme violation of the statutory duty incumbent on the defendant to submit to the orders of the authorized court which, in this instance, is the High Rabbinic Court.

Nota bene, violating a duty to obey the Beit Din HaGadol grants the wife the right to damages only **from the date that the ruling itself was issued**, that is, from June 5, 2006, since before that date, the husband was not obligated to grant a *get* by any court.

The plaintiff argues further that the defendant's duty to obey the ruling of the Beit Din HaGadol in accordance with Paragraph 287 of the Criminal Law is not the only statutory duty that the defendant has violated in his malfeasance and recalcitrance. According to her, the defendant has violated the terms of additional laws that do not depend on, or are not related to, the date of the mentioned order:

a. Basic Law: Human Dignity and Liberty. According to the wife, her right to be freed from the shackles of marriage is part and parcel of her right to the dignity owed to her as a person who bears rights of equal value to the rights of the defendant; and this because the injury to her right to personal autonomy -- which includes her right to marry, to divorce, to have children, to create an intimate relationship with the partner of her choice, and to live a full social life – the harm to all [these rights] infringes on her dignity as a person.

I note that in this matter too, there has been skepticism as to whether it is possible to sue for damages that result from the infringement on basic rights, such as the basic right of a person to Dignity and Liberty, when inflicted by a private party and not by the acts or omissions of governmental bodies. This too is a question of first instance, and has not yet been determined by the courts. For this reason, the Honorable Judge HaCohen ruled in File No. 19270/03 against granting tort damages under the rubric of a violation of a statutory duty, inasmuch as such violation refers to the Basic Law: Human Dignity and Liberty.

In my opinion, it is acceptable to add this argument to the others that this court relies upon to recognize the wife's right to damages. The Honorable President (in his then-position) Aharon Barak made the following statement [with regard to this matte]r: "With the enactment of the Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty, human rights in Israel were given constitutional status…Infringement [on those rights] can be perpetrated by an authority or by an individual." (The words of the Honorable President Aharon Barak in his introduction to the book by Dafna Barak Erez, Constitutional Torts, 1992.)

b. Paragraph 3 of the Law Against Domestic Violence, 5751 – 1991:

According to Paragraph 3, of the aforementioned law, the court is permitted to grant a restraining order against a person who has "abused a family member with ongoing emotional abuse, or behaved in a manner that did not allow a family member to conduct their lives in a reasonable and orderly manner…." The wife argues that the husband's withholding of a *get* for many years is tantamount to "ongoing emotional abuse," and that since such behavior is the basis for granting relief under the stated law, the violation of this statutory duty also entitles the plaintiff to damages for violation of a statutory duty in accordance with Paragraph 63 of the Torts Ordinance.

I cannot accept this line of argument by the wife. The law against domestic violence was designed to grant temporary and short-term relief in extreme situations which place the victim in immediate danger for her wellbeing and which demand taking relatively extreme steps, like removing someone from his house, so as to neutralize the immediate danger caused by the defendant's behavior. It is difficult to surmise that the legislature intended that this law [address] the type of injury for which the plaintiff claims damages in the current proceeding, and thus, in this case, the accepted criteria are not met that would merit awarding damages in accordance with the abovementioned Paragraph 63.

(2) Negligence:

According to Paragraph 35 of the Torts Ordinance,

> When a person performs an act that a reasonable and prudent person would not perform under the same circumstances, or does not perform an act that a reasonable and prudent person would perform under the same circumstances...this is negligence; and if negligence is committed as stated in relation to another person, with regard to whom the person has a duty under those circumstances not to act as he did, this is negligence, and one who causes harm, apart from to himself, as a result of his negligence has committed a civil wrong.

There is no doubt that the elements set forth in Paragraph 35 of the Ordinance all arise in the present case.

It is indisputable that a person owes a duty of care to his spouse, as set forth in Paragraph 36 of the Ordinance, in which it is written that a person owes a duty of care "to all persons whom… a reasonable person ought, under the circumstances, to have anticipated as likely in the usual course of things to be harmed" as a result of his behavior.

As Kaplan and Peri note in the aforementioned article:

> There is no question that a person whose wife asks to dissolve the union with him and to start a new life without him…can foresee that his withholding of the *get* after he has been ordered to do so will cause his wife much suffering. On this point, it is impossible to ignore the fact that the behavior of the *get*-recalcitrant is frequently malicious, and that this maliciousness indicates – a minori ad majus (an inference from minor to major) – foreseeabilty, since a person who intends to cause harm, and acts to carry out his intent, certainly foresees the harm that he intends to cause…. (Kaplan and Peri, id., p. 795)

Cf. the words of the Honorable Judge Nili Maimon:

> Indeed, a husband and wife have a special relationship, a relationship of intimacy, an emotional relationship. On each partner there is a duty to act with regard to the other with respect, decency, and in such manner that allows the partner to conduct his or her life in a reasonable and orderly manner. These [duties] establish the necessary basis for the tort of negligence, [forming] the conceptual responsibility [necessary for the tort]. File No. 18551/00 (Jerusalem) **K.S. v. K. M., Tak-Mash** 2004(2) 279 at p. 292.

It should also be noted that despite that this is a deliberate and malicious act, it is still possible to include such act or omission within the tort of

Kaplan and Peri are prepared to characterize the husband's behavior as negligent only so long as he continues to refuse to grant the get following an order to do so from the rabbinic court. Similarly, my fellow judges HaCohen and Weitzman… limit the award of damages for the tort of negligence to the period subsequent to a Beit Din order to give the get. This position is unacceptable to me, because the negligence we are speaking about is not a function of the Beit Din's order to grant a get, but rather is a function of the husband's refusal to agree to the request of the wife, and of the harm caused to her by refusing to submit to her.

negligence if the behavior is unreasonable, and if it is foreseeable to cause harm.

> …The father's omissions are intolerable behavior, to say the least. The fact that the father intentionally failed to take care of his children does not preclude the possibility of a finding grounds for negligence. Because negligence, in its technical meaning, can also include intentional acts and omissions, since the test for negligence is the unreasonableness of the behavior and the foreseeability of injury.

Appeal No. 2034/98 **Amin v. Amin et al, Tak-al** (3)99 1324, p. 1329.

Since it has been proven to my satisfaction that the husband's withholding of the *get* in this case is an unreasonable act under the circumstances, and that the husband in fact caused severe emotional harm to his wife by obstinately rejecting her request to grant a *get*, [I hold that] this behavior is tantamount to negligence, with all its ramifications, and thus the wife is entitled to damages for the resulting harm.

As to the temporal parameters of the tort, my opinion is different from that of Kaplan and Peri as it takes expression in the above quotations. When describing the behavior of the husband as negligence, the learned experts make the following comments: "There is no doubt that a person whose wife asks to cancel her union with him and begin a new life without him…**can expect that his withholding of the *get* after he is ordered to do so will cause the wife much hardship**…." In other words, Kaplan and Peri are prepared to characterize the husband's behavior as negligent only so long as he continues to refuse to grant the *get* **following an order to do so from the rabbinic court**. Similarly, my fellow judges HaCohen and Weitzman, in their opinions quoted above, limit the award of damages for the tort of negligence to the period subsequent to a Beit Din order to give the *get*. This position is unacceptable to me, because the negligence we are speaking about is not a function of the Beit Din's order to grant a *get*, but rather is a function of the husband's refusal to agree to the request of the wife, and of the harm caused to her by refusing to submit **to her**. How is the harm caused to the wife prior to the Beit Din's order different from the harm caused to her after [that order]? The great harm, humiliation, and the damage to her dignity, and all the other heads of damage intrinsic to the tort of negligence, are a consequence of the recalcitrance between him and her, and not a result of the recalcitrance between him and the rabbinic court; thus the date the *get* was ordered is of no relevance at all in relationship to the tort of negligence. The likelihood that harm would result from the husband's refusal to agree to his wife's request [for a *get*] is the direct result of his refusal itself, and not of any decision or ruling of any court.

How is the harm caused to the wife prior to the Beit Din's order different from the harm caused to her after [that order]? The great harm, humiliation, and the damage to her dignity, and all the other heads of damage intrinsic to the tort of negligence, are a consequence of the recalcitrance between him and her, and not a result of the recalcitrance between him and the rabbinic court; thus the date the get was ordered is of no relevance at all in relationship to the tort of negligence. The likelihood that harm would result from the husband's refusal to agree to his wife's request [for a get] is the direct result of his refusal itself, and not of an decision or ruling of any court.

Nota bene: Divorce in the State of Israel is based on Jewish law, and as such, **two separate routes** are available to a couple interested in divorce. One route is the route of ordering or coercing the delivery of a *get*; and in order for a wife to succeed in such a lawsuit, she must convince the Beit Din that a cause of action exists from among those recognized by *halakha* that warrants obligating the delivery of the *get*. So long as the Beit Din is not convinced that such a cause of action exists, the Beit Din will not obligate the husband to grant his wife a *get*. However, a second, independent route exists, which has no connection whatsoever to causes of action that exist under the *halakha* for ordering the delivery of the *get*, and this is the route of granting a *get* **by agreement**. At the moment that the husband agrees to grant the *get*, the Beit Din will not investigate whether or not there is a halakhic basis for divorce. The only thing the Beit Din will investigate in this type of situation is whether the *get* was with the agreement of the husband of his own free will, that and nothing else.

Divorce in the State of Israel is based on Jewish law, and as such, two separate routes are available to a couple interested in divorce. One route is the route of ordering or coercing the delivery of a get; and in order for a wife to succeed in such a lawsuit, she must convince the Beit Din that a cause of action exists from among those recognized by halakha that warrants obligating the delivery of the get. So long as the Beit Din is not convinced that such a cause of action exists, the Beit Din will not obligate the husband to grant his wife a get. However, a second, independent route exists, which has no connection whatsoever to causes of action that exist under the halakha for ordering the delivery of the get, and this is the route of granting a get by agreement. At the moment that the husband agrees to grant the get, the Beit Din will not investigate whether or not there is a halakhic basis for divorce. The only thing the Beit Din will investigate in this type of situation is whether the get was with the agreement of the husband of his own free will, that and nothing else.

Therefore, if the wife asks her husband to grant her a *get*, it is within the husband's power to agree to this request even if there are no halakhic grounds according to which the Beit Din would order him to grant the *get*. And if the husband for whatever reasons he may have refuses to agree [to the *get*], the fact of his refusal – as a result of which, and only as a result of which, the divorce is not implemented at the wife's request – is behavior that is tantamount to negligence, with all its ramifications, if it is foreseeable that this aforementioned refusal would cause harm to his wife. Thus there is no significance to the defendant's declaration – which he voices at every opportunity and which serves him as a cloak of justice in his arguments before me –that he is willing to submit to every order from the Beit Din, and that thus there is no reason to call him a *get* recalcitrant. And who exactly is it who prevents him from agreeing of his own free will to grant a *get* to his wife, even if there is no such order from the Beit Din?! Hence, when it comes time to examine whether or not the wife is entitled to damages for the tort of negligence, there is no room to investigate whether the husband was obligated to grant a *get* or not obligated, but rather, whether he denied the wife's request, whether his denial was justified, and whether it was foreseeable that his denial would cause her harm. For this reason, even in cases in which there is no order for a *get* at all, it is possible to find that the wife merits damages as a result of the harm caused to her because of her husband's negligence in his withholding of the longed-for *get*.

[E]ven in cases in which there is no order for a get at all, it is possible to find that the wife merits damages as a result of the harm caused to her because of her husband's negligence in his withholding of the longed-for get.

Compare the words of Shmueli on this subject:

> Recognizing that withholding a *get* is a private act of emotional harm, caused to the *mesorevet get* due to the emotional violence that she experienced, leads to the conclusion that the claim is distinguishable from the laws of personal status in an additional way: The date on which the rabbinic court establishes that the husband must grant a *get* is the official date of the beginning of the *get*-recalcitrance….My opinion is that this determination is not correct….If indeed the source of the harm caused to the plaintiff is emotional harm as stated, the date on which the rabbinic court orders the husband to grant his wife a *get* will not always be of any significance… The plaintiff should not be denied the opportunity to argue and prove that the emotional harm began earlier (and even much earlier) than the official date on which the husband was declared a *get* recalcitrant…the laws of tort obligate this conclusion! One should not accept the interpretative position that claims that the tort does not crystallize until there is a decree from the rabbinic court to grant the *get*, if the tort of negligence is addressing the prolonged emotional abuse of the wife that began even before the official refusal to [obey] the decision of the Beit Din. Id., at p. 311

For this reason too, I cannot agree with the position taken by my fellow judges, HaCohen and Weitzman, who in their opinions restrict the onset of the tort of negligence to the date the *get* was made obligatory, and later.

The case before me proves that it would be a mistake to determine negligence only from the date the *get* was ordered, and afterward. The wife filed her divorce request in 1998, and the ruling obligating the husband to grant the *get* was only issued eight years later, in July 2006. Indeed, two years have passed since then, and there is no doubt that in those past two years, additional harm has been caused to the wife as a result of his refusal to obey the order of the High Rabbinic Court. But what of the six years preceding the order to grant the *get*, during which the husband obstinately refused to honor his wife's request to grant a *get*? Does the fact that the Beit Din had not yet obligated him to grant a *get* mean that no harm was done to the wife? Under the unique circumstances of this case before me, the wife claimed from the very first day that her husband's behavior prior to her leaving the house caused her such disgust and revulsion that made it impossible for her not only to resume married life, but also to be in his very presence, even for a briefest length of time. It is clear, therefore, that the wife's deep suffering began in those first years, and did not wait for its impact until the Beit Din HaGadol had ruled.

Therefore, I do not view the date from which the *get* was ordered as an obstacle to establishing the existence of a tort in the years that passed prior to that date.

According to the plaintiff's attorney, a strong precedent should be set that if a husband continues refusing to grant a get a year after divorce proceedings have begun, there should be a presumption of recalcitrance, and everything that causes harm to the wife from that date and forward should merit appropriate damages. The plaintiff's attorney bases her argument that the period of a year is sufficient in the fact that most nations of the world view a year of separation between partners as a sufficient period to grant a divorce, and thus she asks us to infer that the issue of the withholding of a get for more than a year from the date the divorce proceedings began is intolerable and creates negligence.

I do not accept the position that a period of one year should be set as a "default" in lawsuits of this kind. It seems to me unjust to expect a husband against whom divorce proceedings have been started to respond to the request of the wife with the delivery of a get if he has not yet internalized and reconciled himself to the fact that the family unit has broken apart. Two

members of a couple do not always reach the same realization that they must divorce at the exact same point in their lives, and sometimes not insignificant time is necessary until the defendant can fall into line with the plaintiff partner and agree that a divorce is necessary.

Sometimes legitimate financial calculations exist, or calculations related to the best interest of the children, which would justify a certain delay in the granting of the *get*, in order to give the couple the possibility of examining the alternatives available to them instead of an immediate divorce.

With this in mind, it would be appropriate to quote the words of Dr. ShacharLifshitz from the comprehensive article in which he proposes a civil solution to divorce in Israel. There the author expresses his opinion that one should not adopt the doctrine of divorce-on-demand:

> The desire to assure level-headed divorce proceedings that will prevent capricious divorces, the public interest in strengthening the social norms that emphasize the commitments embodied in marriage, and the need to permit economically weak parties a period of recovery, all clarify how, from a civil perspective as well, there is no justification in immediate approval of every divorce request. In this spirit, it may be necessary to lengthen the period of time from the date of filing for divorce until the date of its implementation; perhaps to establish a procedure for mandatory counseling and reconciliation as part of the divorce proceedings; or perhaps it may be necessary to regulate property matters, especially as those matters relate to children, that are incidental to divorce...S. Lifshitz, **"I Want to Get Divorced, and Now! On the Civil Solution to Divorce,"** 28(3) Tel Aviv U. L. Rev. 671, p. 737.

And indeed, there will be instances in which it would be wrong to expect that a partner agree to divorce within a period of even two years, or even longer. And therefore I am not going to arbitrarily set a fixed date for *get*-refusal, from which point of time and onward, refusing [to agree to the *get*] will be deemed unreasonable. Each case should be judged on its own merits.

In the case at hand, given the harsh allegations made by the wife against her husband, that were confirmed by the High Rabbinic Court, as well as in the ruling of this court regarding fair use [of the marital property], it seems reasonable to me [to accept] the wife's demand that the tort of negligence

Recognizing that withholding a get is a private act of emotional harm, caused to the mesorevet get due to the emotional violence that she experienced, leads to the conclusion that the claim is distinguishable from the laws of personal status in an additional way: The date on which the rabbinic court establishes that the husband must grant a get is the official date of the beginning of the get-recalcitrance….My opinion is that this determination is not correct….If indeed the source of the harm caused to the plaintiff is emotional harm as stated, the date on which the rabbinic court orders the husband to grant his wife a get will not always be of any significance… The plaintiff should not be denied the opportunity to argue and prove that the emotional harm began earlier (and even much earlier) than the official date on which the husband was declared a get recalcitrant…the laws of tort obligate this conclusion! One should not accept the interpretative position that claims that the tort does not crystallize until there is a decree from the rabbinic court to grant the get, if the tort of negligence is addressing the prolonged emotional abuse of the wife that began even before the official refusal to [obey] the decision of the Beit Din. Id., at p. 311

commence one year after divorce was filed for, that is from June 1999. On that date, it was clear to the husband that his wife's mind was firmly set, and that no option remained apart from divorce. Likewise, it was clear to the defendant at the end of a year that the wife suffered from his tarrying to grant the *get*. In spite of this, the defendant continued to mock his wife, in every possible manner, and the law should require him to pay the consequences for this.

12. Since we have reached the conclusion that the husband's behavior and his refusal over many years to grant a *get* to his wife are tantamount to a tort that entitles the wife to compensation, we must establish the amount of compensation. In the wife's written complaint and conclusion, her attorney relied on the holding of the Honorable Judge HaCohen in his aforementioned opinion, in which he valued the noneconomic harm to a wife denied a *get* at NIS 200,000 annually. Based on this, the wife is claiming damages for the period from June 1, 1999, until the date the suit was brought, on November 20, 2006, in the amount of NIS 1,600,000 for eight years of [*get*] refusal. In addition, the wife claims NIS 130,000 for the period from the date of filing suit until the date of filing written summation, in July 2007. The plaintiff adds, too, a request for aggravated damages in the amount of NIS 100,000 that would reflect the egregiousness of the defendant's actions; as well as a demand for a monthly payment of NIS 4,000 to compensate for economic damages (lost income from June 1, 1999 until the date summation were filed) in the amount of NIS 388,000. A sum total of NIS 2,218,000. Finally, the wife asks to factor in a daily sum of NIS 549 from the date that [she filed] summation until the *get* is actually granted, as compensation for an ongoing harm.

    With all due respect to the cited ruling, it seems to me that all the sums projected from the ruling of the Honorable Judge HaCohen are not realistic when dealing with a great number of years, and that the multiple of an annual "tariff" of NIS 200,000 per year will yield a result that greatly exceeds the bounds of reasonableness. In examining the rulings in all tort cases in the State of Israel, it would be difficult to find damages in the amounts requested in the case before me even in cases of bodily harm, to say nothing of emotional harm, which is the subject of the case before me.

    I also disagree with the wife's claim for damages due to economic harm, since the lost wages to which she refers are related more to the issue of alimony, which she should raise before the rabbinic court as an independent issue that is not related to *get*- refusal, except indirectly.

    Similarly, it seems to me preferable not to award damages for an ongoing harm, which bears the clear mark of the coercion that would invalidate the granting of the *get* and turn it into a *get me'useh* (forced divorce- s.w.); so in order to protect the wife's right to damages for future harm, I will, at my initiative, allow the wife to split her claim (in accordance the authority given to me under Paragraph 8 of the Rules of Family Court) so that she can sue for damages caused to her subsequent to the date of this ruling if the husband remains recalcitrant.

13. Having made all the calculation set forth above, I hereby order the husband to pay damages for the harm caused to his wife from June 1, 1999 until the date of this ruling in the amount of NIS 450,000 with an additional NIS 100,000 as aggravated damages, for a sum total of NIS 550,000.

    In addition, I am ordering the defendant to pay costs and attorney's fees in the amount of NIS 20,000, plus VAT.

    Issued on 18 Tamuz 5768 (July 21, 2008) in the absence of the parties.

    BenZion Greenberger, Judge

Decision Summary

In this case, a 39 year old haredi woman sued her husband for damages for refusing to give her a get for 8 years.

Here Judge Greenberger wrestles with the questions of: "Is there a cause of action under Israel's Tort Ordinance for get-refusal before a rabbinic court orders the husband to give a get?" and "Whether the court should take in to consideration the problem of the 'forced divorce' (get-meuseh) when awarding damages.

With regard to the question of whether a cause of action for get-refusal exists prior to a rabbinic court order regarding the get, Judge Greenberger holds that the issue at hand is the reasonableness of the husband's behavior vis-à-vis his wife, and not vis-à-vis the Rabbinic Courts. Since it is possible to divorce under Jewish law by agreement, the question for the court to examine is whether the husband's refusal to divorce his wife is reasonable after she has requested his agreement to such divorce, irrespective of a court order to that end. With respect to the question of the forced divorce, Judge Greenberger holds that he cannot take this question into consideration when determining the merits of the wife's claim for damages. He must decide the case before him under the rules of tort, and he must leave the question of the forced divorce to the rabbinic courts. It is the woman's prerogative to file her tort claim with the family court, and he cannot deny her a day in court. Similarly, it is her choice to decide to take the chance that by being awarded damages by the family court, the rabbinic court may deny her a get on the grounds that it was forced. He cannot make that choice for her.

Judge Greenberger awards the wife 450,000 NIS in damages and 100,000 NIS in aggravated damages.

The Wife has asked the execution office to transfer her husband's rights in the marital home to her in order to collect the damages awarded. To this day, the husband has not given her a get. She is pursuing her for request for a get in the rabbinic courts. .

TORT 5 (J. SIVAN, TEL AVIV FAM CT.CASE 024782/98)

Plaintiff: **N.S.,** ID ...
Represented by Susan Weiss, attorney for Plaintiff
F C D
Defendant**: N.I**., ID ...
Represented by Abraham J. Weiss, attorney for Defendant

JUDGMENT

1. The claim in question is a civil suit for damages filed by a woman against her husband to compensate her for the harm that she has endured as a result of his refusal to grant her a *get* for more than 10 years.

2. THE FACTS

The parties married on 3/4/1997. The woman was a new immigrant from Iran, 24 years old, and the husband was a yeshiva graduate, 31years old. Parties were married after being introduced by a match-maker.

The parties lived under one roof for barely three months, at the end of which, in July 1997, the woman, who was pregnant, escaped from the heavy hand of the husband.

Since then – and for some 11 years – the parties do not live under one roof and have been entangled in legal proceedings both in this court and in the rabbinic court, including a claim for child support that has been decided, as well as mutual lawsuits for divorce.

3. PLAINTIFF'S CLAIMS

According to the woman, between the years 1997 through 2005, 25 hearings were held in the rabbinic court in the matter of her petition for divorce and alimony. She claims that the husband did not show up for 10 out of 25 of those hearing, and when he did show up, it was only after having been subpoenaed.

The Rabbinic Court ruled that the parties could no longer live together as a couple and that it was a*mitzvah* [a moral obligation] for the husband to divorce his wife.

Under these circumstances, in light of the years that have passed, and since it has become clear that the marriage of the parties has ended, according to the woman the husband intentionally refuses to give her a *get*, knowing that it causes her great suffering.

As an*agunah,* the plaintiff, who is an Orthodox woman, cannot enter into relationships with other men, cannot bring more children into this world, and cannot engage in sexual relations. By all this, the defendant wields a mortal blow to the woman's dignity, her autonomy, and her right to determine the course of her life.

The husband places various and ever-changing pre-conditions for his agreement to divorce, such as the waiver of child support, the transfer of jurisdiction over child support to the rabbinic court, the waiver of the husband's debt to NII, transfer of custody of the child, ensuring his visitation with the child, etc. These conditions are clearly unreasonable, contravene public policy, and serve as excuses for not granting the *get*. Moreover, despite defendant's verbal protestations, he is not interested in contact with the child. In fact, he did not show up for hearings in the Rabbinic Court regarding child visitation, and stated that he was willing to waive his visitation rights in exchange for a waiver of child support.

According to the plaintiff, the defendant is a violent man who suffers from mental disabilities, and she is afraid that he could cause harm to the child.

Plaintiff argues that there is no "contributory negligence" in matters of *get*-refusal. Even if the defendant's demands were reasonable, correct, and in accordance with public policy, the plaintiff's refusal to accede to the husband's terms for divorce cannot serve as an excuse for his abuse of his wife.

Moreover, according to plaintiff, the husband is "a miscreant in the name of the Torah" who has misappropriated Jewish law and manipulated the rabbinic court to abuse her. The husband takes advantage of the fact that the Rabbinic Court refrains from issuing orders against husbands to divorce their wives, especially in situations where he has [in principle agrees to the divorce] but posits terms that he feels should be met before he grants the *get*.

With regard to the law, the wife's attorney argues that *get*-refusal is a tort in accordance with Tort Ordinance (New Version). It is:

- A violation of a Statutory Obligation set forth under section 63 of the Tort Ordinance. The statute violated is the Basic Law on Human Dignity and Liberty which is designed to protect the basic rights of persons in the state of Israel. By refusing to grant a*get* to the plaintiff, the defendant violates the human rights of the plaintiff including her right to self-autonomy, her right to have children, and her right to social connections and sexual intercourse.

- A violation of a Statutory Obligation as set forth under section 3 of the Prevention of Domestic Violence Law of 1991. The defendant, by refusing to divorce his wife, abuses her in such manner that is tantamount to "prolonged mental abuse" and prevents her from any possibility of "engaging in a proper and reasonable life."

- A violation of a Statutory Obligation as set forth in sections 427, 428 and 431 of the Penal Law 1977, all of which involve the use of unlawful force. Defendant takes advantage of the plaintiff's plight, setting conditions for divorce that include matters involving child support, as well as the child. In this way, the defendant unlawfully uses force for the purpose of anchoring the plaintiff to him, refraining from giving her a *get*, and persuading her to comply with his demands.

- A type of false imprisonment. Refusing to give a *get* is a deprivation of plaintiff's liberty that is so drastic, that it is tantamount to false imprisonment that is a social and spiritual deprivation of liberty that affects all areas of life.

- The tort of negligence. Negligence is framework law that includes the withholding of the *get*-- the defendant's actions constitute gross negligence. A husband has a duty of care towards his Wife. The relationship between Husband and Wife is one of dependency and closeness in which one can expect a heightened duty of care as to the physical and emotional welfare of one's partner. By withholding a *get* from his wife for 11 years, a

husband violates the duty of care to which he is obligated towards his wife and deviates substantially from any proper standard of conduct.

The acts of the defendant cause damage to the plaintiff, regardless of whether or not there is a rabbinic court order that obligates the husband to give the *get.* Not having an order against the husband "obligating" him to give the *get* cannot be used as a "defense" to the damage inflicted. Defendant intentionally caused damage to the plaintiff. A Husband who exploits the possibilities that religious law gives to him to refuse to give his wife a *get* should still be held responsible to pay for the "civil" damages incurred by the Wife.

And even if the husband finally gives the long-awaited *get*, the husband must still pay his wife compensation for the years when he refused to do so. Compensation is not a "fine" that would invalidate the *get* as a "forced." And should the husband finally give the long-awaited *get*, this would just serve as a way to mitigate the damages already caused to his wife.

Universal natural justice requires that everyone be given the necessary conditions that allow her to love, to choose life, to have human contact and to live her life and not those of another. When a man does not give his wife a *get*, he infringes on the basic capabilities of a human being: to enjoy sex, to choose her way of life, to enjoy human contact, etc.

By refusing to divorce his wife, a Husband causes enormous intangible damage. The husband causes his wife: grief, sorrow, shame, humiliation, and emotional distress, all of which warrant compensation. In addition, he causes her monetary harm since the income of a family with 2 heads of the household is greater than that of a single parent family. In addition, the husband prevents the wife from remarrying and is thus responsible for the economic burden imposed on the shoulders of a single woman in the absence of a husband/breadwinner.

The plaintiff estimates the claim to be in the total amount of 2,510,000 NIS, plus 549 NISa days from the day of filing written summation until the day that the divorce is actually given, to be broken down as follows: 200,000 NISa year for non-pecuniary damages = 1,400,000 NIS; 550,000 NISfor non-pecuniary damages from the date the complaint was filed until the day that written summation was filed;4000 NISper month for pecuniary damages, lost income = 460,000 NIS; plus 100,000 in aggravated damages.

4. DEFENDANT'S CLAIMS

In accordance with the decision of the Rabbinic Court the defendant was not obligated to give a *get*. On the contrary, the Rabbinic Court specifically stated in no uncertain terms that the wife's request that the court obligate her husband to give a *get* was denied, and that the defendant does not "anchor" his wife.

In the defendant's mind, the conclusion that must be reached with regard to all this is that the welfare and best interests of the plaintiff do not stand at the heart of this claim, but rather the publicity and good of various other factions who have set as their goal to undermine the legitimacy of the rabbinic judicial system in Israel.

Moreover, according to the defendant, he is not withholding the *get*from the plaintiff. It is she who is anchoring herself by refusing to allow him visitation rights with the minor child, their common son. Defendant quotes, in his support, the decision of the District Rabbinic Court in Tel Aviv, as well as that of the Supreme Rabbinic Court dated 23.4.01.

Defendant contends that he is willing to give his wife a *get* at any time, provided that she comply with judicial decisions rendered by the rabbinic courts.

With reference to the law, the defendant's attorney argues that scholars have argued that damages should be paid to women only in cases in which the Rabbinic Court has ordered the husband to give a *get*, which is not the case here. When the wife's petition to order her husband to give her a divorce was denied, this precluded any cause of action she may have had for damages incurred as a result of a statutory obligation.

With respect to a cause of action based on negligence, the defendant argues that a duty of care does not arise since we are dealing with a couple that is Strictly Orthodox (*haredi*) and observe the commandments. They submit themselves to the legal rules of the Torah and the judgments of its rabbis, and such persons are obligated to listen to and obey rabbinic court rulings regarding these matters.

5. CLAIMS FOR DAMAGES FOR *GET* REFUSAL - LEGAL PURVIEW

Claims such as the one at hand have only on a few occasions reached the doors of the Family Courts. Therefore, there is still no ruling of the Supreme Court that outlines clear criteria on this matter (except for sporadic relevant statements, which I will refer to later). Nonetheless, you can find decisions on point that have written by my colleagues sitting on the Family Courts in Israel. For this purpose: Denying a motion to dismiss for no case to answer: FamCt 3950/00 Doe v. Doe P"M vol. 2001 p. 29; FamCt 9101/00 Doe v. Doe (not yet published); damages awarded against a *get*-recalcitrant: FamCt 19270/03 K. S. v. K. P. (Nevo); damages awarded against the estate of a *get*-recalcitrant: FamCt 19480/05 Doe v.Doe's estate (Nevo), and more.

Like my colleagues, I think that when such a claim comes before the court, it be determined on its merits, in accordance, of course, with the circumstances of each case.

In this context, I'll add that I am well aware of the problems underlying such claims, including the fact that they may constitute an infringement on the exclusive jurisdiction of the rabbinic court, and moreover, that they may result in the *halakhic* problem of the forced*get*. Scholars have related to these issues (I will refer to them later on), as have the family courts that have ruled on these matters in various provinces.

I am of the opinion, and I share this opinion with my fellow judges, that these claims are for monetary compensation alone in accordance with tort law. They do not amount to any obligation to give a get, nor a constraint to do so. They are a demand for compensation for the harm that the plaintiff claims was caused to her by the behavior of the defendant, pure and simple.

I am of the opinion, and I share this opinion with my fellow judges, that these claims are for monetary compensation alone in accordance with tort law. They do not amount to any obligation to give a *get*, nor a constraint to do so. They are a demand for compensation for the harm that the plaintiff claims was caused to her by the behavior of the defendant, pure and simple. (For this purpose, see some FamCt 6743/02. N. C. (Unpublished); FamCt 3950/00 Doe v. Anonymous, SP 2001) 29 (1) התשס"א); Tam " Q 19270/03 K. S. v. K. P. (forthcoming); FamCt 19480/05 Doe v. estate of someone deceased late (not yet published)).

Moreover, by filing suit and following it through to completion, the plaintiff is making clear her desire to have her claim heard. It can be presumed, especially since she is represented by counsel, that the plaintiff understands the risks involved if this claim is accepted or denied, including the consequences with regard to the "forced *get*."

6. FROM THE GENERAL TO THE SPECIFICS OF THE MATTER BEFORE US

First, given the defendant's claims that he is not anchoring the plaintiff, it is necessary to make a factual determination as to whether or not our case involves an act of *get*-refusal, and beyond this, whether, the defendant is right to claim that the very fact that the rabbinic court has only "recommended" that he divorce his wife (as distinguished from ruling that he has a "duty" to divorce her or is "compelled" him to do so) precludes a finding that there is a cause of action under tort law.

At this juncture I would like to make it perfectly clear that under the circumstances of the case at hand as they have been set forth before me, I hold unequivocally that the husband is a *get*-recalcitrant who has been denying his wife her freedom for more than 10 years. And I will explain my words:

There is no dispute that the parties lived together, under one roof, for **barelythree months**. There is also no dispute that a large number of hearings were scheduled for the parties before the rabbinic court, the majority of which (and this is not denied) the defendant did not bother to come to, and the minority of which he attended only after he was dragged by court order or arrest warrant, and that the rabbinic court proceedings continued for many years.

Regarding this, I refer to the cross-examination of the defendant set forth in the transcript dated March 11, 2008, p. 17:

Q. Is it true that you did not appear at hearings?

A. At that time I was in a very, very bad emotional state. I was under the care of various psychologists, and during the same period of time I was terribly beaten by my [brother-in-law and his wife in a way that caused me to lose consciousness, and I was hospitalized in three hospitals ...

Q. That's the reason you didn't appear before the rabbinic court?

A. Yes and I had a lot of orthopedic problems.

Q. You didn't appear for hearings because of medical reasons?

A. Yes.

Q. You didn't appear for the hearing on September 1, 1997,

A. I sent a reason why I didn't appear.

Q. On June 15, 1997, on March 16, 1999, April 25, 1999, July 4, 1999, February 9, 2000, May 11, 2000. You did not appear at any of these hearings.

A. After all, the National Security Institute did not without reason decide that I was psychologically and physically disabled due to the beatings I received from the family

At this juncture I would like to make it perfectly clear that under the circumstances of the case at hand as they have been set forth before me, I hold unequivocally that the husband is a get-recalcitrant who has been denying his wife her freedom for more than 10 years. And I will explain my words:

There is no dispute that the parties lived together, under one roof, for barely three months. There is also no dispute that a large number of hearings were scheduled for the parties before the rabbinic court, the majority of which (and this is not denied) the defendant did not bother to come to, and the minority of which he attended only after he was dragged by court order or arrest warrant, and that the rabbinic court proceedings continued for many years.

and also because of the ten years that I have not see my son, and all these years I had no attorney.

And in continuation, on page 19 of the above-referenced transcript:

Q. Is it true that in addition to dates I recited to you on which you did not appear there were additional hearings at which you did not appear, there were additional hearings at which you did not appear and I will read the dates to you.

A. You are reciting dates that I do not remember. It was 8 or 9 years ago.

Q. Is it true that you did not appear on October 8, 2002?

A. True, I had medical reasons. I don't remember, but every time I did not go, I had a reason not to go, I was ill or something.

Q. December 2, 2004, December 5, 2004, you didn't appear.

A. It could be, sometimes the mail does not come and I don't receive registered mail. I don't remember everything.

Q. Is it true that from 1997 until 2005 you were summoned to at least 21 hearings?

A. I don't remember and can't verify this. These questions are irrelevant to the issue. I don't remember.

Q. Is it correct that out of 21 hearings to which you received summons, you did not appear for 17 hearings?

A. I don't remember.

Q. Is it true that on these dates the court issued at least five orders to have you brought to court?

A. I didn't appear at the hearings for medical reasons or because the mail in the absorption center is really something horrible. I did not get all the dates on which I was summoned by mail and that's why I did not appear. If they notified me and I felt good, I appeared and if I did not feel good, I didn't appear.

These matters speak for themselves.

These facts by themselves constitute preliminary proof of *get*-refusal.

Additionally, I accept as credible the supporting testimony that was brought by the plaintiff. For example, the testimony of Mr. E.S., a family friend, who testified in paragraph 4 of his affidavit from March 12, 2007, as follows:

More people, and better people than myself, have tried to help, to assist, and to persuade the husband to give S a *get*, including rabbinic judges, rabbis, and important activists in the *haredi* sector. Many times the husband declared that he intended to give a *get* without any pre-conditions, but always, on a regular basis, when the awaited moment arrived, the husband would rescind his consent.

Similarly in the examination of Ms. Y.H. the plaintiff's sister, on page 8 of the transcript of the hearing from October 17, 2007: "We encouraged him and entered into agreements and hundreds of times he changed the agreement ...."

Beyond this, even the witness on behalf of the defendant, Mr. S.Y.H., recounted in his testimony, in these or other words, that the defendant is toying with the plaintiff and exploiting his ability to deny the plaintiff her *get*, as follows: **"...**

[O]nce we were at a hearing in the rabbinic court, I was still a student in the yeshiva at the time, and the court suggested a reasonable divorce agreement which was acceptable to him (i.e., the defendant) and afterwards things turned around ...".(p. 16 of the transcript from March 11, 2008).

In addition, the following [incriminating] facts were confirmed, or at least not denied, by the defendant himself in cross-examination: that there was a divorce agreement that was signed by both parties but not authorized by the court due to the defendant; that the defendant set various pre-conditions for giving the *get* like cancelling his debt to the National Insurance Institute, repealing the child-support order, transferring custody to him, carrying out visitation arrangements, etc.And that even when the wife expressed her consent or efforts were made to satisfy these pre-conditions, this did not help and did not lead to the long-awaited *get*; as well as the fact that there are decisions of the rabbinic court recommending that the defendant give a *get* to his wife (see, for example, the decision of the Regional Rabbinic Court dated June 11, 2000, the decision of the Supreme Rabbinic Court decision from November 2, 2000, the decision of the Supreme Rabbinic Court from April 23, 2001 and the decision of the District Rabbinic Court from April 10, 2005). All this leads to the inevitable finding of fact that the defendant has been refusing to give his wife a *get* for more than 10 years.

And still, the defendant's counsel argues that even if the defendant is in fact a *get*-recalcitrant, there is no cause of action against him in tort so long as a Rabbinic Court has not issued a judgment "requiring" him to give a *get* to the plaintiff. In the case at hand, there is only a decision "recommending" that he do so. In this matter, the defendant's counsel relies, inter alia, on the position taken by the scholars Kaplan and Perry, in their above-referenced article, who are of the opinion that:

[T]he following [incriminating] facts were confirmed, or at least not denied, by the defendant himself in cross-examination: that there was a divorce agreement that was signed by both parties but not authorized by the court due to the defendant; that the defendant set various pre-conditions for giving the get like cancelling his debt to the National Insurance Institute, repealing the child-support order, transferring custody to him, carrying out visitation arrangements, etc. And that even when the wife expressed her consent or efforts were made to satisfy these pre-conditions, this did not help and did not lead to the long-awaited get.

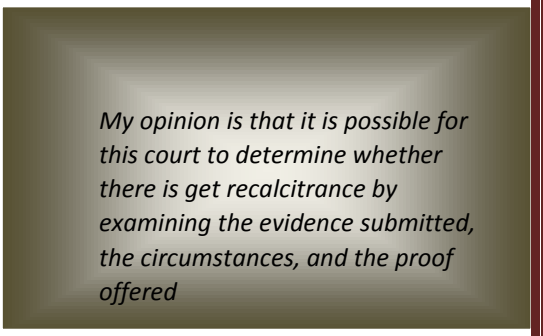
It is appropriate to permit a tort action [only] when [a rabbinic court] divorce judgment can be classified as one that "coerces" or "requires" a husband to give a *get*.

In their opinion, the reason for this is:

The imposition of sanctions on men who refuse to give a *get* when a court has [merely] ""recommended" or suggested that there is a moral duty ["mitzvah"] for a husband to give his wife a *get* raises serious concerns regarding a forced *get* [that would be invalid] under Jewish law.

However, the approach of the [above mentioned] scholars is not in consort with that of the courts on this matter. For example, the Hon. Judge Weitzmann in his decision in FamCt 19480/05 Doe v. The Estate of Doe (not yet published) writes, beyond what was necessary to determine the case under consideration, that even a ruling of a rabbinic court that uses the language of "recommendation" or "mitzvah" is considered to be a judgment of divorce for all intents and purposes. A litigant is required to fulfill the decisions of the judicial instance so long as no decision has been rendered that vacates those decisions or grants a stay as to them. What's more, I

must add to all this the opposing opinions of other scholars who claim that the degree of a rabbinic court order regarding the *get* has no bearings whatsoever on these types of claims (see Yifat Biton's article, "Women's Affairs, a Feminist Analysis and the Dangerous Gap between them – A Response to Yechiel Kaplan and Ronen Perry," 28(3) *IyuneiMishpat* p. 871; and B. Shmueli, "Tort Damages for Women Refused a Divorce," 12 *Hamishpat* (Book in Memory of Judge Adi Azar, page 285 (2007)).



My opinion is that it is possible for this court to determine whether there is *get* recalcitrance by examining the evidence submitted, the circumstances, and the proof offered; and to consider an action to award compensation for damages resulting from *get*-refusal on the merits even in cases where the Rabbinic Court has made do with a "recommendation" to grant a divorce alone. The rabbinic court is obligated to the particular system of laws and values for which they exit, as well as to an array of considerations and guiding principles that are sometimes different from those which obligate the civil court. I have no jurisdiction or discretion to examine the considerations that impel the Rabbinic court. And, as far as I am concerned, as long as there is a civil case before me with sufficient evidence to support a finding of *get* recalcitrance, this court must deal with it substantively, even if the rabbinic court decided merely to "recommend" that a husband grant a *get*.

In light of the above, and in light of my determination that the defendant is a *get*-recalcitrant, the claim itself must be adjudicated, and the applicability of tort law must be examined as to the matter before us.

7. BREACH OF A STATUTORY DUTY

This tort is defined in Section 63 of the Torts Ordinance (new version), as follows:

> 63. (a) Breach of a statutory duty consists of the failure by any person to perform a duty imposed upon him by any enactment other than this Ordinance, being an enactment which, on a proper construction thereof, was intended to be for the benefit or protection of any other person, whereby such other person suffers damage of a kind or nature contemplated by such enactment: Provided that such other person will not be entitled by reason of such failure to any remedy specified in this Ordinance if, on a proper construction of such enactment, the intention thereof was to exclude such remedy.
>
> (b) For the purposes of this section, an enactment will be deemed to be for the benefit or protection of any person if it is an enactment which, on a proper construction thereof, is intended for the benefit or protection of that person or of persons generally, or of any class or description of persons to which that person belongs.

In CA 145/80 Vaknin v. Local Council of Beit Shemesh, IsrSC 37(1) 113, the court explained that the tort is made up of five basic elements that are cumulative [and must be shown to exist in each case under examination]:

> (a) that there is an obligation imposed on the malfeasor by virtue of legislative enactment;
>
> (b) that the enactment was designed to benefit the person harmed;

(c) that the malfeasor breached the obligation imposed on him;

(d) that the breach causes damage to the party harmed;

(e) that the damage caused is of the kind contemplated by the legislator.

The plaintiff asserts that there was a breach of a statutory duty with regard toThe Basic Law: Human Dignity and Freedom, the Penal Code, and the Prevention of Domestic Violence Law.

BREACH OF A STATUTORY DUTY IN ACCORDANCE WITH THE PENAL CODE AND THE PREVENTION OF DOMESTIC VIOLENCE LAW

As noted above, one of the conditions for finding tort liability in the framework of a breach of a statutory obligation is that the legislation underlying the obligation is meant specifically "for the benefit or protection" of the plaintiff (see CA 610/02 The Pais Lottery v. Lotont Members Club Ltd, *Takdin-Elyon* 2003(2), 3144).

That is, even assuming the violation of a criminal prohibition, the plaintiff must prove that the legislation upon which she bases her claim for damages was indeed intended to protect her particular interests, as distinguished from the interests of the general public - the State. I am of the opinion that the provisions of sections 427 (extortion by force), 428 (extortion by threats) and 431 (exploitation) of the Penal Law, 5737-1977, and section 3 of the Prevention of Domestic Violence Law, 5751-1991, were indeed intended to protect the particular men/women suffering from abuse and cruelty perpetrated on them by others.

Also, (and I shall expand on this in detail below) it may be said that, with regard to the particular plaintiff who is an ultra-Orthodox woman, not giving her a *get* constitutes a severe infringement on her ability to conduct a reasonable and normal lifestyle, which amounts, at the very least, to psychological abuse which is ongoing for many years, and which thereby has caused her damage within the meaning of the tort ordinance.

Therefore, it is necessary to examine whether the facts at hand meet the final criteria [as set forth by the Pais Lottery court] regarding this matter, viz, whether the legislature in enacting the particular legislation in question intended, whether by interpretation or purpose, to grant a civil remedy for the breach at hand, i.e., damages for committing a breach of a statutory obligation. I am of the opinion that this is not the case. Both from a reading of the sections of the Penal Law and the Prevention of Domestic Violence Law, they have nothing to do with the issue of *get* refusal or *aginut*.. For example, the goal of the Prevention of Domestic Violence Law is to provide temporary and immediate relief for specific violent events, and it cannot be concluded from this that the law would allow for the possibility of, or intent to award compensation for its breach. Therefore, an action of this nature cannot be grounded upon these laws. (In this regard, see also: FamC 19270/03 C.S. v. C.P. (not yet published); and FamC 6743/02. **C. v C.** (not yet published).

BREACH OF STATUTORY DUTY IN ACCORDANCE WITH BASIC LAW: HUMAN DIGNITY AND FREEDOM

There is no doubt that the refusal to give a *get* constitutes an infringement of values protected by the Basic Law Human Dignity and Freedom, including the dignity, freedom of choice, the right to self-realization, self-autonomy, the right to marry and have children, etc., *a fortiori* where at issue is an ultra-Orthodox woman, for whom there is special and heightened significance to her status as married, divorced or an *agunah*. But, again, it is not enough to determine that in refusing to give a *get* the defendant is causing on-going infringement of the plaintiff's dignity and freedom - rather, it is necessary to examine whether the elements of the cause of action exist, as were set forth above,

and whether it is appropriate to make use of this tort in the framework of the specific statute. From a reading of the relevant case law it seems that it has not yet recognized the possibility of finding a breach of a statutory duty between two private individuals on the basis of the Basic Law - and this is not the place for innovation in this matter, especially - as will be described below, when there is a suitable alternative method of resolving this matter. On this issue, it may be added that the Hon.JudgeMenachem Hacohen in FamC 19270/03 C. S. v. C. P. (not yet published) is of the opinion that the rights protected by the Basic Law: Human Dignity and Freedom can, at this stage, be used as a tool that instructs and guides the interpretation and analysis of the wrong under examination, and nothing else – and with respect to this matter, I agree with him.

8.THE TORT OF NEGLIGENCE

The tort of negligence is defined in sections 35, 36 of the Torts Ordinance, in these words:

35. Negligence

Where a person does some act which in the circumstances a reasonable prudent person would not do, or fails to do some act which in the circumstances such a person would do, or fails to use such skill or to take such care in the exercise of any occupation as a reasonable prudent person qualified to exercise such occupation would in the circumstances use or take, then such act or failure constitutes carelessness and a person's carelessness as aforesaid in relation to another person to whom he owes a duty in the circumstances not to act as he did constitutes negligence. Any person who causes damage to any person by his negligence commits a civil wrong.

36. Duty Towards all Persons

For the purpose of section 35, every person owes a duty to all persons whom, and to the owner of any property which, a reasonable person ought in the circumstances to have contemplated as likely in the usual course of things to be affected by an act, or failure to do an act, envisaged by that section

The tort of negligence includes a number of elements:

a. The duty of care that the defendant owes the plaintiff;

b. Breach of the obligation (or negligence), characterized by thedefendant's failure to act in the manner in which a reasonable person would have acted under the same circumstances;

c. causal relation (factual and legal);

d. harm.

(In this matter, see Shirley Dagan's book, "Issues in Torts Law" (vol. I), *The Institute for Law and Economics* 2002, pages 269-315).

THE DUTY OF CARE AND FORESEEABILITY

The test for the existence of a duty of care, according to the provisions of section 36 of the Ordinance, is the test of the ability of a reasonable man to predict the harmful consequences in advance, i.e., the test of foreseeability.

The technical foreseeability that is required: "is not precisely predicting all of the details of the matter, but rather foreseeing it in general way. This is so with respect to the event that constitutes

the negligence, and all the more so with respect to its consequences" (from: CrimA 119/93 Lawrence v. State of Israel, IsrSCt 48(4) 1, and see also CA 3058/93 Sharon v. O.R.S. IsrSCt 49(2), 781).

But foreseeability is not only "technical" foreseeability but also “substantive” foreseeability. For this purpose, see CrimA 186/80 Yaari, et al. v. The State of Israel, IsrSCt 35(1), 769.

In other words, it is not enough to determine that from a conceptual perspective a person could have foreseen what would happen, but one must also ask if it is reasonable that in view of having so foreseen, he would or would not act differently.

The duty of care is examined in two stages: the first stage is the stage of "the conceptual duty of care” and the second stage is the stage of "the concrete duty of care.” When examining the conceptual duty of care, the abstract question is asked: whether “generally speaking, the tortfeasor, the injured party, the act and the damage all belong to the type of situation that is likely to give rise to a duty of care …” (from: CA 145/80 Vaknin v. Local Council of Beit Shemesh, IsrSCt 37(1), 113).

After an affirmative answer has been given to the first fundamental question and it transpires that the event falls within the area of human behavior that the laws of negligence are intended to regulate – the specific, concrete question is discussed**: "**Under the special circumstances of the case does the defendant owe a duty of care to the plaintiff, for indeed the duty of care is always derived from the special circumstances of the particular case" (from: CrimA 186/80 Yaari et al. v. The State of Israel, IsrSCt 35(1), 769.) In the framework of the concrete duty of care, the court must take into account the special facts of each particular case.

Regarding a woman who has been refused a *get*, the conceptual duty of care exists almost as a given, from the very existence of the marital relationship and all of the rights and duties derived therefrom.

The duty of care is examined in two stages: the first stage is the stage of "the conceptual duty of care” and the second stage is the stage of“the concrete duty of care”…Regarding a woman who has been refused a get, the conceptual duty of care exists almost as a given, from the very existence of the marital relationship and all of the rights and duties derived therefrom…There is no doubt that a man whose wife wishes to dissolve the marital partnership and start a new life without him (with or without another man) can foresee that his refraining from giving a get after being obligated to do so will cause his wife tremendous suffering.

In this regard the words of the scholars Kaplan and Perry, in their article *On the Liability of Recalcitrant Husbands,* 28(3) *IyuneiMishpat*, 795, page 773:

There is no doubt that a man whose wife wishes to dissolve the marital partnership and start a new life without him (with or without another man) can foresee that his refraining from giving *a* get after being obligated to do so will cause his wife tremendous suffering. On this point, it is impossible to ignore the fact that the conduct of the recalcitrant husband is often malicious, and the existence of maliciousness proves, *a fortiori*, the existence of foreseeability. One who intends to cause damage and acts in order to realize his intentions certainly must foresee that the planned damage will occur..."

And similarly, the words of the Hon. Judge Nili Maimon in FamC 20673/04 **B.M. v. B.H.A.** (not published):

There is a special relationship between a husband and a wife, a relationship of closeness, of fidelity, emotional relations, where a duty is imposed upon each of the spouses to act towards the other with respect, fairness and humanity and in a manner that will enable the spouse to conduct a proper and reasonable

lifestyle, and in this the conceptual duty of care exists, the element required to make a finding of the tort of negligence.

And similarly, with respect to this matter, from the words of the Hon. Judge Weitzman in FamC 19480/05 Jane Doe v. Estate of the Deceased John Doe (not yet published) :

> … The Jewish marriage contract itself constitutes a source of, and a proof for, the duty of care of a Jewish husband towards his wife.

In our case, the conceptual duty of care is supplemented by the concrete duty of care: As explicated above, the parties are married to each other. The plaintiff suffered greatly from her husband's behavior and his physical harsh hand, and was forced to leave because of this when she was pregnant. And all the while the parties have been embroiled in litigation in the rabbinic court for more than 10 years due to the plaintiff's desire to receive a get.

Regarding the duty of conceptual care stemming from the marriage bond, see also: FamC 18551/00 K.S. v. K.M., *Takdin-Family Court* 2004(2), 279; CA 145/80 Shlomo Vaknin v. Local Council Beit Shemesh et al., IsrSCt 37(1), 113; CA 243/83 Jerusalem Municipality v. Eli Gordon, IsrSCt 39(1), 113.

In our case, the conceptual duty of care is supplemented by the concrete duty of care: As explicated above, the parties are married to each other. The plaintiff suffered greatly from her husband's behavior and his physical harsh hand, and was forced to leave because of this when she was pregnant. And all the while the parties have been embroiled in litigation in the rabbinic courtfor more than ten years due to the plaintiff's desire to receive a *get*. It is clear from reading the decisions of the rabbinic court and the testimony, that the defendant was warned that his behavior and his refusal to give a *get* causes real injury to the plaintiff and her rights, but he chose to ignore her suffering, offering many and varied excuses.

BREACH OF OBLIGATION – THE NEGLIGENCE

When it is determined that a duty of care exists, this means that the defendant was obligated to exercise the precautions that a reasonable person would have exercised under the circumstances in order to avoid the anticipated harm. The reasonableness of the precautions taken is determined according to objective standards, as understood in the statement that the malfeasor must behave as a reasonable person would have behaved under the circumstances.

It should be emphasized that with respect to this matter, it does not matter if what motivates the defendant's (mis)conduct is his intentional desire, his indifference or his inattention (see: CA 732/80 Arens v. Beit El ZichronYaacov, IsrSCt 38(2), 645; CA 593/81 Ashdod Car Factories Ltd. v. Tzizik, Deceased, IsrSCt 41(3), 169).

The defendant ignored the plaintiff's request and the rabbinic court's orders recommending that he divorce his wife, and there is no doubt that in so doing he breached the duty of care imposed on him, and he should have expected that in so doing he would cause suffering to his wife.

CAUSATION

Another condition for holding the malfeasor responsible is that it was his negligence which caused the injured party's damage, namely that there is a causal relationship between the negligence and the damage (in this respect, see: CA 567/81 Ben Shimon N. Barda, IsrSCt 38(3),1).

In our matter, there is no doubt that the defendant's refusal to give the plaintiff her *get* is the reason for her tremendous suffering in all of its forms, and the connection is direct. In other words, causality exists.

DAMAGE

Damage is defined in section 2 of the Torts Ordinance, as follows: "loss of life, loss of property, comfort, physical wellbeing or good name or detracting from them, and any loss of or detracting from similar things".

According to case law, the definition is sufficiently broad so as to include damages **that are intangible or non-pecuniary,** such as emotional damages, damages to autonomy, suffering, sorrow, distress, etc. (see: CA 2781/93 Miassa Ali Da'aka v. Carmel Hospital Haifa ,*Takdin*– Supreme Court 99(3), 574); CA 243/83 Jerusalem Municipality v. Gordon, IsrSCt 39(1), 113; CA 558/84 Carmeli v. The State of Israel, IsrSCt 41(3), 757).

A woman who has been denied a *get* is stripped of her ability to exercise her autonomy and free choice. She is similarly stripped of the possibility of marrying someone else, and of bringing children into the world.

For this purpose the words of Justice Edna Arbel, who considered the matter recently, in a judgment dated 6.7.08, are appropriate:

> The phenomenon of *get* refusal is difficult, complex, and unfortunately not new to us. It involves severe and painful injury to the woman who remains chained to a marriage in which she is no longer interested: her freedom is compromised, her dignity and feelings are harmed and her right to family life is also affected – all of these rights have been recognized in our judicial system as rights that enjoy a constitutional status of the highest order …[*Get*-refusal infringes] in this way on a woman's right to autonomy, her right to realize herself as a free person, her right to choose her destiny, to write her life story - to decide, by herself and only by herself, whether and when the bond of marriage that she no longer wants will be ended and whether and when she will decide to enter into such a bond again." (HCJ 2123/08 Gabriel Abecassis N. Yaffa Cohen Abecassis (not yet published)).

And from the words of Judge Greenberger in FamC 3950/00 Jane Doe v. John Doe et al, vol 5761-2001, page 29:

> [T]he right of a woman to determine for herself when she wishes to sever marital ties and when she wishes to remarry, her wish "to write the story of her life as she wishes and in accordance with her choice," is a basic right that will certainly find its place by virtue of the aforesaid framework. The aspiration of a woman who wants a divorce to fashion her personal condition as a free person determining her own fate merits every defense as an inseparable part of her dignity as a person...

In our case, it has been proven that the plaintiff is actually suffering and has been damaged by the defendant's refusal to give her a *get*. This conclusion may be reached from the testimony of the plaintiff herself, as well as from the supporting testimony that she brought to this lawsuit.

The great suffering of a woman who has been denied a *get* in the ultra-Orthodox community was given expression in the affidavit that was submitted in the framework of the testimony of Ms.

Rachel Ackerman – a social worker who, according to her statement, has dealt with a large number of women denied gets both within and outside of the ultra-Orthodox community:

> The institution of marriage plays a critical role in the ultra-Orthodox world. Ultra-Orthodox society expects every single man or woman to marry as soon as they reach the acceptable age. The inability to establish and manage a joint home is considered an enormous disadvantage and a failure. (par. 6 of affidavit, dated March 3, 2007).

And further:

> As a result of the conduct of their husbands, those women whose husbands refuse to give them a *get* cannot take measures to change their status. In being chained to their husbands, the social status of the women is damaged to a very great extent, and their estimation in the view of the community is low. Therefore, they feel community isolation, serious humiliation, shame and distress. (par. 8 of affidavit, *supra*).

Ms. Ackerman describes the damage inflicted, and the impact of the refusal to give a *get*, on the ultra-Orthodox woman, with respect to every aspect of her life, including her mental state and her inability to re-marry, have children, to cope in society, etc. At the conclusion of her affidavit Ms. Ackerman testifies as follows:

> In summary, women who are denied a *get* feel shame and humiliation due to their situation, their inability to be in control of what is happening and the uncertainty they feel about when their imprisonment in these chains of marriage will end. The husbands who refuse to give a get to their wives prevent them from enjoying their sexuality, their right to have children and their right to remarry, they deny them the pleasures of life in general. To all of this should be added, in the case of ultra-Orthodox women, the lack of opportunity for to fulfill themselves in the way in which they were educated, and social isolation." (par. 21 of affidavit, *supra*).

As it emerges from the testimony and facts, these words are applicable to the particular situation of the plaintiff. For example, the plaintiff's sister, Ms. Y.H., declares (par.5 of affidavit, dated March 15, 2007):

> Since S separated from her husband, three months after their wedding, S lives in isolation and misery. The family supports her so that she doesn't break down, and encourages her to "take control of her life." Many times I've seen S break down and cry about her place as a woman chained in a failed marriage. She would very much like to socialize with men but she refrains from so doing because officially she is a married woman. In the past she was a very sociable woman. Now S. refrains from meeting friends due to the terrible shame that she feels regarding her situation. She is embarrassed by the possibility that she will be asked about her marital status.

9. ESTIMATION OF THE DAMAGE

The estimation of damage must be calculated with regard to non-pecuniary damages and with respect to pecuniary damages.

Pecuniary damages:

The pecuniary damages claimed are based on the plaintiff's assertion that the income of a family with two spouses is higher than the income of a single parent family. In addition, the claim is that the husband is denying the wife the ability to remarry and thus is responsible for the economic burden imposed on her in the absence of a husband who might provide support.

In this regard I am of the opinion, similar to that of Judge Greenberger in FamC 6743/02 C. v. C. (not yet published), that this line of argument must be exhausted in the framework of a claim for spousal support, in the appropriate judicial instance, as distinguished from tort compensation. I am further of the opinion that the connection between this head of damage and the harm caused by the refusal to give a *get* is not unequivocal, and has not been sufficiently proven. Therefore, I am not awarding compensation for pecuniary damages.

Non-pecuniary damages, and the petition to award aggravated damages:

First, under circumstances such as these, I am of the opinion that in the absence of proof of actual damages, since it is clear that the plaintiff has been anchored to a failed marriage, and in view of all of the afore-stated, it is possible to award estimated compensation for general damages (in this matter, see: CA 1730/92 Matzrawah v. Matzrawah, *Takdin-Supreme Court* 95(1), 1218; FamC 20673/04 B.M v. B.H.A. (not yet published). The plaintiff applied for a number of categories of non-pecuniary damages and even though they are not measurable or given to actual monetary quantification it is clear that these damages were caused to the plaintiff.

In the judgments of the Family Courts it is possible to find various approaches to this matter, moving along a spectrum in terms of scope and quantity. At one end of the spectrum – the Hon. Judge Weitzman in FamC 19480/05 Jane Doe v. The Estate of John Doe, deceased (not yet published) is of the opinion that it is appropriate to adopt a reasonable and unified amount in compensation for the emotional distress caused to woman who has been refused a *get* in the amount of 3,000 NIS for each month in which a husband refuses to give a *get* despite a ruling of the Rabbinic Court in that matter. Such an amount, in his opinion, is moderate and reasonable, and will not lead to disqualification of a *get* as having been "forced." For these same reasons, Judge Weitzman did not award aggravated damages in his decision.

I am of the opinion that in the absence of proof of actual damages, since it is clear that the plaintiff has been anchored to a failed marriage, and in view of all of the afore-stated, it is possible to award estimated compensation for general damages….I think that a reasonable amount of compensation should be awarded to the plaintiff that will reflect her suffering and detriment in a fair and real manner, but that will not block her way, as much as possible and should conditions become appropriate, to receive her divorce in the rabbinic court because of the problem of the forced get which might arise due to the amount that was awarded as compensation. Therefore, I estimate the compensation to the Plaintiff for non-pecuniary damages in the amount of NIS 60,000 per year beginning on July 1, 1998, until the day briefs are filed, i.e., the amount of NIS 600,000 as well as aggravated damages in the amount of NIS 100,000, due to the severity of the defendant's actions.

Later, in the middle ground, in FamC 6743/02 C. v. C. (not yet published), is the opinion of Hon. Judge Greenberger who awarded damages in the amount of NIS 450,000, plus NIS 100,000 as aggravated damages.

At the other end of the spectrum, and on the other hand, the Hon. Judge Menachem Hacohen, in FamC 19270/03 C.S. v. C.P. (not yet published), awarded the plaintiff, under circumstances similar to those in the matter before us, a high amount of damages in the amount of 200,000 NIS per year, plus a sum of aggravated damages in the amount of 100,000 NIS.

My opinion is like that of the middle ground. I think that a reasonable amount of compensation should be awarded to the plaintiff that will reflect her suffering and detriment in a fair and real manner, but that will not block her way, as much as possible and should conditions become appropriate, to receive

her divorce in the rabbinic court because of the problem of the forced *get* which might arise due to the amount that was awarded as compensation. Therefore, I estimate the compensation to the Plaintiff for non-pecuniary damages in the amount of NIS 60,000 per year beginning on July 1, 1998, until the day briefs are filed, i.e., the amount of NIS 600,000 as well as aggravated damages in the amount of NIS 100,000, due to the severity of the defendant's actions.

In addition, the plaintiff's counsel has asked for damages due to continuing harm – daily, for every day from the date of that she filed written summation and until the dated on which the defendant actually delivers the *get*. I also do not grant this relief because I think it goes beyond the scope of a claim for tort damages, which is based, *inter alia*, upon past injury and time elapsed. In addition, it seems that the award of such damages would place a burden upon the complex relationship between the Family Court and the Rabbinic Court, and would enter into, beyond what is desirable, an area which lies in the exclusive jurisdiction of the rabbinic courts (even and especially in accordance with the Rabbinic Courts Law (Fulfillment of Divorce Judgments), 5755-1995).

10. CONCLUSION

In view of the above, and as arises from the above, I determine as follows:

A. The defendant shall pay the plaintiff, as tort compensation, the amount of NIS 600,000 as well as the additional sum in the amount of NIS 100,000, in total - NIS 700,000. This total amount shall be paid within 30 days, and after that date shall carry linkage differentials and legal interest, from the day of the verdict until the day of full payment.

B. The defendant shall pay the legal plaintiff's expenses and attorneys' fees in the amount of NIS 10,000 plus VAT.

C. The Clerk's office will send copies of this ruling to the parties' counsel, and will close FamC 24782/98.

Given on the 17th day of Kislev, 5778 (14 December 2008) in the absence of the parties. This decision may be published without the parties' names or revealing details.

The Hon. Tova Sivan, Judge

Decision Summary

In this case, a 35 year old haredi woman sued her husband for damages for refusing to give her a get for 11 years. The parties had lived together for only 3 months (!!!) when the wife left the marital home, pregnant, and the victim of family violence.

Here Judge Sivan makes it clear that she too thinks that the civil court has jurisdiction to hear the matter at hand since it is a claim for monetary compensation for past pain and suffering. Like Judge Greenberger, Judge Sivan thinks that get-refusal is a question of fact, and should not be dependent on a Rabbinic Court decision (though in this case there is a recommendation (hamlazah) that the husband give the get. And she, like the other judges, assumes that the tort should fall within the negligence statute – get-refusal under certain circumstances is unreasonable.

Of particular interest in this case is Judge Sivan's determination of the non-pecuniary damages to be awarded in this case. She takes the middle ground between HaCohen's 200,000 NIS award a year and Weizmann's 36,000 NIS a year, awarding, like Greenberger, 60,000 for each year of recalcitrance, and lowering the award in deference of the rule against the forced divorce. Judge Sivan awards the wife 600,000 NIS in damages and 100,000 NIS in aggravated damages.

More than two years after the decision, the husband still has not given his wife a get. He appealed the decision with the help of a legal-aid attorney, claiming that he did not give the get because his wife was not allowing him to see their child. At the hearing the tribunal of female judges made it clear to the Husband that his refusal to give a get was heinous, and could in no way be mitigated by any claim that he may have against his wife, justified or unjustified.

SUMMARY AND CONCLUSIONS

The status of *agunot* and *mesoravot get* in Israel, in which women remain inextricably bound in unwanted marriages, is often met with expressions of powerlessness from the rabbinic court system. The rabbinic courts' reluctance to coerce a man to free his wife is compounded by a tenacious ineffectiveness of sanctions when a man is determined to keep his wife prisoner. As one of the husbands mentioned here declared in front of the judges, he would rather spend his life in prison than give his wife a *get*.

The use of tort law opens up new avenues for releasing women and for fighting against the phenomenon of recalcitrance. Torts of *get* refusal give women power and leverage within a system in which they have been relegated to the position of passive victims. As the tort of *get* refusal gains momentum, women anchored to their recalcitrant husbands have all begun to find their voices in a system that had left them speechless.

Beyond the victims themselves, these precedents have also empowered feminist activists, as well as the Israeli family courts, which have found new ways to support women in their struggle for freedom. Tort law has given us all a new voice that allows us to reframe the gender problems posed by Jewish law and "bring the state back in" to help resolve them. It has allowed us to transpose a Jewish husband's religious "right" to withhold a divorce at his behest into a recognized civil wrong. The courts have asserted that a man's recalcitrance is damaging to his wife, and as a result, he owes her damages.

Moreover, these cases have enabled us to delineate the harm being done to women and simultaneously raise consciousness about the status of women in the law, demystify the power relations that undergird Jewish divorce law, strip away the religious aura of a cruel act; and force a discourse that will ultimately lead to change. The tort of *get* refusal is thus defrocking the knots that bind gender, equality, and Jewish divorce law. The tort has prompted an important dialogue in the Israeli courts between modernity and tradition, between liberal principles and religious values. It remains to be seen how that dialogue will play itself out and if the knots that bind Israeli Jewish women unremittingly to their husbands will somehow be undone.

The tort of *get* abuse has empowered Jewish women. Jewish law and Israeli law will not be the same.

QUESTIONS FOR DISCUSSION

(1) What are the main precedents in each decision?

(2) How do the decisions build on the reasoning of previous decisions?

(3) What are the judges saying about the act of get-recalcitrance in human terms?

(4) What do you think prompted the judges to rule the way they did?

(5) How do you think *agunot* will react to learning about these cases? How will recalcitrant husbands react?

(6) What are the implications of these torts for Jewish law?

(7) What are the implications of these decisions for the relationship between religion and State in Israel?

(8) What do you think the State's responsibility is vis-à-vis vis-à-vis *agunot*?

(9) How can these torts be used in other issues of religion and State in Israel?

(10) Do you think that torts of *get*-refusal have the potential to resolve the *agunah* problem once and for all?

(11)

REFERENCES

FAMILY COURT DECISIONS

Bergman, J. Rachel (2010) (Haifa, File 12200/08) (awards 108,000 NIS to woman for *get* refusal)

Elbaz, J. Shlomo (2001) (Jerusalem, File 12130/03, Motion 50576/04) (denies motion to dismiss claim for damages for *get* refusal)

Greenberger, J. Ben-Zion. (2001) (Jerusalem, File 3950/00) P"M (2001) 29 (denies motion to dismiss claim for damages for *get* refusal)

...(2008) (Jerusalem, File 006743/02) (awards 550,000 NIS damages to woman for *get* refusal that is not contingent upon rabbinic court order against husband)

HaCohen, J. Menahem (2004)(Jerusalem, File 19270/03)(awards 425,000 NIS damages to women for get refusal, first instance)

… (2007)(Jerusalem, File 022158/97, Motion 056986/07)(declares that there is claim for damages for *get* refusal independent of rabbinic court order)

… (2010)(Jerusalem, File 021162/07) (awards damages 53,333 NIS in damages to man whose wife refuses to accept *get*)

Katz, J. Itai (2010)(Jerusalem, File 18561/07) (awards damages of 400,000, plus 4,000 NIS a month to man whose wife refuses to accept *get*) (lowered on appeal)

Kitsis, J. Yehudit (2008)(RishonLe'Tzion, File 030560/07) (awards 377,200 NIS damages to woman for *get* refusal and declares that *get* refusal is violation of Basic Law: Human Dignity and Freedom).

Maimon, J. Nili (2008)(Jerusalem, File 022061/07, Motion 054445/08) (denies motion to dismiss claim for damages for *get* refusal filed against husband's family).

…. (2004) (Jerusalem, File 20673/04) (awards damages to woman who was victim of abuse, including *get* refusal; amount increased on appeal).

Marcus, J. Philip (2001) (Jerusalem, File 9101/00, Motion 054233/01) (denies motion to dismiss claim for damages for *get* refusal)

…(2009) (Jerusalem, File 22511/08, Motion 059740/08) (denies motion to dismiss claim for damages for *get* refusal, husband claiming that rabbinic court did not order him to give *get*)

…(2010)(Jerusalem, File 9189/01) (awards 600,000 NIS damages to woman at rate of 100,000 NIS a year who sued for damages after she had already received her *get*)

Sivan, J. Tova (2008)(Tel Aviv, File 24782/98) (awards 700,000 NIS to woman for *get* refusal)

Weitzman, J. Tzvi (2006)(Kfar Saba, File 19480/05) (awards 770,00 NIS to woman for *get* refusal against estate of husband)

DISTRICT COURT

Kovo, J. Esther, with J. Michal Rubenstein and J. OfraCherniak (2011) (Tel Aviv 1020/09) (affirming decision of Tova Sivan, Tel Aviv, File 24782/98).

CWJ THANKS THE FOLLOWING SUPPORTERS

- The Kathryn Ames Foundation
- Rabbi Marc D. Angel, The Institute for Jewish Ideas and Ideals
- The Beverly Foundation
- The Jacob and Hilda Blaustein Foundation
- The David Berg Foundation
- The Dobkin Family Foundation
- The Gimprich Family Foundation
- The Global Fund for Women
- UJA Federation of Greenwich
- The Richard and Rhoda Goldman Fund
- The Hadassah Foundation
- Jewish Women's Foundation of Metropolitan Chicago
- Jewish Women's Foundation of South Palm Beach County
- Levi Lassen Foundation
- The Lillian Fund
- Lions of Judah Israel
- The Sandra and Mitchel Knisbacher Foundation
- Greater Miami Jewish Federation
- National Council of Jewish Women, USA
- The New Israel Fund
- The Rainbow Foundation
- Women's Endowment Fund of the Seattle Jewish Community Endowment
- The Muriel and Howard Weingrow Foundation

For more information, or to find out how you can get involved, contact:

The Center for Women's Justice
43 Emek Refaim St.
Jerusalem 93141
972-2-5664390 (tel.)
972-2-5663317 (fax)
www.cwj.org.il
cwj@cwj.org.il
Israeli NGO: 580430973

CENTER FOR WOMEN'S JUSTICE
מרכז צדק לנשים