What Have Calabresi & Melamed Got to do with Family Affairs?

Women Using Tort Law in Order to Defeat Jewish and Shari’a Law

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INTRODUCTION

Intrafamilial tort lawsuits are no longer as rare as they once were. People
regularly file suit against current or former spouses, and it is not uncommon for
children to file suit against their parents.1 These actions create a fascinating
intersection between tort law, which generally deals with relationships between
strangers, and family issues, which involve current or past members of the same
family. Some intrafamilial tort cases, such as actions for abuse by a parent or
spouse, only involve tort law—and not family law—despite their obvious effects
on the family. The more controversial cases, however, involve an intersection
between tort law and family law—an overlap that creates real conflict.

The question at the foundation of this Article is whether, and under what
circumstances, tort law serves the family by filling the vacuum created when

1. For examples, see infra Sections II & III.
family law is unwilling or perhaps unable to supply the requested remedy.

In this Article, I analyze the issues raised in civil actions in service of the family through the lens of the Calabresi/Melamed framework for economic torts. I focus largely on examples from Israeli law, which is particularly complex because the Israeli legal system incorporates tort, Jewish, and Shari’a law to deal with intrafamilial disputes. Applying this framework creates five categories of tort lawsuits dealing with legal conflicts in the family unit. But beyond presenting a descriptive survey of these categories, the framework I present provides a theoretical basis for new and emerging developments in cases where there are conflicts between tort law, Jewish and Shari’a law, and the courts that adjudicate them: the family courts on one hand and the religious courts (primarily the Rabbinical or Shari’a court) on the other.

A. Intrafamilial Tort Lawsuits and the Intersection between Tort and Family Law in Israel

For many years, courts in countries such as the United States, the U.K., and Israel adhered to the common law doctrine of interspousal immunity, which provided that individuals could not sue their spouses under tort law. However, this immunity has since been repealed in the U.S., U.K., and Israel. These

4. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-43 (1765); Glanville Williams, The Legal Unity of Husband and Wife, 10 MOD. L. REV. 16 (1947). This immunity was abolished in the U.K. with the enactment of Law Reform (Husband and Wife) Act 1962, Ch. 48. Article 1(2).
5. In Israel, § 1(2) of the Law of Family Court, 5755-1995, S. H. 1537 [hereinafter Law of Family Court], enables the filing of a civil action against a family member, including partner, spouse, and ex-spouse. § 18(a) of the Civil Wrongs Ordinance (New Version), 5732-1972, 2 LSI 12 (1972) (Isr.) [hereinafter Civil Wrongs Ordinance], which is based on English law, provided immunity in suits between spouses: “No claim shall be entered by a spouse or the representative of their estate against a spouse or the representative of their estate in respect of a tort done prior to their marriage or as long as their marriage is in force.” The origin of this section is in § 9(1) of the Civil Wrongs Ordinance, 1944, which was in force under the British Mandate. This section was criticized by the Supreme Court because blocking any tort lawsuit against a spouse, under any given circumstance, seemed unjustified. See, e.g., CA 479/60 Appelstein v. Aharoni [1961] IsrSC 15(1) 682; CA 257/57 Barnett v. Barnett [1958] IsrSC 12 565. Ultimately, the immunity was repealed in Israel in 1969, with the passage of the Litigation between Spouses (Regulation) Law, 5729-1969, S. H. 5729, 151 (Isr.). Section 3 of this law repealed § 18(a) of the Civil Wrongs Ordinance. Like English law, this law enables the courts to invoke a stay of proceedings, id. at § 1, if they feel that there is a chance to repair the relationship and feel that the proceedings in the civil action will destroy this chance and are not worth the damage to family harmony, provided that the couple is already participating in a reconciliation proceeding in the civil or Rabbinical court. This arrangement
repeals created a marked growth in intrafamilial tort lawsuits in Israel, a growth\(^6\) fueled partly, but not exclusively, by the use of a new civil-law mechanism by women who were refused a *get*\(^7\) by their husbands. Until recently, Israeli women who were unable to break free from a marriage or who were extorted by the husbands they wanted to leave had no recourse in the civil court system, which traditionally avoided interfering with the religious system’s absolute control over issues of divorce. Yet, in 2004, this began to change with the recognition of a cause of action in tort for “*get* refusal.” This new mechanism sparked controversy primarily because it aggravated the struggle between the Rabbinical-religious court and the civil family courts.\(^8\) In a number of prominent decisions, courts have awarded punitive, aggravated, or increased damages for intangible non-pecuniary injury. The willingness of the civil courts to award damages in these situations gave these actions prominence in emerging research on tort law and its influence on the system of family law in Israel and more broadly.\(^9\)

In contrast with American law,\(^10\) Israeli law never offered parental immunity. Children could always bring tort law claims against their parents, though there have historically been some restrictions on these claims.\(^11\)

Intrafamilial tort actions in Israel are conducted exclusively before the civil Magistrate’s family court,\(^12\) and for various reasons relating to the structure of the courts in Israel, appeals are almost never filed on decisions and rulings of these courts.\(^13\) Therefore, intrafamilial tort actions have rarely, thus far, been

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6. For examples, see infra Sections II-III.

7. The Jewish *halakhic* divorce bill—the marriage release. Jewish law is the judicial part of the *halakha*—the exterritorial religious code that obligates Jews all over the world. According to Jewish law, in order to dissolve a Jewish marriage, the husband must give a divorce bill or *get* to his wife. He must do so of his own free will, and the wife must accept it of her own free will.


9. See infra Sections II-III.


12. Law of Family Court, § 1, 5755-1995, S. H. 1537 (Isr.) (source has not been verified by BGLJ editors).

13. Michal Ben-Shabbat, Benjamin Shmueli, Rhona Schuz, Ayelet Blecher-Prigat & Rhona Kaplan, *Round (Family) Table—A Decade to the Family Court: Vision vs. Reality*, 2 THE FAMILY IN L. REV. 1, 6, 8 (2008) (source has not been verified by BGLJ editors).
adjudicated before the District Courts or the Israeli Supreme Court. There is, as such, no binding precedent on the subject, despite the fact that Israel is a common law country.14

This essay fills an important gap in the literature by providing an overview of the history of such actions with the goal of understanding not only the basis of these actions but also the connection between tort law, discussed in the family court in Israel, and family law, discussed sometimes in that forum and sometimes (as in the case of marriage or divorce) in the religious courts.15

B. Understanding Developments in Intrafamilial Tort Actions with the Help of Calabresi and Melamed’s Four Economic Torts

By referencing a leading theoretical approach to tort law that deals with the intersection of two fields of law—tort and property—that provide alternative remedies for enforcing a single legal right, I illuminate the issue of intrafamilial tort lawsuits through a slightly different prism than that which is normally used. Examining the question by means of common theoretical approaches to tort law helps develop conclusions regarding the place of tort law in the family sphere. This examination justifies the steps, such as actions for the refusal of the get, that tort law has taken in the service of family law—steps that those closely associated with the Rabbinical courts see as controversial. This examination also helps predict and justify future developments in this field. Though I draw most heavily on examples from Israeli law, many of the descriptions I present and the developments I propose have policy implications for, and could be adopted in, other countries. However, we must be cautious in this comparison to other bodies of law. After all, these are still civil actions within the family unit, and the family unit often receives special treatment under the law.

A researcher faced with an intersection of tort law and questions involving the family unit may instinctually see tort law as a secondary remedy—a tool to fill the gaps left by family law in various fields. Tort law can award the victim “consolatory” damages in cases where the remedies in family law are insufficient for legal or technical reasons. This realization might rightly lead a tort researcher to Calabresi and Melamed’s famous article from 1972, sometimes known as the “Four Rules,” which discusses the ways in which tort law can be effectively employed to fill gaps where remedies in property law are not sufficient to protect the interests of a party.16 Although Calabresi and Melamed did not invent the

14. Blecher-Prigat & Shmueli, supra note 8, at 287 n.26. Israel is a common law country, in which the decisions of the Supreme Court are considered binding on all courts other than the Supreme Court itself. See Basic Law: The Judiciary, § 20(b), 5744-1984 S.H. 78 (Isr.). The decisions of the Districts Courts are not binding, but they instruct the lower courts, including the family courts, which are considered magistrate courts. The magistrate courts may deviate from the decisions of the higher courts (other than the Supreme Court), but they must explain their decisions to do so. See id. § 20(a).
coupled use of two alternative systems of remedies to enforce legal rights, their article applies this idea uniquely. I borrow from their framework as a tool for exploring the complex interactions taking place in tort law in the context of the family in general, and in Israel in particular. Ultimately, I use the Calabresi and Melamed framework to help establish and justify existing and potential future uses of intrafamilial tort actions.

When discussing various means protecting legal entitlements, Calabresi and Melamed explained that tort law may serve as a secondary enforcement scheme to the property law system when it is impossible or undesirable to grant a remedy under the primary enforcement scheme available through property law. Entitlements are thereby protected on two alternate levels: the primary level, which provides entitlements with a high amount of protection by granting a certain remedy, and a secondary level which gives less protection by granting another, weaker remedy. The typical example is protection from nuisances: a factory disturbs the slumber of its neighbor, who tries to get an injunction that will require closing the productive factory.\(^{17}\) Sometimes, the legal system is not willing to grant an injunction to stop the nuisance, instead preferring to award monetary compensation to the victim.\(^{18}\) In this example, the injunctive relief is the primary remedy, and tort compensation a secondary, alternative remedy.

I will examine how tort law fills the vacuum created when family law is unwilling or unable to supply a requested remedy, and compare this to the Calabresi/Melamed approach regarding the interplay of remedies from two legal systems to enforce a single legal right. I then determine whether compensation given via tort law serves, in effect, as a secondary remedy in cases where the religious family law does not provide the primary remedy sought. Here, society can protect the asserted legal right in two different ways. There are cases in which society decides not to protect the entitlement at the primary level of protection sought, such as when family law denies a change in familial or personal status. Secondary protection, although lesser in scope, can be found by giving the victim monetary compensation via tort law.

I do not examine the framework presented by Calabresi and Melamed simply for the sake of comparison, though this comparison does have academic and practical value. Rather, my goal is to build on the theoretical framework by surveying, as an overview, the relationship between the Israeli civil-tort law system and the family law system. Examining this interplay by generally and specifically comparing it to the familiar Calabresi/Melamed framework will more clearly show the ways in which civil tort law and religious family law can interact to provide remedies. Among other goals, I will examine whether the framework of protecting a right by means of a secondary remedy when society

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\(^{18}\) If the remedy of an injunction is not granted via property law, one can turn to the path of the tort remedy. Cf. David Kretzmer, Judicial Conservatism v. Economic Liberalism: Anatomy of a Nuisance Case, 13 ISR. L. REV. 298 (1978) (providing an economic analysis of the interplay between nuisance and tort) (source has not been verified by BGLJ editors).
decides not to grant the primary remedy can be seen as appropriate in this area of law. The discussion will also clarify the difference between the roles of the different courts and explain the question of the jurisdictional struggle between these courts. Beyond that, I will examine whether the Calabresi/Melamed framework supports the innovative and controversial steps already taken toward allowing tort lawsuits within the family unit, particularly in the case of tort actions for get refusal. I further examine whether the framework suggests or justifies, from a theoretical perspective, further developments which will presumably be even more controversial. The contribution of this analysis is significant in that it allows us to analyze these decisions based on “pure” tort approaches, untinged by politics, feminist agendas, or antagonism against the Rabbinical courts.19

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

In Section I, I introduce Calabresi and Melamed’s approach. In Section II, I discuss whether this approach, particularly the liability rule in favor of the plaintiff, is suitable for tort actions against family members. Section III moves from the general to the specific and examines five different categories where Israeli religious law can be supplemented with interfamilial tort actions, some of which are relevant to other countries in which actions like these are possible. Section IV examines possible future developments in the framework presented in Section III. The final Section summarizes and reaches conclusions on the subject.

I. CALABRESI & MELAMED’S FOUR RULES: TWO ALTERNATIVE FORMS OF LEGAL ENTITLEMENT PROTECTION AND THE “LIABILITY RULE IN FAVOR OF THE PLAINTIFF”

From the perspective of Calabresi and Melamed, there are two ways in which the law can protect an entitlement. The first order of legal decision-making is to identify conflicts between rights and decide which right is preferred. For example, a party whose property is invaded by the nuisance of air pollution has a property right that conflicts with the right of the party interested in polluting the air to realize an economic gain. In such situations, the law must

choose which right to enforce. Otherwise, the right holder with the most resources will probably win out.\textsuperscript{20} Sometimes the normative decision is to protect the right of the victim; at other times, the decision is to leave the damage as it falls with the victim bearing the costs of the harmful activity.\textsuperscript{21}

Once the enforceable right is identified, the second order of decision-making involves decisions about how an entitlement should be realized and enforced: by awarding an injunction through property law, or by awarding damages through tort law.\textsuperscript{22} This second-order decision is more relevant to our discussion, and stands at the center of Calabresi and Melamed’s article. This decision is, in effect, a question of normative choice between remedies—a choice that is affected by the possibility that the right recognized under the first-order decision may be sold or transferred.\textsuperscript{23}

According to Calabresi and Melamed, there are three basic types of protection for entitlements.\textsuperscript{24} The first type is protection of the entitlement via a property rule. This means that the owner of the property has the legal ability to prevent others from using his property without his consent and to prevent them from damaging his property. He may sell this right to another only if he agrees to do so and agrees with the buyer on a transfer and a price following negotiation. That is to say, in such a case, the parties themselves decide on the price for transferring the entitlement, and the government’s intervention is minimal. The government only intervened preceding the sale when it decided to whom the original, transferrable, property entitlement belonged.\textsuperscript{25}

An injunction is the classic form of legal property protection. An injunction against the damaging activity, such as an injunction against a publication that might injure a reputation or an injunction against a nuisance, means a complete stoppage of the infringing activity. However, the damaged party can still agree to sell this entitlement to the damaging party. That is, the damaging party can continue to be a nuisance and injure the property rights of the damaged party.

\begin{footnotesize}
\begin{enumerate}
\item Calabresi & Melamed, suprano note 2, at 1090-91.
\item Id. at 1091. The state’s allocation can be done in different ways, based on considerations of economic efficiency, distributional considerations, and other justice-related considerations. See also id. at 1093-1105 (regarding the other justice-related considerations (not listed by the authors), which are of marginal importance and may not have any place at all after the parameters of economic efficiency and distributional considerations have been applied).
\item Id. at 1092. There is also a possible combined path, of enforcement and compensation, although this alternative is not central to their article.
\item Id. at 1092.
\item Id. at 1105-06.
\item Id. at 1092. If the state sets the price at the start, rather than the parties doing so via negotiation, the costs of the transaction will be so high that this will sometimes prevent even worthwhile transactions from being realized. Therefore, setting the price of the entitlement sale transaction is left to negotiation between the sides. See id. at 1106. On this subject, Coase’s theorem is obviously relevant. Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). The Coase theorem, which is one of the foundations of the field of law and economics, deals with the selling of property rights. According to Coase, once a court has determined the legal entitlements of parties, the parties might bargain among themselves in order to reach the outcome they find most efficient.
\end{enumerate}
\end{footnotesize}
with the consent of the latter if he is willing to agree to a transaction under which
the damage will continue. Under such an agreement, the right holder would be
compensated by a sum agreed upon by the parties.

The second kind of protection, most relevant to our discussion, is
protection via a liability rule. Liability rules primarily derive from tort law, and
they protect entitlements less strongly than property rules. Under a liability
rule, the right holder is still entitled to compensation for harm, but in this case, it
is not only the right itself that is determined by the state. The compensation is
also objectively determined by the state or by one of its institutions. The
damaged party has no real opportunity to refuse compensation and also does not
have room to bargain over the price. In essence, society sends the message that it
is willing to defend the property owner’s entitlement, but only in a limited way.

The third kind of protection, which is only partially relevant to our
discussion, is the rule of inalienability. There are entitlements that society never
allows to be transferred, even if the entitled party agrees to the transfer or sale
and even if the transfer is economically efficient. For example, a person cannot
sell himself into slavery nor, while alive, sell his organs for transplant into
another person. He cannot do so willingly, nor does society allow setting a
price for such an action done against his will, since approval of the price would
amount to tacit approval of the action, which society views as immoral and
inappropriate. This absolute bar on sale of the entitlement remains in effect
even if the entitlement is infringed by another. It is, however, sometimes
possible for society to set a price tag ex post facto. Among the three kinds of
transactions, it is here that the state intervenes most actively.

In many cases, these rules are mixed in application, and the same type of
entitlement may under different circumstances receive property protection,
liability protection, or protection under a rule of inalienability.

After identifying these three types of protection, Calabresi and Melamed
formulated four rules, drawing examples from nuisance: (1) Property protection
in favor of the damaged party where the damaged party requests and receives an
injunction ordering the polluter to cease polluting; (2) a liability rule in favor

27. Id. at 1092.
28. Id. at 1092-93, 1111-14.
29. Id. at 1112.
30. Id.
31. Id. at 1111-12.
32. Id. at 1111.
33. See id. at 1092. Calabresi and Melamed illustrate this by using the example of the sale of an
apartment. Here, the property rule fundamentally applies. The liability rule applies when the state is interested in expropriating the house. The inalienability rule applies when the seller is not legally competent, permanently or temporarily (such as when drunk). See id. at 1114. According to them, the distinctions between the rules are not always clear. See id. at 1092.
34. Id. at 1115-16. Faithful to his approach regarding the cheapest and most efficient avoidance of damage, Calabresi (together with Melamed) claims that this rule is the most economically efficient when the polluter can prevent the pollution or minimize his expenditures more
of the damaged party, where the damaged party cannot compel the polluter to stop, but he is eligible for damages compensating for the harm; 35 (3) a property rule in favor of the damaging party, where the polluter is judged not to be a nuisance and thus has the right to continue polluting, with the damaged party able to buy the entitlement in a negotiation, if he wishes; 36 (4) a liability rule for the damaging party, where the damaged party has the right to prevent the pollution by completely stopping the polluting activities or demanding that the activities be done in a way that does not pollute, but the polluter must be compensated. Under this fourth regime, as long as the polluter is not compensated, he may continue his activities. 37

Remedies 1 and 3 come from property law and enforce a right to either use property or prevent the use of the property. Remedies 2 and 4 come from tort law and provide for monetary damages. The primary focus in this article will be the second rule—the liability rule in favor of the damaged party.

This article examines whether Calabresi and Melamed’s approach also applies to intrafamilial tort lawsuits. Can the entitlements arising from familial and interpersonal relationships be transferred or sold? Can one regard intrafamilial tort lawsuits as a form of transaction for the transformation of rights? Can Calabresi and Melamed’s liability rule framework assist us in examining these questions?

II. EXAMINING INTRAFAMILIAL TORT ACTIONS USING THE “LIABILITY RULE IN FAVOR OF THE PLAINTIFF”: AN OVERVIEW

Calabresi and Melamed speak about two regimes—property and tort law—and how they can interact within the same legal system. Their innovation is the observation that these two issues should not be analyzed separately as “property law” and “tort law,” but together under an integrated analysis. 38 The secondary remedy under the second rule above—the liability rule in favor of the plaintiff—is employed in cases where it is impossible, unjust, unfair, or inefficient to award the primary injunctive remedy. The principal and secondary legal remedies belong to the same system of law, regardless of whether they originate in property or tort. Thus, the right of a person to live in peace and quiet without disturbance or nuisance is protected by an injunction as the primary remedy and

cheaply than can the party damaged by the pollution. Id. at 1118.

35. Id. at 1116, 1119.
36. Id. at 1116.
37. Id. at 1116-21. Both economic efficiency and the distributional aspect are examined in this solution, and in the opinion of the authors, this rule integrates these considerations well. Regarding other justice-related considerations in the framework of this rule, there might be economic and distributional concerns (such as the question of who came first, the polluter or the victim, in the example the authors give). Calabresi and Melamed call for a serious examination of the liability rule in favor of the defendant as a real alternative to rule two, although they are aware that there is hesitation on the subject. See id. at 1116, 1123.
38. Id. at 1089.
by damages as a secondary remedy. Under a liability rule in favor of the plaintiff, when the first-order decision is to protect that entitlement but not by using an injunction, the damaging action is allowed to continue. Protection is granted only by giving the injured party the option of suing for compensation. The same system of law decides when to give the principal property protection of injunction and when to give the secondary tort remedy of damages. Thus, the same right is protected by two different entitlement regimes under a single legal system.

At first glance, the situation seems very different for family issues. Family law in Israel, as in many other countries, is infused with an unhealthy dichotomy. Some types of family matters are adjudicated before religious courts, while others are decided before civil courts. Where these courts have concurrent jurisdiction, there is the potential for a struggle between the family and religious courts regarding the law. As between the parties to an action, this struggle sometimes leads to a “jurisdiction race” in which one party rushes to file an action with either the Rabbinical or the civil court because that party believes the alternative venue would resolve the conflict in a way that is less compatible with its interests.

There is no disagreement that tort actions against family members are adjudicated exclusively in civil-family courts. This is because tort law is inevitably a mediator of civil disagreements between family members. In contrast with tort actions, cases relating to marital status in Israel, such as those cases adjudicating marriage and divorce, are conducted exclusively before religious courts of the relevant religious community. Therefore, questions of marital status are ostensibly discussed only in the religious courts, and questions of damages, like other civil matters between family members, are discussed only in family court.

The law applicable to cases of marital status—including marriage, divorce, and child custody—is family law, with the religious courts generally applying religious family law and the family court generally applying family civil law. In

39. Moreover, in certain situations, two rules can exist at once. Thus, contractual reliance is sometimes protected by enforcement as the primary remedy and sometimes by damages as the secondary remedy.
40. See Blecher-Prigat & Shmueli, supra note 8, at 279-81; Ariel Rosen-Zvi, Family and Inheritance Law, in INTRODUCTION TO THE LAW OF ISRAEL 75 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).
41. Blecher-Prigat & Shmueli, supra note 8, at 279-81.
42. See Law of Family Court § 1, 5755-1995, S. H. 1537 (source has not been verified by BGLJ editors).
43. Some issues not related to intrafamilial torts, such as child custody, have parallel jurisdiction in the family court under the Court for Family Affairs Law 1995, 5755-1995, S.H. 1537, 393 [hereinafter the Court for Family Affairs Law] (source has not been verified by BGLJ editors), and occasionally in Rabbinical courts as well. See Blecher-Prigat & Shmueli, supra note 8, at 280-81.
44. Id. at 279-81. See also Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1953-54) (Isr.) [hereinafter Rabbinical Courts Jurisdiction (Marriage and Divorce) Law].
contrast, tort actions between spouses, ex-spouses, or parents are always conducted in the family court. These latter actions are conducted entirely according to tort law and vary from “regular” civil actions in that the court expresses a strong desire to bring about a peaceful resolution of the family conflict. The goal of achieving peaceful resolutions in family conflicts was a major motivation for creating the Law of Family Court in 1995. As explained above, potentially different outcomes in each court can create a jurisdictional race.

This situation seems different from the case that Calabresi and Melamed discussed, as there are two different kinds of courts and, at least formally, two different types of legal systems. However, upon closer inspection, there is some similarity to the liability rule in favor of the plaintiff. Here, just as in Calabresi and Melamed’s example, the possibility of a primary and secondary remedy is relevant—two remedies that protect the same entitlement to different degrees. In many cases, the primary remedy sought relates to the matter of status, and this is the remedy from family law; but in cases in which the remedy is not given by the religious court that deals with the personal law of status, either because it cannot or does not want to provide it, the secondary remedy of damages remains. Society thus protects the entitlement on two planes: a primary plane of status-based remedy (family law) and a secondary plane of damages (tort law). When the normative decision is made not to give the primary remedy, society allows the secondary remedy.

However, despite the differences that arise when dealing with family affairs, Calabresi and Melamed’s framework of liability rules in favor of the damaged party can assist in understanding the use of civil remedies in tort actions between family members. The basic structure of the Calabresi/Melamed framework is applicable and can explain conflicts between civil and religious law in a clear and orderly manner. From this analysis, we gain perspective on new and controversial developments in these fields and a theoretical basis for anticipated discussions of future needs and concerns. This Section provides an overview of four hypothetical, but typical, cases.

The first case is that of a woman whose partner has promised to marry her, causing her to change her position in detrimental reliance on the ultimately unrealized promise of marriage. Despite her partner’s promise, this woman cannot receive a legal remedy that declares her married, changing her and her partner’s status, without her partner’s consent. At the primary remedy level of family law, she has no remedy. However, she can file suit for damages for breach of promise to marry. Beyond damages for pain, humiliation, and embarrassment, this action can provide other compensatory damages, such as wedding expenses, lost wages for leaving her job, or renovating her home in

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45. Remedies provided by the family court extend beyond changes in status. See Civil Wrongs Ordinance §§ 35-36, supra note 5, and accompanying text.
anticipation of a change in familial status.46

The second case is that of an individual who abused or sexually assaulted his partner. In those cases in which family law does not allow divorce on this ground alone, thus denying a primary remedy of change of status, the injured partner can at least file a civil-tort action for the battery. In such a case, damages can be seen as a secondary remedy, less preferable to the plaintiff than the unattainable primary remedy of divorce.47

The third case is that of a Muslim husband who divorced his wife against her will. According to the Shari’a religious law, a husband is permitted to take this action.48 Though the courts prefer that he do so under its auspices, a husband can sometimes divorce his wife against her will and the divorce is considered valid. In such a case, the marriage is dissolved, and the court cannot help the woman on the marital status plane, often leaving her humiliated and sometimes with no source of income, since alimony is unavailable in Israel. In this case, family law does not allow the primary remedy of marital status change, wherein the woman would be declared married and the divorce invalided. The divorce is valid according to the personal-religious family law, despite the fact that the Shari’a court did not approve the actions of the husband and despite the detrimental effects this divorce may have on the non-initiating spouse.49 Yet, the woman can still file a tort action against her ex-husband for her damages. In Israel, there is a specific crime of divorcing a woman against her will.50 While there is no corresponding tort, the action is possible via one of the general torts, like negligence.51 Damages do not let her reclaim her married status, and are therefore a secondary remedy. However, they can help to alleviate the potentially desperate economic situation that may follow an unwanted change in personal status.52

The fourth and last hypothetical is get refusal, which is to some degree the “opposite” of divorcing a woman against her will. Under Jewish religious law, a divorce, known as a get, may not be obtained unless the husband grants it of his own free will.53 Thus, if a Jewish husband refuses to divorce his wife, the wife cannot receive the primary remedy of a valid divorce.54 But the husband causes

47. However, if abuse or sexual assault is enough to constitute cause for divorce, then the plaintiff will have the option of receiving both remedies.
49. In such cases, the divorced spouse is sometimes thrown out onto the streets at a relatively advanced age without support, without education, and without real ability to work and support herself. The divorced spouse is sometimes left without a real ability to re-marry within the sector to which she belongs.
51. Civil Wrongs Ordinance §§ 35-36, 5732-1972, 2 LSI 12 (1972) (Isr.) (source has not been verified by BGLJ editors).
52. This kind of claim has been acknowledged in Israel for many years. See, e.g., CA 1730/92 Masarwa v. Masarwa [1995] Dinim Elyon 38, 369 (source has not been verified by BGLJ editors).
53. See generally Rosen-Zvi, supra note 40.
his wife damage by the very act of refusal—primarily the non-monetary
damages of pain, humiliation, injury to autonomy, loss of ability to re-marry, and
loss of real chance to bear children with a new partner, since such children would
be declared bastards. She is permitted to sue her husband for these damages. 54
The protected entitlements are a woman’s right to autonomy over her life, the
right to dignity, the ability to free herself from marriage, and the right to have
children with another who will not be considered bastards under Jewish religious
law. 55 If religious family law cannot protect this right by granting the primary
remedy of changed marital status, it is assumed that many women may prefer to
file a civil-tort action in lieu of receiving no remedy at all, thereby receiving a
secondary remedy of monetary damages. 56 This case is different from, and more

54. FamC (Jer) 19720/03 K.S. v. K.P. (not published) (source has not been verified by BGLJ
editors); FamC (Kfar Sava) 19480/05 Jane Doe v. Estate of John Doe (not published) (source
has not been verified by BGLJ editors); FamC (Rishon LeTzion) 14160/07 (settled) (source
has not been verified by BGLJ editors); FamC (Jer) 23420/01 Estate of John Doe (not
published) (source has not been verified by BGLJ editors); FamC (Jer.) 6743/02, K. v. K.
(not published) (source has not been verified by BGLJ editors); FamC (Rishon LeTzion)
30560/07 H.Sh. v. H.A. (not published) (source has not been verified by BGLJ editors);
FamC (Tel Aviv) 24782/98 N.S. v. N.Y. (not published) (source has not been verified by
BGLJ editors). “Reverse” cases of a husband suing a wife who refuses to accept a divorce
from him are pending as of the writing of this Article. In this essay, I will nevertheless
discuss the action of women refused a get against their recalcitrant husbands as a prototype,
since the vast majority of cases are not “reverse” cases. However, unless I note otherwise,
there is no reason that this analysis should not apply to the reverse cases.

Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948);
Covenant on Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979,
1249 U.N.T.S. 13; 19 I.L.M. 33 (1980). It is interesting that only the right to marry is
recognized as a right in itself and not the right to divorce. Since almost no country permits a
woman to be married to two men (unlike the reverse), the only way for a married woman
who to marry another man is to divorce.

56. On the grounds of the torts of negligence and breach of duty; there is no concrete tort of get
refusal. In Israel, there is no clear division between intentional or unintentional torts and the
tort of negligence. Civil Wrongs Ordinance § 63, 5732-1972, 2 LSI 12 (1972) (Isr.).
Negligence is also relevant in intentional acts. See, e.g., CA 2034/98 Amin v. Amin [1999]
IscrC 53(5) 69, translation available at
http://elyon1.court.gov.il/files_eng/98/340/020/q07/9802340.q07.htm. (Section 13 to
Justice Englard’s judgment). The husband’s refusal to comply with the decree of the
Rabbinical court that tells him that he must divorce his wife violates the statutory criminal
duty to obey any court decisions. Penal Law § 287(a), 5737-1977, S.H. 864, 226. Thus, such
refusal constitutes the tort of breach of statutory duty described in section 63 of the Tort
Ordinance. The section states:

(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
complex than, the classic Calabresi and Melamed examples, since the woman’s goal is not generally to receive damages but to immediately trade a favorable judgment in exchange for a *get*. A further complication involves the potential risk that forgoing damages in exchange for the *get* constitutes “monetary coercion” (*ones mammon*), which would cause the *get* to become unlawfully coerced and thereby invalid from the perspective of the Jewish law.  

In all of these examples, the tort action itself does not change the personal status. It only fills the void created by an inability or unwillingness of the religious family court to provide the primary remedy sought. In the third case, that of forced divorce, the civil-tort remedy is in some conflict with Shari’a law. Under religious law, the woman is divorced against her will, but tort law sees such action as tortious. An alternative interpretation is that the two areas of law are used strategically to provide a consolatory remedy in cases where the primary remedy is unavailable. The result is not conflict, but conflict resolution: the civil legislature was aware of the problematic outcome of implementing the religious Shari’a family law, and acted accordingly to find a solution—consolatory compensation—in the civil-tort plane. In the fourth example, where the woman is refused a *get*, Jewish family law dictates that she cannot be divorced. Yet, tort law sees the refusal as tortious. At the same time, in the third category mentioned above, the secondary remedy does not affect the likelihood of receiving the primary remedy of preventing the divorce. In the fourth hypothetical, however, there are situations in which the secondary remedy can indirectly lead to the primary remedy. This is sometimes the original goal of filing the civil suit, rather than the desire to receive damages. On their face, some of these examples match the liability rule in favor of the plaintiff, and some, although they do not necessarily contradict this framework, are more complex.

In addition, the “family” remedy may not be connected to status issues at all. For example, a temporary injunction can be issued expelling a violent party from the house. This is not a question of status at all, and the law is equally

persons generally, or of any class or description of persons to which that person belongs.

Civil Wrongs Ordinance (New Version) § 63, 5732-1972, 2 LSI 12 (1972) (Isr.).


58. In Israel, the injunction is issued under the Family Violence Prevention Law § 3, 5751-1991, S.H. 1352.
relevant to parents and children, in which there is obviously no issue of status in the religious law. The partner or child can also file a tort action for injuries resulting from violence. Here, one can generally identify the injunction as a primary remedy (albeit a temporary one), since it is the remedy that is really sought, and the damages as a secondary remedy protecting the right to a lesser extent and only post facto.

In these situations, intrafamilial tort actions may be fundamentally reminiscent of the liability rule in favor of the plaintiff. There is a distinction between primary remedies—remedies of changing status or of another remedy under religious family law—and the secondary remedy of tort damages. The secondary remedy does not directly change status, nor does it offer injunctive relief like expelling the violent spouse from the house. In some cases, public policy is designed to deny the primary remedy, and therefore the victim is referred to the path of the secondary remedy—damages—which is what occurs under the liability rule in favor of the plaintiff. In family law, it is hard to point to particular transaction costs that might inhibit bringing a legal tort action. Unlike the classic examples of nuisance and pollution, intrafamilial torts are not mass torts in which it is difficult to identify all of the parties and create a unified legal strategy. In family torts, there is usually one known tortfeasor and one known damaged person. Secondary victims like children are easy to identify.

The Calabresi/Melamed approach is not always applicable to family law, but it will help us understand the different types of intrafamilial tort actions, the differences between them, and interactions between the two systems of law.

III. FIVE CATEGORIES OF INTRAFAMILIAL ACTIONS COMPARED WITH THE “LIABILITY RULE IN FAVOR OF THE PLAINTIFF”

In this Section, I create a framework for analyzing the Calabresi/Melamed approach and applying it to family law. I identify five categories of tort lawsuits between family members to compare with Calabresi and Melamed’s framework regarding the liability rule in favor of the damaged party. Here, my central purpose is to use the skeleton of Calabresi and Melamed’s framework to organize the different categories of intrafamilial tort actions, applying their analysis to explore controversial ideas in one of the central categories of their framework: the liability rule in favor of the plaintiff. Calabresi and Melamed themselves summarize their essay by stating that “[t]he framework we have employed may be applied in many different areas of the law.” I will attempt to follow in their footsteps.

59. See Calabresi & Melamed, supra note 2, at 1122.
60. Family Violence Prevention Law § 3, 1991, S.H. 1352; see also Calabresi & Melamed, supra note 2, at 1128 (discussing the general disadvantages of presenting models).
61. Calabresi & Melamed, supra note 2, at 1128.
A. First Category: No Interaction Between Civil Actions Against the Family Member and Family Law

This category includes cases in which there is no interaction between the courts or the systems of law. Lawsuits in this category create no conflict between the religious courts and the family courts since they relate exclusively to tort law rather than personal law, and as such, are adjudicated solely in civil family court. This category includes cases such as: compensation for violence towards a spouse; compensation for libel against a spouse; and most actions of children against their parents, e.g. for abuse, neglect, etc.

In these situations, the liability rule in favor of the plaintiff is less relevant than in other categories. The Calabresi/Melamed framework developed in reference to tort damages that can be quantified and sold back to the offending party. Therefore, the framework is not particularly helpful when such damages cannot be quantified or sold back to the offending party, either because the defendant’s actions are independently criminal, or because the rights of the plaintiff are inalienable.

63. See, e.g., FamC (Krayot) 1330/01, 1332/01, 1334/01 A. v. Doe (not published) (source has not been verified by BGLJ editors); FamC (TA) 64901/96 Polack v. Polack, [2001] Tak-Mish 83(3) (source has not been verified by BGLJ editors); FamC (Jer) 18551/00 K.S. v. K.M (not published), rev’d, FamA (Jer) 595/04 John Doe v. Jane Doe (not published) (source has not been verified by BGLJ editors); FamC (Jer) 28230/99 K.A. v. K.Y. [2004] Tak-Mish 04(4) 183 (source has not been verified by BGLJ editors).
64. FamC (Kfar Sava) 24983/04 Rodrig v. Bar On, (not published) (source has not been verified by BGLJ editors); FamC (TA) 314827/96 Doe v. Roe [2002] Dinim Mishpaha B 032 (source has not been verified by BGLJ editors); FamC (Jer) 19286/98 Roe v. Doe [2001] Tak-Mish 01(3) 659 (source has not been verified by BGLJ editors).
65. CA 2034/98 Amin v. Amin [1993] IsrSC 53(5) 69 (emotional neglect) (source has not been verified by BGLJ editors); CivilF (Hi) 518/07 Roe. V. Doe [2009] (not published) (sexual abuse (source has not been verified by BGLJ editors); FamC (Krayot) 1330/01, 1332/01, 1334/01 A. v. Doe [2009] (not published) (sexual abuse) (source has not been verified by BGLJ editors); FamC (Jer) 2160/99 L. v. L. (not published) (dealing with physical and sexual assault) (source has not been verified by BGLJ editors); FamC (TA) 2880/00 M.P. v. Y.Sh., (not published) (sexual abuse) (source has not been verified by BGLJ editors); FamC (Hi) 1620/00 Doe v. Roe [2001] Tak-Mish 01(3) 33 (emotional neglect) (source has not been verified by BGLJ editors); FamC (TA) M.T. v. Z.D. [2003] Dinim Mishpaha B 90 (finding that the parent did not report to the welfare authorities or to the police on abuse that was done towards his child, the plaintiff) (source has not been verified by BGLJ editors); FamC (Jer) 19286/98 Roe v. Doe [2001] Tak-Mish 01(3) 659 (emotional neglect) (source has not been verified by BGLJ editors).
66. Unlike the liability rule in favor of the plaintiff, public policy does not permit the tortfeasor to purchase the right to abuse or slander a family member. This is not a case in which the law allows an action but sets a price for that action. While the damages paid by the tortfeasor for his actions are monetary and there is some similarity to the liability rule in favor of the plaintiff, society does not approve these actions, ex ante or ex post. The law does not allow a partner or parent to be abusive, and the monetary damages awarded ex post for the abusive behavior do not validate the past actions and certainly do not authorize them to continue in the future.
67. In effect, in family law some rights are inalienable, unlike those in the Calabresi/Melamed liability rule, which permits transfer of rights in exchange for compensation. The right of a child or partner to bodily and mental safety, for example, is not at all transferable. The
B. Second Category: Family Law Remedy Has Already Been Given or is Not Relevant and Now a Civil Remedy is Sought

The second category consists of a small subset of the civil actions by women who were refused a "get." This subset involves cases in which the primary remedy—the "get"—was given or is no longer factually relevant because the marriage was ultimately dissolved. One example of this category is a suit brought by a woman who was initially refused a "get," later received her "get," and then sued her ex-husband for past suffering. There is no need for the woman to deal with the primary remedy in her lawsuit, since that remedy was ultimately granted. Another example within this category is the case of a woman who was refused a "get" and is now suing her late husband’s estate. Here, the death of the husband dissolved the marriage, and the primary remedy is no longer relevant. In one such adjudicated action, the widow who was refused a "get" was awarded damages for past suffering.68

In those cases in which the primary remedy is no longer relevant, whether because it has already been given or because the husband is deceased, the basic factual situation of the liability rule in favor of the plaintiff does not exist. However, the second category is at least vaguely reminiscent of some of the cases belonging to the first category, if only due to the resulting damages awards. Here too the liability rule’s basic framework exists in some way, since there are really two ways to protect the entitlement. Yet, the secondary remedy of damages is factually relevant to the plaintiff, so she chooses this path rather than the path of the primary remedy. This is not a case in which society chooses not to provide the primary remedy. Indeed, the tort remedy is still secondary compared to the family law remedy. The secondary remedy simply happens to be applicable in this case. Thus, this is not a true application of a legal transaction that sells the entitlement for a damages award.

C. Third Category: Civil Action is Based on Findings and Decisions Reached in Family Law

The third category includes cases in which there is a positive interaction between the systems of law.69 This includes tort actions wherein the tort remedy is a follow-up remedy that relies on the judicial findings of a family law matter. For example, a civil action claiming damages for violence may rely on a restraining order issued by religious or civil-family court under the Law for

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68. FamC (Kfar Sava) 19480/05 Jane Doe v. Estate of John Doe (not published) (source has not been verified by BGLJ editors).

69. The two systems of law are the civil tort law and civil family law. Civil family law is adjudicated in both the religious courts and the family court while intrafamilial tort actions are adjudicated exclusively in the family court. Supra Introduction A. Even though the family court might adjudicate both the tort and the family law issue, I still consider this to be a positive interaction between two separate systems of law mediated by a single court.
Prevention of Violence in the Family as evidence of violence.\(^{70}\) Similarly, a civil action for kidnapping might be based on a decision in the civil family court that ruled whether the kidnapped child should be returned to his legal guardian. Here, if the family law decision indicates that the parent who kidnapped his child did so unlawfully and must return the child to the custody of the other parent, this judgment can form the basis for a civil action.\(^{71}\) The same goes for a civil action for violating visitation rights: the basis of the civil action is created by a violation of the visitation arrangement established by the family court. Tort law can rely on the judgment of the family court, which states that the custodial parent violated visitation arrangements established by the family law by not allowing the non-custodial parent to see the children. Thus, the same court will later award damages for the party injured by the violation of the visitation arrangement.\(^{72}\)

This category also includes American law claims against a spouse on the grounds of infidelity. To succeed on such a claim, the plaintiff must show intent to destroy marital life and a certain level of active participation in the act beyond mere temptation by a lover.\(^{73}\) Such a suit is also possible against the paramour for temptation.\(^{74}\) In these kinds of cases, there is an interaction between tort law and family law even though the cause of action is in tort. This interaction can lead to a type of double jeopardy in states that consider fault in dividing community property and awarding alimony. The same fault is taken into account both in the family law and tort proceedings.\(^{75}\) In my opinion, this is not a cause for concern since family and tort law consider fault differently. In tort law, fault serves as a basis for negligence, which is central to tort liability. Tort’s interpretation is different from that of fault in family-personal law because it means that the individual did not act in the way a reasonable person would act, and did not foresee what he ought to have foreseen. In other words, liability in a tort claim in cases of negligence can only come about by indicating fault, since these are fault-based torts that belong to a rule of negligence, and not to strict liability.\(^{76}\) Assigning fault is a necessary element in these tort actions. Conversely, the modern trend in family law is to abandon fault determinations in divorce proceedings.\(^{77}\) Comparing fault in family law and tort law is therefore problematic; nonetheless, the two are not necessarily incompatible. Proving spousal infidelity with evidence that was accepted in family law procedures

\(^{70}\) The Family Violence Prevention Law, 5751-1991, S.H. 1352 (source has not been verified by BGLJ editors).
\(^{71}\) FamC (TA) 42273/99 Z.M. v. R.M.P. (not published).
\(^{72}\) FamC (Jer.) 13993/02 Doe v. Roe [2007] Tak-Mish 07(1) 516.
\(^{73}\) See, e.g., DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 369 (2006); W. PROSSER & W. KEETON, TORTS 918-23 (5th ed., 1984).
\(^{74}\) W. PROSSER & W. KEETON, TORTS 918-23 (5th ed., 1984).
\(^{75}\) See ABRAMS, supra note 73, at 395-96.
\(^{76}\) See most of the torts in the Civil Wrongs Ordinance, 5732-1972, 2 LSI 12 (1972) (Isr.).
might be the basis of a tort claim.

The civil actions in the third category are claims that family law does not deal with. In some of these cases, it is possible that applying family law led to a good resolution. Family law resolves some of these issues in a preventative manner, such as preventing domestic violence or preventing someone from leaving the country through injunctive relief. In the case of a kidnapping, family law is the basis for a judicial decision that a child be returned. But family law cannot, and does not claim to, provide the victim with compensation. This is not a case where a secondary remedy is provided as consolation for the primary remedy. The secondary remedy follows and complements the primary remedy given under family law. Family law allows a set of remedies, but compensation is not one of them. The remedy according to family law can be an injunction, a decision about visitation rights, or a restraining order. The facts that led to these decisions may also form the basis of an action under tort law in a separate procedure. This relationship is not similar to the liability rule in favor of the plaintiff. In this category the secondary remedy does not appear after an inability or unwillingness to grant the primary remedy. At the same time, the basic concept of two layers of protection for the same entitlement still applies.

This case also differs from the liability rule in favor of the plaintiff because the right is inalienable, and the compensation is provided only ex post. The law does not allow parties to trade visitation arrangements or restraining orders in exchange for compensation set by the court. Payment may only be made ex post facto, after the infringement, and such action is not condoned by the court either retroactively or prospectively. This transaction, then, is not by virtue of the law like a real property transfer, under which the court can set a price tag for the transfer of the right. This is a de facto and illegal transfer of the right by the tortfeasing or injuring party, and the law sets a price tag only after the fact. Therefore, this is not really an ex post facto transaction, and is similar to a case in which someone takes another’s limb without his permission and then is forced to compensate the injured party.

At the same time, in this category, just as in the previous category, the rights may function like alienable property rights. It is possible that the sides may agree between themselves to transfer a right in exchange for money. One of the parents may violate the visitation arrangement and pay the other to take care of the child completely and exercise full custody, or one may violate the restraining order and come to the house from which he was expelled in order to watch the child, despite what the court decided, and despite risking imprisonment. In these instances, we can then assume that the sides will not later come to the family court with a tort action alleging breach of the visitation agreement, since the infringement was mutually agreed upon. Therefore, in such a case, the transaction is best characterized as a private sale between the sides that follows the property rule, even though it is technically illegal.

It is important to note that there is a difference between the first, second and third categories regarding the ability to transfer the rights; but in each of them, tort law makes no attempt to interfere with or alter family law, either actually or rhetorically. In the next two categories, this is not the case.

D. Fourth Category: Civil Law Criticizes the Failure to Provide a Remedy in Family Law but Does Not Interfere to Change the Personal Status of the Plaintiff

This category includes cases where there is no real interaction between family law and tort law, but tort law effectively criticizes family law’s result by allowing for a separate remedy. The classic example of this situation involves the divorce of a woman against her will in the Muslim sector. In such cases, there is a critical interaction: one court of the state (the family court), which applies one set of laws (tort law), in effect criticizes another court of the state (the Shari’a Court), which applies another set of laws (the personal Shari’a law). These cases present a delicate situation in which one hand of the state criticizes the other without actually interfering with the outcome under the religious family law.

As mentioned above, Islamic law allows a husband to divorce his wife against her will. As far as the religious law side of the state is concerned, such cases effectively dissolve the marriage and result in a valid divorce. The civil law that criticizes this result is tort law. When tort law allows sanctions to be enacted against a husband who divorced his wife against her will, it is in effect criticizing the personal Islamic law applied by the Shari’a courts. However, tort law does not manage to change the personal law or the status of the woman. The civil courts do not claim to do so, and are unable to do so.

As such, the interaction between the courts is only at the level of critique. The same behavior—non-consensual divorce—is valid on the plane of status but invalid from the perspective of tort law and criminal law. Such situations allow, in effect, three different decisions to be reached by three different courts of the State: the Shari’a Court decides that the divorce is valid; the criminal court decides that such divorce constitutes a crime; and the family court decides that the woman should receive tort compensation.

The fourth category involves situations reminiscent of the liability rule in favor of the plaintiff. The tort remedy provided in these cases is a secondary remedy that does not compete with or complement the family law remedy, unlike in the third category. Rather, tort compensation serves as a sort of consolation prize that fills the vacuum created by a religious-personal family law

79. Supra Section II, example 3.
80. Indirectly, it is possible that as a result of this action, the husband will choose to remarry his ex-wife in exchange for her dropping the action. However, this does not change her original status as a divorced person, and according to Islamic law, such remarriage is not automatic and is only possible under certain circumstances and conditions. A further discussion is beyond the scope of this article.
that did not provide for the desired solution, thereby failing from the perspective of civil-tort law. The liability rule involves an express, normative, \textit{ab initio} decision of society according to which the damaged party should not, under the circumstances, be given a stronger remedy. The fourth category presents an analogous situation, except that the family court, by giving damages, indirectly suggests that a stronger remedy is deserved but cannot be given, since the religious family law reaches a different result. The family court provides a weaker remedy to the damaged party in order to fill the vacuum created by the religious law.

Calabresi and Melamed illustrate their rules within a legal system that evidences a clear, uniform decision to award the secondary remedy, rather than the primary remedy, in some situations. In such a system, there is uniformity and understanding rather than conflict between those in charge of the primary remedy and those in charge of the secondary remedy. In the fourth category, the situation is slightly different. In effect, the family court’s decision to grant the secondary remedy expresses criticism of the personal law—or more precisely, of the State that applies the religious law and impliedly tells the husband that his actions are valid. Yet, on the tort level, the husband’s actions are not valid, which is why the secondary remedy of compensation is granted. This is not the carefully thought out decision of a single, unified authority that examines the decisions of the two systems simultaneously and decides to award damages rather than a personal status change when a husband divorces his wife against her will. Yet, by awarding the complementary remedy, the court discussing the secondary tort based remedy effectively criticizes the decision of another court not to award the primary remedy, contradicting the results of the religious personal law in the process. The full picture of the law in this category is built in stages—first through the decision of the religious court, then through the decision of the civil family court and lastly through the transaction between the parties; that is to say, this category is built mainly through disagreement between different courts applying different systems of law.

Alternatively, the situation in this category may be seen as an exact parallel of the liability rule’s framework, the argument being that, in both systems, society made the normative decision, \textit{ab initio}, that the entitlement should be protected by the weaker remedy rather than by the stronger one. This decision was made not out of frustration with one piece of the system but from a desire to give the plaintiff a certain consolatory remedy via tort and criminal law when society itself does not recognize the stronger remedy. This is not a case of one system criticizing the other; rather, society uses two different institutions to grant the desired level of protection to the holder of the entitlement. The situation can therefore be seen not as one court criticizing another or as one system of laws criticizing another but as a single process coordinated in two steps. This is exactly like the liability rule’s framework, in which the damaged party has no choice but to accept the weaker entitlement protection that society chooses to award her. The compensation will not make the woman married again and will
not change her status, but it is some measure of protection of her entitlement.

The next step in this category involves sale of the entitlement. According to the personal law, the woman is divorced, and this fact cannot be changed—not by the Shari’a Court and certainly not by the civil court, which has no authority to make any rulings related to personal status. Society in effect allows a woman to be divorced against her will according to the personal religious law and thus does not protect a woman on the plane of status, even while protecting her entitlement on the plane of tort compensation. Yet, while the law insinuates to the husband that he has the right to divorce his wife against her will, it then declares that realizing this right may cost him financially if that realization constitutes a tort against his wife. The law then presents the cost of sale, effectively setting a price tag on these non-consensual divorces. The husband does not really want to engage in this transaction, and the parties did not reach this transaction of their own accord. The state, which discourages divorce against a wife’s wishes, administers this transaction. Muslim husbands are assumed today to know that if they divorce their wives against their wives’ wills, they are entering into a possible transaction whereby they will pay to realize this right, with the civil family court setting the price of this transaction through its award of tort damages.

When a woman is divorced against her will, the remedy offered on the basis of past injury may allow her to start a new economic chapter of her life. However, this remedy is an imperfect substitute for a solution based on personal status, and presumably there are many cases in which the woman would prefer the primary remedy—a ruling of the Shari’a Court that she is not divorced and that her economic and social status rights as a married woman will continue.

Under the liability rule in favor of the plaintiff, there are cases in which the primary remedy is possible, but the court decides not to provide it; indeed, this is the classic case of the rule. Yet, there are also examples like that of the fourth category, in which the primary remedy really is impossible, and all that is left is the secondary remedy. Tort law, of course, does not literally approve of a transactional conception of the husband’s actions in this category; from a systemic perspective, it is the religious law that validates his actions. Tort law simply gives the woman a weaker remedy when the stronger one is unavailable.

In any case, society approves of the action through the personal law, and society then grants compensation following this action through the tort law. This is an example of an ex post transaction under the auspices of the court, and

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

82. For example, if enforcement of the contract is not possible under the circumstances: the contract is unenforceable; enforcement of the contract means forcing a party to give or receive a personal service, etc. In such cases, we turn, necessarily, to the secondary remedy. If the libel has already been published, all that can be done is to ask for compensation.
therefore a certain similarity exists between the fourth category and the liability rule in favor of the plaintiff: the primary remedy is not given, and the situation is acceptable to the personal law. However, there is a chance to receive the secondary remedy, which means setting a price tag for an action that was acceptable from the perspective of the personal law but which constituted a tort on the plane of the civil law. Thus, by ruling that the action is in fact tortious, and that it has a price tag under tort law, the family court can be seen as signing off on the transaction that exchanges status for compensation. If the family court could express itself regarding status, it is very possible that it would oppose the transfer of the entitlement in the first place. But it does not have this authority, and it cannot have its say; this authority belongs exclusively to the religious court. Therefore, all that is left for the family court to do is to allow the transaction ex post.

E. Fifth Category: The Goal of the Civil Tort Remedy is to Change Personal Status Under Family Law

1. Tort Actions for Get Refusal Wherein Husband Violated a Decree of the Rabbinical Court that he Must Grant a Get (2004 onward)

The fifth category involves the most active interaction between family law and tort law—an interaction that is not universally seen as positive or even as legitimate. Here, it is difficult to apply the alternative analysis suggested in the previous category, which saw the situation as one coordinated process overseen by two arms and played out in two stages. In this category, the issue is more complex.

This category includes cases in which the plaintiff seeks the civil remedy not simply to criticize the family law but also in order to circumvent the family law. The plaintiff’s ultimate goal is to obtain the primary remedy of status under family law through the financial pressure that civil compensation will create. In this way, one system of law—tort law—grants the secondary remedy of compensation. Using this compensation, the plaintiff then tries to indirectly obtain the primary remedy of status, which the religious court has thus far refused to grant. The damages do not directly change the status, but there is a chance that they may indirectly achieve that effect.

Most civil actions filed by women who are refused gets fall into this category. In seeking compensation, these plaintiffs intend to force the primary remedy, ultimately foregoing any compensation in exchange for the get. The financial pressure created by the secondary remedy is intended to bring about the primary remedy, though not through the legal system, since the personal law leads the woman to a dead end. Although the Rabbinical court has issued an

83. The fifth category according to the Calabresi/Melamed framework is to be published as Tort Compensation for Women Refused a Get—The Next Generation, Mishpatim (Hebrew Univ. L. Rev.), forthcoming 2011 (source has not been verified by BGLJ editors).
“obligation” to grant a get, it rarely enforces such orders.\textsuperscript{84} As such, the couple does not divorce, and their individual statuses do not change. In such situations, compensation may be used as an effective form of leverage.

There are, in effect, two transactions here. One transaction is under the auspices of the family court, and the other is a private one between the parties. The first transaction is similar to that of the first category: personal law is on the side of the husband, so the woman cannot receive the primary remedy. But the civil court activates the secondary remedy and sets, ex post, a price tag for the violation of the entitlement. It cannot change the status, and therefore it makes do with what it has the authority to grant: compensation as a secondary remedy.

The difference between the fourth and fifth categories can be found in the goal of this compensation and in the process that takes place after the court-authorized transaction. Enforcing the plaintiff’s entitlement through injunction is not a part of the agreement under the Calabresi/Melamed liability rule in favor of the plaintiff. Indeed, this transaction is not performed under the auspices of the civil family court. The court does not actively encourage it or give it the status of a judgment, and often does not even know about the subsequent agreement. In this extra-judicial transaction, a private barter is made between the parties following the husband’s assessment of his situation in light of the civil tort judgment. This is particularly true in cases where the refusal to grant the get is done for financial reasons only—that is, where the husband wants to extort money from his wife in exchange for the get. If the husband calculates that the price tag set by the family court is too high and decides that it is no longer worthwhile for him, considering the costs and the benefits, to continue to withhold the primary remedy from his wife, he will attempt to arrange a transaction in which the wife will waive the compensation awarded to her by the family court in exchange for giving her the primary remedy.

To illustrate, let us assume that the husband had hoped to extort from his wife the half of the apartment that belongs to her (valued at $100,000), and that this is the primary reason he has refused to grant the get. When a judgment is issued against him for $150,000 in damages, his refusal is no longer economically rational. Therefore, he has a strong incentive to make a private deal, under which his wife will waive the $150,000 in damages in return for his dropping his economic pre-condition and granting the get. If the husband refuses to give the get, he may be “covered” by Rabbinical personal law. However, this protection has a price—just as there is a price for continuing to pollute or create a nuisance—and that price is set, albeit ex post facto, by the court and not by the voluntary negotiations between the parties. The fifth category is therefore generally similar to the fourth category, though it is more complex because of the private transaction that follows the initial proceeding under the auspices of the family court.

\textsuperscript{84} After an extensive search in pools of judgments, it is hard to find decisions in which the Rabbinical court enforced a get obligation. See infra note 100.
From an economic perspective, it is possible that the private exchange transaction is precisely what society wants to achieve, and that aggregate welfare is increased if the husband gives his wife the get and she waives her right to damages. Nonetheless, the situation is complex from a halakhic perspective.

The party seeking tort damages to force a get has to consider that the pressure of the private exchange transaction may cause the get to be considered unlawfully coerced, as a get can be voided if economically extorted. If this is the case, then the woman would be unable to remarry without being considered polygamous, and could not have children without those children being considered bastards under Rabbinical law. In such a situation, the Rabbinical court could go so far as to retroactively invalidate the get. If this were to happen, the woman would presumably claim that the extra-judicial agreement is void and insist upon her right to civil compensation. Yet, this transaction would clearly not provide her the desired divorce.

Here we should ask whether the second transaction—the private exchange—should affect the legitimacy of the entire process. In other words, why should this halakhic concern with an unlawfully coerced get, which arises only from the second, private transaction, invalidate ex ante the first transaction administered by the court? How does this situation differ from the fourth category, in which the legitimacy of the process was not questioned?

It has been argued that this process exacerbates the struggle between the courts by allowing the family court to use its lawful jurisdiction over civil matters to indirectly interfere in actions for a get, over which Israeli law explicitly denies them authority. In effect, the claim is that the two transactions cannot be truly differentiated, since the family court knew of the plaintiff’s ultimate goal and simply turned a blind eye to this fact when it issued what was ostensibly a decision grounded only in tort rationales. It has also been argued that such rulings are an infringement upon the principle of mutual respect between the courts; when the family court indirectly interferes in questions of

85. See Kaplan & Perry, supra note 57; Lavi, supra note 57; Rabbi Shlomo Dichovsky, Tze’adei Achifa Mamoni’m Keneged Sarvanei Get [Monetary Enforcement Measures Against Recalcitrant Husbands], 26 THUMIN 173 (2006). For a view that there is room for tort lawsuits despite the fear from a coerced get, see Bitton, supra note 19 (seeing the issue from a feminist perspective); Benjamin Shmueli, Pitzui Neziki Le’Mesuravut Get [Tort Compensation for Abandoned Wives (Agunut)], 12 HAMISHPAT [COLLEGE OF MANAGEMENT L. REV.] 285 (2007) (seeing the issue from a mixed-pluralistic approach to the analysis of the goals of tort law) (source has not been verified by BGLJ editors).

86. See, e.g., Rabbi Uriel Lavi, speech at the Family and Society Conference at Hebrew University, Jerusalem, Global, Regional, and Local: Law, Politics, and Society in Comparative Perspectives: Does the family court Act with Restraint when it Decides Damages against Husbands who Refuse a Get? (Dec. 25, 2008) [hereinafter Rabbi Lavi’s speech] (source has not been verified by BGLJ editors); Rabbi Eliyahu Hayshrik, speech before the Bar Association Tel Aviv District: Tort Awards and their Effect on Divorce Law (Feb. 17, 2009) (source has not been verified by BGLJ editors); Rabbi Eliyahu Hayshrik, speech before the 9th Annual Conference of the Israeli Bar Association, Eilat, Israel: Nor Shall they Learn War Anymore (June 1, 2009) (source has not been verified by BGLJ editors).
personal status by granting damages that lead to the granting of an unlawfully coerced get, it is an affront to the authority of the Rabbinical court and a trespass into territory that was not meant to be controlled by tort law. It has been further argued that granting compensation, as well as the jurisdiction race mentioned before, represents attempts by family court judges to blatantly advance an agenda benefiting women who are refused a get.

Perhaps in response to these pressures, the High Rabbinical Court of Appeals has ruled that the very filing of a civil action will stop proceedings relating to the get in the Rabbinical court, and that such proceedings will only resume if the civil action is withdrawn by the wife. The Rabbinical court has even stated that it believes an attorney who files such an action should be held liable for malpractice, since he led his client to a dead end by exposing her to the dangers of a forced get and leaving her with the worst of both worlds, having also waived her right to damages.

In sum, there are some who question the very legitimacy of this secondary tort remedy. Similarly, others think that the authority to conduct the tort action should be transferred to the Rabbinical court, or that it is really a matter of divorce, and therefore already belongs under the exclusive jurisdiction of the Rabbinical court. Alternatively, there are scholars who believe that it is correct as a matter of principle to award this secondary remedy in civil family court, and that this tort cause of action is legitimate as long as damage awards are limited and minimized, since it is only high damages that risk causing financial coercion and a coerced get.

In assessing these critiques, let us not forget that family court judges decide tort actions, over which they have exclusive jurisdiction, and which they may not refuse to consider, regardless of the possible pressure a judgment may create on familial status. Accepting these cases does not necessarily involve asserting one agenda or another. Judges do not choose which cases to accept as they are bound to review all actions filed with the courts.

Furthermore, the plaintiff’s motivation and the likelihood of a successful post-judgment transaction are not always apparent from the outset. As mentioned, there are cases in which the plaintiff is interested only in damages and not in the get, in which case the action actually belongs to other categories. There are also cases in which a woman will remain interested in the damages

87. Id.
88. See Rabbi Lavi’s speech, supra note 86.
89. Rabbinical court decisions of the High Rabbinical Court, case no. 7041-21-1, 3.11.2008. Judges Lavi and Hayshrik supported the decision. See their speeches, supra note 86.
90. See the speeches of Rabbis Lavi and Hayshrik, supra note 86.
91. Dichovsky, supra note 85; and the speeches of Rabbis Lavi and Hayshrik, supra note 86.
92. Kaplan & Perry, supra note 57; Dichovsky, supra note 85 (supporting the result, but seeing such actions and such awards as legitimate only if jurisdiction is given to the Rabbinical court, and not the family court).
93. See, e.g., FamC (Jer) 19720/03 K.S. v. K.P. (not published); FamC (Jer.) 6743/02, K. v. K. (not published), § 10.
Despite her original intention. This dual motivation may stem from a variety of factors: the damages may be too minimal to convince the husband to issue a get; the post-judgment transaction may fall through for ideological reasons; or the husband may demand something beyond a waiver of damages, such as a large sum of money or exclusive ownership of the couple’s residence. The husband might also die in the interim, so that the marriage is dissolved and the deal is no longer relevant. In all of these cases, the parties will never come to the “private” arrangement, just as in the other categories.

Yet, even if it is clear that the damages are intended to pressure the husband into giving the get, and even if it is clear that the plaintiff is likely to succeed at this goal, I nevertheless believe that the alleged agenda of the family court judges who grant damages in such suits is irrelevant, so long as they rule in a professional manner and within the bounds of the authority granted to them. These judges must only review the first transaction that arises from the liability rule in favor of the plaintiff; even if the personal law approves of the situation in which the woman is, in effect, stuck in the marriage, the court can set a price tag on refusal if it is tortious. The tort is built on the decision of the Rabbinical court obliging the husband to divorce his wife, which the husband is not following and the court is not forcing him to follow. There is no change on the plane of status, which means that the primary remedy is not being given. All that is left for the family court to examine is whether this refusal constitutes a tort. When it so rules—as it has ruled in a series of decisions94 accepted in the legal literature95—the path is open to awarding damages as a secondary remedy. Therefore, the liability rule in favor of the plaintiff applies in a certain manner in these instances.

The civil family court judges may not support the post-judgment transaction since, from their civil-secular perspective, a person is not allowed to mentally abuse his wife in this manner, and as such, the entitlement is more similar to an inalienable entitlement than a transferable one. But in fact, their judgment sets a price tag for the entitlement, effectively rendering it an alienable entitlement. Therefore, these cases do present a sort of liability rule in favor of the plaintiff, built from two stages rather than a single harmonious stage by the same court. Everything that happens after the exchange is made is a private matter between the parties, and while it may indeed affect the validity of the get in the Rabbinical court, it does not injure the legitimacy of the earlier civil-court transaction in any way. It is a completely valid transaction under the law, and the framework of the liability rule in favor of the plaintiff makes this plain.

Moreover, even if bringing a suit for tort damages in some of the categories causes antagonism, it cannot be blocked. As mentioned above, immunity from

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94. See, e.g., FamC (Jer.) 6743/02, K. v. K. (not published); FamC (Rishon LeTzion) 30560/07 H.Sh. v. H.A. (not published); FamC (Jer) 19720/03 K.S. v. K.P. (not published).
95. See, e.g., Bitton, supra note 19; Shmueli, supra note 85.
actions brought by a spouse was repealed in Israel at the end of the 1960s. ¹⁹⁶ Similarly, I see no room for the civil action to be examined or blocked based on the motive for bringing it, so long as all the basic elements of the cause of action are proven by a preponderance of the evidence.

As seen by the courts, this is merely a case of compensation where there is no chance of receiving the get, just like the cases in the fourth category. But in the fifth category, it is particularly difficult to say that there is one coordinated process of the law that allows a woman to receive damages if she is unable to receive a get. It is obvious that this second, private transaction, attempts to pressure the Rabbinical court via the remedy received in the civil family court, and to change the religious personal law via tort law.

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

The fifth category therefore invites the kind of cases in which there is no desire for the tort compensation itself. As such, one might say that these cases do not involve the granting of a secondary remedy that protects an entitlement on a less preferred plane, as per the theory of Calabresi and Melamed, but are instead a tool to achieve the primary remedy. It can also be said that the family court simply applies tort law and does not attempt or claim to change personal status. It simply rules that the actions of the husband constitute a tort and carry a price tag under tort law.

If the husband then wants to act in order to change the results of the transaction, because the price is too high for him, this happens at another stage separate from the judicial process. The arguably problematic, extra-legal barter of the tort damages in return for the get takes place outside of the civil family court’s jurisdiction. Indeed, the family court plays no role in signing, sanctioning, or legitimizing it. Further, the court cannot be certain that such a transaction would be the inevitable consequence of its judgment, since, as mentioned before, the husband may not cooperate, or the wife may prefer to keep, rather than barter, her settlement.

In any case, it can be said that the process of exchange that happens after the judgment is given diverges slightly, but not significantly, from the liability rule in favor of the plaintiff. Even though the basic structure of that liability rule still exists, there is a secondary remedy that is given where, as in the fourth category, the primary remedy could not be given. It is also possible to see this extra judicial exchange as a sort of independent protection of the entitlement,

¹⁹⁶. See supra text accompanying note 5.
albeit not an independent remedy that is realized and enforced legally. Ultimately, the fifth category also involves an actual court-sanctioned transaction very similar to that of the liability rule. According to the personal law, the woman is not divorced and the couple is married. The law puts a price tag on this infringement on the woman’s right to divorce. At the level of the secondary remedy, this price-setting process originates from the decision of the Rabbinical court to order a man to divorce his wife, an order which he subsequently disobeys. Therefore, the liability rule in favor of the plaintiff can form a basis for granting full legitimacy to a process based in the fifth category, and as mentioned, the follow-up private exchange transaction has no relevance to this issue.

By applying the general approach of Calabresi and Melamed to civil actions in the family law context, a potentially controversial process is awarded a certain degree of tort-law legitimacy. The motive of women who are refused a get is less relevant when the process itself is supported by recognized tort theories.

Another possibility is to see the fifth category as a new liability rule—one in which the use of the secondary remedy is meant to indirectly achieve the primary remedy. This rule could be added to the existing rules formulated by Calabresi and Melamed. However, such a rule may well be exclusive to family affairs; further examination may reveal if this rule is characteristic of other sorts of actions, beyond intrafamilial tort actions.

This new liability rule can be seen as completely independent, or at least as a unique product, of the existing liability rule. The general framework of granting the secondary remedy when the primary remedy cannot be achieved may lend legitimacy to the development of such a rule. In other words, despite a lack of mutual respect among the courts and a fear of an unlawfully coerced get, civil tort law provides legitimacy to the development of a new rule under which awarded tort damages indirectly serve to achieve the primary remedy. The new rule created here is also a type of liability rule in favor of the plaintiff. The indirect goal of achieving the primary remedy through the “back door” does not need to disturb the basic process of turning to the secondary remedy of damages. The use of the secondary remedy as a way to obtain the primary remedy may be seen as illegitimate by groups close to the Rabbinical court. At the same time, this process can be seen as a product of the liability rule in favor of the plaintiff, which can serve to justify the process.

It is arguable that even in the classic Calabresi/Melamed case of the liability rule in favor of the plaintiff, there are certain situations in which the granting of the secondary remedy will actually lead to the achievement of the primary remedy, especially when the matter depends on the tortfeasor. The tortfeasor may prefer to stop the damaging activities in exchange for the damages being waived. This sequence of events was common until 2008. The relationship between the primary and secondary remedy have become more complex since that time. I will now move on to examine the significant
developments that occurred in Israel in 2008 and their effects on the framework of the fifth category.

2. Developments (2008): Receiving Damages Before an “Obligation” Has Been Issued or when the Rabbinical Court’s Decree is of a Lower Level

Orders directing spouses to cooperate with the process of the get can be of varying levels of severity depending on the relevant ground for divorce. The most severe order compels a party to give or accept a get (kfiah). When a Rabbinical court issues a compulsion decree against a husband and orders him to give his wife a get, coercive measures, including fines and imprisonment, may be used to compel him to give the get without affecting the get’s validity. When a Rabbinical court decree is on the level of compulsion, extra-judicial bargaining does not present a problem, since coercion—even of a purely financial nature—has been decreed legitimate. However, only a handful of compulsion decrees are issued each year.

Another decree a Rabbinical court may issue is “an obligation to realize a get,” which is not as compelling as a compulsion decree, but still powerful. Under this decree, the husband is obligated to give, or the wife is obligated to accept, the get. The practical implications of such a decree are very limited, and their settlement may include an enlarged sum of spousal support for the wife. The sum must not be too large, however, or else it will be considered a fine that renders the get void. A decree stating an obligation to give or accept a get is enforced primarily through social or psychological measures that include community pressure. In these cases, the financially coercive nature of the tort

97. See Kaplan & Perry, supra note 57, at 816.
98. Hereinafter known as a compulsion decree.
99. See Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1953-54) (Isr.) (source has not been verified by BGLJ editors); Be’eri, supra note 57. According to traditional Jewish law, additional means may also be taken, such as corporal punishment and even threat of death. See also MOSES MAIMONIDES, Mishneh Torah, The Laws of Divorce, 2:20 (Eliyahu Touger trans., 1995). According to Maimonides, the true will of every person is to do what is right. If a person refuses to do so, it is not his true will. Coercing the husband to give the get under such circumstances allows his true will to be executed. Id.
100. Not all rabbinical decisions are published, but based on a search of the primary pools that publish decisions or summaries of decisions, one cannot find many compulsion decrees. See, e.g., Takdin, http://www.takdin.co.il/ (last visited Mar. 8, 2010); Ha-Din Ve-Hadayan, http://sitesdesigning.com/rackman/subcontant.php?PId=4&lang=hb (last visited Mar. 8, 2010).
101. A khiyuv get, hereinafter known as an obligation decree.
102. See Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1953-54) (Isr.); Be’er, supra note 57. If such a decree is issued against the wife, she loses her right to spousal support.
103. These means were satisfactory when the Jewish community was unified and observant and Rabbinical authorities enjoyed strength and reverence among the community. However, these conditions do not apply to most of the Israeli population at large today.
action remains problematic from the perspective of the Rabbinical court.

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

How are these levels of Rabbinical decrees relevant to our analysis of tort actions against recalcitrant husbands? And how do they affect the analogy to the liability rule in favor of the plaintiff?

The first tort actions against recalcitrant husbands, beginning in 2004, were recognized in cases in which there was an obligation decree. Despite the criticisms on the subject from those commentators sympathetic to the Rabbinical courts, in these cases it was easier to prove that a tort had been committed because the husband had been obliged by the Rabbinical court to divorce his wife, and he had violated this obligation. If the wife proved causation—that damage was caused to her as a result of this violation—then her civil-tort action would succeed.

Then, in 2008 two cases expanded the scope of this reasoning and continued to blur the jurisdictional boundaries of the two courts. The first action addressed tort liability for violations of a lesser Rabbinical decree, the “religious commandment.” The case presented for the first time the question of whether a Rabbinical decree at this level was sufficient to justify tort liability. The court answered this question in the affirmative.

Before even considering the liability rule, this case presented a problem on the plane of first-order legal decisions. Because the Rabbinical court did not decide that the husband had a duty to divorce his wife, it may seem as though the

104. FamC (Jer.) 19270/03 (not published); FamC (Jer.) 6743/02, K. v. K. (not published); FamC (Rishon LeTzion) 30560/07 H.Sh. v. H.A. (not published).
105. See, e.g., the speeches of Rabbis Lavi and Hayshrik, supra note 86.
106. FamC (Tel Aviv) 24782/98 N.S. v. N.Y. (not published).
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civil court made no decision on the plane of the entitlement, or that the wife has the right to divorce and that the husband was infringing upon this right. However, I believe this is not actually the case, and that the results of the civil court’s decision can be supported by a different theory of rights if we understand the rationale behind the “religious commandment” and “recommendation” decrees.

The civil family court is able to award a secondary damages remedy. All that the court needs to examine is whether the actions of the husband, on the level of the personal law of status, constitute a tort, and thus are illegal under tort law. A husband who does not obey the instructions of the Rabbinical court and does not divorce his wife, even in cases that involve a commandment or recommendation to divorce, not an actual obligation, is in effect disobeying the Rabbinical court. From the perspective of the personal law, he should divorce his wife, but for various reasons, the Rabbinical judges do not raise the decree to the level of compulsory obligation. Under Rabbinical law, an obligation decree makes it clear that the husband must divorce his wife, and that a failure to do so constitutes a violation of his obligation. From a halakhic perspective, this same rationale applies in the issuance of a commandment or recommendation decree. Therefore, in cases in which a husband fails to follow a Rabbinical decree of any weight, the civil family court must decide whether he violated his duty of care to his wife, and whether her damages were caused as a result of that violation. There are cases in which causation has been thus proved, as in the 2008 case involving a “religious commandment” decree. Therefore, while such decisions stretch the border even further, and may increase the tensions between the courts, they are theoretically grounded in the liability rule in favor of the plaintiff. A commandment-level decree, and perhaps even a recommendation decree, are less compelling than an obligation-level decree. Yet, there are cases in which these lower-level decrees provide sufficient foundation for a civil tort, based on a ruling of Jewish law stating that the husband should divorce his wife.

The second significant decision from 2008 involved an obligation decree. In that case, the court ruled that damages could be awarded even for the period before the Rabbinical court issued a decree if negligence was proved starting before the official date of the decree. For instance, if the Rabbinical court decreed an obligation to divorce in 2005, but the woman could prove that her husband’s negligence towards her, evidenced perhaps by mental abuse, started before the decree, then damages would be calculated from the beginning of the period of negligence rather than from the date of the decree. Here, there is no

107. FamC (Kfar Sava) 19480/05 Jane Doe v. Estate of John Doe (not published). Judge Weizman’s obiter dictum limited such decisions to particularly severe cases.
108. FamC (Jer.) 6743/02, K. v. K. (not published).
109. Regarding the scope of damages, the case was in the end rather similar, since Judge HaCohen in FamC (Jer) 19270/03 granted damages of around 200,000 NIS (about $50,000 USD) for each year of being stuck in the marriage from the time of the issuing of the obligation decree (around two years). By contrast, Judge Greenberger in FamC (Jer) 6743/02 awarded only a quarter of this amount per year and allowed the tort to be proven before the
tension on the level of first order legal decisions, since there is an obligation to
divorce, and as such, the wife has an express right to divorce. The husband
clearly violated his obligation to give a *get*. The problem lies in the act of
awarding damages for the period before the obligation decree was issued, where
there is no obligation to divorce from the perspective of the Rabbinical court.

3. **Can an Obligation be Held Retroactively?**

I believe that an obligation can be found in the absence of a decree and
damages awarded retroactively based on the liability rule in favor of the plaintiff.
Recognizing the husband’s actions as tortious is simple since an obligation to
divorce exists at the time of the tort suit, and at this point, the situation is actually
more straightforward than the example in which the Rabbinical court issued a
lower-level decree. The ability to look backward and examine when the tort
started de facto, assuming that the Rabbinical court decided the obligation ex
post facto after several years of the tortious conduct, seems completely natural
from the perspective of tort law. Tort law is uniquely situated to provide such a
remedy because it concerns itself almost exclusively with examining past actions
in reference to the relationships and duties between individuals. Such actions are
more often adjudicated by reference to context than by reference to statutory or
contractual obligations. A retroactive judgment may not emerge in every
situation, and the burden is obviously on the plaintiff to prove that the tort began
before the date on which the obligation decree was issued. Plaintiffs are
sometimes able to prove the elements of the tort, since in many cases the
obligation decree is the last resort, and the husband had evaded divorcing his
wife for various reasons and for a number of years. Effectively, the husband was
committing an ongoing tort.

Sometimes in such cases the judgments of the religious court highlight the
past as well. The obligation decree may not be projected back into time in terms
of personal status, because the plaintiff’s marriage cannot be retroactively
declared void during the period of the offense. However, retroactive damages are
possible under tort law. It is, in fact, one of the fundamental tenants of tort law,
where the scope of the damages is often commensurate with the longevity of the
tort. The obligation decree is evidence that may support a civil family court’s
finding of a tort. The question of when the tort began is a separate question that
should not be overtaken by this initial threshold question. There are cases in
which one can rely on the decisions of the Rabbinical court itself, where there is
evidence of emotional damage inflicted on a woman before the obligation decree
is made, to support the claim that the tort began prior to the date of this decree.
Therefore, in these cases as well, a decision stating that the tort began before the

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obligation decree. FamC (Jer) 6743/02 involved around nine years of being stuck in the
marriage, so that the sum that was awarded was similar in both cases. Obviously, this stems
from the fact that there are no tables for the calculation of non-monetary damage under tort
law, and each judge can award as he sees fit on this issue.
date of the obligation decree is compatible with the liability rule in favor of the plaintiff, which can in turn serve as a strong theoretical basis for these decisions.

These two cases, representing major legal developments in awarding damages pursuant to commandments and recommendation decrees and in awarding pre-decree damages, thus fit into the category of the liability rule in favor of the plaintiff, and do not concern a decision between entitlements. The right of the woman to divorce exists in both types of cases. These judgments have increased conflict between the courts, but I believe that tort law in general, and the liability rule in favor of the plaintiff in particular, can support these developments and give them legal legitimacy.

Therefore, the fifth category contains possible innovations in adapting Calabresi and Melamed’s liability rule in favor of the plaintiff to intrafamilial tort actions, bringing theoretical tort-law legitimacy to a process that is socially controversial. The motivation for the actions of women refused a get is irrelevant, so long as the process itself is supported by accepted tort theories. The purchase of the entitlement by one party from another through direct negotiation would certainly not raise any objections from Coase, Calabresi, or Melamed. This is particularly true given that the transaction costs are relatively low; the parties are known, defined, and limited in number; and there is no risk of one party objecting and being unwilling to pay for the entitlement.

As mentioned, the action under the fifth category is currently on the front lines of civil-tort actions in service of the family unit. As such, recognition of the relevance of the liability rule in favor of the plaintiff could serve as a fundamental justification for this sort of action. This justification is particularly needed because these actions have thus far been recognized only by the family courts and have not been reviewed in any appeals circuit, so there is no binding precedent on the subject.

F. Summary

The analysis of these categories indicates that tort compensation does not necessarily serve as a classic secondary remedy as in Calabresi and Melamed’s nuisance example. This seems to be the case both because the issues presented involve two different legal systems and because sometimes there are not always two remedies, primary and secondary; rather, sometimes the primary remedy cannot be achieved or is already achieved, leaving only the tort compensation remedy. Yet, at least in some of these categories, there is sufficient similarity to the liability rule in favor of the plaintiff. In these instances, the discussion of particulars is different from Calabresi and Melamed’s discussion of nuisances,

110. See Coase, supra note 25.

111. It should be noted that the process presented in the fifth category does not prevent an unlawfully coerced get. From a halakhic perspective, this problem continues to exist in any such case. The question is whether the fifth category has any legitimacy in terms of legal process.
but the framework is similar and the rationale is fundamentally the same, thus making analysis from the Calabresi/Melamed perspective useful. All five categories represent variations on the liability rule in favor of the plaintiff, which do not necessarily conflict with the liability rule, but rather, often draw from it. Moreover, these categories reveal the potential in applying the general idea of the liability rule in favor of the plaintiff to intrafamilial tort actions.

V. DO THESE CATEGORIES ALLOW FOR PROGRESS?

In this Section, I present several possible developments in categories explained above to show that intrafamilial tort actions are not static and that the framework of the liability rule in favor of the plaintiff can help us to understand and even provide theoretical justification for some of these developments.

A. The First and Third Category: New Civil Actions of Children Against Their Parents

The third category involves civil actions that are based on findings and judgments made under family law. One type of action that belongs to this category is an action for compensation by a parent whose child (who is under his care and custody) was kidnapped, against the parent who kidnapped the child. In my opinion, this category may also include new kinds of actions, like civil actions by kidnapped children against their parents for a breach of duty recognized under family law. Thus, if the child can prove that she was damaged by violation of a visitation arrangement or by kidnapping, she would have a legally recognized action against the violating or kidnapping parent. This action, like the action of the parent from whom the child was kidnapped, can be based in the judicial findings reached under family law in the civil family court. There is no reason for the civil family court not to recognize such an action by a child against a parent in this case, or an action by one parent against the other, if the plaintiff can prove that damage was caused to them.

Similarly, there seems to be nothing preventing actions brought by children against their parents for emotional damage caused by arguments between the parents or a difficult divorce. These actions are in the first category in which there is no interaction between the two systems of law. The child can sue as a direct or secondary victim. If the parents emotionally harmed her through their quarrels, she is a direct victim, but if she is emotionally harmed because she witnessed violence against or abuse of parent by the other parent, she is a secondary, or indirect victim. If the child sues as a secondary victim, she will need to prove significant emotional and mental harm, that she is subject to a variety of limitations, and she must satisfy a number of conditions. Even if she

112. C.A. 444/87 ElSucha v. The Estate of Dahan [1990] IsrSC 43(3) 397; C.A. 754,759/05 Levi v. Shaarei Tzedek Medical Center (not published). Secondary-indirect victims are acknowledged as entitled to compensation subject to some conditions and restrictions as determined in the case law. See also Susan Maidment Kershner, Children v. Parents: A New
is seen as a direct, rather than secondary victim, it is possible to set criteria for
this action, one of which could be recognition of the action only in particularly
severe and serious cases. Such an action would, of course, be subject to policy
considerations, which can be set by courts in proper cases. Setting parameters
around the action avoids over litigiousness, which can cause irreparable damage
to familial relations as well as implicate a couple’s freedom to separate or
divorce. It is impractical for the court to ask married couples to separate
smoothly, without arguments, disagreements, or fights. But it is possible that if
the couple creates particularly severe circumstances for their children that the
court would recognize an action for damages by these children. As mentioned,
the question of how the law would structure this action requires separate
discussion.

B. The Fourth Category: An Action Filed by a Wife Against Her Husband
for Monetary and Non-Monetary Damages Resulting from Bigamy or
Polygamy

The fourth category, as previously noted, includes actions of wives against
their Muslim husbands for divorcing them against their will. In this category, I
have shown that tort law, by the very act of awarding damages, criticizes the
religious personal law that accepts such behavior as legal. Thus, the civil family
court effectively criticizes the Shari’a Court or, to look at it differently, the two
systems of law are complementary to each other, granting a secondary remedy
under tort law while denying the primary remedy of status change under
religious law.

Tort law also provides for potential actions of wives against their husbands
for damages caused by polygamy. Personal Shari’a law does not interfere in this
case, since polygamy is, in principle, permissible according to Shari’a law.
However, like a woman divorced against her will, a woman whose husband takes
an additional wife can attempt to file a tort law suit for loss of financial support
as well as for non-monetary damages to compensate for pain, humiliation, or loss
of her husband’s attention due to his focus on his new wife. Moreover, as
polygamy and bigamy are criminal offenses, there are grounds for a tort action

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113. As has been ruled in the Israeli common law regarding emotional neglect. See CA 2034/98
Amin v. Amin [1999] IsrSC 53(5) 69, translation available at

114. Penal Law § 176, 5737-1977, S. H. 5729. Regarding Jewish husbands, this is generally
under Israeli law based in negligence or breach of a criminal duty.115

C. The First and Fifth Category: Actions of Women Refused a Get when the Rabbinical Court Has Not Issued a Decree Instructing the Husband to Divorce His Wife

As surveyed above, tort actions of women refused a get have thus far been recognized in cases in which the Rabbinical court ordered an obligation or religious commandment decree. Can we take one large step further and recognize civil actions when there has been no Rabbinical decree, or when no divorce case has been filed with the Rabbinical court at all? In such cases, the family court has no evidence that the husband refused to give a get, since the Rabbinical court did not reach a decision on the question. Can the tort of negligence, which is an independent tort, be found in the actions of the husband? There are currently several actions in the family courts for summary dismissal in cases in which no decree ordering divorce was issued in the religious court, and it has already held more than once—although not in final judgment, but in interim decisions in pleas of the defendants for findings of non suits—that the lack of a decree is not in and of itself a sufficient reason to dismiss an action.116

At first glance, it does not seem possible to make use of the remedy of compensation when a husband’s actions are not sufficient for the Rabbinical court to order a decree, creating a duty to divorce, or when they are only sufficient for a recommendation decree or even a mitzva. In such cases, it seems that the family court is not authorized, under any of its functions, to declare (even incidentally, as for the purposes of a tort action) that there is some halakhic obligation for a husband to divorce his wife. Under this rationale, there is no right to compensation, creating a problem of a first order legal decision. Thus, it seems impossible to use the liability rule to justify such developments.

On the other hand, the civil action for damages can be seen as an action for complementary remedy. The substantive remedy that the woman wants is indeed the ruling of a duty to divorce, but the unavailability of this ruling is not sufficient to exclude the possibility of a separate secondary remedy of compensatory damages. The religious law does not grant civil judgments for

impossible even according to the personal law since according to the ban of Rabbeinu Gershom (which spread to most sects) a man may not marry more than one woman, unlike the basic law before the ban. Permission is occasionally given to husbands to marry a second wife, sometimes because of a woman’s refusal to accept a get (such a remedy is impossible in the opposite situation, since according to the Jewish halakha a woman cannot marry two men, although according to the basic law a man can marry more than one woman). In a case where such permission is granted, there is also no criminal offense, and presumably there would also be no tort.

115. See supra text accompanying note 56, which explains the case of women refused a get. As mentioned there, the tort of negligence applies also in cases of intentional acts. The tort of breach of duty lies, in this case, not on § 287 but on § 176 of the Israeli Penal Law, which forbids polygamy or bigamy. 5737-1977, S. H. 5729.

116. See FamC (Jer) 22061/07 Ch.G.B. v. L.B.A. (not published); FamC (Jer) 22511/08 K.Y. v. K.A. (not published).
torts. Therefore, in certain cases tort law can fill this void by providing an action for damages under negligence that is independent of marital status.117

Negligence constitutes an independent tort that does not necessarily rely on a violation of legal duty or on a violation of standards. Thus, for example, if a bridge collapses, it is in principle possible to charge the negligence of the contractor and the engineer even if they met standards and even if they did not violate any statutory obligation. Therefore, the negligence of the husband can be examined even when there is no Rabbinical court decree expressly stating that he has an obligation to divorce his wife, or when a lower-level Rabbinical decree was ignored by the husband. It is clear that the existence of an obligation or even a lower level decree would make it easier to rule that the husband’s failure to meet the requirements of the decree make him negligent. However, the absence of a decree makes proving negligence more difficult, but not impossible.

In my opinion, there is room to recognize such tort actions even when there has been no Rabbinical decree, but this is only in three cases.118 Each of the cases will be examined against the framework of the liability rule in favor of the plaintiff.

The first kind of case involves spousal abuse.119 Since there is no specific tort of refusal to grant a get, if the woman can prove physical, emotional, or sexual abuse in the course of the marriage, she can receive damages from her husband through the general tort of negligence, rendering the refusal to grant a get irrelevant. Whether afterward the husband and wife make a private deal concerning their marital status does not concern the family court.120

In effect, such an action can be categorized under the first category of actions, in which there is no inherent connection between the plane of family law and status and the tort action. It is possible that the private deal to change status is the plaintiff’s primary motivator, but an examination of motives, as mentioned, is not in the purview of the court. Since in any case there is no particular tort of get refusal, there is no reason not to choose this path if abuse meets the elements of negligence, which apply to intentional torts like spousal abuse in Israel.121 If women aim to use this tort action as a means to incentivize a

117. The tort of breach of duty is not relevant here, since it depends ultimately on a breach of a rabbinical court decree. See supra text accompanying note 56. If there is no decree at all, only the tort of negligence is relevant here, not the tort of breach of duty.
118. All three cases obviously do not solve the problem of the coerced get, but it is at least fundamentally possible to award tort damages in each.
120. The fear of an unlawfully coerced get seems diminished in this case, since, as mentioned, the tort action is not connected to the refusal to give the get. However, when the exchange takes place, that connection will be made and the fear of an unlawfully coerced get returns. However, I will again mention that the goal at this stage is to examine whether there is room for such actions from the perspective of tort law, and not to examine the possibilities for circumventing the problem of a coerced get. That problem is built into the fifth category and is problematic one way or another.
private negotiation of marital status then the damages awarded need to be higher than what have been awarded in the past.\textsuperscript{122}

For this first example, it is possible to recognize tort actions if they do not rely on a violation of the right to divorce, but rather rely on a violation of the right to bodily and mental integrity.\textsuperscript{123} Therefore, this is not a first order problem of what right to protect, but rather a question of remedies and liability rules. At the same time, since this type of action belongs, as mentioned, to the first category, in which the framework of the liability rule in favor of the plaintiff is less relevant, the entitlement of a wife not to be abused by her husband is inalienable.

The second kind of case includes emotional abuse arising from behavior related to the get refusal, rather than from the refusal itself. For example, the courts discuss cases in which the husband dragged his wife from rabbi to rabbi, promising her each time that he would give her the get if the rabbi ordered him to do so, and each time violating this promise.\textsuperscript{124} Such behavior may in and of itself constitute emotional abuse. While it is connected to the subject of the get, compensation would not be given for failure to give the get, but rather for the emotional harm created by the behavior itself. This kind of action also belongs to the first category. The action belongs factually to the topic of get refusal, but legally it is not related to the personal law, the proceedings in the Rabbinical court, or to its decision. The result here is the same as in the first kind of case, although here it is more apparent that the motive for the action is forcing the husband to give the get and not receive damages for the abuse itself.

The third kind of case involves a woman who left her husband at a much earlier time, de facto dissolving the marriage, while the husband nonetheless continued to seek reconciliation. In this kind of case, it is hard to identify any entitlement on the plane of first order decisions that society protects legally. Here, we must call a spade a spade: this is a tort action for the very act of refusing to give a get, not for the circumstances surrounding the refusal or for abuse in the relationship. In these cases there is no Rabbinical court decree on the subject at any level. Under the framework presented by Calabresi and Melamed, this type of case does not pass the first stage of first-order decisions because the Rabbinical court never issued a decree that the wife has a right to divorce, and therefore, it is impossible for her to sue the husband for his violation of this right. Here, it is possible to argue that so long as the woman has not exhausted her right to receive the primary remedy in the Rabbinical court, and has not been refused protection of her right to autonomy, to re-marry, or to have children, then she should not be allowed protection of the entitlement via the secondary remedy. That is, under the liability rule, she has still not passed the

\textsuperscript{122} See, e.g., FamC (Jer) 18551/00 K.S. v. K.M. (not published), rev'd, FamA (Jer) 595/04, John Doe v. Jane Doe (not published) (source has not been verified by BGLJ editors).

\textsuperscript{123} For example, sexual humiliation. See FamC (TA) 24782/98 N.S. v. N.Y. (not published).

\textsuperscript{124} See, e.g., FamC (Jer) 19270/03 (source has not been verified by BGLJ editors); FamC (Jer) 6743/02, K. v. K. (not published) (source has not been verified by BGLJ editors).
first barrier of proving that she has an entitlement, and should not have access to
the secondary remedy. If the Rabbinical court has not reached a decision
regarding granting or failing to grant the primary remedy under the personal law,
it seems that circumvention of this law should not be allowed via financial
pressure using the secondary damage remedy. Only when there is a clear
decision of the Rabbinical court in regard to the primary remedy of status, or at a
lower level of decree such as the mitzvah or recommendation, can the plaintiff
activate the liability rule and employ the secondary protection of the entitlement.
Therefore, according to the Calabresi and Melamed framework, the woman is
unable to access the path of the secondary remedy until a religious court
judgment establishes her first order entitlement. But here too, it is not clear that
the necessary outcome is an inability to sue or the unsuitability of the framework
of the liability rule in favor of the plaintiff.

However, I think that in certain circumstances this claim should be
acknowledged. I believe that the law needs to establish a point in time at which,
from an objective civil perspective, a husband who does not give his wife a get is
negligent. Such a law would prohibit the husband from claiming that he wants
reconciliation for a prolonged period of time, believing honestly, subjectively,
and unreasonably that his wife will come back to him. Under tort law, the
husband’s subjective belief can be found objectively unreasonable, thus
negligent if the other elements are satisfied, even in the absence of a Rabbinical
court decree.

Pursuing cases involving this type of circumstance could lead to an
upheaval in the exact adoption of the liability rule’s framework, while
nevertheless maintaining its fundamental rationale. Nevertheless, there are cases
in which the defense of the entitlement should be allowed via the secondary
remedy, despite the fact that there has been no decision on the primary remedy
and where the plaintiff may attempt to attain the primary remedy via a private
transaction.

Here too we must set a minimal evidentiary threshold. If the woman never
approached the Rabbinical court or started any process, even filing a divorce
case, it is hard to see a secondary remedy as appropriate. If the woman files a
genuine action for divorce, but the husband, in bad faith, repeatedly requests
reconciliation, considerably delaying the process, she should be able to turn to
the secondary remedy. While there is no certainty that the court would grant the
secondary remedy, the opportunity to pursue an alternative remedy empowers
women when they would otherwise need to wait on their husbands.

There are a few civil constructions that may support this reformed
provision. From the tort perspective, it can be argued that the tort of negligence
is independent of the personal law, and therefore a husband who asks for
reconciliation that has no chance of being granted, while not freeing his wife
from her bonds, is violating his duty of care towards her, at least after some
years of real separation. As Israeli law acknowledges, the duty of care towards a
spouse mandates mutual respect, dignity, and the granting of at least some
autonomy, since husband and wife are no longer considered “one unity/person of law,” as was the case in English law. Of course this duty does not include the obligation to fulfill all of the spouse’s desires and wishes. However, a husband who is not ready to give his wife the get, forcing her to remain married against her will, does violate his duty of care. Potentially, this husband does not consider his wife’s interests, harming the marriage bond and the family as a whole. In a religious marriage and in the Jewish marriage bill (the ketubah), a husband makes a commitment to his wife to provide for all of her needs, including the emotional ones. Such blatant inconsiderateness constitutes a violation of these duties, at least after a certain number of years has passed from the time that the partner turned, first to her husband and then to the religious Rabbinical court, to receive the remedy. The analysis of the elements of the tort of negligence necessitates such a result even without an obligation decree. A decree could shorten the process of proving negligence, since it would create a presumption that when the husband violated this obligation, or perhaps violated a religious commandment or recommendation decrees, he acted tortiously.

This view may also be supported from a school of thought in Jewish law established by Rabbeinu Yeruham, which admittedly has not been completely adopted, but is followed by some panels in the religious court. This school recognizes that when a husband asks for family harmony in a situation in which no family harmony existed for years and there is no real possibility of achieving this harmony, the Rabbinical court decree carries the weight of a compulsion decree. The Rabbinical court, thus, compels the couple to divorce, since it does not want them – from a religious perspective – to live in sin, with other partners, while they are still officially married. It seems that this result ensues from the fear that if the couple is separated for a long time, the chances increase for them to live in a sin with other partners. In such a situation, there is no fear of a coerced get, and the tort action would not constitute unlawful coercion. Instead, the tort action is legitimate because a compulsion decree can be enforced by Rabbinical courts even through certain kinds of physical coercion, and all the more so through financial coercion. Thus even Jewish law recognizes, according to this known school of thought, that a hopeless request for family harmony can in and of itself validly lead to dissolution of a marriage via coercion. Based on this legal theory, an objectively unrealistic, though perhaps

125. FamC (Jer) 18551/00 K.S. v. K.M. (not published), rev’d, FamA (Jer) 595/04, John Doe v. Jane Doe (not published) (source has not been verified by BGLJ editors).
126. A prominent Jewish sage, Provence, south France, and Spain, 13th-14th centuries.
127. MEISHARIM, part 8, section 23. For application of this rule, see for example Rabbinical Court Decisions (P.D.R.) 11, pp. 89-95, in the District Rabbinical Court of Tel Aviv-Jaffa, before the judges Rabbis Tzimbalist, Azulai, and Dichovsky; case 26259-21-2 in the District Rabbinical Court of Tiberias, before the judges Rabbis Lavi, Bazak, and Ariel, given March 17, 2008, in which they applied this rule to a women; case 7479-21-1 in the District Court of Tel Aviv, before the judges Rabbis Prover, Bibi, and Atias, given November 18, 2007. See also the speeches of Rabbi Hayshrik, supra note 86.
genuine, request for family harmony must receive a an adequate remedy from the personal law through a compulsion decree to divorce, as well as a proper remedy from the tort law, through a payment of damages.

Second, it can be argued that a husband who does not divorce his wife despite the fact that the marriage has de facto dissolved, is not acting in good faith, whether he believes that his wife will return to him someday, or even if he himself lives with another woman. Because in Israeli law, the principle of good faith applies in contract as well as tort law, such a situation permits the granting of a tort remedy against him.

Third, a secondary remedy may be pursued through civil family law. A recently passed amendment to The Property Relation Law in Israel allows for the financial aspects of the marital bond to be dissolved without a get in one of two situations. The first situation involves a real break between the couple, or living separately at least nine months out of a year, and the second involves domestic violence, shown through a restraining order, arrest or indictment. This financial disentanglement is permitted even if the Rabbinical court has said nothing on the subject or has not issued a decree. Therefore, based on this recent amendment, Israeli civil family law today allows for financial dissolution before a get or a Rabbinical court decree ordering an obligation, religious commandment, or recommendation to divorce is established. Although the civil law appears to circumvent religious personal law, it does not go so far as to authorize a secular divorce. Instead, it provides a secular understanding that for the purposes of certain civil actions, like the division of property, the marriage is de facto terminated.

These three explanations, as a whole and each individually, are intended to show that there really is a legal decision on the first order plane of entitlements. Therefore, in principle it is possible to reach the second stage of Calabresi and Melamed’s liability rule even in the cases of de facto dissolution. This possibility is not intended as a call to recognize tort actions for get refusal in all cases in which the Rabbinical court has not yet expressed its opinion. Instead, it is intended to illustrate that the liability rule in favor of the plaintiff can be applied in these situations if there is a proper civil understanding that justifies a negligence tort. This tort action should distinguish the two entitlements for the purposes of the this action only, just as the amended Law of Property Division accepts the de facto dissolution for the purpose of dividing a couple’s property.

1. Is the Woman’s Right to Divorce Alienable?

Finally, I analyze the question of whether under a tort action for get

129. The Contracts (General Part) Law, 1973, S.H. 118.
130. Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1973-74) (Isr.) amended by 5768-2008, 18 LSI 2186 (2008) (Isr.). This reform of the civil law may seem to contradict the personal-religious law, which decides the question of whether the relationship should be dissolved or not (although it is possible that it does not contradict the approach of Rabbeinu Yeruham).
refusal, the Calabresi and Melamed framework treats the woman’s right to divorce as alienable and whether a woman can then sell this right in exchange for the waiver of compensation.

Some may argue that a woman’s right to divorce should be an inalienable entitlement that cannot be sold or bartered via a coercive tort judgment. However, such a conclusion ignores common practices within the Rabbinical courts. These courts generally try, even though they are criticized for it, to pressure the husband to give the get within the framework of what is permissible under halakha while avoiding the risk of a coerced get. As part of these efforts, the courts pressure women in certain cases to pay money to their husbands so that the latter will agree to give the get. The Rabbinical courts encourage this extortion due to a lack of alternatives, as the court cannot give the get in place of the husband. In practice, under certain circumstances the Rabbinical court pressures women, for her own sake, to give her husband money so that he will give her a get. This process makes it clear that the get is, in effect, purchased, and that therefore, the right to divorce is not an inalienable entitlement.

On the other hand, when acknowledging the civil right to autonomy and freedom, the right to divorce may be interpreted as an inalienable right that cannot be transferred. Just as someone cannot sell himself into slavery or agree to be abused, a person cannot waive his right to freedom and autonomy. When the husband withholds from his wife her freedom to marry another person, recognized as fundamental right under international law, he is violating the rule of inalienability, or the third rule that Calabresi and Melamed presented. It can be argued that the legislature gave the Rabbinical court sole authority to apply the personal law, and to withhold, under certain circumstances, the freedom and autonomy of a woman. That is to say, that the right to re-marry is not an absolute right, especially as Israel qualified its acceptance of the international right due to the application of religious law to matters of marriage and divorce. However, these types of cases present an opportunity to integrate the civil law with the religious law, by providing the secondary remedy alongside the primary remedy. The civil law cannot, in fact, give the woman a get, and it does not claim to do so. But it can give her compensation if her autonomy is violated. Even if the

131. The reservation was intended to deny the right of marriage to couples who are halakhically ineligible to marry, including those who have no religion, intermarriages, and those interested in civil marriage (rights that exist in other places in the world where Jewish people can legally marry). But in practice, the reservation also recognizes discrimination against women through withholding the right, in this case, of the individual husband, even in eligible circumstances where there was no original intention to deny the right, since the husband controls the giving of the get under the personal law. For example, Israel qualified its acceptance of the International Covenant on Civil and Political Rights: “With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned. To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law.” International Covenant on Civil and Political Rights, Ratification of Israel, October 3, 1991, 1651 U.N.T.S. 567, available at http://untreaty.un.org/humanrightsconvs/Chapt_IV_4/reservations/Israel.pdf.
Rabbinical court has not decided her case, the very passage of time may establish the failure to dissolve the marriage as a tort under tort law. As mentioned, an analogy to the fourth category, which concerns women divorced against their wills, also indicates that there does not need to be concurrence between the personal law and the tort law. Here a woman is not divorced under the religious law, but from the tort perspective, she deserves compensation. This is not a contradiction. Just as in the fourth category, tort law provides access to a remedy unavailable under personal law. Some suggest that, under halakhic law, trapping a woman in marriage by refusing her a get would be considered a “mistaken purchase,” because she entered the marriage with the understanding that she would later have the option of divorce. There are those who have centered this obligation in the ketuba (Jewish marriage document). Currently, such actions using this framework are still pending, with no final decision on the subject.

In summary, if we accept that status under family law can be separated from tort damages, then we can better understand the legal and practical consequences of negligence action against recalcitrant husbands when there was no Rabbinical judgment made on the status of the marriage.

CONCLUSION

Calabresi and Melamed presented a framework that included two alternative forms of protection for a single legal entitlement, a primary remedy and a secondary remedy, while referencing a liability rule in favor of the damaged party, providing the secondary remedy when the primary remedy is not granted.

It can be assumed that Calabresi and Melamed did not necessarily consider situations such as intrafamilial tort actions when they formulated their rules, but they simply laid a theoretical foundation, primarily illustrated through the concept of nuisance. The goal of the comparison made in this article is not only to explore whether this framework is applicable to family issues and to the relationship between intrafamilial tort lawsuits and family law. The purpose is to also develop a framework that elucidates these increasingly common lawsuits and that may be applied in other countries with a system of parallel religious and civil courts. The liability rule in favor of the plaintiff serves to lay the foundation for understanding how tort law, by providing a secondary remedy, fills a void created by family law when it fails to provide the primary remedy. Calabresi and Melamed’s framework also serves as a mold to create rules applicable to other substantive areas, such as those I developed which exclusively address intrafamilial tort actions.

This framework based in tort law may provide legitimacy to decisions of family courts upholding the civil actions of women who were refused a get, as there are those who argue that the courts are politically motivated, aiming to advance women’s rights or goad the Rabbinical courts through such jurisprudence.

The framework of the liability rule in favor of the plaintiff is part of a central basis for an economic approach in tort law. It has no political agenda, either feminist or anti-religious.

The analysis in this article helps examine the implications of the law-and-economics approach for family law. Calabresi was one of the founding fathers of law-and-economics, and the Calabresi and Melamed article is one of the seminal works in the field. This contribution is significant, since family issues have historically been viewed as less amenable to classic law and economics approaches to research.

Under this analysis, it is permissible for women who have been refused a get to take advantage of tort law to accomplish their personal and legal goals. Therefore, beyond a general understanding of the friction between tort law and family law, the major contribution of Calabresi and Melamed’s liability rule in favor of the damaged party is its ability to resolve some of the complaints around the political motives of the family courts.

This innovation may strengthen the basic recognition of actions against recalcitrant husbands. This recognition certainly needs significant support from the theoretical framework of tort law, because these cases are so far only recognized by the lowest courts and are being challenged by several commentators.

An even larger innovation may be strengthening the 2008 decisions of the family courts, which do not constitute precedent—both those that allowed civil actions in cases without Rabbinical rulings and those that awarded damages for the period before a Rabbinical decree. The even greater contribution of this framework is its ability to validate actions against husbands who refuse to grant gets even when the Rabbinical court has not reached a judgment and has issued no decree, based on an analysis of the rule of negligence and the suitability of the liability rule in favor of the plaintiff. This analysis may also be expanded to other categories and actions, including those actions brought by children against their parents.

We have therefore discovered that Calabresi and Melamed’s framework is fundamentally applicable to tort civil actions in the family, even in Israel’s complex system of parallel courts.

The details of the framework of the liability rule in favor of the plaintiff are not always applicable to the five categories that were presented. Despite this variance, all of the categories involve the protection of rights on two levels. The outline of Calabresi and Melamed’s rationale applies to each case, revealing that tort law and family law are not necessarily as separate or conflicting as they first appear. Instead, there is an understanding that the same entitlement can be
protected from different directions and from different perspectives. In some instances, there is a hierarchy between the types of protection of the entitlement, with the primary remedy on one level, and the secondary remedy on another level, just as with the liability rule. In other instances, there is no real possibility of achieving the primary remedy, but the basic rationale still applies once we consider incentives for private negotiations, the selling of rights, and appropriate monetary consideration.

Some of the categories do not require a theoretical basis like the framework that Calabresi and Melamed presented, and in those categories, the framework served primarily to present the issues in an orderly fashion. The framework applies specifically to the more delicate developments, in which some sort of conflict exists between the religious court and the civil family court, as well as between personal law and tort law. Specifically such cases can ground themselves more securely in the liability rule in favor of the plaintiff. In the first, second, and third categories, an independent dynamic exists, and there is no conflict between the example cases and the systems of law. The fundamental suitability of the liability rule to the fourth and fifth categories, and particularly to possible developments in these categories, is the major innovation of the framework, and is what might give these developments a theoretical-tort basis that family court judges and appellate court judges can use to further develop the 2008 cases.

Following an economic approach, Calabresi and Melamed united topics that seem disparate, as they belong to different fields: the primary remedy that protects property and the secondary remedy that gives tort compensation for an infringement on property. This unification may seem somewhat artificial when it involves family law and tort law, both generally as well as particularly in Israel, where the law and courts are so clearly separated. But an examination of Calabresi and Melamed’s framework also taught us that not all intrafamilial tort actions create a conflict between the religious court and the family court as expected. Sometimes there is harmony amongst the courts. In the first and second categories of actions, for example, there is no interaction among the different legal systems or among the different courts. In the third category, there is a productive interaction, and the legal systems effectively work together in a complementary manner. The fourth and fifth categories invite those more delicate situations that provide an example of the conflict of jurisdiction and law between these courts.

I hope that the application of Calabresi and Melamed’s framework regarding the choice between different forms of protection for the same entitlement, or the liability rule in favor of the plaintiff, successfully leads all those involved in the field to understand that even in the more complicated categories, there is a civil-theoretical infrastructure that provides legal legitimacy to these actions.

133. Calabresi & Melamed, supra note 2, at 1089.