Introduction

Maimonides – Rabbi Moses ben Maimon – was born in Spain at 1135 and died in Egypt in 1204. He was known in the Jewish tradition as the "Great Eagle" due to his eminence in so many fields: as a jurist, philosopher, scholar, physician and theologian. Maimonides is perhaps the best-known and most widely studied figure in Jewish history from medieval times until the present day.

Much research has been devoted to different aspects of Maimonides' work, including the period and the place in which he operated, the connection between his work and Geonic literature, his philosophy, the tension between Maimonides as halakhic decisor and Maimonides as philosopher, his various essays and the relationship between them, contradictions in his approach, and his views on medicine, religion, and science. Despite the abundance of research on Maimonides, very little has been written about Maimonides as a jurist in general, and about his tort theory in particular. Apart from some research on narrowly focused examinations of his stance on a few individual tort-related issues, Maimonides' comprehensive tort theory is in fact understudied. No research has yet been published that presents a systematic study of Maimonides' tort theory in full, in and of itself, as reflected in the entire array of his halakhic and philosophical corpus. Needless to say, Maimonides' tort theory has not been studied as compared with other tort theories in his time, before his time or in our time.

This book presents, for the first time, Maimonides' complete tort theory both in and of itself, and as compared with other tort theories both in the Jewish world and beyond it, in Maimonides' times and prior thereto, and as compared with modern Western theories. It provides a comprehensive and accessible description of his innovative theory. Not only will the book present the details of the rulings relating to tort, but it will also seek to establish a rational, systematic legal theory that allows for a full description and overview of Maimonides' comprehensive conception of tort law, its objectives and its foundations.

The book also offers a new perspective on the understanding of Jewish legal and philosophical tradition, and more generally on the place of traditionalism and religious values in medieval Middle Eastern, Judeo-Islamic life and thought, as opposed to modern Western-liberal life and thought. The proposed perspective is brought into relief by comparing the Maimonidean theory to contemporary tort theories. The book therefore presents Maimonides' complete tort theory as an important Jewish source that engages, for the first time, in a legal and philosophical dialogue with the leading theoretical tort texts of Western scholarship. The book illuminates points of continuity and contrast between these systems. The Maimonidean medieval-religious sources and contemporary scholarship speak in very different idioms, but they address many of the same themes. Drawing on sources old and new, pre-modern-Jewish and modern-liberal-secular, the book offers fresh interdisciplinary perspectives on important moral, consequentialist, economic, and religious issues that will be of interest to both religious and secular scholars.

The Maimonidean theory of tort is revealed in light of all of his works – halakhic as well as philosophical. This book recounts a story that has been neglected by the scholars and the commentators on Maimonides: a story about the rationalization of tort laws that was told by Maimonides in the *Guide of the Perplexed* [hereinafter: *The Guide*], his well-known philosophical work, from which it emerges that tort law has two meta-objectives. The more predictable objective is the deontological aim of removing wrong – a type of corrective justice, and the second, which is surprising in view of the period in which it was first conceived, is the social-consequentialist objective of preventing damages, which has some similarity to basic approaches of the economic analysis of the law. Alongside the deontological and social-consequentialist aspects of tort law, there is also a religious dimension, which Maimonides emphasizes less, and this includes the prohibition against causing harm, and a blurring of the boundaries between the criminal law and tort law.

The basic structure of Maimonides' tort theory relies on a special criterion of tort liability which we call "the effective ability to control test" (EAC), a test that is substantively different from all the tests that have been suggested to date in the common interpretation of Maimonides and the Talmud. Once Maimonides has determined who is the effective avoider of damage, he applies a special model, which we call the differential-pluralistic model. According to this model, for each of three categories in tort – damage caused by property; a person injuring his fellow; a person damaging the property of another – Maimonides sets a different standard of care on the scale between negligence and strict liability. Maimonides' model of differential-pluralistic liability, which represents more than one objective of tort law, with some objectives being more dominant than others in relation to different types of tort laws, may engage in a cautious dialogue with various modern tort theories. The inception of such a dialogue is to be found in volume 26(1) of the *Yale Journal of Law & the Humanities* (2014), which was devoted in large part to a conversation between the authors of the present book and one of the pioneers of the field of

economic analysis of law, Guido Calabresi,[1] who graciously agreed to write Chapter 9 of this book. Whereas the conversation focuses on the comparison between Maimonides and Calabresi, the book goes further and broadens the comparison to include a comparison between Maimonides and other prominent modern scholars, among them Ernest Weinrib, the prominent corrective justice scholar, who commented on the main arguments of this book.[2] We will mention several surprising points of similarity between certain elements of the theories that were formulated by the cream of the scholars from leading North American universities and between significant elements of the Maimonidean theory that was conceived some eight hundred years ago in Egypt. Alongside the similarity between the theories, we will also highlight significant differences, some of them deriving from conceptual-jurisprudential differences, some from the difference between religious law and secular-liberal law, and some from the differences in the historical, cultural, and socioeconomic backgrounds.

EDITIONS USED

Quotations from the *Mishneh Torah* – the *Code* – and its traditional commentaries are cited from the Frankel edition. We have used the Yale Judaica Series English translation of *The Code of Maimonides*: Hyman Klein's translation of The Book of Torts (New Haven, CT: Yale University Press, 1954), and Isaac Klein's translation of The Book of Acquisition (New Haven, CT: Yale University Press, 1951).

Quotations from *The Guide of the Perplexed* (written originally in Arabic) are generally cited from the English translation of *The Guide of the Perplexed* by Shlomo Pines (Chicago, IL: University of Chicago Press, 1963). In some places, where indicated, the English translation is either the authors' own translation of the Michael Schwartz Hebrew translation (Jerusalem: Tel Aviv University Press, 2002),

[1] Senior Judge, United States Court of Appeals for the Second Circuit; Sterling Professor Emeritus of Law and Professorial Lecturer in Law, Yale Law School. *See* Yuval Sinai & Benjamin Shmueli, *Calabresi's and Maimonides's Tort Law Theories – A Comparative Analysis and A Preliminary Sketch of a Modern Model of Differential Pluralistic Tort Liability based on the Two Theories*, 26 YALE J. L. & HUMAN. 59 (2014), and the comment: Guido Calabresi, *We Imagine the Past to Remember the Future – Between Law, Economics, and Justice in Our Era and according to Maimonides* 26 YALE J. L. & HUMAN. 135 (2014). *See also* Guido Calabresi, in a response to Benjamin Shmueli & Yuval Sinai, *A Contemporary View on the Maimonidean Tort Theory: A Consequentialist Analysis of Punitive Damages as a Test Case*, following a lecture at a panel on *A Contemporary View of the Maimonidean Tort Theory – Law, Religion, Economics and Morality*, Wolff Lecture 2016, Institute on Religion, Law & Lawyer's Work, Fordham Law, January 26, 2016.

[2] *See* Ernest J. Weinrib, Cecil A. Wright Professor of Law at the University of Toronto Faculty of Law, a comment to Yuval Sinai & Benjamin Shmueli at a panel on *Aristotelian, Greco-Arab and Islamic Moral Theories: A Comparative Study of Jewish Medieval Tort Theory* in THEOLOGIANS IN A JURIST'S ROBE: RELATIONS BETWEEN THEOLOGY AND LAW IN THE JUDAEO-ISLAMIC MILIEU, The Freidberg Jewish Manuscript Society in collaboration with Anne Tanenbaum Centre for Jewish Studies, University of Toronto, March 20, 2017.

or the English translation by Moses Friedlander (2nd edition, New York, NY: Dover Publications, 1956).

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1

Initial Presentation

A. JEWISH LAW OF TORTS IN GENERAL AND IN MAIMONIDES' WRITINGS

Maimonides' theory of torts was developed when the "Great Eagle" lived in Egypt, and it is based on his reading of the biblical and talmudic literature on torts. Yet his theory also provides a groundbreaking, independent, and conceptual analysis of the biblical and talmudic rules in this area of law.

Moshe Halbertal argued that Maimonides himself did not consider the *Mishneh Torah* (*Code of Maimonides*, hereinafter: *the Code*), his main halakhic work, to be merely a "summary of the *halakhah*," despite his own description of it as such in several places; rather, his approach was that "the *Mishneh Torah* is *halakhah* itself."[1] According to this approach, which likewise emerges from a close examination of Maimonides' words, "*Mishneh Torah* does not merely summarize the earlier halakhic literature; it actually replaces it."[2] Even those who find it difficult on principle to accept the radical reading proposed by Halbertal, and who generally tend towards the moderate reading, will be convinced after having read the present work – so we hope – that the Book of Torts (*Sefer Nezikin*), the 11th of the 14 books of the *Code*, at least, should not be regarded merely as a simple summary of the talmudic *halakhah*, but as much more than that. True, in many cases Maimonides was faithful to the talmudic *halakhah*; nevertheless, we aim to elucidate a systematic Maimonidean tort theory, fairly substantial parts of which not only do not stem directly from the Talmud and sometimes even seem to contradict it, but which to a great extent constitutes a refashioning of Jewish tort law.

[1] Moshe Halbertal, Maimonides: Life and Thought 96–181 (Princeton, NJ: Princeton University Press, 2014).
[2] *Ibid.* at 185.

Before we discuss the principal features of the Maimonidean theory of tort, we will review briefly the general features of the Jewish law of torts. This will enable us to examine the extent to which the Maimonidean theory is novel vis-à-vis the talmudic and posttalmudic theories of tort. In general, it is correct to say that Jewish tort law has not been widely researched. Several studies of Jewish tort law do exist, some of which are mentioned in the following chapters, but mostly they are concerned with the details of the various laws and not with the principles.[3] Indeed, several scholars have offered modern descriptions of Jewish tort law. Most have viewed Jewish tort law as part of Jewish civil law and laws of obligations.[4] They have characterized the majority of compensation in tort that the tortfeasor pays to the victim as payments intended as restitution for the damage caused rather than as a punishment or a fine.[5] Scholars of Jewish law, too, have not usually distinguished

[3] *See* Ilan Sela, Payments for Inflicting Personal Injuries in Jewish Law: Between Criminal Law and Civil Law 15 (Doctoral Dissertation, Bar-Ilan University, Ramat Gan, 2008) (Heb.).

[4] *See* primarily Asher Gulak, Principles of Jewish Law, Book II, 14 (Berlin: Dvir, 1922) (Heb.), who writes that similar to Roman jurisprudence, in Jewish law, too, obligations in respect of damages belong to the laws of obligations, which are divided into two: "One source from which many obligations were imported is a negotiated transaction that was concluded between the negotiating parties, a legal transaction, by which they take upon themselves various obligations; *a second source of obligations is the damages* that a person brings about or causes to the property of another, and that imposes upon the damager or the cause an obligation of payment." *Ibid*. Gulak writes that "indeed our law already from the time of the Talmud distinguished between obligations that are entailed by the damage and obligations that are entailed by a business transaction." However, even Gulak himself comments (*ibid.* n. 2) that the *braita* of R. Oshaya and R. Hiyya, *Bava Kamma* 4b, includes among the heads of damage the obligation of the four watchmen, and this constitutes a difficulty for Gulak's position, since it is clear that leasing, borrowing and depositing for no charge or for payment fall within the category of business transactions. Indeed, he comments on Maimonides' approach in Laws of Rentals 2:3, whereby a person who was negligent in his watch is a damager, and therefore the obligations of watching are the same as the obligations for damage. *See ibid.* that Gulak himself relies on the opinion of the majority of the commentators who disagree with Maimonides, and who hold that the obligations of the watchmen arise from the legal contract, and are not due to damage. For our purposes, however, Maimonides' position is of particular importance, as elucidated later in the chapter.

[5] *See*, *e.g.*, Shalom Albeck, General Principles of the Law of Tort in the Talmud 40 (2nd ed., 1990) (Heb.) ("The obligation of the damager, whether he caused damage with his body or with his property, is to make up for the damage of the injured party, and not a punishment for the damager so that he should transgress no more"). *See also* Ya'akov S. Zuri, Treatise of Hebrew Law – Tort of Negligence 10–11 (London: Urim 1937) (Heb.), who emphasizes that "the Sages of the Talmud understood the difference between payment for damage, which is repairing the losses in relation to the injured party, and between a fine which is a penalty intended to have a beneficial effect in the future," and also, "the payments are not a fine, but are intended only to repair that which is crooked and to restore the former situation, insofar as possible." And *see also* Gulak, *supra* note 4, at 202, who writes that "obligation for the damage which comes as a payment for the economic loss due to the victim (monetary obligation) is always estimated in accordance with the actual loss and with the loss of property incurred in relation to the victim's property. The law governing this obligation is like other monetary obligations that are imposed upon a person and upon his heirs after him." Together with this,

between the different types of damages, and many of them have in fact stressed the common factors between the different types of damages that are caused by a person's property, i.e., the heads of damage,[6] and between physical injury or property damage to another caused by the person himself.[7] The rationales presented by most of the Jewish law scholars as the basis for tortious liability are very similar to the popular modern conceptions, particularly amongst the proponents of corrective justice, with the emphasis on the regime of fault/negligence.[8] Thus, for example, many scholars have explained that liability in torts is based on the single element of *peshiah* (negligence or fault).[9] Other scholars, however, were of the opinion that tort liability is not based solely on *peshiah*. One scholar stressed, alongside the element of *peshiah*, the prohibition against causing injury.[10] Another stressed mainly the "system of ownership and absolute liability" that exists, in his opinion, alongside

he does in fact note that there are a number of obligations in respect of damages that are considered as a fine and a penalty, but he specifies there are exceptional damages such as the double payment imposed upon the thief, and other fines.

6 *See, e.g.*, Albeck, *supra* note 5, at 19–20 ("Examination of the details of the Talmudic laws of damages leads to the conclusion that there are no single heads of damage without fundamental rules. Moreover, the heads of damage in the Talmud have only one single rule whereby a person is liable for the damages he caused, and that is *peshiah*" (negligence/fault)).

7 *See, e.g.*, Albeck, *supra* note 5, at 173 ("In several places, the Talmud differentiates between injury to his body and economic damage, i.e., between a person who injures another physically and a person who damages his property. However, both are subject to the same laws, and there is only one difference between them"). This also emerges from the words of Zerah Warhaftig, *The Basis for Liability for Damages in Jewish Law*, Studies in Jewish Law 211 (1985) (Heb.). Warhaftig was of the opinion that two approaches (that of *peshiah* and that of ownership) lie at the base both of liability for the economic damage suffered by a person (p. 220) and of his liability for damage that the person himself caused (p. 222).

8 *See, e.g.*, Zuri, *supra* note 5, at 11, who writes that "a person is not liable for his damages unless his actions involve some fault, whether to a large or a small degree." And "fault" is interpreted by him mainly as "negligence" (*peshiah*).

9 Warhaftig correctly wrote (*supra* note 7, at 212) that "scholars of Jewish law are certain of their conclusion that Jewish law recognizes only the system of *peshiah*." Indeed, as Warhaftig says, this was the opinion of prominent veteran scholars such as Chaim Tchernowitz, *Shi'urim BeTalmud*, "Damages" 97:4. Gulak, *supra* note 4, at 210, emphasizes that *peshiah* is the basis for the obligation for monetary damages ("The main obligation of a person for damage caused by his property is due to his negligence in watching over the objects that caused the damage"), as well as the basis for the obligation for damage caused by a person's body (*see also ibid.* at 202: "A person is liable for the damages because he is responsible for them having taken place, i.e., because there was some fault on his part that led to them"). Particularly notable in this context is Albeck, *supra* note 5, who sought to base all the details of tort law on the element of *peshiah* (*see, e.g., ibid.* at 26: "In actual fact, there is only one head of damage for all of torts, and that is *peshiah*").

10 Zuri, *supra* note 5, at 9, defining "damage" as dependent upon three factors: the first, "the fault or negligence in relation to the person doing the damage"; the second, "an act of wrongdoing to the body of another, his dignity or his property, an act that is prohibited under the law"; and the third is "the loss caused to another by the act of damaging."

the "system of *peshiah*."[11] It will be emphasized that these views are not necessarily a matter only of modern scholarly proclivities. Some early talmudic commentators viewed tort law as part of civil law,[12] whereas many of the later commentators – and even some of the earlier commentators and decisors – emphasized the prohibition against causing injury as the main element of liability in tort law.[13] What is common to all the scholars is the focus on one main aim of tort law, for the most part deontological: the absence of a principled, substantive distinction between different types of damagers and victims;[14] insufficient attention to the clear connection between tort law and criminal law; and ignoring the unique religious dimension of Jewish tort law.

Against this background, Maimonides' unique theory, which differs significantly in most of the above areas, stands out. This theory emerges from a parallel analysis of all Maimonides' writings, and particularly from a comparative examination of what he wrote on torts in the *Code* and the *Guide*.

What is the nature of the systematic theory that Maimonides expounds, according to our contention, in the field of tort law?

The following principal aspects will be discussed at length in the book:

(a) The scope of tort law in Maimonides' theory is much wider than what is common in modern law, and it includes not only purely civil law (from the field of the law of obligations) but also laws which have a significant connection to criminal law. According to Maimonides, tort law is an intermediate field between civil law and criminal law, and some types of tortious compensation have a punitive dimension.

(b) A fundamental division into different types of tortious events in accordance with the nature and type of the damage, and with the identity of the tortfeasor and the victim (what we call a "differential" approach)

[11] Warhaftig, *supra* note 7, at 213.

[12] *See, e.g.*, R. Menahem Hameiri, at the beginning of Beit Habehirah on Bava Kamma 1, who noted the common denominator in all three tractates, *Bava Kamma*, *Bava Metzia and Bava Batra*, namely that all three are monetary claims (*tviot mamoniot*) "in what has no criminal law aspect at all."

[13] *See, e.g.*, Tur, who wrote at the beginning of Laws of Tort, *Hoshen Mishpat* 378:1: "Just as it is prohibited to commit theft and robbery of the property of another, so it is prohibited to cause damage to his property"; R. Yaakov Kanievsky, Kehillot Yaakov on Bava Kamma, chapter 1 ("On the Prohibition against Harming Another") (Bnai Brak 5748)(Heb.). For an extensive discussion of the elements of the prohibition *see infra* Chapter 4.

[14] This is true not only for those who attribute no significance at all to the distinction between the types of damages, such as Albeck (*supra* note 5) and Warhaftig (*supra* note 7), but even a scholar such as Gulak (*supra* note 4, at 23–24) distinguishes between injury caused by a person to the body of another and damages caused to the property of another. However, this distinction is not substantive, and he did not even think it necessary to discuss the different damages in different chapters as he did in separating injury to a person's own body (pp. 213–25) and damage to his own property (pp. 227–37).

emerges from the classification of the Book of Torts in the *Code*. Central to this classification is a fundamental distinction between damage caused by a person's property (Laws of Property Damages) and damage caused by the person himself (Laws of Wounding and Damaging); the distinction between the damage that is caused by a person's property (damages caused by animals) and between the damage caused by a person's action (pit and fire); a distinction between a person causing physical injury to another person (Laws of Wounding) and a person causing damage to the property of another (Laws of Damaging); a distinction between standard tort law (which is included in the Book of Torts in the *Code*), and nuisance and damage caused by neighbors (which is included in the Book of Acquisition in the *Code*).

(c) Tort law does not have one single objective;[15] rather, Maimonides presents the various aims of tort law that he discussed in his various writings, and principally in the *Guide*. There are two central contentions with regard to the objectives: (1) In Maimonides' theory, the various objectives work together and are not necessarily regarded as contradictory; (2) Some objectives are more dominant than others in relation to different types of tort laws. Thus, for example, in relation to classical torts that are civil in nature, such as monetary damage, caused either by a person or by his property, Maimonides in the *Guide* emphasizes the removal of the wrong, i.e., corrective justice, which is deontological in nature, as well as prevention of damage, which is a consequentialist objective. In relation to damage that involves a criminal law element, however, such as damage caused by wounding, theft and robbery, Maimonides presents a penal, deterrent rationale, which too is consequentialist in nature. In the *Guide*,[16] Maimonides emphasizes distributive justice in his description of the goals of the Book of Acquisition and the Book of Judgments in the *Code*, including the laws of nuisance and the liability of watchmen. The *Code*, too, adverts to the religious-prohibitive aspect, in the prohibition against causing damage.

Maimonides' tort theory may be read in more than one way. In the present book, two alternative readings – both of them modern – will be presented and juxtaposed with one another. The first reading, which we call the *yeshivah* reading, is based on the common interpretation of Maimonides' works on the part of many of the heads

[15] For a discussion on the different aims of tort law *see*: Glanville L. Williams, *The Aims of the Law of Tort*, 4 Current Leg. Prob. 137, 138 (1951), *reprinted* in Mark Lunney & Ken Oliphant, Tort Law: Text & Materials 18 (3rd ed., 2008); W. Page Keeton et al., Prosser and Keeton on Torts 20–26 (5th ed., 1984); Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. Mich. J.L. Reform 745 (2015).

[16] 3:42.

of the Lithuanian *yeshivot* (talmudic academies) in recent generations. The *yeshivah* reading, which was adopted to various extents by several scholars in the wake of the research of Zerah Warhaftig,[17] concentrates exclusively on the reading of a number of texts from the Book of Torts in the *Code*, on the basis of which they attribute to Maimonides what Warhaftig defined as the "ownership and strict liability theory." We believe that the *yeshivah* reading of the Maimonidean approach to torts is mistaken, and that it does not reflect Maimonides' view. Our argument is that the ownership and strict liability theory is not an accurate expression of Maimonides' position. In our opinion, that theory raises serious difficulties, both conceptual-principled and exegetical, and it is inconsistent with several of Maimonides' rulings in the *Code*, which appear to contradict it. The words of the illustrious scholar of the *Code*, Isidore Twersky, are well known: "[t]o a great extent the study of Maimonides is a story of 'self-mirroring'."[18] To a great extent, so we shall argue, the *yeshivah* reading of the Maimonidean approach to torts is a case of "self-mirroring" on the part of the proponents of the said interpretation: the rabbis of the Lithuanian *yeshivot* interpreted Maimonides' words in keeping with the new methodology of *yeshivah* study that was developed in their days.

The focus of our study is a different reading, which we propose for the first time in this book. This alternative reading seeks to provide an appropriate response to the said difficulties, in its presentation of Maimonides' full tort theory in light of what he wrote in other works apart from the *Code*, particularly in his great philosophical work, the *Guide*, as well as through the prism of modern theories of tort law.

Indeed a substantial part of the second, new reading that we propose focuses on a careful analysis of several Maimonidean texts in the *Guide* that have been completely overlooked, not only by the rabbis advocating the *yeshivah* reading but also by some modern scholars who discussed, even if only partially, Maimonides' tort and penal theories. This is only natural, for the *Guide* preoccupies mainly philosophers, whereas scholars of Jewish law and the sages of the *yeshivah* world are concerned primarily with studying the *Code* and comparing it to the talmudic passages. However, one of the far-reaching changes to Judaism wrought by Maimonides is his fascinating and challenging integration of *halakhah* with philosophy, or if you will, of the *Code* with the *Guide*. And indeed, our book is intended as a presentation of the halakhic-philosophical theory of tort law according to Maimonides, as it emerges from a close reading of his writing both in the *Code* and the *Guide*, as well as in his other works. The contribution of the present book is primarily in exposing that neglected story of the goals and rationales of tort law as told by Maimonides in the *Guide*. In substantial sections of the present book we will attempt to elucidate what is written in the *Guide*, comparing it closely to what

[17] Warhaftig, *supra* note 7.
[18] Isadore Twersky, Introduction to the Code of Maimonides (*Mishneh Torah*) 358 (New Haven, CT: Yale University Press, 1980).