

Contents

<i>List of Figures</i>	<i>page</i> xi
Introduction	1
1 Initial Presentation	5
A. Jewish Law of Torts in General and in Maimonides’ Writings	5
B. Why Maimonides?	16
C. Contemporary Tort Theories: A General Perspective	18
D. Abstract	28
E. The Method	31
2 Tort Liability in Maimonides’ Code: The Downside of the Common Interpretation	39
A. Introduction: The Modern Study of Jewish Tort Theory as a Story of “Self-Mirroring”	39
B. The Ownership and Strict Liability Theory vs. the Fault-Based Theory (<i>Peshiah</i>)	42
1 The Difficulties of the Concept of <i>Peshiah</i>	42
2 The Common Interpretation of the Code: The “Ownership and Strict Liability Theory”	43
C. Exegetical and Conceptual Difficulties of the Common Interpretation of Maimonides	46
1 Maimonides Did Not Impose Comprehensive Strict Liability on the Tortfeasor	46
2 Maimonides’ Use of the Term <i>Peshiah</i> in Different Places	50
3 The Theory of Ownership Contradicts Various Rulings in the Code	53
4 The Problem with Finding a Convincing Rationale for the Ownership Theory	56

D.	Difficulties in Understanding Some Elements of Tort Liability Mentioned in the Code	62
1	Rulings That Are Difficult to Interpret According to Either Ownership or Fault-Based Theories	62
2	Providing a Rationale for the Exemption in Tort in Exceptional Cases	65
3	Standard of Care in Damages Caused by a Person to the Property of Another: Absolute/Strict Liability or Negligence?	68
4	Deterrence of Risk-Causing Behavior	70
E.	Re-examining the Opening Chapter of the Book of Torts in the <i>Code</i> : Control as a Central Element of Liability in Tort	72
F.	Conclusion	78
3	The Foundations of the Maimonidean Theory: Different Goals for Different Categories of Damage	80
A.	Introduction	80
B.	The Scope of Tort Law: <i>Nezikin</i> as a Middle Ground between Civil and Criminal Law	82
1	The Legal Classification of the Book of Torts	82
2	Relations between Torts, Criminal Law and Contract Law in Contemporary Jurisprudence	87
3	Penal Characteristics of Tort Law in Maimonides' Theory	93
C.	Conceptualization of Distinct Categories of Damage: A Differential Perception	96
1	Introduction	96
2	Internal Distinctions in the Laws of Property Damages	98
3	Between Laws of Property Damages and Laws of Wounding and Damaging	108
4	Between Laws of Wounding and Laws of Damaging	111
5	Between Laws of Theft and Laws of Robbery and the Return of Lost Property	118
6	Between Laws of Damages to Neighbors and Standard Laws of Torts	124
D.	The Goals of Tort Law: A Pluralistic Perception	131
1	The Major Goals of the Book of Torts: Removal of Wrong and the Prevention of Damage	132
2	Distributive Justice – Book of Acquisition	134
3	Maimonides as a Pluralistic-Differential Scholar	136
4	The Deontological and Religious Elements of Maimonides' Tort Theory	138
A.	Deontological Elements of Maimonides' Tort Theory	138
1	The Philosophical Elements: "The Welfare of the Body"	138

Contents

ix

2	“The Welfare of the Soul” and the Idea of the Sanctity of Human Life	141
3	The Social-Pedagogic Effect of Tort Law: Acquisition of Good Qualities	143
B.	The Religious Elements of Maimonides’ Tort Theory	159
1	The Religious Dimension in Jewish Law in General and in Tort Law in Particular	159
2	The Prohibition Against Causing Harm	160
3	The Religious and Theological Aspects	171
4	The Duty to Rescue: A Religious or a Moral Obligation?	173
5	Visual Trespass	185
C.	Imposing Liability for Risk-Creating Behavior: Deontological and Utilitarian Considerations	187
D.	A Comparative Look: Between Maimonides and Contemporary Tort Theory	192
1	Theories of Corrective Justice: From Aristotle to Contemporary Scholars	192
2	Between Maimonides and Theories of Corrective Justice	202
(a)	Between Maimonides and Weinrib	203
(b)	Between Maimonides and Other Approaches of Corrective Justice	211
3	Various Considerations alongside Considerations of Efficiency in Calabresi’s Theory as Opposed to Maimonides’ Theory	213
(a)	Deontological Considerations and Rules of Inalienability	213
(b)	Between Maimonides and Calabresi	217
E.	Conclusion	220
5	Consequentialist Considerations in the <i>Guide for the Perplexed</i>	222
A.	Consequentialism, Law and Economics, and Maimonides	222
B.	The Starting Point: Consequentialist Considerations in Maimonides’ Texts	227
1	Prevention of Acts Causing Damage and the Effective Ability to Control Test (EAC)	227
(a)	The General Rule of Liability	229
(b)	Exceptions: Cases of Exemption from Liability	232
(c)	Splitting the Liability between the Tortfeasor and the Injured Party (The Case of the Goring Ox)	235
2	Maimonides’ Consequentialist Analysis of Criminal Sanctions and Punitive Damages	238
(a)	Deterrence as the Major Goal of Punitive Damages	238
(b)	A Test Case: Payments of a Thief as Opposed to a Robber	241
(c)	Four- and Five-Fold Payments for the Theft of Sheep and Cattle	246

C. A Comparative Look: Similarities and Differences Between the <i>Guide</i> and Contemporary Law and Economics Scholarship	251
1 Calabresi, Posner, and Maimonides' Test for Tort Liability	251
(a) Calabresi's Cheapest Cost Avoider and the EAC Test	252
(b) Posner's Hand Formula, Contributory Negligence, and Maimonides	260
2 The Multiplier Approach, the Societal Redress Extra-Compensatory Damages Approach, and Maimonides' Test for Punitive Damages	268
(a) Maimonides and Possible Parallels in Contemporary Criminal Law	269
(b) Maimonides' Approach to the Difference between a Thief and a Robber: Between the Multiplier and the Societal Redress Extra-Compensatory Approaches	270
(c) The Uniqueness of Maimonides' Approach in Incentivizing the Injured Party to Take Precautions as a Precondition for High Punitive Damages	277
D. Conclusion	280
Appendix: The Rules of Liability and Contributory Negligence According to Maimonides in the <i>Guide</i> 3:40 Compared with Calabresi and Posner	282
6 Revisiting the Problematic Texts of the <i>Code</i> in Light of the <i>Guide</i> and Contemporary Scholarship	284
A. Using a Consequentialist Rationalization in Various Places in the <i>Code</i>	284
B. The EAC Test as the Basis for Tort Liability	289
C. Best Decision Maker in Maimonidean Texts	291
D. Imposing Liability on the Injured Party	292
E. Splitting the Liability Between the Parties (the <i>Tam Ox</i>)	301
F. Incentive for Preventing Damages: Imposing Liability for Risk-Causing Behavior	305
G. Conclusion	308
7 Maimonides' Standard of Care: A Differential Liability Model	310
A. Presenting Maimonides' Differential Liability Regime	310
1 Damage Caused by a Person to the Property of Another: Strict Liability and Exemption Only in Cases of Force Majeure	312
2 Injury Caused by a Person to the Body of Another: Three Different Standards of Care	316
3 Property Damage: Negligence	321
4 Murder: Fault	323

Contents

xi

B. Differential Liability: Scheme, Rationale, and Historical Background	328
1 Scheme	328
2 Rationale	328
3 Historical Background, Circumstances, and Nature of the Tortfeasors: Between Maimonides' Time and the Modern Era	333
4 Conclusion	336
8 Maimonides as a Pluralistic-Differential Scholar and Contemporary Tort Law Theories: A Dialogue and Lessons	338
A. From Contemporary Tort Law to Maimonides: Characterizing Maimonides as a Pluralistic-Differential Scholar	338
B. Dialogue Between Maimonides and Current Pluralistic Approaches	340
1 Introduction	340
2 Current Mixed-Pluralistic Approaches: An Overview	341
(a) Izhak Englard: "Complementarity" – An Attempt to Reach Harmony between Corrective and Distributive Justice	342
(b) Gary Schwartz: Optimal Deterrence as the Dominant Goal and Its Constraint by Corrective Justice Considerations	343
(c) Mark Geistfeld: Out of a Number of Possible Efficient Outcomes, the Most Moral Will Be Chosen	346
(d) Fleming James Jr. and Christopher J. Robinette: A Casuistic Approach	347
3 Placing Maimonides on the Pluralistic Approaches Scale	349
C. From Maimonides to Contemporary Law	353
1 Possible Lessons for Contemporary Tort Law Theories	353
(a) Creating a Pluralistic-Differential Framework in Modern Tort Law	353
(b) Possible Dissociation between the Element of Control and Strict Liability	354
(c) Distinction between Harms Caused by a Person and Harms Caused by Property	355
(d) Possible Distinction between the Tort of Robbery and the Tort of Theft	359
(e) Caution when Learning Lessons from Religious Law for Modern Secular Law	360
2 Bridging between Seemingly Dissimilar Approaches	367
(a) Between Economics and Morality	367
(b) Blurring the Distinction between Civil and Criminal	368
(c) Possible Bridge between Economic Approaches Based on Fault and Economic Approaches Based on Strict Liability	370

(d) Bridging between an Economic Approach and a Social Approach with Respect to Punitive Damages	371
D. Conclusion	371
9 Reflections on Maimonides' Tort Theory (Guido Calabresi)	373
A. "We Imagine the Past to Remember the Future" – Between Law, Economics, and Justice in Our Era and according to Maimonides	373
1 Preface	373
2 Empirical Differences in Time and Their Implications	374
3 Are there Differences between the Differential Liability and the Cheapest Cost Avoider/Best Decision Maker Doctrines?	375
4 On Justice and Deontological Considerations	377
B. A Combination of Goals in Punitive Damages: Maimonides, the Common Law, and the U.S. Supreme and State Court Rulings	379
1 Maimonides' Emphasis on Consequentialist Considerations	379
2 Maimonides as Pluralist	383
3 Action in Trespass and Action in Case: Two Approaches Pushing Each Other in the Common Law	384
4 Tort Law as a Middle Ground between Civil and Criminal Law	385
5 Punitive Damages: The Economic Multiplier Approach vs. the Punitive Approach, Supreme and State Court Rulings	386
6 The Combination of Goals in Relation to the Issue of Punitive Damages	388
7 Putting Incentives on the Victim to Take Precautions and the Possibility of Reducing Punitive Damages	393
C. Conclusion	395
<i>Index</i>	397