THE INTERPLAY BETWEEN TORT LAW AND RELIGIOUS FAMILY LAW: THE ISRAELI CASE $^{\#}$

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I. INTRODUCTION

This article concerns the application of tort law doctrines by Israeli courts to ameliorate suffering caused by the governance of religious law over family matters, in general, and the suffering of Jewish women seeking divorce in particular. Part II describes the role of religious law in Israeli family law and the methods used by Israeli civil court judges to evade the implications of applying patriarchal and often archaic religious laws, and then describes the particular problems encountered by Jewish women attempting to obtain a divorce under Jewish religious law as well as the difficulties encountered by a civil system coping with this problem and working to formulate a useful solution. Part III surveys the development of a novel tortious cause of action in Israeli family (civil) courts for refusal to give a *get*, a Jewish contract of divorce, which can only be given with the consent of both parties. In Part IV, we consider the various dilemmas such a tort claim raises, with a focus on difficulties that arise from examining the issue in light of traditional tort law principles, mainly the rule of negligence.

II. DIVORCE IN ISRAEL

In order to understand and examine the tortious cause of action of *get* refusal as well as the dilemmas it raises, we briefly examine marriage and divorce law in Israel and the basic principles of Jewish divorce law.

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A. Law and Religion in Israeli Family Matters

Israeli family law is characterized by a split in law as well as a split in jurisdiction. While some aspects of family law are governed by civil (and territorial) law, other aspects are governed by religious law applicable to Israeli citizens based on religious affiliation.¹ Additionally, some issues fall under the jurisdiction of Israeli family (civil) courts while others are adjudicated by the relevant religious courts.² It is worth noting that religious affiliation for purposes of law and jurisdiction is independent of personal beliefs and instead relies on Israeli law, which determines religious affiliation by the relevant religious laws.³ Thus, even those who identify themselves as secular, atheist, or agnostic as a matter of personal belief may still be considered members of a religious community for purposes of law and jurisdiction.

Since religious law is often patriarchal in a way incompatible with modern liberal values,⁴ Israeli civil court judges have sought jurisdiction over matters relating to family life and have attempted to subject these matters to civil secular laws. One method of doing so is by characterizing various matters as civil, rather than personal, and giving a narrow interpretation to personal matters. For example, prior to the enactment of the Spouses Property Relations Law in 1973,⁵ the Israeli Supreme Court developed a case law-based presumption of community property under which property relations between spouses were governed. This was done by characterizing property relations as exogenous to "matters of marriage" over which religious laws would hold sway, and instead as questions of civil property, the provenance of secular laws.

^{1.} See Ariel Rosen-Zvi, Family and Inheritance Law, in INTRODUCTION TO THE LAW OF ISRAEL 75, 75-76 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995). The Israeli application of religious laws to "matters of personal status" was inherited from the Ottoman Empire's *millet* (religious community) system, which was preserved by the British Mandatory rule and later adopted by the Israeli legislature with certain amendments. *Id.* at 75. Not all religious communities are recognized under Israeli law. The list of recognized religious communities appears in the Second Supplement to the Palestine Order in Council. *Id.* at 76.

^{2.} Several religious courts are recognized under Israeli law as having judicial authority over members of their religious communities: Rabbinic Courts (authority over Jews), Shari'a Courts (authority over Muslims), Druze Religious Courts (authority over Druze), and Courts of the Christian Communities (authority over members of the relevant recognized Christian communities).

^{3.} Rosen-Zvi, supra note 1, at 78.

^{4.} It must be emphasized that most religious laws could be interpreted to be more compatible with liberal values. Nonetheless, relevant religious courts in Israel primarily adhere to patriarchal and fundamental interpretations. *See, e.g.*, Moussa Abou Ramadan, *The Shari'a In Israel: Islamization, Israelization and the Invented Islamic Law*, 5 UCLA J. ISLAMIC & NEAR E.L. 81 (2005/2006) (concerning this process in the Shari'a Courts).

^{5.} The Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1972-73) (Isr.).

community property was originally developed based on contractual principles according to which spouses implicitly consented to jointly own property accumulated during their marriage. Framing the issue in terms of an implied contract assisted the court in portraying the issue as a civil, rather than a personal, matter.

Marriage and divorce (in the narrow sense) are personal status matters governed almost exclusively by religious law and subject to the exclusive jurisdiction of the religious courts. Therefore, the involvement of the civil courts in the law that governs marriage and divorce has been very limited. This has created a serious problem for Jewish women because under the Jewish law of divorce they can find themselves unable to break free from a marriage or forced to pay substantial amounts of money in order to obtain the Jewish bill of divorce.

B. Principles of Jewish Divorce

Under Jewish law, divorce is a private act of the parties and not a judicial act; no religious authority can dissolve a valid matrimonial bond.⁶ Jewish divorce occurs when the husband, by his free will, delivers a bill of divorce (a *get*) to the wife, who consents by accepting it. While the consent of both husband and wife is required for the divorce to be realized, there is a significant difference between the requirement for the husband's consent and that of the wife's.

Originally only the husband's consent for divorce was required according to the *Torah* (Old Testament); the husband could divorce his wife against her will. The requirement that a wife consent to divorce is attributed to Rabbi Gershom who, in the 11th century, issued an edict that prohibited husbands from divorcing their wives against their will. However, under Jewish law, biblical law takes precedence over rabbinical law. Consequently the husband's consent is much more important than the wife's.

A get given without the complete free will of the husband is known as a "coerced get" (get meuseh) and is void. A woman that obtained such a forced get is still married under Jewish law. On the other hand, a get accepted by the wife without her complete free will is not necessarily invalidated. It should be emphasized that when we say that a woman who obtained a coerced get is still married, this is not a mere formality. Under Jewish law, any children born to a married woman from a man other than her husband are considered mamzerim. Mamzerim, the children of married women with men who are not their husbands, and their descendants may only marry other mamzerim under Jewish law and face enormous social stigma tantamount to being labeled a "bastard"; however, the children of married men who are not their wives are not considered

^{6.} There are rare situations in which a rabbinical court can declare a marriage to be annulled.

mamzerim. Furthermore, under Jewish law, a man may obtain a permit to take a second wife if his first wife refuses to accept a *get*, whereas a married woman can never obtain a permit to marry another man. Though Israeli law establishes bigamy as a criminal offense, a permit from a rabbinical court to take a second wife constitutes a defense.⁷ It should be clear, therefore, that although both men and women can find themselves unable to break free from their marriage under Jewish divorce law, the likelihood of this scenario is much greater for women and the implications are more severe.

Though, as noted, rabbinical courts cannot create a divorce and end the parties' marriage, they can issue an order directing the husband to give, or the wife to accept, the *get*. Such orders are issued when the rabbinical court finds that a party has proven that grounds for divorce exist under Jewish law. Here, "grounds for divorce" mean those that justify issuing a court order for a spouse to cooperate with the process of the *get*, rather than grounds for divorce in the civil meaning—the grounds that serve as the basis for a judgment that brings the marriage to an end.

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 holds that a party is compelled to give or accept a *get* [hereinafter compulsion decree]. When a rabbinical court issues a compulsion decree against a husband and orders him to give his wife a *get*, coercive measures, including fines and imprisonment, may be used to compel him to give the *get* without affecting its validity.⁸ Nonetheless, only a handful of compulsion decrees are issued each year. For the thousands of women who apply for divorce each year, this option is largely irrelevant.⁹

9. According to the management of the rabbinical courts in 2008, 8,080 claims for divorce were filed. This number refers to the cases where divorce was contested (in addition, 8,787 proceedings were initiated where the couples reached a settlement outside

^{7.} Section 176 of the Penal Law specifies bigamy as a criminal offense, whereby "[a] married man who marries another woman, or a married woman who marries another man, is liable to imprisonment for five years." Penal Law § 176, 5737-1977, Special Volume LSI 50. Section 179 of the Penal Law states that the criminal prohibition does not apply to the second marriage of a Jewish man who has received permission to remarry from a rabbinical court. Though rabbinical courts do not use this option frequently, they do when the husband establishes grounds for divorce against the wife and she refuses to accept the *get. Id.* § 179. Often, the mere knowledge of this option induces the wife to accept the *get.*

^{8.} According to traditional Jewish law, additional means may also be taken, such as corporal punishment and even threat of death. *See also* MOSES MAIMONIDES, MISHNEH TORAH: HILCHOT GERUSHIN: THE LAWS OF DIVORCE ch. 2 para. 20 (Eliyahu Touger trans., 1995) (providing an explanation of how the *get* obtained under these circumstances is not void). 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.*

The next level of a decree a rabbinical court may issue is "an obligation to realize a *get*" (*khiyuv get*) [hereinafter obligation decree]. Under this decree, the husband is obligated to give or the wife is obligated to accept the *get*. The practical implications of such a decree are very limited and may include an enlarged sum of spousal support for the wife. However, the sum must not be too large or else it will be considered a fine that renders the *get* void.¹⁰ A decree stating an obligation to give or accept a *get* is enforced primarily through psychological measures including community pressure.¹¹ Furthermore, though obligation decrees are not as rare as compulsion decrees, very few of these decrees are issued each year.

In the majority of cases, where a rabbinical court does not issue a decree rejecting the claim for divorce, its decree instead states a recommendation that the parties divorce [hereinafter recommendation decree]. Such a decree means that while it would be desirable for the spouses to be divorced, no ground exists for an obligation to cooperate with a divorce or (of course) to coerce a divorce. Thus, this type of decree has limited practical impact.

Even when grounds for an obligation decree exist, rabbinical courts do not hasten to issue such a decree and the process of obtaining it may take a few years.¹² Furthermore, if the husband agrees to give the wife a *get* with conditions, such as requiring the wife to give up some or all of her property rights or pay a sum of money in order to receive a *get*, no justification exists to apply decrees against him in the eyes of the religious courts.¹³ If the wife refuses to accept the conditions set by her husband, it is she who prevents the realization of the *get*.

It should be rather obvious that under this system of divorce husbands have a strong incentive to refuse to give a *get* or condition the giving of a *get* on various requirements. As a result, women find themselves unable to break free from a marriage or subject to extortion by their husbands. Until recently, these women found no recourse in the civil court system, which traditionally avoided interfering with the absolute control of the religious system over issues of divorce.

10. If such a decree is issued against the wife, she loses her right to spousal support.

11. 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 Israeli society at large today.

12. See discussion of cases, infra Part III.

13. Recall that divorce under Jewish law is a private act between the parties and cannot be created by a court. Rabbinical courts sometimes support and encourage such "deals" between the husband and wife.

the court and turned to legal proceedings only to get the rabbinical court's approval for the settlement and arrange the *get*). *See* http://www.rbc.gov.il/statistics/2008/2008.pdf. However, divorce proceedings do not necessarily begin with a direct claim for divorce. Women can file a claim for spousal support, for child custody, for "peace in the home" (*shlom ba'it*) and for spousal support, and these proceedings are usually part of the divorce process tactics. If we also take these proceedings into account, then more than 8,000 additional proceedings where divorce is disputed are initiated each year. *See id.*

This has started to change with the recognition of a tortious cause of action for "*get* refusal."

III. THE EMERGENCE OF THE TORT OF "GET REFUSAL"

This Part describes the process of the development of a tortious cause of action for "*get* refusal" in Israeli (civil) family courts, detailing relevant milestones in the development of this cause of action. In five groundbreaking cases between 2004 and 2008, women have been awarded damages against their recalcitrant husbands for refusal to give a *get*.¹⁴ In four of these cases, the women involved obtained an obligation decree from a rabbinical court and in one case the wife obtained a recommendation decree. Nevertheless, in each case the husband refused to comply with the decree. The litigation in all cases was initiated by the wife after many years of failure to obtain the desired *get* -- in one case after twenty-nine years. All cases involved violence or some form of abuse. Nonetheless, in none of these cases was a compulsion decree issued by the rabbinical court.¹⁵ Furthermore, though the rabbinical courts adjudicating these cases recognized violence and abuse by the husband, the divorce decree was only issued after long and exhausting litigation.

The first case on the merits of the tort of *get* refusal was decided by Judge Menachem HaCohen of the family court in Jerusalem in December of 2004 [hereinafter *The 1st Jerusalem* case].¹⁶ Judge HaCohen held that refusing to comply with the rabbinical court's obligation decree was negligent within the meaning of Article 35 of the Tort Ordinance.¹⁷ Judge HaCohen awarded the

17. Section 35 of the Tort Ordinance [New Version] states:

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

^{14.} Note that the cases are not presented here chronologically, but instead in an order that helps explain the elements of the tort.

^{15.} Violence is not recognized as grounds for a decree compelling a *get*. In fact, only recurring violence is considered grounds for divorce at all.

^{16.} FamC (Jer) 19720/03 K.S. v. K.P. [Dec. 21, 2004] (unpublished). Prior to that, two decisions in motion to dismiss proceedings recognized the existence of a cause of action in torts for *get* refusal in principle. *See* FamC (Jer) 9101/00 Jane Doe v. John Doe [2002] (unpublished); FamC (Jer) 3950/00 Jane Doe v. John Doe [2001] Dinim Mishpacha 2004 A 662.

woman 200,000 NIS (approximately US \$50,000) for each year she was denied the *get* after the rabbinical court issued the obligation decree in September 2003. The damages were awarded for the emotional harm caused to the woman, the denial of her right to remarry, infringement on her right to bear more children, and infringement upon her autonomy. Judge HaCohen awarded the woman an additional 100,000 NIS (approximately US \$25,000) in aggravated damages. The wife contended that her husband's negligent behavior started in 1994, two years after she filed for divorce in the rabbinical court. She had filed for divorce in 1992 and lived apart from her husband from that time on. She contended that a reasonable man could expect to cause severe emotional damage to his spouse by refusing to provide a *get* for two years after divorce proceedings had been initiated and where the spouses were no longer living together. Judge HaCohen denied this claim, stating that the negligent behavior of the husband was limited to his disobedience of the rabbinical court decree.¹⁸

In 2006 Judge Tzvi Weitzman of the family court in Kfar Sava presided over a case in which a woman filed a tort claim against the estate of her husband. The woman filed the claim twenty-nine years after a rabbinical court had issued a decree ordering the husband to give his wife a *get* and thirty-nine years after the wife had left her husband due to severe violence [hereinafter *The Kfar Sava* case].¹⁹ Only the death of her husband released the woman from the (formal) bonds of marriage. Following Judge HaCohen, Judge Weitzman found that the refusal to comply with the rabbinical court's decree was negligent behavior.²⁰

18. A similar case with similar results ended in a judgment exceeding 400,000 NIS, including 100,000 NIS in aggravated damages. FamC (Rishon LeTzion) 30560/07 H.Sh. v. H.A. [Feb. 12, 2008] (unpublished decision by Judge Hannah Kitzis).

19. FamC (Kfar Sava) 19480/05 Jane Doe v. Estate of John Doe [Apr. 30, 2006] (unpublished). Note that it took the rabbinical court 10 years to issue the decree in a severe violence case.

20. Judge Weitzman also held that the husband's refusal to comply with the decree of the rabbinical court violated the statutory duty to obey court decisions in Section 287(a) of the Penal Law, 5737-1977, S.H. 864, 226, and thus constituted 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

negligence. Any person who causes damage to any person by his negligence commits a civil wrong.

Civil Wrongs Ordinance (New Version) § 35, 5732-1972, 2 LSI 12 (1972) (Isr.). It should be noted that Israeli tort law recognizes the tort of negligence even in cases of deliberate and malicious cases and there is no clear-cut division in Israeli law between intentional and unintentional torts. *See also infra* text accompanying note 62.

Judge Weitzman awarded the woman 3,000 NIS (about US \$750) for each month she was denied the *get* following the rabbinical court's decree for a total of 711,000 NIS (approximately US \$180,000). Judge Weitzman stated in dictum that he would have reached the same decision had the rabbinical court not issued an obligation decree and instead issued a recommendation decree, if only in harsh cases.²¹ However, here again the court only recognized tortious behavior as beginning on the date on which the rabbinical court issued the decree of divorce and ignored the ten years that had passed since the woman left the house and filed for divorce.

Judge Weitzman's dictum was applied in a case that was decided by Judge Tova Sivan of the Tel Aviv family court in December 2008 concerning a couple married for only three months before a breakup precipitated by the husband's violence [hereinafter *The Tel-Aviv* case].²² Proceedings in the rabbinical courts lasted eleven years and ended only with a recommendation decree, rather than an obligation decree. Judge Sivan, adjudicating this case, applied Judge Weitzman's dictum by holding that the recommendation decree was sufficient to render the husband's refusal to grant a *get* unreasonable and make him liable for negligence.

A groundbreaking case decided by Judge Grinberger of the family court in Jerusalem is worthy of special attention for offering a significantly different formulation of the cause of action for *get* refusal [hereinafter *The 2nd Jerusalem* case].²³ In this case a wife filed for divorce and left the house she shared with her husband in 1998. In 2006 the High Rabbinical Court issued an obligation decree.²⁴ In addressing the cause of action for negligence, which he recognized, Judge Grinberger held it had arisen prior to, and independent of, the rabbinical

> contemplated by such enactment: Provided that such other person will not be entitled by reason of such failure to any remedy specified in this Ordinance if, on a proper construction of such enactment, the intention thereof was to exclude such remedy.

> (b) For the purposes of this section, an enactment will be deemed to be for the benefit or protection of any person if it is an enactment which, on a proper construction thereof, is intended for the benefit or protection of that person or of persons generally, or of any class or description of persons to which that person belongs.

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

21. The fact that the action was filed after the husband had died was relevant for this purpose as there was no possibility of a coerced *get*.

22. FamC (TA) 24782/98 N.S. v. N.Y. [Dec. 14, 2008] (unpublished).

23. FamC (Jer) 6743/02, K. v. K. [July 21, 2008] (unpublished).

24. This was an appeal from the district rabbinical court that denied the woman's claim.

court decree.²⁵ According to Judge Grinberger the husband's refusal to provide a *get* itself constituted negligent behavior once one year had elapsed since the woman filed for divorce. It is important to note that Judge Grinberger refused to determine as a rule of thumb that it is unreasonable to deny a wife a *get* for more than a year after she has made her claim. Instead, he held that there may be circumstances in which a person may reasonably refuse divorce for more than a year and that the amount of time required before refusal becomes unreasonable and constitutes negligent behavior should be determined on a case by case basis.

Through their decisions in the *get* refusal cases, the judges have undoubtedly taken a bold step in helping Jewish women in their struggle to break free from unwanted marriages. To be sure, it is hard to remain indifferent to the plight of the women in the cases that have reached the courts. Nevertheless, they seem like erratic ad hoc responses to perceived injustices and fail to offer a calculated and coherent theoretical framework for the tort of *get* refusal. The significance of coherence is intensified by the fact that the judgments were given by family courts judges and thus they do not serve as binding precedents. Thus, disagreement between judges makes it easier in future cases to deviate from existing rullings and open up even further issues for debate.²⁶

Recognizing a cause of action for *get* refusal in torts gives rise to various complex dilemmas that must be addressed in order to develop such a theoretical framework. The next Part explores two such dilemmas. The first, to be dealt with in Subpart A, concerns the conflict between the religious and civil systems in Israel. The second, to be dealt with in Subpart B, focuses on a pure tort perspective and addresses the difficulties in articulating the tortious behavior. Our attempt is to offer solid theoretical grounds, which are missing from the current case law, that can serve as a basis for developing the cause of action for *get* refusal.

^{25.} Judge Grinberger also recognized a cause of action under the tort of breach of a statutory duty for failure to obey the rabbinical court's decree, as in the *Kfar Sava* case. *See supra* text accompanying note 20. This cause of action was found to have arisen on the date the decree was issued.

^{26.} It should be noted that although Israel is a common law country, and as such is subject to the binding precedent principle, this principle is somewhat irrelevant in practice, at least for the time being. All the judgments on the issue of tort compensation in cases of refusal to give a *get* were given in first instance, i.e. family court. There are no judgments in the appeal instances, namely the Magistrates' Courts and the Supreme Court. For various reasons, there are significantly fewer precedents in Israeli family law than in other fields of law, and therefore decisions of the courts of first instance grant more power than one might suppose. According to Israeli law, a precedent by the Supreme Court binds all the lower instances, although it does not bind the Supreme Court itself. A precedent set by the Magistrates' Court instructs and directs the lower instances (family courts, in our case), but they can deviate from it if they present good reasoning for doing so.

IV. DILEMMAS

A. The Civil Tort Claim and the Religious Laws of Divorce

The civil tort claim of *get* refusal creates a conflict between the civil and religious systems in Israel on two levels. The first conflict, which is also the easier one to address, subsists at the level of jurisdiction. Rabbinical courts have exclusive jurisdiction over matters of divorce.²⁷ Rabbinical court judges and various religious scholars argue that a tort claim for *get* refusal concerns matters of divorce and should therefore fall within their jurisdiction.²⁸ In their view, family court judges adjudicating such tort claims are interfering with the exclusive jurisdiction of the rabbinical courts over matters of divorce and with the governance of religious laws in such matters.²⁹

While tortious claims for *get* refusal may indeed affect the *get* negotiations between the parties, we find the rabbinical authorities' claim for jurisdiction to be unfounded. Under the Court for Family Affairs Law, intrafamilial tort claims clearly lie within the exclusive jurisdiction of the family courts.³⁰ As noted, the meaning given by the Supreme Court to "matters of divorce" (or marriage) is narrow, focusing on issues such as validity and procedure. Indeed, many other legal proceedings between spouses that are ordinarily litigated in family courts might also indirectly affect *get* proceedings.³¹ Therefore, there is no ground for the arguments concerning the rabbinical courts' jurisdiction over *get* refusal tort claims.

The second problem is more complex and also more substantial. As explained above, a *get* given without the husband's free will is considered coerced, and hence null and void. Several rabbinical judges and scholars have

^{27.} Court for Family Affairs Law 1995 § 1, 5755-1995, S.H. 1537, 393 (Isr.). Tort law claims on grounds of domestic violence, abuse, defamation, child kidnapping, breach of promise to marry, and even breach of visitation rights were and are still dealt with in civil family courts.

^{28.} Rabbi Shlomo Dichovsky, *Tze'adei Achifa Mamoni'im Keneged Sarvanei Get* [Monetary Enforcement Measures Against Recalcitrant Husbands], 26 THUMIN 173 (2006); Rabbi Oriel Lavie, Sidur Get Le'achar Khiuv Ha'Ba'al Bepitzui Kaspi Leishto [Arranging a Get After Holding the Husband Liable to Pay Compensation to His Wife], 26 THUMIN 160 (2006).

^{29.} See generally Dichovsky, supra note 28; Lavie, supra note 28.

^{30.} Court for Family Affairs Law 1995 § 1. The Israeli Supreme Court sitting as a High Court of Justice also held that even the parties' consent cannot give the rabbinical court jurisdiction over civil matters such as torts. *See* HCJ 6103/93 Levi v. Regional Rabbinical Court, Maale Adumim [1994] IsrSC 48(4) 591.

^{31.} E.g., division of property, spousal support decrees, and the like. Thus, for example, the duty of spousal support ends once the *get* is given and received. Recognizing a woman's right to support and the monthly amount she is awarded might influence the husband to give the *get*, as he has an interest in breaking free from his duty of support.

argued that a man who gives his wife a *get* in order to avoid paying damages is not acting out of free will.³² This problem is aggravated by the fact that in many cases the reason for filing the suit is not the compensation in itself but rather in order to induce the husband to give a *get*.³³ Some women file such suits to make their husbands understand that their refusal to give a *get* is not in their best interests and that they should reach a compromise with them instead: specifically, the wife will agree to drop claims for compensation in exchange for the *get*. Family court judges may thus face a dilemma when awarding damages that could render the *get* null and void, if it is eventually given. Should the possibility of coercing a *get* and the religious implications of coercion be relevant considerations for civil family court judges adjudicating these claims?

Two opposing positions have been adopted in Israeli scholarly writing on the role that validity of the *get* should play in *get* refusal tort decisions. On the one hand, Yehiel Kaplan, a researcher of family law and Jewish law, and Ronen Perry, a researcher of tort law, argue that family law in general, and the possibility of a coerced *get* in particular, must play a central role in shaping a tortious claim for *get* refusal.³⁴ Kaplan and Perry construct the tortious claim for *get* refusal in a manner that minimizes the undesirable possibility of a coerced *get* by integrating principles of both tort and Jewish divorce law.

According to Kaplan and Perry, recognizing a tortious cause of action for *get* refusal must be preconditioned on a rabbinical court decree that the marriage should end, where this decree carries some degree of obligation.³⁵ In other words, in their opinion, a recommendation decree is not enough.³⁶ Therefore, if the rabbinical court only issues a recommendation decree, or if it does not issue any decree at all concerning the *get*, a tort claim should not be recognized. In those rare cases when the rabbinical court does issue a compulsion decree, no additional limitations are required to ensure that recognizing a tortious cause of action and awarding damages will not affect the *get*'s validity.³⁷ This is because once a compulsion decree has been issued, all measures, even coercive ones, may be used

^{32.} Yehiel S. Kaplan, Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law, 15 JEWISH L. ANN. 57, 61-107 (2004); Yehiel Kaplan & Ronen Perry, AL Achraiutam Be'Nezikin shel Sarvanei Get [Tort Liability of Recalcitrant Husbands], 28 EIUNEI MISHPAT [TEL AVIV U. L. REV.] 773, 782, 802, 804 & n.110 (2005) (Isr.). If damages are awarded after a rabbinical court has ruled that the husband is compelled to give the get, this problem does not arise. As noted, however, this is not probable.

^{33.} This was indeed the result in the two cases related to motions to dismiss. *See supra* note 16. When the motion was rejected, the husbands agreed to give a *get*.

^{34.} See generally Kaplan & Perry, supra note 32.

^{35.} Id. at 782, 818-25.

^{36.} Id. at 815-16.

^{37.} Id. at 782, 811-12 & footnote references.

to compel the husband to give the *get* without affecting its validity.³⁸ If, however, only an obligation decree is issued, then additional constraints must be placed in order to avoid a coerced *get*.

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According to Jewish *Halakha*, a decree of obligation has only limited practical implications, but once it has been issued against the husband, greater maintenance may be awarded to the wife. Based on this implication of obligation decrees, Kaplan and Perry suggest that the damages awarded in *get* refusal tort claims should be the same as (but not larger than) enlarged spousal support payments.³⁹

In contrast to Kaplan and Perry, Yifat Biton, who engages in feminist analysis of tort law, offers an entirely different ideological position.⁴⁰ Biton rejects the subjection of the tort claim to religious family law, arguing instead that its independence must be preserved. In her opinion, Kaplan and Perry's analysis remains entirely within the framework of the oppressive and anti-feminist restrictions imposed by family law on the rights of Jewish women.⁴¹ She particularly deplores the suggestion of limiting damages regardless of the woman's real suffering.⁴² Biton proposes that tort law can provide an impetus for changing the attitude of family law towards women by providing them with a powerful tool in their struggle for a get.⁴³ Furthermore, Biton sees Kaplan and Perry as representing an objectionable paternalistic attitude toward women.⁴⁴ In her view, even if Kaplan and Perry's concerns that a coerced get is invalid are justified, the correct course of action would nonetheless be to enable women to exercise their absolute right to choose between the various options – exhausting their tort claim versus their ability to obtain a get in accordance with religious law.⁴⁵ According to Biton, there will always be women who prefer economic

^{38.} *See supra* note 8 and accompanying text. If the amount is too excessive, then, despite the obligation decree, it will be considered a financial coercion that renders the *get* void. *See* Kaplan & Perry, *supra* note 32, at 782, 805-06.

^{39.} Kaplan & Perry, *supra* note 32, at 782-84, 825-30. For example, if the rate of maintenance is 100, and the rate of enlarged punitive maintenance is 120, the punitive element in this enlarged but not excessive maintenance payment is 20, whereas the "pure" tort damage is completely unrelated to the amount of maintenance and can be much higher.

^{40.} Yifat Biton, Inianim Nashi'im, Nituach Feministi Ve'Hapa'ar Hamesukan Beineihem – Ma'aneh Le'Yehiel Kaplan Ve'Ronen Perry [Feminine Matters, Feminist Analysis and the Dangerous Gap Between Them – A Response to Yehiel Kaplan and Ronen Perry], 28 EIUNEI MISHPAT (TEL AVIV U. L. REV.) 871 (2005).

^{41.} Id. at 871.

^{42.} Id. at 884-88.

^{43.} Id. at 888-98.

^{44.} Id. at 874-80, 883-84.

^{45.} Id. at 897-98.

benefits following years of terrible struggle to the possibility of getting a divorce. $^{46}\,$

When we examine the cases addressing the tort claim of *get* refusal, we see that the judges adjudicating these cases have indeed found the issue of a coerced *get* to be a factor that should be taken into consideration. Thus, as a policy, they have been more inclined to follow the approach put forward by Kaplan and Perry. However, not all cases raise this dilemma in practice. For example, the *Kfar Sava* case concerned a suit against the husband's estate following his death. In such cases, compensation becomes the only issue, as the marriage was dissolved by the husband's death and so no issue of divorce and a coerced *get* arises. Nevertheless, as shall be discussed in further detail, in adjudicating this case, Judge Weitzamn considered the implications of his judgment on future cases where the validity of the *get* may still be relevant.

Despite their initial position regarding the importance of the *get*'s validity being closer to that of Kaplan and Perry, none of the judges have adopted their practical proposals in their entirety. Judges have chosen either to limit the award of damages to an amount that would diminish the risk of it being considered financial coercion, or have treated a rabbinical court decree of obligation as a precondition for recognizing the tort and hence awarding damages. The strictest approach regarding the amount of damages was presented in the *Kfar Sava* case. Recall that in that case there was no issue of a coerced *get*, as the woman filed her suit following the husband's death, and yet Judge Weitzman awarded the plaintiff only 36,000 NIS (approximately US \$9,000) per year from the time the rabbinical court had decreed that a *get* should be given, expressively arguing that a higher rate might render the *get* void.⁴⁷

In two other cases (the 2nd Jerusalem case and the Tel Aviv case), an intermediate approach was taken, awarding the women between 50,000 - 60,000 NIS (approximately \$12,000 - 15,000) per year. Recall that in the *1st Jerusalem* case the court awarded much more than that. After addressing the problem of a coerced get, the court decided not to limit the damages and awarded 200,000 NIS (approximately \$50,000) for each year from the date of the obligation decree. In addition, in all cases, except for the *Kfar Sava* case, an amount of 100,000 NIS (approximately \$25,000) was awarded in aggravated damages, in spite of the fear of a coerced get.

^{46.} *Id.* at 897-98. Consider the case of a woman struggling through her fertile years to obtain a *get* in order to remarry and have children. After her menopause, the compensation may become the central issue. For a critique of both Kaplan & Perry and Biton, see Benjamin Shmueli, *Pitzui Neziki Le'Mesuravut Get [Tort Compensation for Abandoned Wives (Agunut)*], 12 Hamishpat [College of Management L. Rev.] 285-343 (2007).

^{47.} However, the judge did not restrict his judgments to cases of an obligation decree. On the contrary, he offered, albeit in obiter dictum, to recognize the tort even in harsh cases where a recommendation decree had been issued.

An interesting development occurred in case law regarding the requirement of a rabbinical court decree. As noted, in four of the five cases, judgment was given after a rabbinical court had already issued an obligation decree.⁴⁸ Such a decree is a clear indication not only that the rabbinical courts consider it desirable that the marriage should end, but also that some religious-legal measures can be held against the husband without such measures rendering the *get* void.⁴⁹ Nonetheless, in all these cases it took many years of litigation to obtain the decree (an average of nine to ten years). However, in three of the cases, the court refused to award the women damages for the years prior to the issuance of the decree.⁵⁰ Two developments have signaled a deviation from this approach.

One development occurred in the *Tel Aviv* case, where Judge Sivan recognized a tortious claim where only a recommendation decree had been issued.⁵¹ The court explained that a recommendation decree is enough to serve as a threshold for examining the foundations of the tort. In other words, even if the rabbinical court has only recommended that the husband give a *get* to his wife, it has thereby expressed its general view that the marriage should end.⁵² However, this is nonetheless a different degree of decree from obligation: while it recognizes that the marriage should end, it does not *order* that it do so.

What might be considered an even bolder judgment was given by Judge Grinberger in the 2^{nd} Jerusalem case. Although an obligation decree had already been issued by the rabbinical court at the time the suit was filed, Judge Grinberger recognized the refusal to give the get as tortious behavior even before a decree is issued if the plaintiff could prove that a tortious action had been taken by the husband prior to that time (and the wife did indeed prove it in that case). The judge explained that the tortious act in that case had begun long before the obligation arose and that damages should therefore be awarded from the time

^{48.} FamC (Jer) 19720/03 K.S. v. K.P. [Dec. 21, 2004] (unpublished) [hereinafter *Jerusalem 1st*]; FamC (Jer) 6743/02, K. v. K., [July 21, 2008] (unpublished); FamC (Kfar Sava) 19480/05 Jane Doe v. Estate of John Doe [Apr. 30, 2006] (unpublished) [hereinafter *Kfar Sava*], FamC (Rishon LeTzion) 30560/07 H.Sh. v. H.A. [Feb. 12, 2008] (unpublished decision by Judge Hannah Kitzis) [hereinafter *Rishon LeTzion*]. This should not indicate the prevalence of such decrees. Cause lawyers initiating these cases usually seek the best test cases to set off a new cause of action. Today there are lawsuits pending in family courts where women have filed for damages even before the rabbinical court has issued a decree concerning the *get*.

^{49.} This is in addition to criminal sanctions. Penal Law § 287, 5737-1977, S.H. 864, 226 ("A person who disobeys a direction duly issued by any court, officer or person who acts in an official capacity and is authorized in that behalf is liable to imprisonment for two years.").

^{50.} Jerusalem 1st; Kfar Sava; Rishon LeTzion.

^{51.} Chronologically, this was the second case. However, we have chosen to present the cases in an order that demonstrates the development.

^{52.} This was done by the court in the *Kfar Sava* case as well, although in an obiter dictum, since in that case an obligation decree had been issued.

harm was first caused to the plaintiff.⁵³ Judge Grinberger's approach established the basis for recognizing women's entitlement for compensation for denial of a *get* regardless of whether the rabbinical court has issued a decree concerning the *get*, and regardless of the degree of the decree once issued.⁵⁴ Indeed, nowadays there are a few cases pending in family courts where women plaintiffs have filed for damages before a decree has been issued by the rabbinical court.

As a practical matter, it should be clear that subjecting the tort claim of *get* refusal to the limitations imposed by Jewish divorce law in order to evade the possibility of a coerced *get* may render this tortious cause of action impractical for most women as a tool in their divorce negotiations. This is particularly so if a rabbinical court decree is required as a precondition to sue.⁵⁵ In addition, limiting the amount of damages might also undercut the usefulness of this tort claim in helping women. As long as withholding the *get* or subjecting it to various conditions (economic and otherwise) remains more beneficial to men than the risk of having to pay damages, then the risk of their being sued in torts will not induce them to give a *get*.⁵⁶

Putting these practicalities to one side, it is our view that a tortious cause of action should not be constrained by (religious) family law. Otherwise, it is a concession that such a tort interferes with matters of divorce and thus undercuts the argument supporting the family courts' jurisdiction. In adopting this position we are fully aware that it entails a direct confrontation with *Halakha* and the rabbinical court system and that it might render the *get* void, if eventually given.

^{53.} However, as explained above, Judge Grinberger limited the amount of damages awarded, and, in fact, reached a similar level of compensation to that in the *1st Jerusalem* case, where larger compensation was given, but only for the two years since the obligation decree had been issued.

^{54.} It should be remembered that in this case Judge Grinberger had an obligation decree to signal that, in the eyes of the rabbinical system, the marriage should have ended.

^{55.} Furthermore, one must be aware of the political struggle between the rabbinical courts and the civil system (family courts, the district appellate courts, and the Supreme Court as a second appellate instance). Knowing that their decree is required for a civil tort action, this struggle might lead rabbinical courts to further delay issuing decrees in order to avoid an award of damages based on them. Support for such a prediction of the rabbinical court's reaction can be obtained by a judgment issued by the High Rabbinical Court, No. 7041-21-1 [Mar. 11, 2008] (not published). In this case, the High Rabbinical Court stated that it would not address the claim for a *get* as long as a tort claim is pending in a family court.

^{56.} It must be noted that not all of the husbands who refuse to give their wives a *get* act out of tactical reasons. Some of them are what we would term ideological recalcitrants. Ideological recalcitrant husbands are much harder to influence; there are well known cases where husbands have refused to give their wives a *get* even after a rabbinical court has issued a compulsion decree and have thus found themselves in prison. The most notorious case is CA 164/67 General Attorney v. Yihia [1968] IsrSc 22(1) 29. The defendant, Yihia, died in 1995 in prison after spending 33 years in jail for denying his wife a *get*.

Nonetheless, as we demonstrate in the next section, departing from the requirement of a rabbinical court decree raises difficulties from a pure tort perspective as well.

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B. Defining the Tortious Behavior

As noted, the tortious cause of action for *get* refusal has been recognized under Israeli law mainly within the framework of the general tort of negligence (as obviously no specific tort for *get* refusal is recognized under Israeli tort law).⁵⁷ In considering cases of *get* refusal within the framework of the tort of negligence, Israeli family courts have followed existing case law that recognizes a duty of care between spouses outside the context of divorce (mainly in cases of physical and emotional abuse).⁵⁸ This duty of care is based on the special intimate relationship between spouses that gives rise to a duty to treat each other with respect and decency.⁵⁹ Courts have also recognized that the primarily non-pecuniary damage that may result from breaching this duty of care – mental and emotional damage – merits compensation under the Israeli law of torts.⁶⁰

Applying this framework of analysis to get refusal cases seems like a natural step. Regarding the question of the damages caused by get refusal, in all of the cases described above women sought compensation for harm, including anxiety, shame, suffering, loneliness and distress, during the years awaiting the get – all of which are types of emotional distress. But while the extent of the harm

^{57.} As we have seen, several judges also considered it a breach of statutory duty. We do not address this latter cause of action because in practice it does not enable the ability to award damages in cases in which there is no decree at all, since disobeying the decree is a breach of the general statutory duty to obey courts. *See* Penal Law § 287, 5737-1977, S.H. 864, 226. Accordingly, it is not the main tort considered here. In addition, there are some problems with recognizing a tort based on a breach of criminal duty, and thus the court in the *1st Jerusalem* case doubted the feasibility of taking this path from the outset (even in cases when only compensation from the time of the decree is being discussed and taken into account).

^{58.} See, e.g., FamC (Jer) 18551/00 K.S. v. K.M. [Jun. 7, 2004] (unpublished) (*approved in* FamA (Jer) 595/04, John Doe v. Jane Doe [Feb. 24, 2005] paras. 10-14 (unpublished).

^{59.} See id.

^{60.} See, for example, in Israel, the definition of 'damage' in Section 2 of the Civil Wrongs Ordinance as "loss of life, or loss of, or detriment to, any property, comfort, bodily welfare, reputation or other similar loss or detriment." Civil Wrongs Ordinance (New Version) § 2, 5732-1972, 2 LSI 12 (1972) (Isr.). Since the judgment in CA 243/83 Jerusalem Municipality v. Gordon, IsrSC 39(1) 113 (1985), emotional damage has been recognized through the definition of loss of profit and loss of comfort. See also CA 2034/98 Amin v. Amin [1999], IsrSC 53(5) 69. An English translation of the ruling is available at http://elyon1.court.gov.il/files eng/98/340/020/q07/98020340.q07.htm.

for which compensation is sought raises no difficulty, defining the tortious act, i.e., the breach of the duty of care, gives rise to difficulties and doubts. Before addressing this difficulty, however, we would like to note a particular characteristic that differentiates the Israeli and American concepts of the tort of negligence. In common law there is a clear distinction between intentional torts and unintentional torts that are based on recklessness and negligence. There is thus a greater inclination to accept claims based on intentional torts. For example, as far as emotional and psychological injury is concerned, there is a tendency to accept claims based on Intentional Infliction of Emotional Distress (IIED), while in instances of Negligent Infliction of Emotional Distress (NIED) tort claims are limited only to behavior that is considered "outrageous."⁶¹ Israeli tort law is different in this respect in that it recognizes deliberate and malicious acts as falling under the tort of negligence. And although few torts in Israeli law require an element of malice or outrageous conduct, there is no clear cut division in Israeli law between intentional and unintentional torts.⁶² Thus, the fact that the refusal to give a get and divorce is intentional, does not raise any difficulty in defining it as a breach of the duty of care within the meaning of the Israeli tort of negligence.

The difficulty arises from a different angle. Namely, when does the refusal to grant a divorce constitute a breach of the duty of care? An example might illustrate this problem. Imagine a legal system in which divorce is granted almost immediately when there is mutual consent, but in which a waiting period of one year is imposed on contested unilateral no-fault divorce cases.⁶³ Let us now imagine a wife who fell out of love with her husband many years ago, but who stayed married for the sake of the children. One day, after the children have grown up and left home, the wife decides that enough is enough and tells her husband she wants a divorce. The husband does not consent, and so the woman is forced to wait a year until she can finally divorce. Having to stay officially married for an additional year may have caused her emotional distress. Nonetheless, it can hardly be argued that the husband had a duty to consent to his wife's request to divorce. When is there a duty to cooperate with the process of divorce and thus allow one's spouse to break free from the marriage?

^{61.} Steven Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 704-05 (2000); Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1274, 1325 (1996); RESTATEMENT (SECOND) OF TORTS § 46 (1965).

^{62.} Indeed, in 1998 the Israeli Supreme Court decided that negligence can be fulfilled in deliberate cases too. *See Amin*, para. 13 ("The fact that the father intentionally ceased caring for his children does not take away from the possibility that the elements of negligence have been established. Negligence, in the technical sense, can also include intentional acts and omissions, because the test for negligence is the unreasonableness of the behavior and the foreseeability of the harm.").

^{63.} For such systems, see MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 64-81 (1987).

In this respect, from a purely tort perspective (and utterly ignoring the religious implications of the *get*'s validity), whether or not a rabbinical court has issued a decree of divorce, as well as the degree of the decree, may have implications regarding the existence of a duty to render a *get*. According to the Israeli legal system's policy (as expressed through the religious system that has authority over divorce matters), both compulsion and obligation decrees serve as a clear legal indication that the marriage should be terminated. A refusal to comply with these types of decrees may definitely be considered unreasonable behavior, as ruled in the I^{st} Jerusalem and Kfar Sava cases.

The same is true in relation to recommendation decrees, as noted in dictum in the Kfar Sava case and as applied in the Tel Aviv case, though this requires that the concept of "recommendation" be further elaborated. First of all, it should be noted that in addition to compulsion or obligation decrees, a decree stating that the couple should divorce may be phrased in various ways by the rabbinical court. The rabbinical court's decree may recommend that the parties divorce, or declare that it would be a *mitzva* (commandment) for them to divorce, or that the parties should get divorced, and so on. All of these different turns of phrase fall under what is considered a recommendation decree. It should be clearly noted that recommendation in this sense is not a mere proposal or piece of advice, as in the common meaning of the word. In the current context it is a clear statement by the rabbinical court that, according to Jewish Halakha, grounds for divorce have been proven. Therefore, the marriage should end and a get must be rendered. Nevertheless, the proven grounds for divorce were not sufficient to enable the rabbinical judges to issue a decree that would permit legal means to be taken to enforce the giving of the get. As this is still a clear statement that a get should be rendered, the husband may be considered as acting unreasonably when refusing to give a get.

In our view, the existence of a decree by the rabbinical court should also enable the family court to recognize the tortious behavior as commencing at a date prior to the decree, as Judge Grinberger ruled in the 2^{nd} Jerusalem case, but in contradiction to the judgments in the 1^{st} Jerusalem case and the Kfar Sava case. As mentioned, the rabbinical court's decree serves as an indication that the marriage should end, as the wife has been able to demonstrate the existence of grounds for divorce against her husband.⁶⁴ Nonetheless, most probably these grounds for divorce existed prior to the date of the decree. Indeed, as we can see in all of the get refusal cases, it took many years (an average of about 10 years) to issue a decree based on behavior that was already known when the women initiated the get proceedings. One possible reason for this long period of time is the rabbinical judges' preference to reach a situation of a consensual get without the involvement of a (rabbinical) court decree, though there may be other reasons

^{64.} As we discuss here, this argument assumes that the decree recognizes the wife's rather than the husband's claim for divorce.

as well. The facts of the I^{st} Jerusalem case illustrate this well. Recall that the husband in that case dragged his wife from one rabbi to another for many years, each time promising her (and the rabbinical court) that this would be "the last time" and that he would abide by that rabbi's ruling. Each of the rabbis stated their opinion that the couple should divorce, but each time the husband continued to refuse and suggested yet another *Halakhic* authority – a cycle that repeated itself over and over until, after many years, the rabbinical court issued an obligation decree. It is clear (as was recognized by each of the rabbis to whom the couple referred), that the husband should have given his wife a *get* years before the rabbinical courts' decree, and that his refusal to do so was unreasonable and constituted a breach of his duty of care toward his wife. In this respect we find Judge HaCohen's refusal to rule accordingly, and his recognition of the wife's claim only from the date on which the obligation decree was issued, to be unjustified.⁶⁵

If a family court adjudicating a tort claim reaches the conclusion that grounds for divorce existed prior to the date that the rabbinical court issued its decree and that it was thus unreasonable for the husband to refuse to render a *get* even before the decree had been issued, it should recognize the woman's right to damages as commencing on the date the husband's refusal became unreasonable. While this might not actually be the conclusion in each and every case, women should nonetheless be given the opportunity to try and prove that they were unreasonably denied a *get* prior to the decree. True, in some cases it would be hard to prove that divorce had been unreasonably refused prior to the decree. However, this is a problem in many cases of continuing torts. According to pure principles of tort law, the substantive law is supposed to hold the defendant liable in torts from the date he first commits the tort. If there are cases where the plaintiff's wife fails to prove that as it may, the substantive law remains valid and applicable.

An even more complex and problematic group of cases concerns situations when a decree has not (yet) been issued by the rabbinical court. None of the judgments given thus far have involved such a scenario, but, at the time of writing, a few claims of this nature have been filed and are pending. The formulation of the tort of *get* refusal in a way that is utterly independent of rabbinical court decrees is necessary in order to make such a tort an effective means of coping with the problems of divorce introduced by Jewish religious law. However, if there is no decree stating that the husband should give a *get*, on what grounds can the court say that his refusal to do so is a tortious act? This is particularly problematic given that no-fault divorce is not recognized in Israel.

^{65.} Judge HaCohen's ruling might be explained by him being the first judge to recognize *get* refusal as tortious behavior, which may have made him cautious. It may be reasonably assumed that in awarding such a large amount of damages (the highest per month) Judge HaCohen did in fact take into consideration the years prior to the decree.

Thus, a husband could claim that he entered into the marriage contract in the context of a system that allows him to stay married unless his wife establishes grounds for divorce.

Note that the problem we are raising here is not that the *religious* divorce system is fault-based, but rather that there is no clear indication as to the Israeli *civil* legal system's policy regarding the appropriate rules of divorce. Thus, for example, it is unclear whether Israeli policy supports a waiting period, and if so, for how long? Does it distinguish between childless marriages and marriages with minor children? These issues and others affect the reasonableness of a husband's refusal to divorce. Recall that Judge Grinberger refused to recognize a rule of thumb according to which the refusal to render a *get* within a year of the wife's suit for divorce is unreasonable. Instead, he chose to leave this issue to case by case determinations. However, he did not indicate what the criteria for such a determination should be.

In this respect, the issue raised in the *get* refusal cases differs from other issues concerning the proper rules of divorce, in which the Israeli legal system has clearly established its policy. Thus, for example, the Israeli Penal Law makes it a criminal offense to divorce a wife against her will and without an official court decision.⁶⁶ This is a clear response to Muslim law (Sharia) that enables a man to divorce a woman without her consent simply by declaring her divorced. Though the divorce may be valid under Sharia law, Israeli civil courts have recognized a tort claim for women divorced against their will against their former husbands.⁶⁷ Nonetheless, in these cases it was quite simple to recognize the husband's behavior as tortious given the clear policy against divorcing a wife against her will.⁶⁸ Such a clear statement is lacking in the Israeli system regarding the proper grounds and conditions for divorce.

Ostensibly it could be argued that the Israeli civil system has adopted de facto fault-based divorce (at least for Jews) by embracing religious divorce laws. If this were the case it would indeed be difficult to argue that a husband, against whom no grounds for divorce have been proven (according to religious criteria), is breaching his duty of care to his wife by refusing to cooperate with the process of divorce. However, there are some indications that the Israeli civil system endorses no-fault divorce as the desirable divorce policy. This can be inferred from cases that address issues related to divorce, such as property division,

^{66.} Penal Law § 181(A), 5737-1977, S.H. 864, 226.

^{67.} See, e.g., CA 245/81 Sultan v. Sultan [1984] IsrSC 38(3) 169. Note that in HCJ 2829/03 Plonit v. Druze Appellate Court in Acre [Jan. 16, 2006] IsrSC (not yet published), Justice Jubran held in an obiter dictum that, under certain circumstances, the criminality of unilateral divorce can and should impose a duty on the Druze religious court to disregard the divorce in spite of the fact that Druze religious law sees unilateral divorce as valid.

^{68.} Likewise, the Israeli Penal Law criminalizes bigamy, *see supra* note 7, and this policy statement regarding matters of marriage can serve as the basis for a tort claim against a person who violates this prohibition by marrying more than one individual.

custody of children, child support, and so on. In reviewing such cases it would seem that the civil system, knowing it cannot give the formal divorce itself, is attempting to dictate the *consequences of divorce*. Thus, for example, the court encourages property division prior to formal divorce, including the sale of the spouse's family home, and even recognizes relationships formed by either of the divorcing parties while still formally married, (including allowing non-married cohabitants to share the same last name).⁶⁹

In this respect, we consider recent legislation, passed in November 2008, as indicia of the civil system's preferred divorce policy. The Spouses (Property Relations) Law (1973) replaced the case law-based community property presumption and conditioned the distribution of property on formal divorce (i.e., for Jews, a get).⁷⁰ After a political struggle lasting over 30 years, the statute was amended to enable the division of property prior to formal divorce so long as any of the following conditions are met: a year has passed since the divorce procedures were initiated or a motion for property distribution has been filed; there is a rift between the couple; or they have been living separately for nine of the previous twelve months.⁷¹ Given that the division of property signals the substantial end of the marital relationship, the 2008 amendment can be viewed as an indicator of the proper rules of divorce. We propose to use these factors as indicia of when it becomes unreasonable to refuse a divorce. This leads us to suggest that after a year of de facto separation, or following the commencement of legal proceedings, a presumption should be created that refusing a divorce by rendering a get becomes unreasonable. Nevertheless, judges should be left with the discretion to deviate from this rule in appropriate cases, provided they give proper reasoning for doing so.

This suggestion raises the interesting possibility of filing a tort claim of *get* refusal without even filing for divorce. The specific proceedings an individual pursues are influenced by tactical considerations. Thus, for example, a woman may obtain a *get* more quickly if she files for "peace in the home" rather than divorce, and asks to enforce the husband's duty to provide her with housing (as part of her right to spousal support). If a rabbinical court accepts her claim it will most likely rule that her right to housing entitles her to remain in the marital home. This implies that the spouse's apartment cannot be sold and the husband cannot receive his share of the property. The husband's duty to support his wife

^{69.} HCJ 693/91 Efrat v. Commissioner of the Population Registry [1993] IsrSC 47(1) 749; HCJ 6086/94 Nizri v. Commissioner of Population Registry [1995] IsrSC 49(5) 693.

^{70.} The Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1972-73) (Isr.). On the detrimental effect this condition has had on women by providing husbands further incentive to refuse to give a *get* and on attempts to bypass this limitation and its consequences. *See, e.g.*, CA 1915/91 [1995] Ya'akoby v. Ya'akoby IsrSC 49(3) 529.

^{71.} These periods of time may be shortened even further when a restraining order has been issued or an indictment for domestic violence is served against the partner of the spouse seeking property distribution.

and provide her with housing ends once the *get* is rendered. In this situation, the husband thus has a strong incentive to give his wife a *get*, as this would free him from his duty of support and permit him to sell the apartment. The amendment to the Spouses Property Law recognizes that there are different legal proceedings in addition to filing for divorce that may be tactically deployed as part of the divorce process in order to obtain the *get*. Therefore, it does not necessarily condition the division of property on a legal action for divorce, i.e., for a *get*. Nonetheless, at this stage we propose that the tort action should be conditioned on a legal suit for divorce unless there are special circumstances, such as a background of violence (though the time by which it becomes unreasonable to refuse to render the *get* should be calculated from the date of de facto separation and not necessarily from when the divorce suit was filed).

Lastly, we would like to stress that our focus on the refusal to obtain a get should not cause us to ignore the emotional abuse that may surround the separation process over and above the refusal to render the get itself. At least in some get refusal cases, the husband's breach of his duty of care does not necessarily lie in his refusal to give a get, but rather in the circumstances that surround this refusal. The facts of the l^{st} Jerusalem case are once again illustrative in this regard. The husband abused his wife by dragging her from one rabbi to another, filling her with hope by promising to abide by the next rabbi's ruling, though without actually intending to keep the promise even as he was making it. The husband mocked his wife by spinning a web of deceit around her, which caused her humiliation, shame, and pain at every turn. This behavior in itself constitutes emotional abuse, regardless of his refusal to divorce. On this point we criticize Judge HaCohen's judgment in the Ist Jerusalem case, which, while acknowledging and emphasizing this abuse, failed to recognize it as a tortious behavior entitling the woman to compensation. Instead, the judgment focused only on the refusal to give the get following the rabbinical court's obligation decree. We argue that courts should not merely focus on the question of whether the refusal to divorce was unreasonable, but rather that they should broaden their perspective to examine whether the husband's overall behavior constitutes abuse, as determined by existing case law on spousal emotional abuse outside the context of the get.⁷²

V. CONCLUSION

In this article, we have attempted to shed light on the intriguing interplay between religious family law and civil tort law in Israel as expressed in the field

^{72.} See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710-55 (1998) (demonstrating how legal focus on sexual harassment leads to legally ignoring "pervasive forms of gender hostility" in the workplace).

of divorce. We presented the dilemmas that arise from this interaction and proposed some guidelines for developing *get*-refusal as a cause of action. It remains to be seen whether or not tort law will afford Jewish women a significant means for ameliorating longstanding suffering caused by the application of religious patriarchal structures to matters of divorce.

