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The Propriety of Awarding a *Nezikin* Claim by *Beit Din* on behalf of an *Agunah*

On August 17, 2011, Judge Esther Stein of the Rishon Letzion Family Court, a civil Israeli court, awarded compensation in the amount of NIS 680,000 (approximately $182,850) to a Jewish woman whose husband refused to give her a *get* (a Jewish divorce).[1]

Concurrently, in her lawsuit filed with a rabbinical court, the wife argued that she was physically abused and abandoned by her spouse. At times, the husband would hit her and slam her head against the wall. Additionally, he cursed her and their children. Subsequently, he ceased having relations with her and eventually he abandoned the marital home.

A 2003 Rabbinical Court ruling recommended that a *get* should be forthcoming and a 2004 Rabbinic Court decision mandated that the husband give his wife a *get*.[2] This is a case of entrenched recalcitrance, where the husband continued to refuse to give his wife a *get*. Though she received two *beit din* rulings either recommending or mandating that her husband deliver a *get* to her, the *beit din* subsequently rescinded these directives due to the husband's insistence that the division of marital assets be addressed by the *beit din* prior to the deliverance of the *get* and due to the wife's unwillingness to drop her civil damage suit which she filed in Rishon Letzion Family Court.

[1] File No. 9877/02, Rishon Letzion Family Court

[2] The ramifications of the distinction between a *beit din* coercing, obligating, or recommending that a husband deliver a *get* to his wife, including its impact upon a *beit din*'s recognizing the legitimacy of a *nezikin* claim, is beyond the scope of this presentation.

Suffice it to say, in the absence of a *beit din* actually obligating a husband to give a *get*, any tort award in favor of the wife rendered by a civil court will result in a coerced *get* should a Jewish divorce be arranged. See File No. 000766955-21-1, Jerusalem Regional *Beit Din*, 25 Iyar 5764; Netanya Regional Rabbinical Court, January 23,2011, Ploni v. Plonit (published on Nevo); R. Dichovsky, "Monetary Enforcement Steps against Recalcitrant Husbands" [in Hebrew], *Tehumin* 26 (2006), 173.

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The Family Court held that refusal to divorce constitutes a violation of the values protected by Israel's "Basic Law: Human Dignity and Freedom," which includes freedom of choice, the right to dignity, and self-fulfillment. Invoking this governing Israeli statute as well as other arguments, the Family Court awarded the wife compensation for the husband's recalcitrance during a period of eight years in failing to give a *get* to his wife. This decision follows in the footsteps of various earlier decisions handed down by other Israeli Family Courts which have awarded civil damages in cases of *get* recalcitrance, either in cases of the husband's refusal to give or a wife's recalcitrance to receive a *get*.[3]

Without addressing the halakhic propriety of the wife's decision to file a civil claim for *nezikin* (damages) in civil court, we will address whether such a *nezikin* claim for *get* recalcitrance, had it been advanced in a *beit din* setting, would find reception amongst *dayyanim*?

According to Halakhah, the dissolution of a marriage requires the voluntary agreement of both spouses, and failure of one party to assent to the divorce precludes execution of a *get*. Coercing a recalcitrant spouse to grant a *get* produces a divorce that is invalid, i.e. *get me'useh*. Without a valid divorce, neither party may remarry without violating Halakhah.

Hence, in our case, the wife became an *aguna*, a "chained woman", unable to remarry because of her husband's refusal to grant her a *get*.[4] If she remarries without receiving a *get* from her husband, in the eyes of Halakhah, she is an adulteress. Should children be sired from this relationship, they will be viewed as *mamzerim*, offspring of an adulterous relationship, and thus unable to marry most other Jews.[5]

[3] File No. 6743-02, Jerusalem Family Court; File No. 19270-03; File No. 19480/05, Kfar Saba Family Court; File No. 30560-07, Rishon Letzion Family Court; File No. 18561-07, Jerusalem Family Court; File No.24782-98,Tel Aviv Family Court.

For an overview of these cases, see Benjamin Shmueli and Ayelet Blecher-Prigat, "The Interplay between Tort Law and Religious Family Law: The Israeli Case," *Arizona Journal of International and Comparative Law* 26 (2009), 270.

Though our presentation focuses upon the wife's right to advance various *nezikin* claims in *beit din*, such a right equally exists for a husband who is in an '*igun*' situation due to his wife's recalcitrance in receiving a *get*. However, our discussion focuses on the more frequent situation of the *agunah*.

[4] Clearly, once a *beit din* panel issues a judgment that the husband should give a *get* and all end of marriage issues, such as child support, division of marital assets, and parenting arrangements have been resolved, should a husband refuse to deliver a *get* to his wife, then and only then a wife becomes an *agunah*. See R. Menashe Klein, "The Giving of a *Get* and Financial Arrangements: Which Precedes the Other?" [in Hebrew], *Tehumin* 22 (2002), 157; *Piskei Din Rabbanayim* (hereafter: *PDR*) 3:169, 5:208-214; 10:115-144, 11:153-171. For exceptions, see my *Rabbinic Authority: The Vision and the Reality* (Jerusalem: Urim, 2013), chapter 3.

[5] *Rambam*, *Hilkhot Gerushin* 10:4, *Hilkhot Issurei Bi'ah* 15:7, 21.

The issue in our case at hand is whether the awarding of monetary damages due to *get* recalcitrance will serve as a vehicle to coerce the husband to deliver a *get* to his wife in exchange for a wife's waiving her right to the award. If such is the case, is the resulting divorce an instance of a *get me'useh*? According to numerous authorities, should monetary fines be leveled against a recalcitrant husband, any subsequent execution of a *get* will be unlawful.[6]

Consequently, the advancement of a monetary claim to compensate for damages due to a husband's recalcitrance in delivering a *get* is without halakhic foundation. Should such an award be forthcoming and the husband decides to give the *get* in exchange for being released from paying this debt, the subsequent execution of the *get* will create a *get me'useh*. In fact, in another case a Jewish husband had been ordered by a French court to pay his wife 25,000 francs to compensate her for his refusal to deliver a *get*.[7] In replying to the merits of this judgment, Rabbis Weiss and Wosner ruled that such an award is a classic example of financial compulsion (*ones mammon*), indirectly procuring a *get* by exerting financial pressures.[8]

Therefore, it is unsurprising to discover that numerous Israeli rabbinical courts will require any monetary damage claim to be withdrawn by the wife from the *beit din*'s consideration prior to deliberating upon the propriety of a husband giving a *get* and arranging its execution. Furthermore, while a *beit din* is addressing the matter of a *get*, it will insist that any monetary damage claims being filed and/or advanced in a civil court proceeding be withdrawn.[9] Halakhically, there are three possible reasons for such a posture:

First, as we mentioned, the awarding of compensation may result in a private exchange transaction between the couple resulting in the *get* being tainted by compulsion.

Moreover, should *battei din* have rendered such awards in the past, the mere advancement of such a claim in *beit din* may motivate the husband to divorce his wife fearing the impeding threat of financial loss due to *battei din*'s track record in handing down such relief.[10]

Furthermore, should we impart validity to such an award and permit a wife to submit such a claim even *after* the delivery of a *get*, a husband

[6] *Teshuvot ha-Rashba*, Vol. 4, no. 40; *Teshuvot Tashbetz* Vol. 2, nos. 68-69; *Meiri, Beit ha-Bekhira Gittin, Mishnah* 8:1; *Rema, Even ha-Ezer* 134:5; *Teshuvot Maharik* no. 63; *Teshuvot R. Bezalel Ashkenazi* no. 15; *Mishkenot Ya'akov* no. 38. *PDR* 15:145, 16:260.

[7] *In D. v. France, 35 Eur. Comm. H. R.D.R.* 199 (1983).

[8] *Teshuvot Minhat Yitshak*, Vol. 8, no.136; *Teshuvot Shevet ha-Levi*, Vol. 5, *Even ha-Ezer* no. 210.

[9] See the series of Israeli *battei din* decisions found in *Hadin ve-haDayyan*, nos. 19 and 27.

[10] *Teshuvot Tashbetz*, Vol. 2, no. 69. See *infra* text accompanying n. 47.

fearful of the impeding possibility that he may incur financial losses due to a potential award may feel coerced in giving the *get*. Hence, such threats and fears will engender a *get me'useh*.[11]

In short, the above understanding may serve as the basis for invalidating the claim for civil damages advanced in a *beit din*.

1.

Given the foregoing presentation, is there any monetary claim that can be advanced by an *agunah* within the context of a *beit din* which will avoid the strictures of a *get me'useh*?[12] Though, as we explained, there are authorities who view any monetary duress as grounds for invalidating a subsequent execution of a *get*, there are *posekim* who distinguish between different types of monetary and non-monetary types of coercion. Certain forms of duress will taint the subsequent execution of a *get* while others will be free from any compulsion. For example, a wife stole 515 silver rubles and, in order to convince the husband to give her a *get*, she returned 400 rubles. The husband then challenges the validity of the *get*. Addressing this question, R. Menachem Mendel Schneersohn rules,[13]

> Not all monetary duress constitutes duress…115 rubles in comparison to 515 rubles is not a lot of money and this is not an instance of full-fledged duress [*ones gamur*],and it is not worse that *harhakot* (estrangement measures-AYW) of Rabbeinu Tam that is not viewed as full-fledged duress.

Under certain conditions, R. Tam enumerates various social measures which may be imposed upon a husband in order to compel the issuance

[11] Bezalel Ashkenazi, supra 6; *Teshuvot Tsemach Tsedek* (Lubavitch) *Even ha-Ezer*, no. 212; *Teshuvot Avnei Nezer*, *Even ha-Ezer* no. 177:2-3.

[12] There is an assumption that claims for *nezikin* (damages) can be awarded in contemporary times by a *beit din*. See my earlier discussions in "Spousal Emotional Stress: Proposed Relief for the Modern-Day *Agunah*," (hereafter: "Spousal Emotional Stress") *Journal of Halacha and Contemporary Society* 49 (2008), 55, and "Recovery for Infliction of Emotional Distress: Toward Relief for the Agunah," (hereafter: "Emotional Distress") *The Jewish Law Annual* 18 (2009), 213, which can be accessed at www.yutorah.org.

In our earlier presentations we focused upon a marriage where the wife desired to remain married and the husband refused to engage in sexual relations and we examined a wife's right to advance claims for her inability to have conjugal relations. Here, we are dealing with a "dead marriage" where the wife who requests a *get* wants to remarry and/or have children and the husband refuses to grant her a *get*.

[13] *Teshuvot Tsemach Tsedek Even ha-Ezer*, no. 262.

of a *get* without creating a *get me'useh*. Pursuant to one account of these estrangement measures, Rema states,[14]

> …they may mandate upon all individuals who are members of the community of Israel to refrain from granting him any benefit, nor engage in business with him, nor to circumcise his son, nor to bury him, until he gives her a *get*…

In short, as aptly characterized by R. Isaac Herzog,[15] these measures are not so severe that he would divorce his wife if he was in love with her, and if he divorces her, he has not acted under duress…

These restrictions are moderate coercive measures which minimally impact upon the husband's free will and are permissible without creating a *get me'useh*. Similarly, R. Schneersohn argues that the question posed to him should be treated. If a man is prepared to divorce his wife for 115 rubles, relatively speaking a small amount of money, this is indicative that he is ready to divorce her and he is utilizing the refusal to grant a *get* as a bargaining chip to extort her for monies or he is posturing out of spite. In such a situation, any ensuing *get* would not be tainted by compulsion. Such an approach was adopted by R. Ya'akov of Lisa, author of Netivot Hamishpat, and R. Moshe Feinstein.[16]

The civil judge in the Rishon Letzion Family Court awarded the wife approximately $182,850.00. Had such an award be rendered by a *beit din*, the question would have been whether such an amount of money rises to the level of *ones gamur* or if it is only a moderate form of coercion in pressuring the husband to give a *get*. In accordance with R. Schneersohn's approach, the answer to this question is contingent upon the financial situation of the husband. For one husband, such an award will wreak financial havoc in his life and, therefore, the awarding of such a claim would be construed as coercion, while for another husband such an amount would be financially non-threatening and, therefore, such an award would be valid. Coercion is measured proportionally by the *beit din*, factoring into consideration the husband's ability to pay.[17] Since we

[14] *Rema, Even ha-Ezer* 154:21. For earlier versions, see *Sefer ha-Yashar*, no.24; *Sefer Ets Hayyim* Vol. 2, no. 198; *Teshuvot Binyamin Ze'ev*, no. 88; *Teshuvot Maharik*, Shoresh 102.

[15] *Teshuvot Heikhal Yitshak, Even ha-Ezer*, Vol 1, no.1.

[16] *Torat Gittin* 143:4; *Iggerot Moshe, Even ha-Ezer*, Vol. 1, no. 134.

[17] For others who subscribe to this approach, see *Teshuvot Beit Ephraim, Mahadura Tinyana, Even ha-Ezer*, Vol. 1, no. 70; *Mishkenot Ya'akov* 38-41; *Teshuvot Heikhal Yitshak, Even ha-Ezer*, no. 158.

And in contemporary times by R. Amar and R. Probar who serve as dayyanim on *battei din* which are under the aegis of Israel's Chief Rabbinate and R. Dichovsky,

are unaware of the financial ability of the husband in the Israeli case, we cannot determine whether in fact this would have been a legitimate award which would not subsequently impact upon the propriety of an issuance of a *get*.

There is a second type of damage claim that can be advanced by a divorcing wife in a *beit din,* labeled "*kefiyyah ke-din*" (legitimate coercion), which avoids the strictures of a *get me'useh.* Numerous authorities have argued that certain kinds of pressure are not sufficiently coercive to invalidate the divorce, provided that the coercive element emerges from circumstances unrelated to the divorce. For example, describing the following scenario, Rivash of fourteenth century Spain and North Africa rules,[18]

The case… involved a person cast into debtor's prison for nonpayment of a debt. His wife's relatives offered to satisfy the debt on his behalf and thereby obtain his release from prison on the condition that he divorce his wife. Rivash finds no objection to execution of a *get* under such circumstances "for he was not seized in order to [compel] him to divorce [his wife] but on account of his debt; the *get* is not coerced but [the product] of free will.

Given that the husband was imprisoned for defaulting on a debt rather than as a means to coerce to give a *get*, his release in exchange for executing a *get* is not to be viewed as duress and therefore the strictures of *get me'useh* are inapplicable. Numerous authorities such as Tashbetz, Ranah, Rema, and, in contemporary times, Rabbis Yosef Elyashiv, Shlomo Daichovsky and Shilo Rafael, while serving on the Israel Rabbinical Court, endorsed the notion that coercion relating to another matter (*kefiyyah le-davar aher*) is permissible.[19]

A similar view is subscribed to by R. Moshe Feinstein. Summarizing his position, R. Breitowitz observes,[20]

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director of this network of *battei din* and former dayyan of Jerusalem Supreme Rabbinical Court, have endorsed this position**.** See *Teshuvot Shema Shlomo*, Vol. 1, *Even ha-Ezer*, no. 11; R. Dichovsky, "Rabbinical Courts and Civil Courts: Thoughts on Their Overlapping Boundaries," [in Hebrew], 4 *Mozenei Mishpat* 261 (2005), 295-298; R. Dichovsky, "Proportionality in Coercing a *Get*," [in Hebrew] *Tehumin* 27 (5767), 300,301-302; Nahum Probar, "The Obligation to give a *Get*, Return of Gifts, A Justifiable Claim- in a Case Dealing with a Couple Who do Not Want to Remain Married," [in Hebrew], *Kenas ha-Dayyanim* 109 (5768),112.

[18] Yehiel Kaplan, "Enforcement of Divorce Judgments by Imprisonment Principles of Jewish Law," 15 *The Jewish Law Annual* 57, 102 (2004), citing *Teshuvot Rivash*, no. 232. See also *Teshuvot Rivash* no. 127.

[19] *Teshuvot Tashbets*, Vol. 1, no.1; *Teshuvot Ranah*, Vol 1, no. 63; *Rema, Even ha-Ezer* 154:21; *PDR*,11: 300, 302-307, 16:271, 272-279, 275-276.

[20] Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in*

> In a responsum dated 5719 (1959), Rabbi Feinstein dealt with the following situation: a husband and wife were civilly divorced and the husband was ordered by a court to pay alimony. Failing to meet those obligations, the husband was imprisoned. The wife then agreed to drop her alimony claim (for arrearages) and procure his release if he would execute a *get*, which he did. Was this a *get me'useh*? Rabbi Feinstein ruled that it was not, and such a *get* could be executed even *ab inito*. See Igrot Moshe E.H. 1,137.

Approximately twenty five years later, addressing the situation of a husband who engaged in adulterous relationship with a married woman, R. H. Shlomo Sha'anan, a leading Israeli Rabbinical judge who today serves on the Tel Aviv Rabbinical Court, ruled:[21]

> There is a basis for coercing him to give a *get*… we can obligate him to pay an exorbitant sum of money (as a penalty for his unbecoming conduct -AYW) until he carries out one of two options; either he will leave the person he conducted an adulterous relationship or give a *get*… and this would not result in a *get me'useh* because we are not coercing him regard to the *get* at all… as Tashbetz Helek 11:1 rules…

In short, these authorities concur with the view expressed hundreds of years ago by R. Moshe of Trani:[22]

> A *get* is only considered unlawfully enforced when [the husband] is coerced with regard to the divorce. But if he is coerced with regard to a different matter, and in order to free himself from that coercion he divorces his wife, [the *get*] is not regarded as unlawfully enforced.

Invoking the concept of *kefiyyah le-davar aher*, i.e. advancing a *nezikin* claim unrelated to divorce, therefore may be justifiable.[23] There is a compelling desire upon a woman to be married rather than experience a life of spinsterhood. In addressing women, the Talmud Bavli states, "*tav lemeitav tan du mi-leMeitav armalu*" (it is better for two to live together rather to live alone) or as the Talmud Yerushalmi conveys to us in more strident terms "if she claims to desire marriage" (*tova'at le-hinase*) in order

American Society, (Westport, Conn.: Greenwood Press, 1993), 135, n. 391.

[21] PDR 14:183, 192.

[22] *Responsa Mabit*, Vol. 1, no. 22 (translation from Kaplan, supra n. 18 at 104-105).

[23] This notion of "*kefiyya le-davar aher"* is to be distinguished from *"kefiyya derekh bereira*," which means coercing a husband to comply with his marital duties such as spousal support and to exempt him from his obligation by delivering a *get* to his wife. See *Gevurat Anashim* 48.

to transcend her personal loneliness.[24] Regardless whether this compelling desire for marital ties is to engage in sexual relations or for the sake of companionship and security,[25] an inability to marry causes emotional scarring which engenders feelings of *boshet* (shame) and *tsa'ar* (emotional stress).[26]

Or for that matter, an *agunah* may be emotionally distressed due to the fact that she cannot remarry or have children and submits such a claim to a *beit din*. Such feelings are engendered by many of our life experiences and Halakhah recognizes the right of an injured party to file such claims.

Throughout different periods of Jewish history dating back to medieval times and running through the contemporary period, arbiters have meted out compensatory awards based upon *boshet* and *tsa'ar* claims for defamation of character and broken wedding engagements.[27] In 1965, invoking their power of *le-migdar milta* (protective measures, also referred to as *hora'at sha'ah*),[28] the members of the Supreme Rabbinical Court in Yerushalayim, Rabbis Abudi, Elyashiv and Goldschmidt marshaled numerous teshuvot to support their position that damages for *boshet* can be awarded in the case of a broken engagement.[29] To state it differently, if an individual is a habitual wrongdoer with regard to a certain practice and many members of the community, by engaging in this misconduct, have shown themselves to be dissolute, an emergency situation exists if the individual will continue to violate the halakhic norm of being compliant regarding giving a get unless he is punished. In short, positing that we have a situation of *le-migdar milta*, a wife desiring to remarry may advance a *nezikin* claim against her recalcitrant husband.[30]

[24] Talmud Bavli, *Bava Kamma* 110b; *Talmud Yerushalmi, Ta'anit* 4:6, *Korban ha-Edah*, ad. locum.

[25] J. David Bleich, "*Kiddushei Ta'ut*: Annulment as a Solution to the *Agunah* Problem," *Tradition* 33:1 (1998) 102, 121, n. 18. Additionally, see *Teshuvot Havvot Yair*, no. 221.

[26] For the scope of *boshet* and *tsa'ar* as well as how these injuries are assessed, see "Spousal Emotional Stress", supra n. 12 at 58-61; "Emotional Distress," supra n. 12, at 230-233.

[27] *Teshuvot ha-Rosh*, *Kelal* 101:1,89; *Teshuvot ha-Rashba ha-Meyyuhasot la-Ramban*, no. 240; *Teshuvot Tashbets,* Vol. 3, no. 204; *Teshuvot ha-Ridvaz*, Vol. 3, no. 480; *Shakh, Hoshen Mishpat* 207:24, 333:49; *Teshuvot Noda be-Yehuda, Mahadura Tinyana Yoreh De'ah*, no. 146; *Teshuvot Hatam Sofer, Even ha-Ezer* no.134, *Hoshen Mishpat,* no 181; *Teshuvot Avodat ha-Gershuni*, no, 74; *Teshuvot Zera Emet, Yoreh De'ah*, no. 102; *Teshuvot Rav Pe'alim*, Vol. 2, *Even ha-Ezer,* no. 3; *PDR* 3:151.

[28] For an understanding of a *beit din*'s extra-judicial authority, see *Emotional Distress*, supra n. 12 at 218-223.

[29] *PDR* 5:322,327.

[30] Implicit in one contemporary approach to this question is that *"migdar milta"* is inapplicable to the *agunah* situation. See R. Uriel Lavi, "The Arrangement of a *Get* after a Husband's Monetary Compensation Award to his Wife," [in Hebrew], *Tehumin* 26 (2006), 160, 164.

Alternatively, if an individual prevents another individual from performing a mitsva, the individual so precluded is entitled to receive monetary damages.[31] Consequently, if a woman wants to marry in order to have children, then she potentially will have the opportunity to fulfill the mitsva of populating the world.[32] Given her incapability of her fulfilling this mitsva due to her husband's recalcitrance in delivering a *get*, she may seek an award for damages for being unable to engage in a mitsva. Even in the absence of a desire to have children, the act of marriage *per se* entails the performance of a mitsva for some authorities.[33] Should her attempts to engage in this mitsva be thwarted, there are grounds for submitting a claim for damages.

In sum, a wife may either submit a *nezikin* claim for *tsa'ar* and/or *boshet* based upon her right to marry due to her wish to engage in sexual relations, experience companionship, engage in the mitsva of marriage, or the mitsva of bringing children into this world. Arguably, each of these claims is unrelated to divorce and therefore is a halakhically legitimate demand based upon the notion of *kefiyyah le-davar aher*.

In many instances, upon receiving her *get*, an ex-wife will not desire to remarry. In fact, her experiences with her husband may cast doubt on her inability to identify "the right man to marry" or may generate negative feelings to the institution of marriage and therefore marriage no longer remains an option for her. To put it differently, the act of divorce does not inexorably lead to a divorcee's wish to remarry. As such, we cannot advance grounds for a wife's claim for *tsa'ar* and/or *boshet* in situations where she does not want to remarry.

However, the submission of such a *nezikin* claim can be made by an *agunah* who desires to remarry and/or have children. A woman's advancement of a monetary claim grounded in her right to marriage is independent and unrelated to the divorce and therefore should be halakhically justified. In other words, though the submission of a damage claim grounded in the right to marriage clearly assumes that a *get* must be forthcoming, nonetheless, we may still focus on the merits of the claim without linking it to a

[31] *Teshuvot Ketav Sofer, Hoshen Mishpat,* no. 26; *Sha'arei Teshuva, Orah Hayyim* 482:1; Sheinfeld, Nezikin, 306-307, n. 112. This damage claim due to the inability to perform a mitsva has been applied without explanation to the *agunah* situation. See Yosef Sha'rabi and Yuval Sinai, Halakhic Advisory Opinion, Netanya Academic College, June 23, 2011.The grounds for justifying such a claim is presented in this essay.

[32] Though women are exempt from the mitsva of procreation (see *Rambam, Hilkhot Ishut* 15:2), nonetheless some posekim argue that the mitsva of populating the world is incumbent upon women. See *Rashi, Yoma* 9b; *Tosafot Shabbat* 110b; *Teshuvot ha-Ran*, no. 32; *Birkhei Yosef, Even ha-Ezer* 1:16; *Teshuvot Binyan Tsiyyon*, no. 23.

[33] Following in the footsteps of Rambam, R. Aharon of Barcelona views it as a mitsva. See *Sefer ha-Hinnukh,* Mitsva 539 (Chavel ed.).

divorce procedure.[33a] As long as the submission of such a claim is intended to address a breach of an independent claim that is halakhically justified [in our case, the right to marriage and/or to sire children], and is sincerely desired by the wife for the aforementioned reasons, not simply a means of pressuring the husband to deliver a *get*, any subsequent execution of a *get* will be valid. As such, though her desire to receive a *get* is required prior to her ability to remarry, nevertheless her monetary claim is linked directly to her manifest desire to remarry and/or have children.

What about a claim that is ostensibly independent of the *get*, but is employed for purposes of compelling a husband to give a *get*? Is the *kavana* (intent) to initiate such a claim in *beit din* relevant in determining whether a divorce is coerced? And, if so, how is intent to be ascertained – by noting whether anything is mentioned about delivery of a *get* when the *nezikin* claim is submitted, by assessing the wife's behavior, or by inference from the circumstances?

Many contend that the mere mention of the matter of a *get* indicates that the claim is in actuality submitted to persuade the husband to become divorced. If the matter is not mentioned, we can assume that the wife's intent is to have the *beit din* address the merits of her plea rather than for it to serve as leverage to procure her *get*.[34]

Others contend that even a self-standing claim which is not linked to a request for the execution of a divorce is problematic if there is an *umdena de-mukhah* (a proved presumption) that this claim was put forward primarily to procure a writ of divorce, and therefore any subsequent delivery of a *get* would be invalid.[35] Addressing a *nezikin* claim related to a husband's conduct

[33a] Others agree with this conclusion. For example, one contemporary dayyan has suggested that a *beit din* is empowered to impose monetary penalties upon the recalcitrant husband for the embarrassment and psychological pain engendered due to his intransigence in delivering a *get* to his wife. In other words, the fact that a *get* was withheld does not invalidate the right to advance various *nezikin* claims. We only construe it as financial coercion if the giving of the *get* will exempt him from the financial burden. However, if he has to pay the financial debt even if he delivers the get, in such a situation the financial pressure is not the grounds for giving the *get*. Subsequently, should his wife waive the right to the debt in exchange for delivery of the get, we are dealing with *kefiyyah le-davar aher* and therefore the issue of a *get me'useh* does not arise. See Dichovsky, supra n. 2, 176-178. See also *Tashbetz*, supra n. 19; *Torat Gittin* 134:4. The same rationale applies to our situation.

[34] *Teshuvot Ein Yitshak, Even ha-Ezer,* Vol. 2, no. 33 (1-6); Tzvi Gartner, *Kefiyyat Get*, 379, 386. Though some argue that the mention of the *get* in our situation will not invalidate any subsequent execution of a *get* (see *Ranah, supra* n. 19 *Teshuvot Beit Ephraim, Even Ha-Ezer* Vol. 1, no.73), many disagree with this position. See *Tashbets*, supra n. 10 *Teshuvot Maharashdam Even ha-Ezer*, no. 63; *Pithei Teshuva, Even ha-Ezer* 134:6.

[35] *Maharashdam*, ibid.; *Rav Pe'alim*, supra n. 27.

during marriage, R. Tzion Algrabli, in a recent decision handed down by the Jerusalem Supreme Rabbinical Court, states:[36]

> There is no reason for reluctance to submit to the court a claim for monetary damages for *boshet* and the like due to one spouse's neglect of the other… even if the claim is procedurally linked to [i.e. submitted along with] a claim for divorce. However, it must be clear that the *nezikin* claim was not submitted for the purpose of pressuring the husband to grant *get*… Only a rabbinical court may determine whether the claim impacts upon the propriety of the *get*.

Yet there are other *posekim* who argue that the wife's intent in producing such a plea is irrelevant and any ensuing delivery of a *get* is proper.[37]

Pursuant to the latter approach, the focus must be on the claim itself. As we have seen, emotional stress engendered by a refusal to give a divorce, financial coercion,[38] and blackmail on the part of the husband in the course of the negotiations and the anguish emerging from years of divorce litigation cannot serve as grounds for a monetary award. Such claims for compensation for these injuries are related to the divorce and therefore violate the halakhic mandate that a *get* must be given voluntarily. However, mental anguish expressed in terms of *boshet* and *tsa'ar* due to the wife's need to be married or due to the husband's precluding her from performing the mitsva of getting married and/or siring children is an independent claim which ought to be validated. A woman's right to marriage and/or to have children is self-standing, independent, and unrelated to her feelings linked to her existing marriage and the need to dissolve the relationship.

Should a wife want to advance a *nezikin* claim in *beit din*, how does she proceed? If the parties appear in *beit din* in order to resolve all end-of marriage issues including but not limited to parenting arrangements, child support, division of marital assets, and the delivery of a *get*, it is understood that other matters can equally be addressed. Whether a *nezikin* claim is to be construed as an additional claim not specifically mentioned in the arbitration agreement which empowers the *beit din* to resolve these matters or whether it is to be construed as related to the matter of the *get*, it is a claim which ought to be heard. Once both the husband and wife obligate

[36] File No. 7041-21-1, Supreme Rabbinical Court, March 11, 2008.

[37] *Ranah*, supra n. 19; *Beit Ephraim*, supra n. 34; *Teshuvot Penei Yehoshua*, no. 75; *Mabit*, supra n. 22. For an understanding of *Mabit's* view based upon an examination of his various rulings regarding *get me'useh*, see "Emotional Distress," (supra n. 12) at n. 147.

[38] As we have explained, whether moderate financial pressures will avoid the strictures of a *get me'useh* is subject to debate.

themselves to the *beit din*'s jurisdiction[39] to address the end-of-marriage issues, should at any juncture during the proceedings the husband refuse to deliver a *get*, the wife's claim for either a monetary award, which ought not be excessive for *get* recalcitrance, or a claim for mental anguish due to her right to marry and/or have children or based upon her inability to perform the mitsva of marriage and/or sire children may be advanced. Upon deliberation, should the *beit din* rule in the wife's favor,[40] it will direct the husband to pay damages.[41] Should the husband refuse to proceed to make compensation, the award can be enforced in civil court.

On the other hand, should the husband accept the rabbinical court's decision, he has the option of suggesting to his spouse that, in exchange for giving a *get*, she waive her entitlement to the monetary damages; and the resulting *get* will not be tainted by coercion. Under such circumstances of a private exchange transaction, such financial inducements, whether to appease a recalcitrant husband[42] or a recalcitrant wife who refuses to accept a *get*,[43] do not contravene the stricture

[39] The parties' signing of an arbitration agreement (*shetar borerut*) gives the *beit din* authority to resolve this matter. See *Rema, Hoshen Mishpat* 12:7; *Sma, Hoshen Mishpat* 12:18 and *infra* text accompanying notes 55-58. Assuming this decision complies with the rules of secular arbitration procedure, it would be legally enforceable in a competent civil jurisdiction in the United States. See Uniform Arbitration Act, section 1.

Should the husband fail to agree to submit to a *beit din*'s jurisdiction, then the wife should optimally receive permission from the *beit din* or alternatively receive permission from a rabbinic authority who has expertise in Even ha-Ezer and Hoshen Mishpat to litigate the matter in civil court. See *Shulhan Arukh, Hoshen Mishpat* 26:2; *Teshuvot Maharil Diskin* 13; *Teshuvot Shevet ha-Levi* 4:183. For the receptivity of such a claim in civil court, see "Emotional Distress," supra n. 12, at n. 164. Here, again, a monetary claim advanced in civil court would equally have to be based upon the parameters outlined in our presentation.

Should someone receive permission to file a suit in civil suit, it is extremely important that the individual consult with a recognized rabbinic authority who has expertise in Even ha-Ezer and Hoshen Mishpat and possesses legal and jurisprudential education in order to receive competent advice in preparing a claim statement and submitting expert testimony in civil court which will avoid the strictures of a *get me'useh.*

[40] Whether a *beit din*'s willingness to render such an award requires a *beit din* to coerce, obligate, or only recommend that the parties dissolve their marriage is beyond the scope of this presentation.

[41] Whether a monetary award given based upon a wife's right to marriage and/or having children should be limited lest an exorbitant amount be viewed as financial coercion resulting in a *get meuse.* we leave as an open question.

[42] *Teshuvot Maharshah*, Vol 1, no. 67, Vol. 2, no.129; *Teshuvot Hemdat Shlomo, Even ha-Ezer* no. 80; *Teshuvot Tsemach Tsedek, Even ha-Ezer*, nos. 262-263; *Teshuvot Avnei Nezer, Even ha-Ezer* 167; *Hazon Ish, Even ha-Ezer* 99:2; *Iggerot Moshe, Even ha-Ezer* 3:44; "Emotional Distress," supra n. 12, at 252-254.

[43] *Teshuvot ha-Rosh*, *Kelal* 35:2;*Teshuvot Tashbets,* Vol 4, no.35; *Torat Gittin*

against a coerced divorce in situations of "a dead marriage" where the couple desires to be divorced.

Following in the footsteps of Rivash, Mabit, R. Feinstein and others, R. Shilo Rafael observes:[44]

> One is allowed to release from imprisonment someone who is serving time for contempt of the rabbinical court [failing to produce information requested by the court], and condition his release on his giving his wife a *get*. For his imprisonment is not related to his recalcitrant refusal to grant the *get*, but is, rather, punishment for contempt of court, and he is redeeming himself by giving the *get*. And at the time R. Elyashiv agreed with me.
>
> One can promise a prisoner that his term of imprisonment will be reduced by a third in exchange for giving a *get*… and I hear from R. Elyashiv, long may he live, that it is clear that this is not considered a coerced divorce, and it is like [the case of] a wife who purchases her *get* for a certain sum of money- such a *get* is entirely acceptable (*kasher le-mehadrin*)

What happens, however, if the exchange is consummated by the husband and wife outside the confines of a *beit din* proceeding? Seemingly, if the wife threatened to file a claim in *beit din* and subsequently the husband agreed to grant a *get* in exchange for his wife's willingness to refrain from submitting such a claim, such an agreement ought to run afoul of the strictures of a *get me'useh*? In fact, there are *posekim* who contend that a husband who gives a divorce due to a threat is deemed to have been forced to grant the *get*.[45]

But these rulings are readily distinguishable from our case. These *posekim* are addressing a situation of "a clear and present danger," i.e., these are instances where a husband is being threatened with harm, imprisonment, or death if he refuses to consent to a divorce, and hence are indeed instances of unlawfully coerced divorce. By contrast, in our scenario, the husband is threatened by a monetary claim too remote to rise to the level of compulsion, especially since we are neither sure whether a *beit din* will agree that they are empowered to award such

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supra n. 17; *Teshuvot Noda be-Shearim,* no. 6; *Teshuvot Heikhal Yitshak, Even ha-Ezer* 1:9;*Teshuvot Yabia Omer*, Vol. 6, *Even ha-Ezer*, no. 10.

Additionally, in a series of rabbinical court decisions, R. Yosef Elyashiv endorsed this position in cases where the *beit din* obligated the wife to receive a *get* from her husband. See *PDR* 7:111: 8:36; 9:65.

[44] PDR 16: 271,275-276.

[45] *Teshuvot ha-Rashba* 2:276; *Teshuvot Mahari ibn Lev* 2:77; *Teshuvot Avnei Nezer* supra n. 11; *Teshuvot Shem Arye* 93-94.

nezikin damages[46] nor is the amount of the award known in advance should such a decision be rendered. As the Tashbetz exclaims:[47]

"if he has a remote fear of financial loss and therefore desires to give a *get*, ought one label this a coerced *get*?"

Indeed, the wife may threaten to submit a claim and never follow through with her threat.[48] Consequently, a private exchange should not taint any subsequent delivery of a *get*.

Obviously, if our *battei din* begin to award such damages and therefore it becomes "a clear and present danger" akin to the threat of imprisonment, the threat that such a claim will be submitted may render execution of the *get* coerced. However, even were such an award to become commonplace, the amount of the award would not be known in advance, and hence the threat would remain remote.[49]

The foregoing presentation affords the basis of allowing an *agunah* to advance certain tort claims in *beit din*, albeit noting in our discussion those who challenge the propriety of such claims. Deciding between the competing arguments relating to the propriety of the different types of *nezikin* claims for an *agunah* will be the sole prerogative of the *posek*. The relative strength of each argument applicable to a case will hopefully be tested within the framework and constraints of future *piskei din* [halakhic decisions]. In the event that a *posek* and/or *beit din* decides to render such awards, it is clear that in their mind(s) the awarding of such monies will not create a situation of a *get me'useh*. Consequently, should other *posekim* reject such an approach, any subsequent *get* rendered by a *beit din* after an award is made ought to be recognized by all segments of our community. In other words, though a *get me'useh* administered by a *Jew* is *pasul*, i.e. invalid,[50] nonetheless, be-di-avad (*ex post facto*) the execution of a *get* under duress is kosher.[51] Hence, *posekim* who reject the right of a

[46] See supra n. 12.

[47] *Teshuvot Tashbets* 2:69.

[48] *Mordekhai Gittin* 395; *Teshuvot Maharik Shoresh* 185. Cf. *Teshuvot ha-Rashba* 1:883, *Teshuvot Hadashot of Rivash* 27 and 32 and *Teshuvot Bezalel Ashkenazi,* supra n. 6; *Teshuvot Anei Nezer, Even ha-Ezer* 177:2-3, *supra* n. 11, who argue that even a mere threat constitutes duress.

[49] Breitowitz, supra n. 20, at 248.

[50] *Gittin* 88b.

[51] *Teshuvot Ma'aseh Moshe*, EH 17 in the name of Rashba; *Teshuvot Ma'aseh Hiyya* (Rofe), no. 24; T. Gartner, *Kefiyyah be-Get*, 26, 232-233.

However, should the tort claim be awarded by a secular court (see *supra* n. 39), a subsequent delivery of a *get* under certain circumstances *may* be *battel* (null and void) according to those *posekim* who consider this an instance of a *get me'useh*. See Gartner, op. cit., 141-146, 233.This matter is beyond the scope of our presentation.

recalcitrant spouse to advance a tort claim, be-di-avad a subsequent execution of a *get* ought to be recognized.

Hopefully, the following incident recorded in the Talmud could not transpire in our day:

> R. Rehumi who was [studying at the school] of Rava at Mahoza, used to return home on the eve of every Day of Atonement. On one occasion, he was engaged in his studies [that he forgot to return home]. His wife was expecting [him any moment saying] 'He is coming soon, he is coming soon.' As he did not arrive, she became so depressed that tears began to flow her her eyes. [At that moment] he was sitting on a roof. The roof collapsed under him and he fell and died.[52]

And the Shulchan Aruch admonishes, "One must be mindful of [causing] anguish to one's wife, for her tears are ever-present."[53]
These words of admonishment should be applicable equally to our situation. Failure to deliberate upon the merits of this *nezikin* claim may undermine a community's trust and confidence in rabbinic authority in general and in rabbinical courts in particular. We hope that our articulation of these claims will allow *battei din* to live up to their mission addressing openly and forthrightly the challenges of our community.

ADDENDUM:

In the absence of a *dayyan*'s employment of "*migdar milta*" to resolve these matters, there are three additional avenues which will empower a *dayyan* to address such *nezikin* claims:

(1) Generally speaking, there is a requirement of having a *beit din* composed of *mumehim* (i.e. *dayyanim* who have received classical ordination handed down from Moshe Rabbeinu) who are empowered to award *kenasot* (i.e. penalties) including but not limited to *nezikin*. However, in contemporary times in the absence of *mumehim*, given that the power of *beit din* stems in part from the parties' willingness to accept their authority, the awarding of *kenasot* is permissible.[54] In effect, by the acceptance of their authority via the execution of a *kinyan* (i.e. a symbolic act of undertaking the duty to abide by the *pesak* of the *beit din*), the parties agree to obligate themselves to

[52] *Ketubbot* 62a.
[53] *Shulhan Arukh, Hoshen Mishpat* 228:3.
[54] *Shita Mekubetset, Bava Kamma* 89b, s.v. *u-gedolei ha-mehabberim*; *Ketsot ha-Hoshen* 3:1; *Tumim* 1:1;

remit such monies should an award be rendered. This obligation is effective even though the parties do not explicitly state in the *shetar borerut* (arbitration agreement) that the *dayyanim* may issue a decision regarding a *nezikin* claim(s) which may entail a *kenas*. Second, given that the parties empower the *beit din* to resolve their matters in accordance with *peshara*, the panel may resolve matters dealing with the *halakhot* of *kenasot*.[55]

(2) Usuallythe couple signs a *shetar borerut* accompanied by the execution of a *kinyan* which authorizes the *beit din* halakhically and legally to issue a ruling. The *shetar* should *specifically* authorize the panel to resolve claims relating to the five types of personal injury as well as *gerama* (indirect damage), matters which we described earlier in our study. The significance of this arrangement is that, though, as we pointed out, generally speaking contemporary arbiters are precluded from addressing these *nezikin* matters (except via the other two avenues mentioned in this addendum as well as an exigency situation - "the times demand it" as elaborated upon in our chapter) nevertheless, should the parties obligate themselves to accept a *beit din*'s decision regarding these claims, such a *shetar* is valid. In other words, the authority to issue a judgment is grounded in the parties' willingness to fulfill their respective obligations, no different than complying with the terms of a contractual agreement rather than based upon the judicial capacity of a *dayyan* to render a *pesak*.[56] Alternatively, such acceptance is no different than the imparting of validity to litigants' decision to accept a halakhically invalid individual as an arbiter such as a relative[57]

(3) Even in the absence of a provision in the *shetar* which allows a panel to render a decision in matters relating to personal injury or

[55] *Teshuvot Mabit*, Vol.1: no. 93;*SA*, *HM* 12:2; *Teshuvot Beit Yehuda* (Landau), HM 1 which is cited authoritatively by *Pithei Teshuva*, *HM* 1:3; *Mishpatekha le-Ya'akov*, Vol. 2, no. 32; Ya'akov Ariel, *Dinei Borerut*, 187; File No. 70029, Eretz Hemdah-Gazit Rabbinical Court, October 31, 2011.

[56] *Bava Metsia* 114a; *Rambam, Hilkhot Shekhenim* 12:7;Shulhan Arukh, YD 334:43; R. Zalman Nehemiah Goldberg, In the Matter of Civil Courts (Hebrew), *Yeshurun* 11 (2001), 702-703. And, in fact such a conclusion was endorsed by Imrei Binah, HM 2.

[57] *Arukh ha-Shulhan, HM* 1:13; *Beit Yehuda*, supra n. 55. For recent applications of this view, see File No. 9326351, Jerusalem Regional Rabbinical Court, August 11, 2007 (R. Eliazrov's opinion); File No. 9326351 (Appeal Decision), Supreme Rabbinical Court, August 25, 2008 (R. Sherman's opinion); Cf. *Sha'ar ha-Mishpat, HM* 1:1, 2:1 who casts doubt upon the validity of such a *shetar* with regard to punitive damages. However, regarding non-punitive damages such as *nezek*, *rippui* and *shevet, Sha'ar ha-Mishpat* will validate such a provision in a shtar.

in the absence of conditions which would earmark the situation as "*le-migdar milta*", in accordance with a *takkanah* (legislation) enacted by the Geonim and "the *minhag* of *battei din*" (the practice of rabbinical courts), a panel is empowered to employ their discretion in determining the amount of the monetary award and they will inform the batterer that this amount will appease the victim. This amount will be final even if the figure arrived at by the panel is unacceptable to the victim. As elucidated by the *posekim*, the grounds for this award are to deter others in the community from emulating the batterer's conduct.[58]

[58] *Otsar ha-Geonim* (ed. B. Lewin), *Ketubbot*, *Teshuvot*, 477; *Teshuvot ha-Geonim*, *Sha'arei Tsedek*, Vol. 4, *Sha'ar* 1, 19 in the name of R. Sherira Gaon; *Piskei ha-Rosh, Bava Kamma* 8:2-3; *Tur*, *HM* 1:11; *SA*, *HM* 1:5, 420:38, *Rema*, *HM* 1:2;*Teshuvot ha-Rema* (A. Siev ed.) 88 (379-380); *Teshuvot ha-Mabit*, Vol. 1, no. 93; *Teshuvot ha-Ridvaz*, Vol. 4, no. 1291; PDR 5: 322; Piskei Din Yerushalayim Dinei Mamonot u-Berurei Yahadut, Vol. 3, 205; Supreme Rabbinical Court, supra n. 3; Eretz Hemdah, supra n. 55.