Tort Liability of Recalcitrant Husbands

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Abstract

A Jewish man and a Jewish woman, both residents of the State of Israel, are married in a Jewish religious ceremony. After their relationship encounters difficulties, the woman applies for a divorce in accordance with Jewish law (hereinafter: a Gett). A Rabbinical Court determines that the man has to grant his wife a Gett, but he disobeys the ruling. The Rabbinical Courts (Enforcement of Divorce Rulings) Act, 1995, enables the court to impose various sanctions on the recalcitrant husband but despite the sanctions, or as a result of the court's reluctance to impose them, the man remains recalcitrant. Under these circumstances the woman cannot marry another man nor can she live with another man, if she wishes to marry him in the future. Moreover, any child she may have with another man before she receives a Gett from her husband will be stigmatized as a Mamzer and deprived of certain rights. The woman is ensnared in an unwanted marriage, and cannot start a new family.

This article endeavors to determine if the woman may sue the recalcitrant husband for her non-pecuniary loss. It discusses the jurisdiction of civil courts over tort actions of this type and the various causes of action that may be used by the woman. There seem to three possible legal bases for claiming damages: breach of constitutional duty, negligence, and breach of statutory duty. The article contends that an independent constitutional tort cannot be recognized; that an action for breach of statutory duty based on constitutional
violation should not be allowed between two private persons; and that an action for negligence based on infringement of a constitutional right is indistinguishable from a traditional action for negligence. The article further argues that subject to several conditions ordained by Jewish divorce law, the woman may recover under two theories: negligence, and breach of statutory – penal – duty.

In any consideration of a tort action Jewish divorce law must be taken into account. According to Halachic authorities and in light of the current policy of Rabbinical Courts concerning coerced divorce, a Gett that is granted after the husband has been obliged to pay tort damages to his wife may be deemed Meuseh (coerced) and therefore invalid. Thus, applying the principles of Jewish divorce law guarantees that the benefit (tort damages) to the woman is not outweighed by the detriment (an invalid Gett). The article attempts to harmonize the civil action with Jewish divorce law, not because the outcome is ideal with respect to the woman's interests or from a social perspective, but because under existing law any other "solution" may be detrimental to the interests of both the woman and society, instead of promoting those interests. The article suggests what seems to be the most practicable solution for a painful phenomenon within the existing legal framework, in which Jewish couples in Israel cannot terminate their marriage without a Gett. The proposed solution does not attempt to resolve the severe ideological dispute between proponents of the current law and reformists. In fact, the two authors of this article do not hold the same opinion concerning the desirability of this legal condition. Any attempt to fashion a solution within existing law should be viewed as neither justification nor criticism of that law.
The main difficulty arises where the woman aspires to obtain a valid Gett and brings a tort action prior to receiving the Gett. It is very likely that a Gett obtained under such circumstances would be deemed coerced and therefore invalid. If the woman's right of action is not constrained in light of Jewish divorce law harsh consequences may ensue. For example, a Rabbinical Court may refuse to hear an action for divorce until the woman abandons her tort action, waives her right of action in torts, or signs over to her husband any sum obtained through a tort action. The Rabbinical Court may even refuse to arrange a Gett.

The article suggests that the woman should only have a right of action in tort when a Rabbinical Court has held that the husband (1) may be coerced into rendering a Gett, or (2) is obliged to render a Gett. In cases of the first type no further adjustment of the tort action is required. In cases of the second type the article suggests that tort damages be paid in accordance with the Jewish law of maintenance. The Rabbinical Courts might consider payment of tort damages to be an enforcement of the Jewish obligation to pay maintenance. The monetary burden would then be regarded as "coercion by means of giving a choice" and the subsequent Gett would be valid. But since the woman is entitled to maintenance anyway, what is the value of a tort action?

Rabbi Isaac Herzog expressed the opinion that a recalcitrant husband may be obliged to pay "enlarged but not excessive" maintenance, i.e. ordinary maintenance plus a certain amount (that may be termed "the punitive element") that is not untenable, in consideration of the husband’s financial status. This addition does not affect the validity of the consequent Gett imposed by a Rabbinical Court. Rabbi Moses Feinstein added that where a
civil court obliges the husband to pay maintenance in an amount that is lower than, equal to or slightly higher than the sum that could have been imposed by a Rabbinical Court, the following Gett is also valid. Our suggestion is therefore based on the views of Rabbi Herzog and Rabbi Feinstein: a civil court may impose tort liability on a recalcitrant husband, provided that the extent of liability is similar to the punitive element in "enlarged but not excessive" maintenance. The woman may recover a lump sum for the period of her husband's recalcitrance prior to the ruling in her tort action, together with periodical payments thereafter until she receives her Gett. Since we are mainly dealing with non-pecuniary losses, this adjustment is tolerable within the law of remedies.

Our model may to a certain extent alleviate the suffering of the woman awaiting a Gett and induce her husband to give her the desired Gett. Equally important, it ensures that the Gett when given will be valid, so that the woman's fundamental will is realized.