TORT 1 (J. GREENBERGER, JER. FAM.CT. CASE 0395/00)

BEFORE THE HONORABLE JUDGE BEN-ZION GREENBERGER: 23.1.2001

Re: Jane Doe
By Her Attorney Susan Weiss, Esq. Plaintiff
v.
.1 John Doe A
Te'enah Ackerman, Esq. (Guardian at Law)
.2 John Doe B
By His Attorney, IditYafet, Esq. Defendants

DECISION

1. This concerns a motion for summary dismissal of the claim brought against the Defendants on account of injury that the Plaintiff suffered, she alleges, on account of the recalcitrance of Defendant 1 to give her a *get* [a Jewish document of divorce] in accordance with the laws of Moses and Israel, even though he was required to do so in a Rabbinic Court, and on account of the assistance and encouragement of Defendant 2 (the father of Defendant 1) in support of this recalcitrance.
2. The motion for summary dismissal is based primarily on two arguments: First, that there is no cause of action in tort in the State of Israel with respect to the recalcitrance of a husband to give a *get*; and second, that this concerns a subject that by its nature and substance lies in the exclusive jurisdiction of the Rabbinic Court, because only the Rabbinic Court has jurisdiction to adjudicate "matters of marriage and divorce of Jews in Israel who are citizens and residents of the State" (Paragraph 1, **Rabbinic Courts Jurisdiction [Marriage and Divorce] Law** , 5713 - 1953)

CAUSE OF ACTION IN TORT

3. The controlling question at this stage of the adjudication of the claim is whether the claim states a cause of action. The familiar rule is that a claim will not be dismissed for lack of a cause of action unless it is absolutely clear that, even if all of the allegations of the claim are proven true, there is no possibility that the claim will be successful. If there is any possibility whatever - no matter how slight - that the Plaintiff will prevail in her claim, the motion must be denied.
4. The question before the Court has in fact never been decided in the State of Israel. However, the phenomenon upon which the claim is based is familiar and widely known. A great deal of ink has already been spilled, not only in the Israeli legislature and in the State of Israel but over many generations in Israel and the Diaspora, and enormous efforts have been invested, in the attempt to find appropriate solutions to release the many women who are shackled by marital ties that they wish to sever but who confront one, single obstacle:

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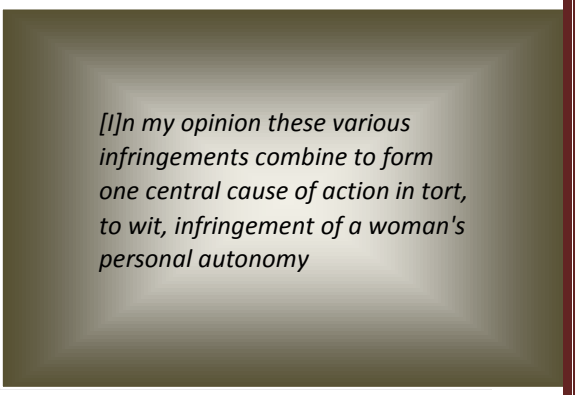
the recalcitrance of the husband to give the desired *get*.

5. In 1995 the **Rabbinic Courts (Enforcement of Divorce Judgments) Law**, 5755-1995, was enacted, providing the Rabbinic Courts a variety of tools for the imposition of sanctions on the recalcitrant husband in order to motivate him to desist from his recalcitrance. This law reflects the powerful desire of the legislature - as well as of the Rabbinic Courts, which participated actively in the preparation of the law - to attempt to solve this dismal problem while preserving the principal of applying *halakhah*[Jewish law] in all that pertains to marriage and divorce.
6. What if the husband persists in his recalcitrance? If despite the issuance of a Rabbinic Court decision mandating the giving of a *get*, and despite the power of the Rabbinic Court to impose sanctions on the husband, he stubbornly fails to give a *get*, and a great deal of time passes during which the wife suffers, without a real partner, without marital life, without any possibility of bringing children into the world and raising them in a normative family, and without any possibility of remarrying and determining her future - are we then dealing with compensable injury under our legal system?
7. The required answer, at least prima facie and at this stage of the proceedings, is that the Plaintiff should be allowed to prove her claim and that the claim should not be summarily dismissed.
8. Although the attorney for the Plaintiff has assembled in her briefing assorted arguments as to the possible causes of action that are available to her, such as breach of a statutory obligation, false imprisonment, deprivation of a woman's right to marriage and children, and others, in my opinion these various infringements combine to form one central cause of action in tort, to wit, infringement of a woman's personal autonomy caused by depriving her of her ability to determine the continuing course of her life with respect to those issues that are central to the life of any woman.

   The framework for my conclusion can be found comprehensively and in depth in the remarks of the Honorable Judge Or in Civil Appeal 2781/93 **Miasa Ali Da'aka v. Carmel Hospital**, Haifa (58 Dinim Elyon 174); and in light of the importance of his remarks to our matter, I permit myself to quote them at length:

THE RIGHT TO AUTONOMY-GENERAL

15. The point of departure for the discussion lies in the recognition that every person has a basic right to autonomy. This right was defined as the right of every individual to make decisions regarding his actions and desires on the basis of his own choices, and to act in accordance with these choices. The right to autonomy is, in the words of that definition, "his or her independence, self-reliance and self-contained ability to decide…" See, F. Carnerie, **Crisis and Informed Consent: Analysis of a Law-Medicine Malocclusion**, 12 Am. J. L. and Med. 55 (fn. 4)…This right of a person to shape his life and his destiny encompasses all of the central aspects of his life - where he will live, what work he will do, with whom he will live, and what he will believe. It is central to the condition of each and every individual in society. It is a necessary expression of the value of each and every individual in the world



unto himself. It is essential to the self-definition of each individual, in the sense that the entirety of the choices of each individual defines the personality and life of the individual…

17. Recognition of a person's right to autonomy is a basic ingredient in our legal system, as the legal system of a democratic country (see R. Gavison, **"Twenty Years Since the Rule of Yardor- The Right to be Elected and the Lessons of History,"** A Tribute to Shimon Agranat 151 (5747/1987); High Court of Justice 693/91 **Efrat v. The Person in Charge of the Population Registry in the Interior Department**, Dec. 47(1) Piskei Din 749, 770). It constitutes one of the central expressions of the constitutional right of each person in Israel to dignity, which is grounded in the Basic Law: Human Dignity and Freedom. Indeed, it has already been held that one of the expressions of this right to dignity is "… the freedom of choice of each person as a free creature," and that this reflects the concept according to which "…. each person…is a world unto himself" (remarks of President Barak in High Court of Justice /7357/95 **Barki Pate Hemfris (Israel) Ltd. v. State of Israel**, Dec. 50(2) Piskei Din 769, in section 3 of his decision). As President Barak noted, "autonomy of personal will is a fundamental value in our law. It is grounded today in the constitutional protection of human dignity" (High Court of Justice 4330/93 **Ganam v. Office of Attorneys**, 44 Dinim Elyon 435, in section 14 of the decision). Regarding the meaning of human dignity in this context, President Shamgar spoke in Civil Appeal 5942/92 **Doe v. Roe** et al., 48(3) Piskei Din 837, saying (on p. 842) that: "Human dignity is reflected, inter alia, in the ability of a human being as such to form his personality independently, as he wishes, to express his aspirations and to choose how to achieve them, to make his volitional choices, not to be subject to arbitrary compulsion, to be treated decently by every authority and every other individual, and to enjoy the equality of human beings". . . .

18. The right to autonomy is a "framework right" (see Barak, Judicial Commentary - Statutory Commentary (Jerusalem, 1994), pp. 357-358. Accordingly, this right serves as the basis for the derivation of many specific rights. Thus, for example, the right of an individual to choose his family name has been derived from it (Efrat, supra). The right of a criminal accused not to be present at his trial if he does not want to be has been derived from it (**Barki Pate Hamarfis**, supra). It is given great weight in resolving the question of whether a guardian should be appointed for a person (see, Civil Appeal 1233/93 **Cohen v. State Legal Advisor**, 42 Dinim Elyon 264, in sections 4 and 5 of the decision of Judge Strasberg-Cohen). The basic right of every person to freedom of movement in Israel has been derived from it (see section 74 of the decision of President Barak in High Court of Justice 5016/96 **Horev v. Minister of Transportation**, 51 Dinim Elyon 414). It served as well as the grounding for the right of a person to choose as he wishes an attorney to represent him in court (**Ganam**, supra). It was given great weight as well in resolving the question of whether and to what extent the adoption of an adult must be recognized, on the basis of the approach that "in an era in which 'human dignity' is a protected basic right, effect must be given to the aspiration of a person to fashion his personal condition" (remarks of Judge Benish in Civil Court 7155/96 **IlanYisraeli v. Government Legal Advisor, 51 Dinim Elyon** 873 in section 10)…" (pp. 41-43).

9. A person does not have the ability to shape his life however he wants, and life poses varied, and sometimes painful, limitations to a person, which prevent him from realizing all of his

desires. Not every such impediment constitutes an infringement of the person's dignity and freedom for which the law can create a judicial/constitutional remedy. However, there are cases in which the infringement is so severe that if it is possible to remedy it by judicial intervention, or at least to compensate the aggrieved party, the court will not hesitate to intervene. Cf. Criminal Appeal 115/00Arik **(Moris) Taib v. State of Israel** (58 Dinim Elyon 174), in which the following is said:

> Every woman, every person, is entitled to write the story of their life as he or her she wishes and in accordance with their choice - as long as he or she does not trespass into the domain of others - and this is the autonomy of free will. Should a person be compelled to follow a path that he or she did not choose, the autonomy of free-will will be infringed. Indeed, it is our fate, human fate, that we constantly act and refrain from acting not of our free will, and in this way autonomy of our will is found lacking. But when autonomy of free will is profoundly infringed, the law will intervene and speak. The scholar Joseph Raz wrote on the subject of the autonomous person, and among other things he told us:
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> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives. A person whose every decision is extracted from him by coercion is not an autonomous person. Nor is a person autonomous if he is paralyzed and therefore cannot take advantage of the options which are offered to him. (Joseph Raz, Autonomy, **Toleration, and the Harm Principle, Issues in Contemporary Legal Philosophy**, Ruth Gavison ed., Clarendon Press (Oxford, 1987), 313, 314). (P. 28)

10. In our case, I am convinced that the right of a woman to determine for herself when she wishes to sever marital ties and when she wishes to remarry, her wish "to write the story of her life as she wishes and in accordance with her choice," is a basic right that will certainly find its place by virtue of the aforesaid framework. The aspiration of a woman who wants a divorce to fashion her personal condition as a free person determining her own fate merits every defense as an inseparable part of her dignity as a person.

11. The following are the remarks of the late Prof. A. Rosen-Zvi, which he delivered before the Committee on Constitution, Statute and Law (Protocol No. 240, 8.11.94, p. 10) in the context of a deliberation that took place in connection with the proposal of the **Rabbinic Courts (Enforcement of Divorce Judgments) Law** 5754-1994:

> In my opinion, the basic concept of human dignity and the sanctity of the life of a human being as a free person absolutely cannot be reconciled with recalcitrance to give a *get* or with *Aginut* [the condition of being unable to remarry because of such refusal], a

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priori, and does not tolerate a situation of dependency in which one party limits the other and creates impossible consequences for her. The situation of *aginut*, in which the *get*-recalcitrant leaves a woman, infringes her basic dignity. This is not only a halakhic feature to which Rabbi Ovadiah Yosef gave consummate expression; there is a striking expression in the view of the MaHaRSHa at the end of Tractate Yebamot, who writes: "Where there is the creation of *aginut*, there is no peace, and the entire Torah was given only in order to make peace." In other words, a situation of *aginut* undoes in this respect the basic purpose for which the Torah was given. These are words expressing the universal concept of peace, freedom and human dignity.

12. A still sharper expression of the severe infringement that occurs in the life a woman whose husband refuses to give her a *get* can be found in the expression on the subject by one of the greatest decisors of the twentieth century, Rabbi Y. E. Henkin. In his book **Edut le-Yisrael** Rabbi Henkin says as follows:

> …and whoever withholds a *get* because he is illegally demanding payment is a thief, and worse, for he [falls into] a sub-category of shedding blood. P. 144 (quoted as well in Writings of the Gaon Rabbi Y. E. Henkin, vol. 1, p. 115b.
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> We are thus dealing with so severe an infringement in the eyes of *halakhah* that it is viewed not only as a spiritual, emotional and psychological infringement, but as the actual shedding of blood; and these words are well said.

13. It follows that the aspirations of Israeli society for human dignity and freedom, which are embodied in the Basic Law: Human Dignity and Freedom, and in the Torah of Israel itself - the Torah that determines the fundamental values of family life not only in Jewish religion but in Israeli law, as well - require the conclusion that creation of a state of *aginut* negates a woman's dignity and freedom.

14. The infringement of the autonomy of a woman that results from her being placed by her husband in a state of *aginut* is, in my opinion, compensable injury in accordance with the Tort Ordinance. I will quote once again from Judge Or in the Da'aka decision: The basic right of the Appellant as a person to dignity and autonomy has been infringed. Does this fact suffice to afford the Appellant a right to compensation, even if she has not suffered bodily injury . . .? The first question that must be considered in this context is whether the injury involved in an infringement of the dignity and freedom of the Appellant is "injury" in the sense of the Tort Ordinance. In my opinion, this question should be answered affirmatively. The term "injury" is defined in Section 1 of the Tort Ordinance (revised version). This definition is broad and addresses:

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"Loss of life, loss of property, convenience, bodily welfare or reputation, or a diminution of any of them, and any similar loss or diminution".

In the framework of this definition, protection is provided to many intangible interests. Thus,

compensation is afforded for non-property injury – for example, pain and suffering – involved in bodily injury that the injured party has suffered. In view of the evident breadth of this definition, it has been held that infringement of bodily convenience, and emotional distress, even without any physical expression, and even if not associated with any physical infringement, can be compensable injury in tort (Civil Appeal 243/93 **Municipality of Jerusalem v. Gordon**, 39(1) Piskie Din 113, 139). According to this approach, the Tort Ordinance also protects "the interest of the injured party to his mental health, convenience and contentment" (ibid., p. 142). We have therefore held that one who has been harassed as the result of a criminal proceeding that resulted from the negligent initiation of an erroneous criminal proceeding against him has a right to compensation on account of this infringement by the prosecutorial authority (ibid.).

In a series of decisions rendered after that same episode, courts followed suit and ordered compensation on account of infringements of intangible interests of tort plaintiffs. Thus, it has been held that the moral injury and mental anguish caused the owner of intellectual property rights as a result of infringement of his rights is compensable injury (see the decision of the Vice President, Judge S. Levine, in Civil Appeal 4500/90 **Hershko v. Orbach**, 49(1) Piskei Din 419, 432). It has also so been held with respect to infringement of human dignity and freedom entailed in involuntary and unlawful hospitalization in a mental hospital (decision of Judge Netanyahu in Civil Courts 558/84 **Carmeli v. State of Israel**, 41(3) Piskei Din 757, 772). Similarly, it has been held that the suffering caused a woman that is entailed in the fact that her husband divorced her against her will constitutes compensable injury (see the decision of Judge Goldberg in Civil Appeal Courts 1730/92 **Masrawa v. Masrawa**, 38 Dinim Elyon 369, in section 9 of the decision.)

The same is true of injury to human dignity and feelings, which constitute the principal impetus for the imposition of damages in the wrongs of assault and false imprisonment (see **McGregor on Damages** (London, 1988) at p. 1024, 1026).

I believe, against this background, that infringement of human dignity and the right to autonomy that is entailed in the performance of a medical procedure without informed consent should be seen as compensable injury in tort law. Unlawful infringement of personal feelings as a result of not honoring a person's basic right to shape his life as he wishes constitutes an infringement of the welfare of that person, and it is encompassed by the aforesaid definition of "injury." This is the case whether we view it as an injury to a person's "convenience" or as a "similar loss or diminution," in the words of the definition of injury in paragraph 2 of the Order. Indeed, we have noted the centrality of the right to autonomy in the shaping of a person's identity and fate in the society in which we live. We have seen the importance of this right to one's ability to live as a thinking and independent individual. The conclusion follows that this right is a critical, inseparable part of a person's interest in "his life, convenience and contentment" (Gordon, supra, at p. 42), the infringement of which can entitle him to tort compensation. The remarks of Crisp in his article "**Medical Negligence, Assault, Informed Consent, and Autonomy,**" 17 J. Law & Society 77 (1990) are appropriate in this regard:

> One's well-being is constituted partly by the very living of one's life oneself, as opposed to having it led for one by others. The fear that we have of paternalism does not arise merely from the thought that we know our own interests better than others, but from the high value that we put on running our own lives (at p. 82).
>
> Indeed, a person is not an object. The right of every competent person is that the community and its members will respect his wishes with respect to those matters that are important to him, as long as he does not infringe upon others (Criminal Appeal by Special Permission 6795/93 **Aggadi v. State of Israel**, 48(1) Piaskei Din 705, section 7). This is required by the recognition of the value of the person and by the fact that every person is a free agent. Violation of this basic right other than pursuant to lawful power or right infringes severely the welfare of the individual and creates compensable injury in tort.(Pp. 44-45)

15. It is true that there are many questions that will have to be resolved in the adjudication that will be conducted: for example, whether we in fact have here a *get*-recalcitrant, and when in general the refusal of a husband to give a *get* becomes "recalcitrance" that entitles the wife to damages; whether the sought-after remedy, i.e., monetary damages, will be considered by *halakhah* to be coercion of the husband that may complicate the very possibility of a *get* being given altogether, because of halakhic problems relating to the halakhic law of a "forced *get*"; etc. But these questions do not influence my present decision. On the face of matters, there is a Rabbinic Court decision dated 11 Tamuz 5754 requiring the husband to give a *get*, and accordingly, it at least appears, we are dealing with a *get*-recalcitrant. The problem of a "forced *get*," as serious as it may be, likewise is not relevant when the sole question is whether there is a cause of action in tort, since the question of the injury that has already been caused to the wife after six years of refusal exists in any case. Moreover, the problem of a forced *get* is not necessarily an element of the tort question at all; take, for example, the tort claim brought by a wife after she has already been properly given a *get*. In such a case it is undisputed that there can be no problem of a forced *get*, and the question of the existence of a cause of action in tort would be presented to the same extent and with identical force.

16. The aforesaid is sufficient to lead to the conclusion that the claim should not be dismissed, and that on its face the claim states a cause of action.

THE QUESTION OF JURISDICTION

17. The argument of lack of jurisdiction must likewise not be accepted. The wife in her claim does not ask this Court to require the husband to give a *get* or to implement any sanctions against him to force him to give his wife a *get*. This Court is not intervening at all in the act of giving the *get*, and the wife is not asking the Court to intervene in this act; the claim is for monetary compensation only and this on the basis of a cause of action in tort and tort alone. Insofar as the argument is that the wife was caused injury as a result of her husband's conduct, the fact that the injurious conduct relates to the failure to give a *get* does not relegate the tort cause of action to the domain of "matters of marriage and divorce of Jews in Israel who are citizens and residents of the State" which is the exclusive jurisdiction of the Rabbinic Courts, even if the failure in the non-execution of this "act" is an event that is itself subject to the jurisdiction of the Rabbinic Court.

18. In conclusion, I hereby deny the motion for summary dismissal.

Given and announced today, 28 Tevet 5761, 23.1.01, in the absence of the parties.

Ben Zion Greenberger, Judge

Decision Summary

This is an interim decision in a motion to dismiss a case for damages for get-refusal.

In this case, a 36-year-old haredi woman sued her husband for damages for refusing to give her a get for 11 years. She also sued her father- in- law who had been accompanying his son to hearings at the rabbinic courts and actively encouraging him not to give a get so long as his wife refused to waive her rights to the house and child-support. The attorney for the defendants moved to dismiss the case, claiming that there were no grounds under Israeli Tort Law forget-refusal.

Judge Greenberger denied the defendants' motion to dismiss and set the ground for the new tort, holding that get-refusal is a violation of the Israeli Basic Law: Human Dignity and Freedom. He held that get – refusal is a violation of a woman's right "to determine for herself when she wishes to sever marital ties and when she wishes to remarry, her wish 'to write the story of her life as she wishes and in accordance with her choice'... The aspiration of a woman who wants a divorce to fashion her personal condition as a free person determining her own fate merits every defense as an inseparable part of her dignity as a person."

On the same day that the judge gave this landmark decision, the wife waived her rights for damages and received her get. She did not give up any interests she had in the marital home or in child support. Today she is happily remarried.

This is the first time the question of get refusal as a tort has been addressed. The judge held that it is an infringement on a woman's autonomy and dignity in violation of Basic Law: Human Dignity and Freedom. He also says that these principles are embodied in the Torah.