CHAPTER 2

TORT LIABILITY IN MAIMONIDES’ CODE (MISHNEH TORAH):
THE DOWNSIDE OF THE COMMON INTERPRETATION

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A. INTRODUCTION: THE MODERN STUDY OF JEWISH TORT THEORY AS A STORY OF “SELF-MIRRORING”

Isidore Twersky showed us that “[t]o a great extent the study of Maimonides is a story of ‘self-mirroring’,”1 and that the answers given by modern and medieval scholars and rabbis to some questions on the concepts of Maimonides “were as different as their evaluations of Maimonides, tempered of course by their own ideological convictions and/or related contingencies.”2

Maimonides’ opening passages of the Book of Torts (Sefer Nezikin) in the Code (Mishneh Torah) can also be described as a story of “self-mirroring”. His words have stimulated a great deal of interest over the last 150 years, both among the rabbis who were active in this period, particularly the heads of the Lithuanian talmudic academies (yeshivot) and among some scholars of Jewish law. All of them regarded Maimonides’ words, which we shall examine in this chapter, as the major source (although they also mention other sources from the Talmud and its commentators) for the existence of a theory that explains the basis for tort liability, particularly for damages that are caused by a person’s property, in a new way that is substantively different from the theory of fault-based liability which, as stated in the previous chapter, is accepted by the mainstream of commentators and scholars as the common talmudic theory. In this chapter we propose to describe the tort theory attributed by some of the rabbis and scholars to Maimonides, i.e., the “ownership and strict liability theory”, and examine critically the sources on which they sought to rely. The aim of this chapter is to present the difficulties besetting whosoever wishes to understand Maimonides’ tort theory only as it appears in the Code and according to the common interpretation suggested by the Lithuanian rabbis and some scholars, which we call the yeshivah reading. The full resolution of these difficulties will be presented mainly in the following chapters, in which we will present Maimonides’ tort theory in full in light of what he wrote in other words, and in particular in the Guide of the Perplexed (hereinafter: the Guide), and not only in the Code, and in view of modern theories of tort law. An understanding of what Maimonides wrote in his various works and a comparison of his writing with modern theories will help enlighten us on his theory; only thereafter will we be able to take a fresh look at what he wrote in the Code, and to propose new and reasonable solutions for the serious difficulties discussed in this chapter that confront those who explain Maimonides according to the common interpretation of the yeshivah reading.

Our central argument in this chapter is that the ownership and strict liability theory does not accurately reflect Maimonides’ position, for it presents serious difficulties – both conceptual-principled and exegetical – and it does not comport with certain of Maimonides’ rulings in the Code, which appear to contradict this theory. To a large extent, so it is argued, the yeshivah reading that has been the common interpretation of Maimonides’ tort theory over the last one hundred and fifty years has constituted “self-mirroring” on the part of those offering the said interpretation: heads of Lithuanian yeshivot who interpreted Maimonides in accordance with the new methodology developed in their days for study in the yeshivot, and some scholars of Jewish law who sought, by means of their interpretation of Maimonides, to create a dialogue with the tort theories that had become dominant in the 20th century, particularly the theory of strict liability.

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2  Id. Twersky made this statement in the context of the relationship between halakhah and philosophy in Maimonides’ thought, but it is equally applicable to our topic.
At this point we should mention something which we discussed at length at the beginning of this study: a comparison between modern jurisprudential thought and jurisprudential thought in ancient times and in the Middle Ages presents extremely complex methodological problems. It must be recalled that jurisprudence in the ancient world and in the Middle Ages differed greatly from the modern approach, which began in the period of the Enlightenment and was influenced on the European Continent by Kantian philosophy. The abstract conceptualization of legal principles and the quest for one unitary principle, too, are modern phenomena. Both classical Roman law and the Jewish halakhah are primarily casuistic, and the level of abstraction is in general fairly low. Attempts were indeed made to base tort liability in Jewish halakhah on a uniform principle of peshiah (negligence/fault), but as we saw in Chapter 1, these attempts encountered difficulties and drew criticism from many scholars. Hence, the talmudic legal tradition, in that it is based on the interpretation of the biblical laws which themselves are casuistic in nature, did not seek a single, abstract principle for all cases of liability in tort. It was therefore not troubled by the fact that there were different reasons and justifications in relation to the specific cases of liability. Awareness of the differences in thinking between the modern age and the Middle Ages is important to whosoever wishes to examine Maimonides’ approach in light of modern jurisprudential theory.

Indeed, the modern study of Jewish tort theory in general (not only in relation to Maimonides) is in many ways a story of “self-mirroring”.

A study of what has been written by modern Jewish law scholars seeking to determine the basis for liability for damages under Jewish law will reveal that they not infrequently present the Jewish law tort theory in a somewhat similar fashion to the prevalent tort theories in the Western world. And to a large extent it may be said that these scholars look at Jewish law tort theory and define (redefine?) it through the prism of the common tort theories in their time in modern Western jurisprudence (the Common law, Roman law and European Continental law). This phenomenon manifests itself clearly in the emphatic position of most scholars of Jewish law, particularly those who were active a century ago, when scientific research of Jewish law was becoming established (but also more modern scholars), that Jewish law recognizes a peshiah fault-based theory only. Identification of Jewish law tort theory with the doctrine of peshiah rendered it extremely close to the traditional legal system (in both Roman and Common law), according to which liability was based on the fault of the person who caused the damage – fault-based tort theory. Of course, not for nothing did some of those scholars stress the proximity of the talmudic principle of fault to the principle of negligence, and some were even explicit in their use of the tort-related expression from the Common law – negligence, by virtue

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3 Such as the heads of damage mentioned at the beginning of Bava Kamma: horn, tooth, foot, pit and fire – as well as a person who causes injury with his body. Each head of damage has its own derivatives.

4 See Avishalom Westreich, Hermeneutics and Developments in the Talmudic Theory of Torts As Reflected in Extraordinary Cases of Exemption (PhD thesis, Ramat Gan; Bar-Ilan University, 2006) (Heb).

5 Cf. the statement of Zerah Warhaftig, “The Basis for Liability for Damages in Jewish Law”, Studies in Jewish Law (Ramat Gan: Bar Ilan, 1985) 211, 212 (Heb.): “Scholars of Jewish law are adamant in 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; Asher Gulak, Foundations of Jewish Law, Book 2, 202-203, 210; J.S. Zuri, Talmudic Law, Book 6, pp. 11-24, 61. This was also the opinion of a contemporary scholar of Jewish law, Shalom Albeck, whose well-known work on tort law is based entirely on the development of the principle of peshiah: Shalom Albeck, General Principles of the Law of Tort in the Talmud (2nd ed., Tel-Aviv/ Dvir, 1990) (Heb.).

6 See, e.g., Shalom Albeck, “Torts”, in Menachem Elon ed., The Principles of Jewish Law (Jerusalem: Encyclopaedia Judaica, Keter publishing house, 1975), at 319-320 (“The basis of liability – negligence. The Talmud states that a man could be held liable only for damage caused by his negligence (peshi’ah)”.)
of which the liability of the person who caused the damage lies in the fact that he had a duty to guard, or a duty of care, and to the extent that a breach of this duty of care caused the damage, liability is that of the tortfeasor. An example of this is provided by a scholar of Jewish law active in the first half of the last century, I.S. Zuri, who drew a parallel between the talmudic principle of peshiah and negligent behavior; his definition of this principle is remarkably similar to the definition of the tort of negligence in English law. Zuri wrote that under Jewish law –

... failure to be cautious is therefore also negligence in fulfilling a person’s general duty not to harm others, for every person is bound to take care and to pay careful attention to all the tragedies and the events which can and might occur in relation to all those cases that simple, regular people can imagine. And it therefore transpires that failure to take care in relation to damages is fault in fulfilling a duty, because the law imposes upon a person the duty to take care and to be watchful.7

Indeed, if this is the definition of peshiah according to Jewish law, Zuri continues, “this meaning [of Jewish law] comes close to the English law definition (according to Salmond), which says that ‘negligence is the breach of duty to take care.’”8 This provides an opening, according to Zuri, to explain not only the talmudic element of peshiah in a manner similar to English law, but “further we will see that also in relation to the other elements of the law of damage of this type, English law is similar to Jewish law.”9 After having discussed the similarity and difference between Jewish law, English law and French law,10 Zuri also emphasizes the similarities between the different degrees of peshiah under Jewish law and the different meanings attributed to the term “culpability” (culpa) in Roman law11 – which was discussed by Asher Gulak,12 one of the pioneers of scientific research of Jewish law in the renascent settlement in the Land of Israel. Establishing peshiah as the supreme principle of tort law in Jewish law received significant support following publication of the well-known book by Shalom Albeck (1965),13 one of the leading contemporary scholars of Jewish law. Albeck attempted to show that the concepts of negligence and foreseeability underlie all the rules of Jewish law.14

The clear proclivity of Jewish law scholars to identify the principle of peshiah with similar concepts in Western legal systems was explained by one contemporary sage, who wrote:

[W]hen they began in the modern age to discuss the principles of Jewish law as compared to the laws of the nations, certain scholars searched and found

7 Zuri, supra n. 5, at 13-14. See also ibid., at 11.
8 Here, Zuri (supra n. 5, at 14) refers to the well-known work of Salmond, Law of Torts
9 Zuri, id.
10 Ibid., id.
11 Ibid., at 15-16.
12 See Gulak, supra n. 5, at 202-203, who in distinguishing between the different parameters of peshiah invoked the parallel terms in Roman Law: “A person’s maliciousness in damages, that is his doing something deliberately, which under normal circumstances can lead to injury (dolus); within the parameters of peshiah is included inadvertent lack of caution or negligence with respect to something, which under normal circumstances can lead to injury (culpa lata, culpa levis).”
13 Albeck, supra n. 5. The first edition was published in 1965, but below we refer to the page numbers in the second, 1990 edition.
14 See Albeck, “Torts”, supra n. 6, at 320, arguing that peshiah is negligence, and that: “Negligence is defined as conduct which the tortfeasor should have foreseen would cause damage”. See also Albeck, General Principles, supra n. 5, at 20: “Peshiah is conduct which a person must realize will entail damage, because it is something that happens frequently and as a matter of course” (foreseeability), “and a person who caused damage under one of the heads of damage is liable if he was at fault” (negligence).
that our law does not “lag behind” other systems, and it, too, hung the liability of the owner of the object that caused the damage upon the duty of the owner to take care not to cause damage to the property of another, and his negligence with respect to taking care is what obligates him.15

One can hardly disagree with these words, which are bolstered by the great importance that some of those scholars of Jewish law attached to the comparative dimension of their research, to their aspiration to translate Jewish law into simple, comprehensible modern language and to approximate it to the concepts of modern Western law,16 thereby making it more attractive and relevant in the eyes of the nationalist Jewish jurists of the renascent Zionist settlement in the Land of Israel,17 some of whom sought to base the revived law in the Land of Israel (first in the new Yishuv and later in the young State of Israel) on the principles of Jewish law. There is no doubt that the establishment of tort liability in Jewish law upon one central foundation – peshiah – and the definition of this foundation by most of the scholars of Jewish law in a fashion that is very similar to the definition of the elements of negligence in English law, is intended to legitimize recourse to Jewish tort law by judges and scholars (not only those who were active in the first half of the previous century, but also contemporary ones) who deal with modern Israeli tort law.18

The views of these modern scholars who sought to base the element of tort liability in Jewish law on the element of peshiah alone drew criticism both from several learned contemporary rabbis, such as R. Yehiel Yaacov Weinberg19 and R. Nachum Rabinovitch,20 and from other scholars of Jewish law, who took issue mainly with the approach of Shalom Albeck. In light of the rabbinic views of the preceding one hundred and fifty years (the yeshivah reading) several of these scholars – Weinberg and Warhaftig in particular – identified a different element as an alternative to the element of peshiah, i.e., the element of ownership, and some say ownership and strict liability, by virtue of which liability is imposed for damages caused by a person’s property. Below, we will first briefly discuss the main lines

17 We agree with Steven F. Friedell, “The Role of Jewish Law in a Secular State”, 24 Jewish Law Association Studies (2013) 100, 104, who argued that “it is likely that Gulak was himself trying to interpret Jewish law so that it would be in accord with the then-accepted view in Western legal systems that liability for unintentional injuries should be based on fault.” A different view was presented by Judge Moshe Drori of the Jerusalem District Court in CC (Jer) 5380/03 Estate of R. v. Tz. [2009] Tel Aviv DC 2009(1) 8, 208, at 299, who favors the view of Professor Asher Gulak, whose work on Jewish law was written before the establishment of the State of Israel and was therefore not influenced by a desire to make Jewish law compatible with the law of the State. We think that while it is true that Gulak’s work predated the State, undoubtedly one of the objectives of his work was to establish Jewish law as the national law of the renewed Zionist settlement in the Land of Israel, and Friedell was therefore correct.
18 Clear expression of this can be found in Avraham Sheinfeld, Torts (Jerusalem: The Library of Jewish Law, 1991) (Heb.). This book is part of a series of books edited by Professor Nahum Rakover, entitled Jewish Law for Israel, the aim of which, according to the title, is “A Systematic and Up-to-date Presentation of Jewish Law as a Basis for Legislation and Judicial Decision Arranged According to the Law of the State of Israel.” Indeed, in a substantial part of his book, Sheinfeld looks at parallels between Jewish law and the tort of negligence, which is extremely dominant in Israeli law, following English law. In the case law of the Israeli courts, too, reference to Jewish law as support for tort approaches that seek to base tort liability on negligence and fault rather than on strict liability is discernable. See, e.g. CA 3881/98 Salma v. Sadeh [1999] IsrSC 43(4) 721, 724; Moshe Drori, supra n. 17, at 301-302.
20 Rabinovitch, supra n. 15.
of criticism levelled yeshivah at the theory of peshiah as expounded by Shalom Albeck. We will then take an in-depth, critical look at the elements of the alternative theory – the theory of ownership – on the basis of which the common interpretation of Maimonides’ rulings in the Code was formulated, as presented by the rabbis of the Lithuanian yeshivot and some modern scholars. We will discuss at length the conceptual-exegetical difficulties of this theory. We will argue that similar to the presentation of the peshiah theory by modern scholars in a way that approximated the tort of negligence in the Common law, the theory of ownership, too, has been presented by several of the modern scholars in a way that displays a tendency to reinterpret the Jewish sources through the prism of the prevalent tort theories in twentieth-century Western jurisprudence.

B. THE OWNERSHIP AND STRICT LIABILITY THEORY VS. THE FAULT-BASED THEORY (PESHIAH)

1. The Difficulties of the Concept of Peshiah

Although Albeck’s book on the General Principles of Law of Tort in the Talmud is considered the most comprehensive scholarship to date analyzing most of the talmudic rules, it was highly criticized by scholars such as Izhak Englard, Steven Friedell, Benzion Schereschewsky, Zerah Warhaftig and Irwin Haut. These scholars agreed that although the concept of peshiah (based on the elements of negligence and foreseeability) is emphasized in some talmudic texts or by some commentators, and that this concept is indeed a major principle that explains some of the rules mentioned in the Talmud, nevertheless, the concepts of peshiah, negligence and foreseeability do not explain all the talmudic rules.

Izhak Englard argued that “Albeck’s principal error is to assume that legal rules are always the expression of unitary principles.” According to Englard, particular legal rules may well result from compromise between conflicting principles which are each legitimate per se, but which cannot co-exist in the particular circumstances. This point is illustrated in Albeck’s emphasis of the principle of peshiah as the sole principle underlying the rules of tort; Englard says that this is not clear cut, for peshiah can be defined according to a concrete test (subjective state of mind) or an abstract external criterion (objective state of conduct). Steven Friedell further argues that although one cannot deny that it is possible to explain most talmudic tort rules dealing with unintentional conduct in terms of negligence based on a concept of foreseeability, these explanations are inherently weak, due to the fact that the elasticity of the concept of foreseeability allows for almost any situation to be defined as foreseeable or unforeseeable. A concept whose flexibility enables it to explain almost every desired

21 See Englard, supra n. 16, at 57-64 (criticizing Albeck’s method in general), and esp. 60-63 (criticizing his book on Torts).
23 In a book review: see “Book Review”, 1 Mishpatim (1968-1969) 275 (Heb.).
24 Warhaftig, supra n. 5.
26 Englard, supra n. 16, at 62.
27 Id.
28 These two tests, comments Englard, id., “are based on different principles, partly conflicting (personal fault of tortfeasor vs. social fault).”
29 Friedell 1989, supra n. 22, at 97-98.
30 Ibid. at 98.
result is not really sufficient to explain any result, and Friedell argues that an explanation based on such a concept will appear forced when taken to an extreme.\(^{31}\) Friedell concludes that it therefore seems more realistic to look at the actual results that are achieved in the talmudic tort system.\(^{32}\) Moreover, argues Englard against Albeck’s tort theory of one unitary principle of *peshiah* there are other rationales, such as the concepts of risk or distribution of loss, for imposing liability in torts. According to Englard, many regard the dominant principle in ancient law to have been strict liability based on causation, as distinct from fault; it is therefore likely that the causal principle figured in some form, in some areas of liability, in Jewish law, even if it was never an exclusive principle.\(^{33}\) In Englard’s view, a principle of liability different from that of Albeck could accommodate many rules of liability which do not fit nicely into Albeck’s theory.

We agree with the criticism levelled by Englard and Friedell, and in our opinion, *peshiah* should not be viewed as all-encompassing; it is certainly very likely, as Englard says, that there is a different principle of liability. But what is this principle? Below we shall present the common description of the alternative basis, which many attribute to Maimonides, and discuss the problems it involves.

2. **The Common Interpretation of the Code: The “Ownership and Strict Liability Theory”**

In the first *halakhah* of Laws of Property Damages which opens the Book of Torts in the *Code*, Maimonides writes:

> If any living creature under human control causes damage, its owners must pay compensation for it is their property that caused the damage.\(^{34}\)

Here Maimonides defines the basis of tort liability for damages caused by a person’s property, but what is interesting is that the element of *peshiah* is totally absent from Maimonides’ definition; instead, Maimonides mentions the element of ownership of the property that caused the damage, i.e., the fact that the damage was caused by a person’s property. This surprising disregard by Maimonides of the element of *peshiah* in defining the basis for the obligation in tort, even though *peshiah* is considered to be the predominant element in creating tort obligation under the common interpretations of the Talmud, and his emphasis, instead, on the element of ownership fired the imagination of many, particularly over the last one hundred and fifty years, who saw in Maimonides’ words a major source for basing an alternative tort theory, distinct from the fault-based theory.

From the last part of the sentence – “for it is their property that caused the damage” – many rabbis who were active in the last one hundred and fifty years, and following them, some scholars of Jewish law, understood that in Maimonides’ view, the basis for liability for damages that were caused by a person’s property lies in the fact that it is his property that caused the damage, i.e., that the person is the owner of the property and he is therefore liable to pay for the damage that it caused, and not

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\(^{33}\) Englard, *supra* n. 16. This assumption could be supported by the theory suggested by Asher Gulak, who viewed Jewish law as having developed a rule of fault-based liability from an earlier view based on a strict liability. See A. Gulak, *Yesodei Ha-Mishpat Ha-Ivri* (Berlin: Dvir, 1922), vol. 2, at 204.

because he was negligent (pesiah) in caring for the property. This is the common explanation of Maimonides’ tort liability theory, which we call the yeshivah reading, provided by several later halakhic authorities, especially from the heads of the Lithuanian yeshivah.

These Lithuanian rabbis dealt at length with the question of the obligation of the owner to pay for damage caused by his property: is this because he did not guard his property, or is the obligation derived from the very fact that his property caused damage (as implied by Maimonides’ above words), and they discussed the theoretical and practical differences between the two possibilities.

Based on the said question, there were those who emphasized the distinctions between the pesiah/fault-based (mainstream talmudic) theory and the ownership (Maimonidean) theory, and they laid the foundations of these two approaches in detail and in depth. In modern Jewish law scholarship, a typical example of analysis of these two approaches to tort liability emphasizing Maimonides’ unique tort theory may be found in Zerah Warhaftig’s well-known study.

In a ground-breaking article frequently quoted in the last three decades by researchers and jurists, Warhaftig takes a firm stand against the approach accepted by most Jewish law scholars, which was discussed at length in the first chapter, whereby Jewish law recognizes fault-based theory only. Warhaftig argues that it is very doubtful if the said approach of those scholars is founded. He claims as follows:

Another look at the sources will prove to us that the fault-based theory is not the exclusive theory, and the sources also support a theory of strict liability i.e., the “method of causation of the damage” whereby the person who caused the damage is responsible for damage caused by his property, and obviously for damage caused by himself (his body) even when there is no fault on his part, as long as the actions of the victim himself did not cause the damage.

Maimonides’ rulings in the Code served as a major anchor for grounding the theory of ownership and strict liability according to Warhaftig’s approach. Maimonides’ words also served as a central

36 See, e.g., Even Ha’azel, id.; R. Shimon Shkop, Commentaries of R. Shimon Yehuda Hacohen Shkop, Bava Kamma, sec. 1; Novella Hagranat, Bava Kamma, sec. 1; Commentaries of R. Chaim Talaz, Bava Kamma, sec. 1; Commentaries of R. Shmuel Rozovsky, Bava Kamma, sec. 1; Resp. Seridei Esh, supra n. 19; R. Y.H. Sarna, Foundations of Liability in Tort Law, in Memorial Book for R. Chaim Shmuelevitz 582-97 (Jerusalem, 1986).
37 Warhaftig, supra n. 5, at 218-221.
38 This was also the subject of discussion in the framework of a judgment of an Israeli District Court: CC (Jer) 5380/03, supra n. 17. Judge Moshe Drori surveys at length the various possibilities of deriving an approach from Jewish law that imposes strict liability on different tortfeasors, referring extensively to Warhaftig’s said article. At the Court’s request, a group of scholars at the Center for Practical Application of Jewish Law at Netanya Academic College (“YISHMA”) submitted its opinion, “Ahrayut Nizkit shel Hevrat Shemirah b’gin Nezek Shegaram Shomer” (Jan. 13, 2005), (“YISHMA”). The opinion was written by Moshe Be’ari & Yuval Sinai.

In response, Michael Wygoda, Director of the Jewish Law Department of Israel’s Ministry of Justice expressed his view in “Ahrayut Benezkin begin Retzah Beneshek Mu’kad” (May 16, 2005), available at http://www.daat.ac.il/mishpat-iurvi/havat/46-2.htm [hereinafter Wygoda]. YISHMA accepted Warhaftig’s approach that some Jewish law authorities, especially Maimonides, would impose strict liability when injuries are caused directly by a person’s body. By contrast, Wygoda argued that Jewish law rejects the concept of strict liability. Drori accepted this argument. (At the present time, one of the authors of the YISHMA opinion, Yuval Sinai, who is also one of the authors of this book, believes that Warhaftig’s analysis is wrong with respect to Maimonides, and that some of the arguments made by Wygoda and Drori against Warhaftig should be accepted.) For a summary of the different views and for a renewed proposal for a solution, see Friedell 2013, supra n. 17.
39 Warhaftig, supra n. 5, at 213.
source for another scholar, Irwin H. Haut, who argued that there are aspects of absolute/strict liability in Jewish law, and in research which was published later\(^{40}\) compares these aspects to the existing approaches in modern Anglo-American law.

Warhaftig explains Maimonides’ approach according to the *yeshivah* reading, the common interpretation of later halakhic authorities, known as the theory of ownership and strict liability. He infers from the above-cited text of the *Code* that “it is the property connection that serves as the basis for their liability for the damage.”\(^{41}\) According to Warhaftig and other scholars (especially rabbis of the 19th and 20th centuries),\(^{42}\) Maimonides adopts the ownership theory, according to which the basis for tort liability (for damages caused by one’s property) is –

…the relationship of ownership: as if the liability is imposed on the harmful object, and because an object cannot pay, liability is imposed on the owner of the object, whether he is at fault or not. One’s property is not only for one’s pleasure and use, but it also imposes liability and obligations on one.\(^{43}\)

There are, indeed, differences between descriptions of Maimonides’ method by modern scholars such as Warhaftig and Haut, and its description by rabbis of the 19th and 20th centuries in the *yeshivah* reading. The differences relate to the details of the theory attributed to Maimonides, the extent to which it differs from the common *peshiah* theory and whether Maimonides favored the theory of strict liability for the person whose property caused damage. However, what is common to them all is the conception that Maimonides ascribed great meaning to ownership *per se* of the property in torts.

Warhaftig understands Maimonides’ words in a radical manner that is a dramatic departure from the theory of *peshiah*, saying that not only does a theory of ownership as the basis for liability for the damages caused by a person’s property exist in Jewish law, but that this theory, which Warhaftig attributes to Maimonides –

… leads us logically to a theory of strict liability, for if ownership itself of the property causing the harm imposes on the owners liability for damages that it caused, from where do you know to exempt the owners in cases of compulsion in relation to guarding the damaging object? Neither *peshiah*, fault nor negligence on the part of the owners in guarding their damaging property is the cause of their liability, but solely the fact of their ownership.\(^{44}\)

Even in relation to damages that are caused by the person himself, many theories can be found relating to the extent of liability for damages that were caused in the absence of fault. Here too Warhaftig explains that these two theories are related to the element of liability in tort.\(^{45}\) According to the theory of *peshiah*, the fault, negligence, or omission of the person causing the damage are the

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40 Haut, *supra* n. 25. The discussion in the article is mainly of the talmudic and post-talmudic sources relating to liability for damage caused by a person’s body to another person, and in this framework the author discusses Maimonides’ method at length (pp. 31-46), but he does not refer to what Maimonides wrote at the beginning of Laws of Property Damages (on which Warhaftig and the rabbis of the Lithuanian *yeshivot* relied), but on what he wrote in Laws of Wounding and Damaging (*Hilkhot Hovel Umezik*).

41 Warhaftig, *supra* n. 5, at 220.

42 See the references in n. 35 and 36 above.

43 Warhaftig, *supra* n. 5, at 216.

44 Id.

cause for rendering him liable; there is no liability without fault. On the other hand, explains Warhaftig, according to the theory of ownership and strict liability – attributed as aforesaid to Maimonides – the owner of the object causing the damage must make good its consequences, and act to restore the former situation. Paying for the damage is not a punishment, but rather, making good the wrong caused by the tortfeasor. According to the theory of ownership and strict liability, the tortfeasor is not liable for the damages only if the victim himself caused the damage, for in that case, the latter bears the liability, and cannot sue another to correct the situation. In his attempt to base the theory of strict liability as an exclusive regime that applies to all types of tortfeasors, Warhaftig relies on Maimonides’ rulings,\(^{46}\) from which it emerges, in his opinion, that Maimonides adopted the approach of strict liability not only when the damage was caused by a person’s property (nizkei mamon), but also when the damage was caused by the person himself, who caused damage to others (adam ha’mazik).\(^{47}\)

We agree with the substance of Warhaftig’s argument that Maimonides did not adopt the theory of peshiah as an exclusive theory, but we do not agree with Warhaftig’s understanding of Maimonides’ rulings, namely that Maimonides advocated strict liability in a comprehensive and exclusive manner for all types of tortfeasors. In Chapter 6 we will show that indeed, strict or almost strict liability should be imposed upon a person who causes damage to the property of another, and there are specific reasons for this, and indeed, this provides strong proof that Maimonides departed from the fault-based regime and adopted a standard approximating absolute/strict liability, at least in cases in which the damage was caused by a person who damaged the property of another. But this is not the case, in our view, when a person injured another, or when the damage was caused by the person’s property, for then, as we shall prove, Maimonides adopted a standard of care lower than strict liability (closer to negligence). Hence, in our view, we should not accept Warhaftig’s radical view whereby Maimonides adopted the method of ownership and strict liability in a comprehensive manner, not only in relation to a person causing damage to another’s property but in relation to all kinds of tortfeasors, and that his method is fundamentally and radically opposed to the theory of peshiah. As we shall see below, Maimonides’ conception of the element of peshiah is more complex, and he does not reject the theory outright, as Warhaftig would claim, but rather refines it and incorporates it as an important, although not exclusive, component in his tort theory, alongside other elements. Therefore, in our view Maimonides’ approach to tort liability should not be categorized as based on peshiah on the one hand, nor on strict liability on the other, even though it contains elements of both. Here it should be emphasized that many of the later authorities (Aharonim) who headed the Lithuanian yeshivot over the last one hundred and fifty years did not argue that the two theories explaining the basis of tort liability were as radically opposed as Warhaftig contended, in his explanation of the theory of peshiah as being different from and diametrically opposed to the theory of ownership and strict liability that he attributed to Maimonides. Admittedly, according to the yeshivah

\(^{46}\) *Ibid.*, at 224.

\(^{47}\) Warhaftig, *id.*, mentions two rules from Laws of Wounding and Damaging: 6:1 (a person’s liability for damage caused to the property of another), and 1:12 (a person’s liability for injury he caused to the body of another). Attribution of the theory of strict liability to Maimonides, at least with respect to damage caused by a person’s body, appears in Haut’s abovementioned article, *supra* n. 25. As opposed to Warhaftig who explicitly attributed strict liability to Maimonides, both with respect to property that causes damage and with respect to a person who causes damage, Haut in his article related explicitly to imposing strict liability according to Maimonides in the case of damage caused by a person, both when he wounds his fellow and when he damages the property of another, but it is not clear whether Haut attributed strict liability to Maimonides’ approach when the damage was caused by a person’s property.
reading, these later authorities also believed that there are two possible ways of justifying the obligation of the owner of property that caused damage – either that he did not guard his property, or due to the very fact that his property caused damage. However, from the writings of the later authorities it emerges that the two conditions for obligating a person to pay are accepted by all the commentators and authorities: in order to be liable to compensate for damage that was caused by a person’s property, the property that caused the damage had to have belonged to the defendant, and there also had to have been peshiah in his guarding of the property. In fact, these are two cumulative conditions, and the question raised by these later authorities concerns the relationship between these conditions is this: is it failure to guard that engenders the obligation to pay, and ownership of property only imposes upon him the duty to guard (a person does not have a duty to guard property that is not his, unless he took upon himself the obligation to guard); or does obligation to pay stem from the fact that it is the property of the defendant that caused the damage, as those later authorities understood from Maimonides, but if he guarded the property as required he is exempt, and one cannot, therefore, speak of strict liability according to Maimonides, as Warhaftig claims. In other words, their question is only about which of the two conditions for liability for the damage caused by the defendant’s property is the principal condition, and which of them constitutes only a marginal condition for imposing an obligation.48 Below we will attempt to show that like Warhaftig’s explanation, this interesting explanation offered by the later authorities cannot withstand criticism.

C. EXEGETICAL AND CONCEPTUAL DIFFICULTIES OF THE COMMON INTERPRETATION OF MAIMONIDES

1. Maimonides did not Impose Comprehensive Strict Liability on the Tortfeasor

As noted, in his attempt advocacy of the theory of ownership Warhaftig relied heavily on Maimonides’ words; moreover, he stresses that “the best proof of the theory of ownership and the principle of strict liability together can be seen in the following words of Maimonides.”49 Warhaftig’s conclusion that in Maimonides’ view, a person bears strict liability for damage caused by his property is based on an ostensibly surprising ruling by Maimonides:

When a person entrusts his animal to an unpaid watchman, a paid watchman, a renter or a borrower, these individuals assume the owner’s responsibilities. If [the animal] causes damages, the watchman is held liable.

When does the above apply? When he did not guard the animal at all. If, however, he guarded the animal in an excellent manner, as he should, and it got loose and caused damage, the watchman is not liable, and the owners are liable, even if the animal kills a human being.50

Maimonides rules that placing an animal with a watchman also transfers to the watchman the tort liability in the event that the animal causes damage. Even though the watchmen are not the formal owners of the animal, “these individuals assume the owner’s responsibilities.” However, further in the same ruling Maimonides distinguishes between different cases in which the animal caused damage,

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48 See Even Ha’azel, supra n. 35; R. Shimon Shkop, supra n. 36; R. Shmuel Rozovsky supra n. 36.
49 Warhaftig, supra n. 5, at 218.
50 Laws of Property Damages 4:4. The translation is from Eliyahu Touger, Mishneh Torah (Moznaim).
and the question is whether the watchmen are indeed always liable, and whether the owner can be held liable when the watchmen are exempt.

Many of the commentators on Maimonides and the authorities were surprised by Maimonides’ ruling, which raises an obvious difficulty: if the watchmen guarded the animal in an excellent manner, why is the owner liable? Warhaftig\(^5\) concludes from this ruling that Maimonides adopted the theory of ownership and strict liability, according to which an owner is liable for damages caused by his animal even if there is no fault on his part, for the animal was handed over to the watchmen to be guarded, the watchmen guarded it in an excellent manner, and nevertheless the owner is liable. This outcome whereby the owner is liable for compensation, explains Warhaftig, is indeed incomprehensible if the theory of peshiah is the basis for tort liability, for once the animal was placed with the watchmen, the watchmen assumed the owner’s place with respect to the duty to guard and with respect to tort liability in cases in which they were negligent in their guarding. However, adds Warhaftig, this ruling is very clear under the theory of ownership, for according to this method, the owner of the animal remains its owner even after he has given it to the watchmen, and therefore there is justification for obligating him to pay compensation for damage done by his animal due to his ownership per se, by virtue of which he bears liability that parallels the liability imposed on the watchmen. This was the also the explanation given by some later authorities who held that the basis for liability according to Maimonides is ownership.\(^5\)

However, it appears that Warhaftig’s view of Maimonides’ ruling on the animal that was placed with a watchman, as well as the views of the later authorities, according to the yeshivah reading, are based on an incorrect text of the ruling quoted above, as printed in the common editions of the Code. On the basis of the correct wording of the ruling, as amended by Maimonides himself, not only is there no proof that Maimonides advocated a theory of strict liability, but it is very difficult to explain the corrected version according to this theory.

Maimonides himself was asked about the logic of this ruling by the Sages of Lunel (Provence),\(^5\) and he answered that a scribal error had occurred in the copying of the rulings, in that the words “and the owners are liable”, which Maimonides attests that he himself inserted as an addendum to his book, were inserted by the copyists in the incorrect place.\(^5\)

Following, therefore, is the accurate version of Maimonides’ ruling, as corrected by Maimonides himself:

When a person entrusts his animal to an unpaid watchman or to a paid watchman or to a renter or a borrower, he assumes the position of the owner and if the animal causes damage – the watchman is held liable. When does the above apply? When he did not guard the animal at all. If, however, he guarded the animal in an excellent manner, as he should, and it got loose and caused damage – the watchman is not liable [and this means that the owner,\

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\(^5\) Warhaftig, supra n. 5, at 219.
\(^5\) See e.g., Commentary of R. Haim Halevi (Soloveitchik) on Maimonides, supra n. 35; Resp. Seridei Esh, supra n. 19, no. 126:3.
\(^5\) In his responsum, id., Maimonides states that there was a scribal error and that the text should corrected as indicated above.
too, is exempt]. And if he guarded the animal in an inferior manner if he is an unpaid watchman – he is exempt, and the owner is liable, even if the animal kills a person; and if he is a paid watchman or a renter or a borrower – he is liable. 55

The amended version of the ruling makes it clear that if the owner gave his animal to a watchman who guarded it in an excellent manner, as he should, and the animal got loose and caused damage, the watchman is exempt, and neither is the owner liable in this case to pay for the damage caused by his animal, even though according to the theory of ownership, he ought to have been held liable. It is therefore clear that this amended version destroys the basis for a Maimonidean theory of ownership and strict liability. Nevertheless, it is interesting that many of the earlier and the later authorities posed abundant questions and devised many explanations on the basis of the incorrect version that had been preserved in the manuscripts and made its way into the printed editions of the Code. Warhaftig surpassed them all, and surprisingly insisted on perpetuating the incorrect version, 56 from which he sought to adduce strong proof for the ownership theory. But Warhaftig’s explanation (and the yeshivah reading commentators who commented on the incorrect version) is very problematic in view of Maimonides’ express words in his response to the Sages of Lunel 57 stating that the version in circulation was incorrect and should be amended as quoted above. 58 According to the amended version of the ruling, a distinction must be drawn between two cases: (1) The owner gave his animal to a watchman who “guarded the animal in an excellent manner as he should and it got loose and caused damage – the watchman is not liable”, and the owner is not liable in such a case to make compensation for the damage caused by his animal; and (2) The owner gave his animal to an unpaid watchman who guarded it in an inferior manner – the owner is liable for the damages. But what is the difference between the cases, and what is the basis for tort liability in light of which the ruling in its amended version can be explained? Not only can this ruling not be explained by the theory of ownership and

55 The above amended version is according to Maimonides’ responsum, as worded in the Mishneh Torah, “Yad Peshuta” edition, Nachum L. Rabinovitch ed. (Jerusalem: Maaliyot Press, 2006), at 120, and not the erroneous wording quoted in other printed editions.

56 Warhaftig mentions Maimonides response to the Sages of Lunel in which he says that the text in the printed editions is incorrect. Nevertheless, he relied on the interpretation of R. Nahum Asch (author of Tizomei Maharan), that the text in the printed editions should not be erased, despite Maimonides’ explicit statements, “because in relation to some matters Maimonides in his old age did not remember the source for his words, and those who succeeded him ‘found and pointed out the source’, but you should still take the original version of Maimonides’ text.” Rabinovitch, “Liability for Property that Caused Damage”, supra n. 15, at 72 n. 4, very correctly commented: “How far do we go!!!”, and indeed, Warhaftig’s position is very problematic.

57 See supra n. 53. Indeed, in Mirkevet Hamishneh (a commentary on Maimonides’ Code) ad loc., R. Shlomo Mahalma expresses doubts about the authenticity of this responsum by Maimonides, but see R. Prof. Sh.Z. Havlin, “The Attitude to ‘Questions of Text’ in Rabbinic Literature”, Beit Hava’ad, 5763-2003, who wrote that there is no basis for doubting the authenticity of the responsum.

58 This emendation was accepted by some of the commentators on Maimonides ad loc.: Kessef Mishneh (R. Joseph Karo, author of Shulhan Arukh), Lehom Mishneh, and by some of the commentators on Shulhan Arukh: Bi’ur Ha’Gra, Hoshen Mishpat 396:18; R. Joshua Falk Katz, Sefer Me’irat Einayim (a commentary to Shulhan Arukh) ad loc., 18. Nevertheless, it should be noted that there are some authorities who stand by the text found in the versions of Maimonides in our hands (and not the corrected text). See, e.g., Maggid Mishneh, according to whom Maimonides’ intention was that the owners should be liable only if the animal that went out caused damage in the category of “horn” (according to Laws of Property Damages 7:1: “An ox whose owner tied it up and locked it in properly and it strayed and caused damage, if it is a tan he pays half damages … if it caused damage that it could have been expected to cause from the outset, such as eating things which are fit for it or broke something with its foot as it walked, [he – the owner] is exempt from compensation”). And see additional commentaries in the Collection of Textual Variations, S. Frankel edition (Jerusalem: Yeshivat Ohele Yosef, 1982). Here is not the appropriate place to review these commentaries; we will mention only that their common denominator is that they interpret the text in a way that does not contradict the principle of fault. It is interesting to note, however, that in his Shulhan Arukh (Hoshen Mishpat 396:8), R. Joseph Karo quotes the interpretation of Maggid Mishneh, and does not quote the corrected text mentioned in Maimonides’ responsum. The Sefer Me’irat Einayim 396:18 questions this, citing Karo’s Kesef Mishneh, id., which referred to the corrected text.
strict liability, but it is even difficult to explain it by the theory of *peshiah*, for in both cases the owner gave the animal to the watchman and it was the latter who guarded the animal in one way or another; from the point of view of the owner, however, it is hard to find a difference in conduct in the two cases as a result of which he will be considered to have acted under compulsion and exempt from payment in the first case, whereas in the second case he will be considered at fault and will be liable for payment. It is simply because the basis of liability lies in another element, which is not connected to ownership nor to *peshiah*; we will discuss this element in Chapter 4. For our purposes here, it is sufficient to stress that the basis for liability is clearly not ownership *per se*, as Warhaftig argues, for were this so, the owners would have to pay whenever the watchman was exempt from payment, i.e., strict liability.

Indeed, with all due respect, Warhaftig’s statement that Maimonides adopted, in principle and comprehensively, an approach that held the tortfeasor to strict liability seems unacceptable.\(^{59}\) We have seen above that many of the leading rabbis of the Lithuanian *yeshivot* also did not believe that Maimonides held such a radical view, even though they admitted that he adopted an approach that attributed great importance to the fact of ownership of the property that caused damage. Many talmudic sources\(^{60}\) point out that Jewish law does not impose strict liability on the owner of property for every tortious event that is caused by the object. As an example we will cite the famous *mishnah*: “If a man brought his flock into an enclosure and shut it in properly and it nevertheless came out and caused damage, he is not liable,”\(^{61}\) and Maimonides, too, did not refrain from citing this *mishnah* as law: “If one brings sheep into an enclosure and secures them with a door able to withstand a normal wind and a sheep gets out and does damage, the owner is exempt.”\(^{62}\)

If Warhaftig’s claim that the owner of the property bears strict liability for damages it causes is correct, why is the owner not held liable when his sheep caused damage, even when he is guarding his property himself?!\(^{63}\)

A similar picture emerges from other rulings that exempt the owners of objects from damages caused by those objects. Thus, for example, in the following ruling:

> If one’s jar [full of water] is broken in the public domain and a person [the injured person] slips on the spilt water or is injured by the shards of the jar, the owner [of the jar – the tortfeasor] is legally exempt because he is the victim of circumstances beyond his control, and he is therefore exempt.\(^{64}\)

Here too, one may ask why strict liability is imposed on the owner of the jar that caused the damage?

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\(^{59}\) Haut discusses several of Maimonides’ rulings in “Some Aspects of Absolute Liability”, supra n. 25, from which he draws conclusions about the existence of absolute/strict liability in Maimonides’ approach; however, the author presents only those rulings dealing with the liability of a person who himself caused damage to another, and not rulings that deal with damages caused by property or with a person who causes bodily injury to another. As we will see below in Chapter 6, Maimonides advocated a different level of liability for each of these types of damage – we have called this “differential liability”; in all events, he certainly did not adopt a sweeping regime of strict liability.

\(^{60}\) Which were followed by Maimonides, as explained in Chapter 6 below.

\(^{61}\) M. *Bava Kamma* 6:1.

\(^{62}\) See Laws of Property Damages 4:1.

\(^{63}\) As Wygoda, supra n. 38, asked in relation to Warhaftig’s theory.

\(^{64}\) Laws of Property Damages 13:7.
Warhaftig and Haut’s argument that Maimonides tended to the theory of strict tort liability in relation to damages caused by the person himself does not hold up. As we will see below at length in Chapter 6, a careful analysis of what Maimonides writes reveals that a distinction must be drawn between injury caused by a person to another person’s body, in relation to which Maimonides does not adopt a standard of care of strict liability but rather, liability based on fault, and damage caused by a person to the property of another, in relation to which Maimonides does indeed adopt a standard of care at the higher level of strict liability, and exemption for cases of force majeure. We will further prove that Maimonides in no way advocated a unitary standard of care, namely, strict liability, as Warhaftig claims, in a universal, sweeping manner in relation to all kinds of damages; rather, he supported a differential standard of care whereby the level of liability depends on the kind of damage caused (to property or to the person), on who caused the damage (the person himself, or his property), and to whom the damage was caused (to the injured person’s property or his person).

Similar to what was said at the beginning of this chapter regarding the proclivity of many modern scholars for explaining the basis for tort liability in Jewish law (peshiah or negligence) in keeping with the common legal approaches in their times, particularly in the 19th and beginning of the 20th centuries, it is definitely conceivable that the attempt – unsuccessful, in our opinion – of Warhaftig and Haut to attribute to Maimonides a theory of strict liability is connected to the time, the context and the purpose in relation to which these two studies were conducted. The work was done in the second half of the twentieth century, and what these two scholars had in mind were, of course, the modern tort theories that developed in the twentieth century imposing strict liability on the person causing the damage, for which the authors attempt to find parallels in Jewish law. Moreover, one of the objectives of Warhaftig’s research was the absorption of ideas from Jewish law into the modern positive law of the State of Israel.

It is important to understand the context in which Warhaftig’s said study was first published in 1976.65 This study, like much of Warhaftig’s research, was conducted in the course of his work in the field of legislation in the State of Israel,66 and as he says at the beginning of his Studies in Jewish Law in which the above article appears:

Comparison between presentation of the subjects in the studies and between the legislative documents on the same matter is liable to attest to a certain extent, and sometimes to a great extent, to the absorption of principles of Jewish law into Israeli legislation.

And indeed, at the beginning of his study of the basis for liability for damages in Jewish law, Warhaftig describes the process that unfolded in modern tort law, mainly in the twentieth century;57 beginning in the era of massive industrialization of the economy, and the many incidents of damage in which no fault could be proven on the part of the factor causing the damage, acceptance of the rule that liability is only imposed where there is some fault or negligence was challenged. With the increase of incidents in which damage was an unavoidable consequence of greater industrialization, of

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65 It first appeared as “The Basis of Liability for Damages in Jewish Law”, 13 Bar Ilan Year Book (5736-1967), and was republished in Studies in Jewish Law, supra n. 5, with the addition of updates in light of legislation, judgments and research that had appeared since.

66 Zerah Warhaftig (1906-2002) was a jurist and a Religious-Zionist political leader in Israel, one of the signatories to the Declaration of Independence and an important legislator who sought to integrate the principles of Jewish law into the secular Israeli law.

67 Warhaftig, supra n. 5, at 211.
wide-spread motorized transport and of intense social life, continues Warhaftig, the tendency of modern tort law was to move over to a theory of strict liability. In this context Warhaftig refers to the Compensation for the Victims of Road Accidents Law that was enacted in Israel in 1975, according to which the liability of the person causing the accident due to use of a motorized vehicle will be strict and complete, and it is irrelevant if there was or was not fault on the part of the injuring party and if there was or was not fault or contributory fault on the part of others. Against this background, in Warhaftig’s attempt in his research to prove that in Jewish law too, and in particular, in Maimonides’ approach, there are echoes of a tort approach that imposes strict liability on the person causing harm irrespective of fault, which he calls “the theory of ownership and strict liability.” Warhaftig likens this jurisprudential theory to the “business risk theory” that developed in France at the beginning of the twentieth century. We shall return to the question of whether it is indeed possible to liken Maimonides’ approach to the “business risk theory”; for our purposes it is enough to note that here too, Warhaftig’s tendency to explain the stance of Jewish law in light of modern theories, this time from the area of economics and law, is evident. Indeed, if there is an approach that imposes strict liability on the defendant in Jewish law sources, as Warhaftig contends, it is liable to be consistent with what was then the new Israeli law (the 70s of the previous century), and even to be considered part of the general initiative to “absorb principles of Jewish law into Israeli law.” Hence, in our view, Warhaftig’s strong motivation to show that there is such a method.

Haut’s attempt in his article of 1989 to identify various aspects of absolute/strict liability in Jewish law, particularly in Maimonides’ writing, must also be understood in light of the fact that he was an American scholar who wished to find a parallel between Jewish law and the American Common law. Admittedly Haut does not argue that one system influences the other. He does, however, argue that —

What will be permanent will be the degree to which certain developments leading toward the concept of strict liability under the Common law reflect, or indicate, that Jewish law sources should or can be interpreted in a manner which is consistent with similar or identical developments in another agrarian system of law, i.e. the Common law, prior to the industrial revolutions.

This argument is methodologically problematic in our opinion, for it assumes that the Jewish law sources must be interpreted in such a way as to be consistent with similar concepts of strict liability in modern Common law. In this book, we too compare what Maimonides wrote with modern theories; however, we try as much as possible to refrain from anachronistic interpretation which sees in

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68 Wygoda, supra n. 38, and Drori, supra n. 17, commented on Warhaftig’s attempts to anchor the provisions of the Compensation for Victims of Road Accidents Law (with respect to strict liability) in the sources of Jewish law.
69 Below, sec. 4.
70 See his statement at the beginning of the article, supra n. 25, at 7, that “This analysis will take into consideration developments in the Common law, in those and other areas, which are well documented and which may shed light on developments in Jewish law as well.”
71 Ibid., at 8. The author discusses the common law that preceded the Industrial Revolution, but the passages that he quotes in the article relating to the rule of liability without fault (p. 9) are from Anglo-American literature from the 20th century, such as Prosser and Keeton, The Law of Torts (5th ed., 1984), to which he refers in n. 2, and Landes and Posner, Economic Structure of Tort Law, to which he refers on p. 19, n. 35. And see the many references (on p. 34, n. 95) to the case law of the Common law and the American legal literature, all from the second half of the 20th century.
72 It is therefore not surprising that at the end of his article (p. 46), Haut reached the conclusion for which he was aiming from the beginning of the article: “It is in this particular area of law that we encounter startling parallels between Jewish and early common law” with respect to the existence of rules that reflect a concept of absolute/strict liability.
Maimonides’ words that which is not there. Indeed, we are not convinced by the arguments of Warhaftig and Haut, who attribute to Maimonides a system of strict liability in tort that is identical to the modern approaches of the twentieth century. Rather, we believe that a very careful examination of what Maimonides actually wrote (without anachronism) clearly reveals that he advocated a system of exclusive-differential liability that differs significantly, as we shall show at length in Chapter 6, from the modern regime of strict liability.

2. Maimonides’ Use of the Term Peshiah in Different Places

Even if we assume for the moment that the theory of ownership is rational and coherent (and as noted, we do not believe it is), it is very difficult to accept the position that the basis of tort liability according to Maimonides is explained purely by means of a theory of ownership, as Warhaftig contends, unconnected in any way to the question of whether the owner of the property was at fault or was negligent in guarding the property that caused damage. This is due to the fact that in various places in the Book of Torts, Maimonides uses the talmudic term *peshiah*. In several places, Maimonides even explains that imposing or not imposing tort liability is connected to the existence or absence of the element of fault and negligence in the conduct of the person causing the damage, and he uses the express term *peshiah* (in the singular, *pash’a* – was at fault, and in the plural, *pash’u* – were at fault).

Indeed, there is no doubt that according to the *yeshivah* reading of many of the above-mentioned later authorities, and as opposed to Warhaftig’s explanation, it is possible to explain Maimonides’ use of the term *peshiah* in various rulings alongside his insistence, at the beginning of Laws of Property Damages, that the basis of the obligation is “the property that caused damage,” as well as the fact that he does not adopt a regime of strict liability, as we showed in the previous section. According to these later authorities, Maimonides, too, integrates the element of *peshiah* into his theory, at least as a marginal condition, alongside the element of ownership. However, the method of the later authorities, too, appears to have several very problematic aspects. Regarding the rationale: it is simpler to explain that it is negligence (*peshiah*) in guarding that engenders the liability for compensation (but it is necessary to guard one’s property to ensure that it does not cause damage to others), for in that case it seems reasonable to impose tort liability on the person who was at fault, due to his fault. However, if the lack of guarding is only a marginal condition of the liability, as the later authorities argue, and the imposition of liability arises due to the very fact that it was the owner’s property that caused the damage, what justification is there for this imposition of liability?

From a conceptual point of view, it is easier to understand Warhaftig’s explanation, according to which the gap between the two theories – the *peshiah* theory and the ownership theory – is clear and significant, particularly in view of the obvious connection that he makes, and which to him is coherent, between the ownership theory and the theory of strict liability. Nevertheless, in view of what we have seen up to this point and what we will see below, it is clear that Warhaftig’s explanation, insofar as it touches upon Maimonides’ writings, does not accurately and completely reflect Maimonides’ theory. On the other hand, according to the said *yeshivah* reading of the later authorities

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73 On use of the term “*peshiah*” see e.g. Laws of Property Damages 2:15; 3:11. Additional rules will be mentioned below.


75 Supra end of sec. B.
as well – which may not suffer from some of the problems of Warhaftig’s theory – the two said theories appear to resemble each other closely, to the extent that it is difficult to find a practical difference between them. The conceptual-analytical difficulties of the approach of the later authorities arise even in the absence of a satisfactory explanation for the way in which the two said parameters – ownership of the property and negligence (peshiah) in guarding – are supposed to integrate into Maimonides’ theory, which is not properly explained by the later authorities. The major difficulty is to explain, on the theory of the later authorities, the actual difference in practice between the two said theories, for both of them include these two parameters, and in any case, according to them both a person can be held liable only for the damage that was caused by objects or animals that belong to him and in the event that he was at fault (pashah) in his guarding of them.

Admittedly, some of the later authorities were aware of this problem. There were those who suggested that the two theories are differentiated by some halakhic ramifications. Thus, for example, some held that the two theories differ in relation to the question of who bears the burden of proof in the case of a doubt: must the injured party bring proof that the owner of the property that injured him did not guard his property properly, or must the owner of the property bring proof that he guarded the property as required and therefore he should be exempt? If the basis for liability is the fact that his property caused the damage, and the element of lack of fault (peshiah) is only a marginal condition and a reservation to the obligation, i.e., where the owner of the property was not at fault in his guarding of the property he must be exempted, then in order to be exempt, the owner must bring proof that he guarded the property as required. If, however, it is the element of peshiah itself that is the basis for the liability to pay compensation, then the injured party must prove that the owner was at fault in his guarding in order that he be obligated to pay. However, this difference does not appear to be substantive but only procedural, and it is hard to imagine that this is the only difference between the two theories relating to the basis for tort liability.

It would seem that the inclination of later authorities to present two possible different explanations for liability for property damage is the result of the classic yeshivah method, that was developed primarily by the leading rabbis of the Lithuanian yeshivot in the nineteenth century, especially members of the Brisker, or Soloveitchik, school (related to the founder of the Brisker school, R. Hayyim Soloveitchik, 1853-1918). Let us take a brief look at the main features of the Lithuanian yeshivah method, with an emphasis on the Brisker school, and see how this method finds expression in the Lithuanian rabbis’ yeshivah reading of Maimonides’ position regarding the basis for the tort obligation.

Many of the works of the Briskers are structured as a commentary on the Code, and the Briskers set out to “defend” the Maimonidean approach by introducing a distinction – often structured as a two-sided query – that refines the traditional understanding of the legal rule under review. The query

76 See R. Samuel Rosovsky, supra n. 48, who cited a dispute on this matter between the books Pnei Yehoshua and Hazon Ish.
78 Saiman, ibid., at 50.
often demonstrates that there are two ways to understand the mechanism through which the legal rule is said to work. The Briskers then show how Maimonides and his critics disagree over the precise construction of the legal mechanism, often through a discussion of how the various sub-rules interact in a given case.\textsuperscript{79} The name given to this two-sided query is \textit{hakira}, and while the Briskers were not the first rabbinic writers to use this term, they popularized it and made it a central feature of their analysis.\textsuperscript{80}

Indeed, one of the main tools of analytical study in the \textit{yeshivah} is the \textit{hakira}. In \textit{yeshivah} terms, this expression usually indicates an examination of some rule, aimed at clarifying which of two explanations of a specific rule is correct. A \textit{hakira} such as this assumes that there are two possible explanations of the said rule, and we must examine which of the two is consistent with the details. A basic assumption that underlies a \textit{hakira} of this type is that only one of the two explanations is correct. In modern terms, this is a monistic, dichotomous approach. The abovementioned \textit{hakira} of the \textit{yeshivah} reading of Maimonides – most of them schooled in the Brisker method\textsuperscript{81} – regarding the two possible ways of explaining the basis for tort liability (“\textit{peshiah}” or “his property that caused damage”), and Maimonides’ identification with only one of the possibilities, constitutes clear expression of the dichotomous \textit{yeshivah} method in the style of Brisk. But this method is not problem-free, and the \textit{yeshivah} reading of Maimonides’ approach is not the only possible one. It should therefore come as no surprise that we have not found even one classical commentator on Maimonides from earlier periods (twelfth-eighteenth centuries) who attributed to him the theory of ownership (“his property that caused damage”) specifically, as opposed to the theory of \textit{peshiah}. In our view, this is because this common interpretation of the rabbis of the Lithuanian \textit{yeshivot} is the necessary outcome of their method, which led them to adopt a monistic approach that favors one of these two – \textit{peshiah} or ownership – over the other. But it does not necessarily reflect the position of Maimonides himself, as we will argue below, whose approach was definitely not monistic, but rather, combined different elements without ranking one over the other.

One contemporary scholar criticized the dichotomous \textit{yeshivah} methodology with respect to the foundation for liability in property damages\textsuperscript{82} whereby there are two different explanations: the first, in accordance with a theory of \textit{peshiah} and the second in accordance with ownership theory; or in a milder version, whereby the two elements (property that caused damage and negligence in guarding) exist in each of the two explanations and the question is which element constitutes the main condition of liability and which constitutes only a marginal condition. According to Michael Avraham’s view, there are not two explanations of which only one is correct; rather, there is a third explanation – the correct one – and it is constructed from a logical amalgamation of the first two explanations. In other words, the \textit{peshiah} theory and the ownership theory should not be viewed as two separate theories, but as two theories that come together and complement each other. This exegetical approach seems to us to be more reasonable than the common dichotomous approach expounded by the later authorities, but it too is flawed, for it does not explain exactly the role of each component – \textit{peshiah}/negligence and ownership of the property – and in what manner the two components complement each other within

\textsuperscript{79} Ibid., at 51.
\textsuperscript{80} Id.
\textsuperscript{81} See their writings, supra n. 35-36.
the normative halakhic tort framework in general, and in the tort theory of Maimonides in particular. In modern terms, a pluralistic approach presents different components or different goals, but its advocates must explain when each component is to be invoked, and when one dominates the other/s. In Chapters 7-8 we will propose and analyze different pluralistic approaches and examine the extent of their compatibility with Maimonides’ tort theory.

3. **The Theory of Ownership Contradicts Various Rulings in the Code**

Another thorny problem facing those who attribute the ownership theory (Warhaftig) or the theory of property that caused damage (the *yeshivah* reading) to Maimonides as the basis for liability for damage to property is the fact that these theories are inconsistent with various rulings in the Code in which Maimonides exempts the owner from liability for damages caused by his property, or holds liable a person who cannot be considered the formal owner of the property that caused the damage. We will cite two typical examples.

Maimonides rules, following the Talmud, that in the event that a slave caused damage, his master cannot be held liable for this damage. The explanation provided by Maimonides for this ruling is extremely interesting:

> …[F]or one is not liable for damage done by his slaves, despite the fact that they are his property [and a man is liable for damage caused by his property], seeing that they have minds of their own and he is unable to keep watch over them. Moreover, should he be annoyed at his master, a slave might go and set fire to a wheat stack worth a thousand dinar or do similar damage.83

Several of the later halakhic authorities struggled to explain Maimonides’ ruling, and claimed that it is inconsistent with the *yeshivah* reading of his words at the beginning of the Book of Torts from which, as noted, later authorities and other scholars derived that the basis for liability according to Maimonides is that the defendant is the owner of the property that caused the damage. If, some asked, it was indeed the case that liability was imposed on the owner for the damage caused by his property due to the fact of his ownership of that property (even where there was no fault on the part of the owner), as those later authorities and scholars argue, is there justification for holding the owner liable for damage caused by his slaves?84 From Maimonides’ words, however, the law is clearly that the master should not be held liable for damage caused by his slave, even though the slave is his property, for the master is not able to watch over him. We will come back to Maimonides’ ruling about the slave and elucidate it at length; for now, however, our limited purpose was to prove that the ownership theory is not comprehensive according to Maimonides.

We shall now cite examples of cases in which the ownership theory attributed to Maimonides is incompatible with various types of tortfeasors who are liable for the damages caused by different objects, even though they are not the owners of those objects. As is known, according to Jewish law there are different types of property damages for which there is liability. Clearly the liability for damage caused by animals, with which Maimonides deals in the above ruling at the beginning of Laws of Property Damages, can usually be explained nicely by the ownership theory – the owner of the

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83 Laws of Theft 1:9.
84 See e.g., *Even Ha’azel* on *Hilkhot Nizkei Mamon* 1:1, no. 15; Resp. Seredei Esh, supra n. 19, at 128 n. 7.
animal is liable for the damages caused by the animal. According to the halakhah, however, a person is liable for the damage caused by objects that are not necessarily owned by him. Thus, for example, if a person makes an opening in a fence to allow the animal of another to go through, he must pay for the damage caused by the animal, even though he is not the owner of the animal. Similarly, a person must pay for the damage caused by a pit that he dug, and Maimonides rules that liability to pay compensation falls upon the digger of the pit, even though the pit is not situated on private property but rather, in the public domain, and not only when he dug the pit himself but also when the pit appeared by itself, or when it was dug by an animal but the person did not cover it – then the person who did not cover the pit is liable for the damage it causes. The same applies to a person who lights a fire and the fire spreads and causes damage, whether the person lit the fire in the field of another or whether he lit it on his own property but did not keep it away from neighboring property as he ought to have done, and it spread and caused damage. Not only is the person who lights the fire liable for the damage it caused, but Maimonides also rules as follows:

If one’s court catches fire, and a fence falls down independently of the fire and it spreads into the next court, the rule is that the owner is liable if he could have restored the fallen fence but failed to do so. This is analogous to one’s ox getting out and causing damage, in which case the owner is liable, for he ought to have taken care of it but failed to do so.

The analogy drawn by Maimonides between the person whose court caught fire and he did not fence it off, and the fire therefore spread and caused damage in another court, and between the liability of the owner of an ox which went out and gored is not clear under the theory of ownership as the basis for tort liability. True, the ox has an owner who should be held liable, but does the fire that caused damage have an owner?

In cases of damage caused by a pit or by fire, it is difficult to speak of ownership; why therefore is the person who sets the fire or the person who digs the pit or who did not cover the pit liable for the damage caused by these things?

Several of the rabbis of the Lithuanian yeshivot strove hard to answer these questions. R. Shimon Shkop wrote as follows:

In the case of a pit, the Torah held him liable for the damage caused by his property. And that the pit is his is due to the digging and the opening, that is, he prepared the damaging thing and he is therefore called its owner, similar to that which concerns a person’s right: it is accepted under the laws of the Torah and the laws of the nations that whoever invents something new in the

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And indeed, in relation to damages caused by animals as well, there are cases in which even a person who is not the formal owner is held liable. An example of this is Maimonides’ abovementioned ruling (Laws of Property Damages 4:4), whereby if a person entrusts his animal to a watchman, then “the watchman takes the place of the owner.” However, it would appear that this does not constitute a significant difficulty for those who attribute the ownership theory to Maimonides, for they can say that watchmen become quasi-owners due to the proprietary connection that they have to the object of their watch. And cf. Even Ha’azel, ibid., at 14.

Laws of Property Damages 4:2.
Ibid., 12:1.
Ibid., 12:3.
Ibid., 14:1.
Ibid., 14:2.
Ibid., 14:4.
world is the owner of all rights to it – similarly the Torah called a person who prepares an obstacle by the name of owner of the pit and owner of the fire, and held the owner of the damaging thing liable.92

R. Shkop introduces an interesting, original innovation in defining ownership in tort as inhering in the person who created the damage, and he compares this to the laws of patents and intellectual property that have developed in Western legal systems, particularly over the last two hundred years, which confer ownership of a new creation or invention on the creator or inventor. In similar fashion, says R. Shkop, the person who created the obstacle and the pit and who lit the fire is the owner for the purpose of torts. This is an innovation which greatly extends the concept of ownership beyond the simple, common meaning in the Jewish sources,93 and it is therefore not surprising that R. Shkop referred to the modern, Western “laws of the nations.” Undoubtedly this innovation is beset by legal and analytical difficulties in relation to the problematic analogy from the laws of (intellectual) property to tort law. Indeed it appears to us that R. Shkop was pushed to propose an innovative – and problematic – interpretation (that reaches the distant realms of “the laws of the nations”) due to the conceptual-legal difficulty involved in explaining the laws of the pit and of fire according to the common theory of property ownership.

4. The Problem with Finding a Convincing Rationale for the Ownership Theory

In our view, the most serious problem with the ownership theory, according to which the basis for holding a person liable for damage caused by his property is his very ownership of that property, lies in the fact that it is difficult to establish its rationale, as opposed to the extremely logical and comprehensible theory of peshiah. According to the theory of peshiah, the basis for tort liability lies in the culpable conduct of the person causing the damage, whose guarding was faulty and consequently damage which he ought to have foreseen was caused; this – as most scholars argue – is very clearly comparable to the common rationale for the model of negligence in the common law systems. But what is the rationale underlying the ownership theory? Most of the later authorities did not even bother to explain this, going no further than simply to present the fact of a person’s property having caused the damage as the basis for obligating him, as the owner of the damaging object, to pay compensation. This is a formalistic, axiomatic determination, the underlying logic of which is difficult to fathom. One must really ask why ownership per se should justify imposing tort liability in the absence of fault on the part of the owner? Why is it sufficient that an object belonging to the defendant caused damage in order to obligate him to pay compensation? After all, it was not the person himself who caused damage but the object that he owns, and if the basis for the obligation does not depend on negligence on his part (as in the theory of peshiah), it is not clear why he nevertheless is held liable.

The yeshivah reading of Maimonides’ approach to the basis for tort liability posed many problems, and later authorities struggled to find its rationale;94 several of them were not prepared to

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92 Novella R. Shimon Yehuda HaKohen Shkop, Bava Kamma 1.
93 We did find that in the context of damages caused by a pit, the scriptural wording was: “[t]he owner of the pit shall make it good; he shall give money unto the owner of them,” (Exod. 21:34) and Rashi comments there: “This means the one who occasioned the damage. Although the pit was not his – for he dug it in the public thoroughfare – Scripture regards him as its ‘owner’ in so far that he becomes responsible for the damage caused by it” (Rashi based himself on Bava Kamma 29b). However, this would not seem to mean true ownership of the pit; rather, the person is liable in respect of the pit as if he were its owner, as implied by the Talmud (id.) that a pit that is not in a person’s possession but Scripture treated it as if it were in his possession. This is the reason that R. Shimon Shkop drew an analogy from the laws of intellectual property.
94 See e.g., Even Ha’azel, supra n. 35; Novella R. Shmuel Rosofsky, supra n. 35.
accept a rationale based on ownership theory. The difficulty in finding a convincing rationale for the tort liability being due to “his property [having] caused damage” (ownership) is so serious that it led one authority to reject outright the famous hakira of the later authorities (whether he is liable due to peshiah or due to the fact that it was his property that caused the damage), owing to the lack of logic on one side of the hakira, viz., that he is liable only because it was his property that caused the damage. This authority is of the opinion that there is only one plausible explanation of the basis for tort liability, i.e., the person was at fault in guarding the objects for which he is responsible. The difficulty in understanding the rationale underlying the ownership theory as compared to the simple rationale of the theory of peshiah increases in light of the narrow manner in which some later authorities explained the difference between these two systems. As will be recalled, they explained that even according to the approach whereby the basis of tort obligation is the fact that it was the owner’s property that caused damage, the absence of peshiah in guarding is a marginal condition of the obligation (and if there was no fault, he is exempt from liability). But if the element of peshiah is a necessary and obvious component of the tort liability, is there also a need for the element of ownership (which is dominant, according to the yeshivah reading)? What is there in the element of ownership that is not present in the element of peshiah, and what is its role in establishing the basis of liability?

It is difficult to find a clear, uniform answer to these questions, but several later authorities and contemporary scholars have made various, interesting proposals, some of them extremely creative.

We have already discussed R. Shimon Shkop’s innovative proposal whereby he defines ownership in tort as inhering in the person who created the damage. Moreover, as we saw, R. Shkop’s definition of ownership constitutes a departure from the common definition of this term in the halakhic sources, and there is no support for it in Maimonides’ writings either; it also raises the conceptual and analytical difficulties entailed by the problematic comparison that he draws between Jewish tort law and modern intellectual property law (which has a very different way of thinking to that of Maimonides). However, even if we accept the proposal whereby the person who created the damage is its owner, the major question remains: why should the owner of the object that caused damage be held liable? It was not the owner himself who caused the damage, but rather, his property! In other words, R. Shkop’s proposal explains, at most, why the person creating the obstacle is considered the owner, but it does not explain why, as the owner, he should be held liable for the damage resulting from that obstacle.

Let us now look at other proposed explanations of the ownership theory.

According to Warhaftig’s approach, “the right of ownership brings with it the duty concerning the risks associated with ownership. The owner of the property enjoys it, but must also bear the burden of losses that his property causes to others,” or in the words of R. Weinberg, “at the basis of this
responsibility is the view that a person’s property is not only for his pleasure and use, but it also imposes obligations on him, and in this case, an obligation to pay for damages.⁹⁹

Even though Warhaftig and R. Weinberg’s explanation seems preferable to that of R. Shkop, it still does not explain the jurisprudential theory that underlies their axiomatic assumption that the right of ownership also imposes various obligations on the owner, including the obligation to pay for damage caused by his property.

As will be recalled, Warhaftig compares this jurisprudential theory to the business risk theory that developed in France at the beginning of the twentieth century. According to this theory as described by Warhaftig, the owner of the business, factory or plant must factor into his business expenses the cost of damage caused by his business to others through no fault on his part. Calculation of the costs of running a business must be based on the fact that every growth in business activity increases the risk of causing harm to others, and liability for compensating the injured party must figure in the anticipated costs of that activity. In modern terms, we would call this risk management. Indeed, a business that is active and wishes to make a profit, and which also has the potential to cause damage, must calculate income as against anticipated costs in order to calculate the anticipated profits and *inter alia* to determine, accordingly, the cost of the product (obviously, taking into account other parameters such as competition, market conditions and so forth). Those anticipated costs include the compensation that a potential causer of damage will be required to pay as a result of the damage he causes. In the modern age, the cost of insurance covers the cost of damages in most businesses, and the risk management undertaken by modern sophisticated concerns conduct must examine anticipated costs, including the cost of damages. This includes damage caused by workers of the potential tortfeasor, when the damage is caused in the framework of the employment of that worker and there has been no deviation from the authority granted to him by the employer. One utilitarian rationale that can be presented for holding a person liable for damages that his worker caused to others, or even to himself, is that the worker can be considered as is the instrument through which the employer profits, and were it not for the worker there would be no justification for the existence of the business. Hence, the employer must also pay for the damages that the worker causes, and not simply enjoy the benefits and profits from his work. This is quite similar to the rationale presented by Warhaftig and Weinberg.¹⁰⁰

The business risk theory is applicable and certainly suited to the economic thinking of the twentieth century, in the wake of the industrial and consumer revolutions that saw the construction of huge plants for mass production, the operation of which necessarily involves the creation of great damage to the environment. It is difficult, however, to attribute a similar theory to the talmudic sages who were active two thousand years ago, or to Maimonides, who wrote his works eight hundred years ago in a commercial and economic reality that was much more primitive, in which those causing the damage were usually the farmer, the blacksmith, the wagoner, or an individual craftsman, rather than the huge factories that exist today. But can one find support for a theory similar to that of the business risk theory in the works of talmudic sages, or of Maimonides and other classical commentators? Maybe yes and maybe no; in this essay we will of course not dwell on this point, for we wish only to

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⁹⁹ *Resp. Seredei Esh, supra* n. 19.
100 Warhaftig, *supra* n. 98; Weinberg, *supra* n. 99.
say that Warhaftig, in all events, did not adduce any proof of this from the Talmud, from Maimonides or from the classical commentators and authorities who lived in the 11th-17th centuries.

It will be stressed that the authors of this work are certainly not opposed to comparing the tort theory of Maimonides to contemporary economic theories, and do so throughout the book. Indeed, the authors of this book, too, will attempt (in Chapters 4 and 5) to explain Maimonides’ approach according to modern theories of scholars in the field of law and economics such as Calabresi and Posner, but only after having proved on the basis of the Guide that a major objective of tort law is the consequentialist aim of preventing damage by creating effective incentives for damage avoidance, and that Maimonides’ approach bears a great similarity to certain aspects of Calabresi’s theory (cheapest cost avoider and best decision maker) and that of Posner (development of the Hand formula, and the theory of contributory negligence). To do so it will be necessary to show that the lines of thought and the rationales are similar. This was not done by Warhaftig, who simply mentioned the modern theory (“theory of business risk”), without showing that its elements also existed in the writings of Maimonides and other halakhic authorities.

The great difficulty in finding a satisfactory explanation for the yeshivah reading basing liability to pay damages on the fact that it was the person’s property that was the cause of the damage led one contemporary scholar, Michael Avraham,101 to despair of finding the basis on the purely jurisprudential level. He therefore proposed that we examine this position on meta-halakhic, and possibly even metaphysical, planes. In an interesting article, the author proposes two directions for explaining this understanding (the ownership theory) of the basis of tort liability: one is that in fact, the ox itself that caused the damage has an “obligation” to pay, and when the ox has an owner, that obligation is assigned to the owner. The other explanation is that there is a metaphysical (and not purely legal) relationship between a person and his property: the property is part, or is in the peripheral circle, of the person himself, and it does not simply “belong” to him on the legal plane. For this reason, a person is liable to pay for the damage caused by his property, just as he is liable to pay for damage caused by his body.

Support for the assumption on which the first explanation is based, i.e. that the halakhah, in principle, imposes tort liability on the offending animal itself, can certainly be found in various scriptural,102 talmudic and post-talmudic sources. Some early authorities gave this as the reason for stoning the ox that killed a person,103 and this approach is backed by various talmudic104 and possibly even scriptural105 sources. Indeed, even though imposing tort liability on animals seems strange and unacceptable in the world of modern rational Western jurisprudence, it must be admitted that such an

102 For a scholarly summary of the subject of the liability of the owners of animals in biblical and Jewish sources as compared to other historical sources (Christian, Roman and others), see: Bernard S. Jackson, “Liability for Animals: An Historico-Structural Comparison”, 24(3) International Journal for the Semiotics of Law (2011) 259.
103 See Nahmanides’ Commentary to Genesis 9:5; Sefer Hahinukh Precept 52; Hagahot Harashash on Bava Kamma 45:1, s.v. afilu.
104 See Albeck’s proofs, supra n. 5, at 128-130.
105 In Gen. 9:5, it is written: “And surely your blood of your lives will I require; at the hand of every beast will I require it…” Nahmanides’ commentary on this verse is well known: he remarks that according to the literal scriptural meaning it would appear that the animal is responsible for spilling the person’s blood and it is therefore punished. However, he says, rationally it is hard to accept this assumption, for “an animal does not have intention so that it would be punished or rewarded.” At the same time, he presumes, “it may be that with respect to human blood, an animal that kills a person will be executed, since this is a Divine decree, and this is the reason that the ox shall surely be stoned and its flesh may not be eaten, but there is no financial liability accruing to the animal’s owner (as suggested by Maimonides in his Guide).”
approach is not strange to positions that may be discerned in various sources of Jewish law (and parallels to this may also be found in other ancient legal systems), and it may even explain certain talmudic passages. Nevertheless – and this is the most important, most critical point for our purposes – because our concern is to explain Maimonides’ tort theory, we must always bear in mind what Maimonides wrote in the chapter explaining the reasons for tort law in the *Guide*, and in this context it is sufficient to quote his well-known statement opposing the approach whereby the ox that killed a person is stoned as a punishment to the ox itself: “The killing of an animal that has killed a human being is not a punishment to the animal, as the dissenters insinuate against us, but it is a fine imposed on the owner of that animal.”

In view of Maimonides’ clear rejection of the criminal liability of the ox for the damage it has caused, Avraham’s explanation of the *yeshivah* reading approach imposing liability on a person for damage caused by his property as a possible explanation of Maimonides’ stance must be dismissed, even if it is capable of rebutting the position of other authorities.

The second explanation proposed by Abraham assumes that there is a metaphysical, and not solely legal, relationship between the person and his property, and the person is liable for all damage that his immediate environment – that which is considered part of him – does to another. Avraham suggests that the closest circle around a person is his body, and he is therefore liable, even in situations of unavoidable mishap (*ones*). The second closest circle surrounding a person is his property, and therefore if his property caused damage, he is liable to pay; here, however, he is not liable in cases of unavoidable mishap, and if he kept proper watch over his property he is exempt, for this periphery is more remote than his own person. Even though this explanation is interesting and very original, and support for it may possible be found in extra-halakhic, non-rational sources such as the Kabbalah and Hassidism, it is very distant from the normal patterns of halakhic thought. In any case, it is difficult to believe that Maimonides would have accepted this explanation as the basis for tort liability for damage to property, since Maimonides is known as the absolute rationalist, who strove “to bring the laws close to the intellect,“ and he does not hesitate to vehemently reject halakhic stances that are not rational or to erase them from his books or to replace them with other approaches.

In our view, all the above-mentioned explanations of Maimonides’ approach, some rather contrived, do not provide solid and convincing theoretical insights that clarify what is exactly the basis of liability for damages in general and for property damages in particular, and why Maimonides departed from the common theory of *peshiah* that was dominant in talmudic and post-talmudic sources. Most of these explanations encounter great difficulty in justifying the various rulings in the

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106 Jackson, *supra* n. 101.

107 *Guide* 3:40. Extensive analysis of this chapter of the *Guide* will appear in Chapters 3-4 below.


109 Schwartz, *id.*, n. 12, cites Munk and Pines, according to whom the reference was to the Karaites. The Karaitic proclivity for interpreting Scripture according to its literal meaning, namely, that the ox that kills is punished, is well known.


111 Twersky already pointed out that Maimonides includes as one of the objectives of his *magnum opus*, the *Code*, that of educating the masses and eradicating superstitious beliefs from amongst the vulgar people, for they too are forbidden to hold such beliefs: see Twersky, *supra* n. 1, at 77-79. Yaakov Levinger argued that Maimonides omitted or changed the reasoning for rules cited in the Talmud insofar as they were incompatible with his rational-scientific-philosophical approach. See Levinger, *Maimonides as Philosopher and Decisor* (Jerusalem: Mossad Bialik, 1989) 100-111 (Heb.). For a broader discussion of this topic, see Levinger, *Oral Law in Maimonides’ Thought* (Jerusalem: Magnes Press, 1965), at 92-155 (Heb.).
(in which Maimonides enunciates rules without explanation) that appear to contradict the substantiated explanations of the ownership theory; hence the great confusion in explaining Maimonides' method.\textsuperscript{112}

Most importantly, although the explanations offered by Warhaftig and by rabbis of recent generations are intriguing, they do not reflect Maimonides’ approach in light of his explicit statement in the \textit{Guide},\textsuperscript{113} which these scholars and rabbis appear to have ignored. As we will see in Chapter 4, Maimonides frequently exempted the owner from tort liability for property damages, if it transpired that there was a more efficient avoider of the damage. Indeed, those who proposed an ownership theory had particular difficulty in explaining these laws, because they contradict the theory that imposes liability specifically on the owner.

If we wish to find a convincing rationale for Maimonides' approach, it will be necessary to analyze more deeply and more carefully his general theory of torts, as emerges from all of his various works (and not only from the beginning of the Book of Torts in the \textit{Code}) – assuming, as we do, that Maimonides indeed did not adopt the theory of \textit{peshiah} (as an exclusive bases, although he did weave it into his theory), but rather, sought to base tort liability on an alternative rationale. But this alternative rationale is not the rationale or one of the rationales of the ownership theory attributed to him – wrongly, in our opinion – by later authorities and scholars. So what is this alternative rationale? A first step towards its exposition will be taken near the end of this chapter by means of a new, careful examination of the first rule in the Laws of Property Damages.

D. DIFFICULTIES IN UNDERSTANDING SOME ELEMENTS OF TORT LIABILITY MENTIONED IN THE \textit{CODE}

The Book of Torts in the \textit{Code} contains many rulings, most of which are based on the Talmud but some of which were refashioned by Maimonides and reflect his particular approach to torts. Quite a few of these rulings refer to additional important elements that impact on tort liability (over and above the elements mentioned above). Several rulings aroused great interest amongst the Maimonidean commentators and scholars, who sought an explanation for these rulings which seem, at least at first glance, to require explaining either because they are difficult to understand according to both of the common theories – \textit{peshiah} and ownership – or because they deviate to some extent from what appears in the talmudic sources. Below we will briefly discuss some examples of these questionable rulings. In order to resolve the difficulties, a deep understanding of Maimonides’ theory of torts, in all its aspects, is necessary, and we attempt to acquire this understanding in the following chapters. In Chapter 5 we will return to re-examine most of these rulings, and we will see how they fit into Maimonides’ tort theory as a whole (in light of what he wrote in the \textit{Guide} and as compared to modern tort theories).

1. \textbf{Rulings that are Difficult to Interpret according to Either Ownership or Fault-Based Theories}

In sec. C(3) above, we dealt with rulings in the \textit{Code} that are difficult to explain under the ownership theory, but simple under the theory of \textit{peshiah}. However, there are quite a few rulings in the \textit{Code} that

\textsuperscript{112} To illustrate this see \textit{Even Ha'azel}, supra n. 35: even though R. Meltzer is of the opinion that in principle, the basis of liability according to Maimonides is “his property caused damage” (the ownership theory), he struggles to explain, in light of this theory, several of Maimonides’ rulings that appear to contradict this rationale.

\textsuperscript{113} 3:40.
are difficult to explain under either theory. In this section we will discuss two typical examples, and further examples will be mentioned in later sections.

A clear example of a matter that is hard to explain according to either theory is the primacy of place accorded by Maimonides to a person’s *intention* to cause damage as the basis for liability for damages caused as a result a person breaching a fence that prevented his neighbor’s animal from getting loose, and as a result the animal strayed and caused damage to others. Maimonides distinguishes between two situations in relation to this matter:

If one breaks down a fence enclosing his neighbor’s animal [with the intention that it will get out and cause damage] so that it gets out and causes damage, the rule is as follows: If the fence is strong and firm he is liable [for the damage caused by the animal, like any other person who causes damage].\(^{114}\)

Maimonides ruled that a regular person who breaches the fence of his neighbor must pay for the damage caused by the animal (belonging to the neighbor, not to the person who broke down the fence) that got out, if it got out by itself. However, this was not how he ruled in the case of brigands who breached the fence: in that case, the law is that the brigands are not liable for the damages caused by the animal that got out, unless the brigands led the animal out themselves – only then will they be liable.\(^{115}\) Many of the classical Maimonidean commentators struggled to explain the difference between the two situations, in which the actions of the persons causing the damage were identical – they broke open the fence, following which the animal went out by itself and caused damage: why is the regular person who breached the fence liable in this case, but the brigand who did so is exempt?\(^{116}\)

This question was posed by Maimonides himself, and in his response he explained the difference between the two cases:

There is a great difference between brigands who breached the enclosure and a person who breached his neighbor’s fence enclosing his animal. For in the case of the brigands, it was *their* intention to steal the animal, and therefore as long as they did not take it out of the owner’s domain, they are not liable and [the damage] was not done within their own domain, but if they led it out it is done within their own domain and they are liable for the damages; but if they left it there they did not cause the damage *that they intended to cause*, which is the theft, and they are therefore exempt. But one who breaches a fence enclosing his neighbor’s animal – *his* intention is not to steal – and what he intended only was that the animal should go out and cause damage, and that the owner will be held liable for the damage, and therefore he [the one who breaches a fence] is liable for that damage like any other tortfeasor. And this is the difference between a brigand and a person breaching the fence of his neighbor, and all of this is correct, and is based on the fundamental principles of law, and all issues from the one Shepherd.\(^{117}\)

\(^{114}\) Laws of Property Damages 4:2.

\(^{115}\) Ibid., 4:1.

\(^{116}\) See commentaries of Ra’avad, *Bi’urei Hamaggid Mishneh* and *Migdal Oz ad loc*. Following them were many others who discussed this topic.

In his responsum, Maimonides resolves the difficulty by means of an interesting distinction between a person who intends to steal and one who intends to cause damage. Maimonides’ responsum will be analyzed in depth in the following chapters; for our purposes here, we will simply mention that not only is the basis for liability that Maimonides emphasizes, i.e., the intention of the person causing the damage, incompatible with the ownership theory – according to which the person breaching the fence ought to have been exempt since he is not the owner of the animal – but it is also incompatible with the theory of peshiah, for according to that theory, emphasizes Albeck, “[p]ayment of compensation is not dependent on the culpability and the intentions of the tortfeasor.”

In fact, the common approach in modern jurisprudence too is that the tort of negligence does not include intentional torts; in common law there is a clear distinction between intentional torts and unintentional torts that are based on recklessness and negligence. Therefore, for an understanding of the basis for tort liability according to Maimonides, one will not necessarily look solely to the element of peshiah nor to the element of ownership (nor both together), but also to an additional element – the intention of the tortfeasor. This is a new, unique element that is emphasized in Maimonides’ responsum, even though it does not receive much attention in the Talmud or from other early authorities, and it must be considered, together with other elements, in any attempt to explain Maimonides’ tort theory.

Let us now move on to another example of a ruling that accords neither with the theory of ownership nor with the theory of peshiah. Following the Talmud, Maimonides rules on the liability for injury caused by a dog when a person who was not the owner incited the dog, causing it to bite a third person or the inciter himself. Maimonides writes as follows:

If one incites another’s dog against a third person he is legally exempt but morally liable. But the owner of the dog is liable for half of the damage caused because, since he knows that his dog bites when incited, he ought not to have left it loose. If, however, one incites another’s dog against himself, the owner of the dog is exempt, because whenever anyone who has acted

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118 Albeck, supra n. 5, at 40. Elsewhere (ibid., at 32) he writes that although “for malicious and intentional behavior a person will be liable by virtue of Divine law (see the discussion in Bava Kamma 56a), but by virtue of human law he is liable only for those acts that are measured against the acts of the rest of mankind.”

119 Although not in all the jurisdictions. In Israel, for example, which is a Common law state, this distinction is blurred, and the case law of the Supreme Court, which constitutes binding precedent, states explicitly that the tort of negligence may also include intentional acts. See CA 2034/98 Amin v. Amin [1999] IsrSC 53(5) 69, para. 13, per Justice Englard. An English translation of the ruling is available at http://elyon1.court.gov.il/files_eng/98/340/020/q07/98020340.q07.htm. In the Israeli Civil Wrongs Ordinance [New Version]. 5732-1972, 2 LSI 12 (1972), § 35, there are a number of torts that include a mental element (of intention, calumny and so forth) but usually, these torts are not invoked, because in most cases plaintiffs prefer basing claims on other torts which do not contain these requirements. The element of calumny may be relevant for determining punitive damages, for example. We will not elaborate here.

120 Bava Kamma 24b.

121 A person who incites an animal is exempt under human law, because he himself did not perpetrate a damaging act but was only the indirect cause of the damage; from a moral point of view, however, he bears responsibility and must pay, but the court cannot force him to do so.

122 Here we are not discussing the question of distribution of liability between the causes of the damage; our aim is primarily to discuss the question of the liability in principle of the owner of the dog and of the inciter. As for the question of distribution, we will remark only that it is necessary to explain why, according to Maimonides, the owner is liable for only half the damage that the dog caused when a person incited it against a third person, and why he should not pay full compensation if this is a dog whose way it is to bite. This was Ra’avad’s question on Maimonides’ ruling. And see Maggid Mishneh ad loc. who wrote that indeed the owner of the dog does not pay more than half damages even when it is a dog that is known to bite, because the dog did not attack of its own accord but only due to the incitement. However, this explanation is problematic in our view: what of it if the damage was caused by incitement? Ultimately, the owner knew his dog would probably bite when someone incites it, so why should be not be required to pay full damages? A detailed discussion of this question, interesting in itself, is beyond the scope of our study.
abnormally first (is injured by) another who is acting abnormally, the latter is exempt.123

What is the basis for differentiating between a case where one person incited the dog of another (hereafter: the dog-owner) against a third person, in which case the dog-owner is liable, and a case where that same person incited the same dog against himself (the dog bit the inciter), in which case the dog-owner is exempt? This appears to be problematic according to both the ownership theory and the theory of peshiah. This is a special test case: the dog-owner owns the dog, whereas the negligent, faulty conduct was primarily that of the inciter, although the dog-owner too was at fault in that he did not guard the dog properly to prevent the possibility of it biting others when incited. According to the ownership theory, the law ought to have been that just as in the first case, the dog-owner is liable for damages caused to a third person by his dog, so too the dog-owner ought to have been held liable for the damages caused to the inciter himself in the second case. From the point of view of ownership of the dog there is no difference between the two cases, and why, therefore, should the rulings differ?

Indeed, it would appear from Maimonides’ formulation that the basis for the liability of the dog-owner is not the ownership per se, for he justifies the liability of the dog-owner by his fault in knowing that if someone incites his dog to cause harm, the dog bites, and he was therefore at fault in allowing the person to incite the dog. However, according to the fault-based (peshiah) theory as well, it is difficult to understand the basis for distinguishing the two cases. If fault is based on the principle of foreseeability, and the dog-owner ought to have foreseen that the dog would bite as a result of the incitement, and he was at fault in allowing a person to incite his dog, why is he exempt when the inciter himself, rather than a third party, is injured? From the point of view of the conduct of the dog-owner there is no difference between the two cases, and in both cases it must be said that he was at fault in allowing another to incite the dog. Albeck proposes an explanation for the law governing the inciter in keeping with his approach (supporting the theory of peshiah).124 He explains that the inciter himself changed the status quo, and he ought to have known that it is normal for a dog to attack the inciter, but this would usually not occur when he incites it against a third person. Therefore the inciter introduced a change (by inciting the dog against himself), and the dog acted normally and therefore its owner is exempt. However, this explanation is difficult to accept: is it in fact a norm of animal behavior that a dog will turn on a person inciting it, but not when he incites it against a third person? And why should the dog-owner and not the inciter be liable in the first case? Should not the inciter have foreseen the damages that would result from his incitement, and therefore ought he not to have been liable for the injury caused to a third person when he incited the dog? If one wishes to say that the dog-owner was at fault in that he did not guard his dog, which was likely to attack another person, why should he be exempt from liability when the inciter incited the dog against himself?

Undoubtedly the rule regarding the inciter requires a more convincing explanation, one that is not based on the normal rhetoric of peshiah or the ownership theory.

123 Laws of Property Damages 2:19.
124 Albeck, supra n. 5, at 127.
2. Providing a Rationale for the Exemption in Tort

The exceptional cases in which the owner of the property that caused damage is exempted from liability for the damage aroused extremely lively interest both on the part of the rabbis of the scholars,\(^{125}\) for there is nothing like an exception to teach us about the rule in general. There were many, therefore, who sought to cast light on the exceptional cases, each person according to his approach and to his preferred tort theory. At the same time, so it seems to us, the cases of exemption in tort are difficult to understand according to both the ownership theory and that of \textit{peshiah}. The exceptional cases mentioned in the Talmud are also discussed in the rulings in the \textit{Code}, and many of them require explanation.

One of the striking features of talmudic tort law is its extremely limited scope of liability.\(^{126}\) For example, let us consider the limited scope of liability of the owner for the damage done by his animal. This kind of “tortfeasor” is subdivided by the Talmud (following Scripture) into three distinct categories. The first category is tooth (\textit{shein}), which refers to damage done by an animal through a normal act of \textit{eating}. The second category is foot (\textit{regel}), which refers to damage done by an animal with its foot in the course of its normal walking. The third category is horn (\textit{keren}), which refers to damage done by the animal intentionally with its horn – i.e. by goring. The general principle of liability in the first two categories is that one pays full damages for the damage done by his animal as a result of walking or eating something that belongs to another only when the animal is on the premises of the damaged party without permission. However, there is no liability for damage done by the animal when walking or eating in the public domain. The general principle of liability in the third category (\textit{keren}) is significantly different from the principles of the two first categories. Unlike liability for tooth and foot, liability for horn applies both on the injured party’s premises and in the public domain. However, the \textit{halakhah} limits liability for horn to half damages, which are payable only from the body of the damaging animal itself. The said payments for horn apply only to an animal that is \textit{tam} [literally: innocent], meaning that its destructive act can be considered an aberration, since it has not become a habitual offender. However, if the animal repeats a particular destructive act three times and its owner is duly warned about each incident, then the animal becomes a \textit{mu’ad} [literally: warned]. The owner is put on notice that his animal has this destructive tendency, and if it causes any subsequent damage through that act, the owner must use any and all assets to pay full damages for that subsequent damage. These basic rules that derive from the Talmud and the Bible are all accepted by Maimonides.

The sources of the rulings in the \textit{Code} are talmudic, and the rulings are not exegetical innovations of Maimonides, but Maimonides not infrequently shaped these laws and brought them into line with his approach and his tort theory. A good example of this is to be found in Bernard Jackson’s insightful research on Maimonides’ definitions of \textit{tam} and \textit{mu’ad}.\(^{127}\) According to Jackson, Maimonides’ definitions of \textit{tam} and \textit{mu’ad}, which receive so much emphasis in the first chapter of Laws of Property Damages, contain revision and reorganization of the talmudic materials.\(^{128}\)

In examining the reasons for the exceptional rulings, the following questions arise: what is the difference between damages caused by tooth and foot on the one hand and damage from horn on the

\(^{125}\) See, e.g., Westreich, \textit{supra} n. 4.

\(^{126}\) Friedell 1986, \textit{supra} n. 22, at 75.


\(^{128}\) \textit{Ibid.}, at 169.
other, and how does this difference explain the differences in the respective laws? Why are the owners of animals that caused damage in the public domain by eating or walking exempt, and why are they liable for the damage caused as a result of their animals goring, even when the damage occurred in the public domain?

The exceptional law of the tam ox is particularly hard to explain. Why is the law applicable to it different from the other laws applying to damage caused by animals? What is the reason for the fact that only in relation to horn damage is there a difference between tam and muʿad oxen? Why are only half damages paid in the case of a tam ox and not full damages?

It is especially difficult to answer these questions according to the ownership theory. If the basis for tort liability is that it was the person’s property that caused the damage, what justification is there for exempting the owners from damage caused by their animal eating or walking in the public domain? And why is the owner of a tam animal that gored liable for only half damages?

Recourse to the theory of peshiah to explain the differences in the law between the different categories of damage caused by an animal is not problem-free either. Albeck, true to his approach, explains that when the law states that the tortfeasor is exempt from liability, such as in the case of damage from tooth and foot in the public domain, the reason is that damages are frequent there, and the victim should have foreseen that he would be injured, and should have taken care; he was at fault in not doing so. But such explanations – which peg everything on foreseeability – seem problematic, and Friedell rightly wrote, as will be recalled: “But these explanations are inherently weak because the concept of foreseeability is sufficiently plastic to permit almost any case to be termed foreseeable or unforeseeable.”

Albeck’s assertion that damages from tooth and foot are common in the public domain, too, contradicts Maimonides’ explicit statement that “[T]ooth and foot in the public domain are exempt, because this is something that we cannot guard against, and they rarely cause damage there.”

As Friedell wrote, the law governing the tam ox is especially difficult to understand according to the theory of peshiah. Even the possible interpretation whereby the law of the tam ox is an exception that deviates from the regular rules cannot be reconciled with Maimonides’ approach which, as Jackson showed in his article, viewed the distinction between tam and muʿad as a fundamental, principled distinction in the rules of liability, and not merely as an aberration.

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129 Albeck, supra n. 5, at 103-109.
130 Friedell 1989, supra n. 22, at 98.
131 Guide 3:40. We will deal at length with Maimonides’ statement in Chapter 4 below; for our purposes here suffice it to say that damages of tooth and foot in the public domain are not common.
132 Friedell 1986, supra n. 22, at 85-88. Albeck, supra n. 5, at 115-6, explains the tendency to be lenient in the matter of a tam ox in that goring is not frequent and it is difficult to foresee, and according to his approach, as will be recalled, liability in tort depends on foreseeability. But as Friedell correctly wrote, ibid., at 85: Albeck’s approach does not explain the Talmudic rule on liability of ox owners: the owner is liable for gorings even though he has used reasonable care. According to the Talmud, the ox owner is liable for gorings even if he tied up his ox with reasonable precaution. The owner is excused from liability only if he exercised substantially more than reasonable care. This liability rule contradicts Albeck’s theory that one is not liable when damage is unforeseeable.
133 Supra n. 127.
3. **Standard of Care in Damages Caused by a Person to the Property of Another: Absolute/Strict Liability or Negligence?**

With respect to a person who causes damage to the property of another, we learn from the *Mishnah* that a person is liable for all damages he caused, and the Talmud comments that the tortfeasor must pay, whether the damage occurred unintentionally, by unavoidable mishap (ones) or intentionally. Commentators are divided as to the degree of unintentionality or unavoidability of the mishap (ones) that the tortfeasor must demonstrate. Some maintain that he is liable if the ones was not total, but in the case of an absolutely unavoidable mishap (for example, if a man is blown off the roof by an abnormal wind and causes damage) he is exempt. However, some interpreted Maimonides’ opinion as meaning that a person who injures must be held liable even in a case of an absolutely unavoidable mishap, i.e., that Maimonides’ ruling regarding the tortfeasor was based on a regime of strict liability. In his words:

> If one damages another’s property, he must pay full compensation; for whether one acts inadvertently or accidently, he is regarded as one who acted deliberately. Thus, if one falls from a roof and breaks articles, or if one stumbles while walking and falls on an article and breaks it, he must pay full compensation.

The sources presented thus far indicate that Maimonides advocated a regime of strict liability. It is therefore no surprise that Warhaftig relied on these rulings, as we have seen, in stating that Maimonides’ theory was that of ownership and strict liability and not *pesiah*, according to which the tortfeasor would be exempt in cases of total ones.

It seems, however, that Maimonides imposed the lower degree of strict – rather than absolute – liability, as he holds that even a person who causes damage to another’s property is exempt from payment in cases that he defines as a “strike from heaven”, as per his ruling in the case of the liability of the man who climbed a ladder:

> If one is climbing a ladder and a rung slips from under him and it falls and causes damage, the rule is as follows: If the rung was not strong and firmly fixed, he is liable. But if it was strong and firmly fixed and yet it slipped, or

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134 M. Bava Kamma 2:6.
135 *Sanhedrin* 72b.
136 As in the ruling in Tur, *Hoshen Mishpat* 378:1-2 (exempting from liability a person who fell in an uncommon wind and harmed another person’s body or property).
137 See, e.g., Tosafot Bava Kamma 27b, s.v. *veshmuel* (distinguishing between ones that is a type of theft, in which case liability is imposed, and duress that is a type of loss, in which case liability is not imposed); Rosh, Bava Kamma 3:1 (same); Rama, *Hoshen Mishpat* 378:1 (same).
138 See, e.g., Maggid Mishneh on Maimonides’ Laws of Wounding and Damaging 6:1; Schach, *Hoshen Mishpat* 378:1 (explaining that in the opinion of Maimonides and of *Shulhan Arukh* he is liable in a case of an absolutely unavoidable mishap as well). Nahmanides also rules according to this opinion in his commentary to Bava Metzia 82b, s.v. *ve’ata* (explaining that when the sages held liable a man who caused damage in a case of an unavoidable mishap, they did so even in when the mishap was absolutely unavoidable, such as falling off the roof in a strong storm, and even when it is entirely uncommon, as the windstorm in which Elijah ascended to heaven, and they similarly held liable the person who had a stone in his lap without realizing it, and the stone fell and caused damage – even though there is no greater ones than this).
139 Laws of Wounding and Damaging 6:1.
140 See Warhaftig, supra n. 5, at 224.
if it was rotted (eaten by worms), he is exempt, for this damage is a strike from heaven. The same rule applies in all similar cases.\textsuperscript{141}

Commentators on Maimonides had a hard time explaining this ruling. Ra’abad\textsuperscript{142} wondered how it is possible to define the breaking of a rung or the fact that it has been eaten by worms as an act of heaven. It is true that it can be considered an unavoidable mishap, but Maimonides had already ruled at the beginning of the same section (quoted above) that the tortfeasor is liable even in the case of an unavoidable mishap. What is the difference between these tortfeasors who have caused an unavoidable mishap and the person who climbs a ladder and a rung breaks under him?

Modern scholars of Jewish law who espoused the theory of ownership and strict liability\textsuperscript{143} as well as those who adopted the theory of \textit{peshiah}\textsuperscript{144} struggled with the answer to this question. This is not surprising: the explanation is patently inconsistent according to both of these theories, for it is clear that in Maimonides’ opinion, the standard of care in relation to a person who causes damage is higher than \textit{peshiah} or negligence and lower than strict liability.

The great difficulty involved in the attempt to explain all the talmudic laws – including the laws relating to the standard of care, according to the theory of \textit{peshiah}, understood by the scholars to be identical to negligence of foreseeability – is illustrated by what Friedell wrote recently.\textsuperscript{145}

Moreover it is difficult to explain all of the Jewish tort rules as based on either a concept of negligence or foreseeability. Consider the case of a man who climbs onto a roof carrying a knapsack. He puts the knapsack down and lies down. An unusual wind blows him and his knapsack off the roof causing injury below. The ruling in this hypothetical case is that he is liable for the injury caused by his body but not for the injury caused by his property.\textsuperscript{146}

However, writes Friedell –

This conclusion is hard to justify on the basis that he was negligent with respect to one of these injuries but not the other, or that one of the injuries was foreseeable but not the other.\textsuperscript{147} Similarly, when he is blown off the roof, it is hard to understand why damage for \textit{nezek} [physical damage] is foreseeable but that damage for pain and medical expense is only foreseeable if the wind was of normal strength.\textsuperscript{148} Some principle other than foreseeability seems to be operating.

\textsuperscript{141} Laws of Wounding and Damaging 6:4. See also Laws of Property Damages 14:2 (providing an additional example of a strike from Heaven).

\textsuperscript{142} Laws of Wounding and Damaging 6:4.

\textsuperscript{143} See Warhaftig, \textit{supra} n. 5, at 224-227; Haut, \textit{supra} n. 25, at 41-46.

\textsuperscript{144} See Shalom Albeck, “A Person Causing Damage under Duress in the Laws of the Talmud”, \textit{16-17 Bar Ilan} (1979) 86-87, end of n. 1 (Heb).

\textsuperscript{145} Steven F. Friedell, “The Role of Jewish Law in a Secular State”, \textit{24 Jewish Law Association Studies} (2013) 100, 104.

\textsuperscript{146} This became the binding halakhic decision: \textit{Shulhan Arukh, Hoshen Mishpat} 378:2; 411:2, and it would appear that Maimonides, too, accepted this. See Laws of Damaging and Wounding 1:12; 6:1.

\textsuperscript{147} But see Albeck, \textit{supra} n. 5, at 177.

\textsuperscript{148} But see Albeck, \textit{supra} n. 6, at 320-322 (suggesting that more specific damage is foreseeable when the defendant is grossly negligent).
These rulings that impose different standards of care in accordance with the nature of the entity causing the damage (a person or his property) are therefore difficult to explain according to the theory of *peshiah*; needless to say they are incomprehensible according to the theory of ownership and strict liability.\(^{149}\)

The correct solution will be elucidated in Chapter 6.

4. **Deterrence of Risk-Causing Behavior**

Maimonides suggests a far-reaching approach that promotes deterrence of risk-causing behavior even if it did not cause actual damage, as shown in his ruling in principle in the *Code*:

> If an animal at pasture strays into fields and vineyards, the owner should be warned three times even if it has done no damage. If the owner of the animal does not take care of it and prevent it from pasturing there, the owner of the field has the right to slaughter the animal in a ritually valid matter and then say to its owner, “Come and sell your meat.” For one is forbidden to cause damage with the intention of paying for the damage he causes. Even to bring about damage indirectly with this intention is forbidden.\(^{150}\)

Maimonides’ rule is far-reaching as it entitles the person who may sustain damage caused by the animal, even if the animal did not yet cause damage, to seek relief on his own and slaughter the animal. It is for this reason that this ruling was opposed by some of the great halakhic authorities, foremost among them Ra’abad. In his reservations to Maimonides’ ruling, Rabad writes that not only “have such things not been written in the Talmud” and they are Maimonides’ innovations, but even in principle one must object to them, because “someone who has a herd of animals, his entire herd is not slaughtered, but if he causes damage to the world, he will pay without any warning.” Ra’abad is saying that there is no permit to slaughter an animal that trespassed onto the field of another, for it has not yet caused damage. Even if the animal has caused damage, it must not be slaughtered; at most, its owner can be made to pay compensation for the damage it has caused (even if he was not forewarned that his animal is trespassing). This seems to be a classical controversy between Ra’abad, who focuses on correcting the wrong caused to the victim by the tortfeasor (a corrective justice type of approach), and as long as no harm was caused to the injured nothing should be done to the tortfeasor – only “if he causes damage to the world, he will pay” – and Maimonides, who focuses on “preventing damage”. According to Maimonides, even if the animal has not yet actually caused damage, it is possible to prevent the tortfeasor, who in this case is the owner of an animal, from persisting in the activity that may cause damage to another, if it transpires that this owner is a “serial negligent” who did not take serious supervisory measures and precautions with regard to his animal, despite having previously been warned three times in cases in which he did not prevent his animal from entering private lands.

In fact, the ruling regarding the right to slaughter an animal that strayed onto the property of another does not necessarily contradict the theory of *peshiah*, for it can be argued that the owner of the animal

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\(^{149}\) For it is not clear why strict liability is imposed on a person who causes damage, and his liability is imposed at a lower standard of care if it is his property that causes damage, for these are things which he owns.

\(^{150}\) Laws of Property Damages 5:1.
was at fault in his guarding of it, even though he had been warned repeatedly to guard it properly, and therefore it was right to punish him. In the subsequent ruling, however, Maimonides adds:

Because of this [that the animal are not properly watched and they therefore stray into the fields of others and cause damage], the Sages forbade the rearing of small cattle or small wild animals in the Land of Israel in regions containing fields or vineyards but allowed it only in the wooded and desert regions of the Land of Israel.

On this ruling, Albeck, who supports the theory of *peshiah*, asks:

Why were they more severe, making a ruling in relation to all small animals, and fining the person who was not at fault in the same way as a person who was at fault (*pasha*) in watching his animals? Why did they not fine only the person whose animals strayed into the fields of another, for example, the owner of the field would be permitted to slaughter the animal that was grazing in his field [in accordance with Maimonides’ first ruling]? 

In other words: why did Maimonides adopt different legal solutions in the two consecutive rulings quoted above – in the first ruling, he penalized only the person who was at fault in his watching over the animal, and in the second ruling he totally forbade the rearing of the animals – when Maimonides himself bound the two rulings together (in beginning the second ruling with the words “Because of this”), hinting that there is a single legal policy common to both? What is this policy, and on what is it based? The answer to Albeck’s question must be sought in jurisprudential realms, to be visited in the following chapters, which go beyond the theories of ownership and *peshiah* that have been discussed till now.

E. RE-EXAMINING THE OPENING CHAPTER OF THE BOOK OF TORTS IN THE CODE: CONTROL AS A CENTRAL ELEMENT OF LIABILITY IN TORT

Having seen the serious conceptual-theoretical and exegetical difficulties facing those who attribute the ownership theory to Maimonides, we ought to reexamine the above-quoted ruling that opens the Book of Torts, from which the *yeshivah* reading deduced that Maimonides was of the opinion that the basis for tort liability is that “it is their property that caused the damage,” and not failure to guard and *peshiah*. In the course of examining the first ruling and the first chapter of the Book of Torts, we will also encounter the process by which Maimonides fashioned the Book of Torts and some of the principles that guided him in the task of arranging and classifying the materials relevant to the laws of tort.

It is interesting that prior to the time of the Lithuanian rabbis with their *yeshivah* reading of Maimonides, we do not find that any connection was made between the ruling opening the *Code* and the question of the basis for tort liability (whether due to a person’s property having caused the damage or due to *peshiah*). However hard we looked, we could not find a similar connection in the classical commentaries to the *Code* or in the works of the prominent authorities who flourished in the

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151 See Maimonides’ wording in his *Commentary to the Mishnah*, Bava Kamma 7:7: “It is forbidden to rear small animals in the Land of Israel because they spread over the fields.”

152 Laws of Property Damages 5:2.

153 Albeck, *supra* n. 5, at 112.

154 Extensive discussion of these questions is beyond the scope of our study. And see Twersky, *supra* n. 1, at 238-323.
Middle Ages and later, in the period preceding the era of the Lithuanian rabbis.\(^{155}\) This phenomenon poses a question: why did the classical authorities and the commentators who were very familiar with Maimonides’ style and form of expression not mention that the first ruling implies that he regarded ownership of the property as the basis for liability? We believe that this is because this yeshivah-reading interpretation, which is so common among the Lithuanian rabbis, reflects the orientation towards abstract, analytical and conceptual thinking.\(^{156}\) However, the yeshivah reading of Maimonides’ first ruling is not the only possible understanding, and a different, simpler interpretation is certainly conceivable.

We would like to propose another interpretation whereby Maimonides’ use of the expression “for it is their property that caused the damage” in the first ruling of Laws of Property Damages does not necessarily mean that this is the basis of the owner’s liability for damages caused by his property, as assumed by those later authorities. Maimonides only wished to emphasize, at the beginning of Laws of Property Damages, that in these rulings he is concerned purely with damages caused by a person’s property (damages caused by animals, a pit and fire), and not with other types of damage, which he discussed in the Book of Torts in other, separate groups of rulings, i.e., Laws of Wounding and Damaging (Hilkhot Hovel Umazik), dealing with injury caused by a person himself (and not by his property) to the body of another (wounding) or to his property (damaging). It was a type of methodological comment, we argue, aimed at clarifying the contents of Laws of Property Damages and nothing more.

In this context it is important to pay attention to the legal classification used by Maimonides in the Book of Torts in the Code. This is a detailed and sophisticated classification that has profound implications for the various objectives of tort law. The following chapter consists of a detailed analysis of some of the main characteristics of the classification, and below we present only the major structure of the Book of Torts which is relevant to our discussion.

The classification that Maimonides uses in the Book of Torts demonstrates extensive use of certain parameters, on the basis of which he differentiates between various rulings: (a) How was the damage caused? Was it caused by an animal owned by the person or did it result from a wrong that the person caused by his actions? (b) Who suffered the damage? Was it an animal, property, or a person? (c) What damage was caused? Was it property damage only or was it bodily injury? In light of these parameters, the tort laws are ordered from the least to the most serious. They begin primarily with rulings concerning damage caused to property by property owned by the tortfeasor (Laws of Property Damages), and with damage caused by a person who robs or steals the property of another (Laws of Theft and Laws of Robbery and Lost Property). They then move on to bodily injury (Laws of Wounding and Damaging) and finally to manslaughter (Laws of Murder and Preservation of Life). These parameters are also the context for the basic distinction made by Maimonides between damage caused by a person’s property

\(^{155}\) Even in the index to halakhic literature in the Frankel edition of Sefer Hamafteah to the Mishneh Torah, supra n. 58, relating to the said ruling, there was no reference to the work of classical commentators and authorities in relation to Maimonides’ famous inference that the main basis of the obligation is fact of the person’s property having caused damage, with the exception of one single head of a Lithanian yeshivah (who lived in the twentieth century), R. Isser Zalman Meltzer, in his work Even Ha’azel, supra n. 35. And as we shall see infra n. 165-167 from the words of the Maggid Mishneh and the Gaon of Vilna, it transpires that they were aware of Maimonides’ use of the formulation, “for it was their property that caused damage,” but they do not appear to have seen this as some kind of fundamental conceptual determination with respect to the basis for tort liability.

\(^{156}\) For a description of the methodology of the heads of the Lithuanian yeshivot, see text near n. 77.
Strong support for the proposed interpretation, according to which the statement “for it is their property that caused the damage” in the opening ruling of the Book of Torts was made by Maimonides in order to create and emphasize the distinction between Laws of Property Damages and Laws of Wounding and Damaging, can be adduced from the draft of the Code written in Maimonides’ own hand, found in the Cairo Genizah, which was located close to Maimonides’ place of residence in Fostat (on the outskirts of Cairo).\(^{157}\) Quite a number of folios written in Maimonides’ own hand were discovered in the Genizah, mostly single folios from first versions (drafts) of his works. Particularly prominent amongst these drafts were the drafts of the Code, including the first page of the Laws of Property Damages. From this draft, as well as from other drafts of the rulings in the Code, it is possible to enter the Maimonidean workroom and witness the process of formation of the Code in general, and of the Book of Torts in particular. As is known, Maimonides quite often corrected and amended what he wrote in the Commentary to the Mishnah and in the Code.\(^{158}\) It has been pointed out that in the format of the Code initially planned by Maimonides, the Book of Civil Law (Sefer Mishpatim) apparently contained the Books of Torts, Acquisition and Civil Law.\(^{159}\) The first folio, which has already been published, contains the beginning of Laws of Property Damages, and according to the caption heading the page, it is the first page of the Book of Civil Law in the first version.\(^{160}\) From an examination of this draft folio it transpires that Maimonides made two significant changes, apparently simultaneously, to the wording of the title of the first rulings in the Book, and in the wording of the first ruling in the first chapter. The first change relates to the name of the rulings in the Book. From the draft it emerges that these rulings were initially entitled “Laws of Torts” (Hilkhot Nezikim), and then Maimonides changed the title to “Laws of Property Damages” (by erasing the word “Torts” and writing “Property Damages” – nizkei mammon – over it), and this possibly indicates that the initial intention was to include the laws of property damages and the laws of wounding and damaging together in Laws of Torts,\(^{161}\) which includes all types of damages; only at a later stage did Maimonides decide upon a more detailed classification and on the division that he made in the final version of the Code between Laws of Property Damages and Laws of Wounding and Damaging as totally separate rulings that deal with different types of damage. In the same draft, Maimonides changed the wording of the ruling that opened Laws of Torts (which later became Laws of Property Damages). Initially, Maimonides wrote only that “If any living creature under human control causes damage, its owner must pay compensation, whether a domestic animal or a wild animal or a bird.”


\(^{158}\) Maimonides himself, on different occasions, remarked that there are some matters about which he changed his mind over the years, and the opinion cited in the Code is the main one, and that he reneged on what he had written in the Commentary to the Mishnah: see Iggerot Harambam (Bennett), Letter 6, p. 58; Resp. Rambam (Blau edition) no. 217, p. 383. The possibility that Maimonides reneged and changed his mind is taken into account also in order to resolve internal contradictions in the body of the Code. For Maimonides’ own evidence about changes he made while re-editing, see Resp. Rambam ibid., no. 345, p. 618.

\(^{159}\) Eliezer Horowitz, 38 Hadarom (Tishrei, 5734-1974) 32.

\(^{160}\) So presume Rabinovitch and Sheilat, supra n. 157, at 11.

\(^{161}\) Rabinovitch and Sheilat, supra n. 157, at 15. They further suggest (p. 13) that from the caption on the page of the draft it appears that in its first format, there were only twelve books comprising the Code. The eleventh book was a book of law, and it included the Book of Torts, of Acquisition and of Civil Law, thus bringing the final number to fifteen, one more than originally planned (at the final stage the laws of tort were split into two: Laws of Property Damage and Laws of Wounding and Damaging). Later, Maimonides decided to divide the book into three books – Torts, Civil Law and Acquisition.
Only at the second stage, at which he amended the title of the rulings to Laws of Property Damages, did he also delete the end of the first ruling, replacing it with the words “for it was his property that caused damage,” to obtain the final version that is found in the texts that we have before us: “If any living creature under human control causes damage, its owner must pay compensation, for it is his property that caused the damage.” Hence it is clear from this draft written by Maimonides himself that not only did the phrase, “for it is their property that caused the damage” not appear in the first version of the ruling, but it was added only at the same time as the change in the title of the rulings and the transition to Laws of Property Damages. It would certainly appear that there is a direct connection between the change of the title to Laws of Property Damages and the addition of the phrase, “for it was his property that caused the damage” in the opening ruling.

One Maimonidean scholar, Yaacov Levinger, noted that often, the rulings opening the books of the Code or a particular group of rulings (such as Laws of Property Damages or Laws of Wounding and Damaging) use different expressions which are merely linguistic variations of the titles of groups of rulings in the Code, and it would appear that the various differences in formulation between the titles of the books and their opening rulings are only semantic.\(^\text{162}\) Twersky, too, wrote that because Maimonides crafted an innovative method of classification in the Code, he sometimes hints at the nature of the various rulings and the mode of classification in the opening paragraphs of the various groupings.\(^\text{163}\) Hence it would seem perfectly reasonable that in adding the words “for it is property that caused the damage” to the opening ruling, Maimonides in no way intended to imply a substantive, unitary legal-conceptual basis (ownership theory) underlying tort liability. Indeed, even though the element of ownership of the damaging property appears in various places in halakhic literature, as well as in Maimonides’ work, as one of the necessary conditions of liability,\(^\text{164}\) nowhere have we found that Maimonides attempts to see in ownership the essential principal legal element on which all of tort law is based (as an alternative to peshiah). It may be assumed, we suggest, that Maimonides used this addition only to connect the opening rule to the subject-matter of the rulings that it opens, and he does this by invoking the term “property that causes damage” (which is “mamon hamezik”) in a sense identical to “property damages” (“nizkei mamon”) – the general title of this group of rulings – both of them semantic terms which were not invented by Maimonides but which are based on similar terms that appear in talmudic literature.\(^\text{165}\) Maimonides therefore points out at the end of the first ruling that the damages that are caused by a living creature (discussed in the first chapter of the Laws of Property


\(^{163}\) Twersky, *supra* n. 1, at 282.

\(^{164}\) See e.g., *Commentary of Maimonides to M. Bava Kamma* 1:2, where he says that the Mishnah enumerated “five conditions and said that a person would not be liable to pay for the damages that were caused by his property if one of the conditions was lacking,” including the third condition mentioned in the Mishnah, i.e., “special property”, the meaning of which, according to Maimonides, is as follows: “The property from which the damage comes must be specific and their owner must be specific.” Ownership of the property is one of the preconditions for tort obligation, but this should not be viewed as the actual basis of tort liability.

\(^{165}\) It appears that this is what the Vilna Gaon meant in saying that the source of the expression, “for their property caused damage” used by Maimonides is in the words of Talmud, *Bava Kamma* 3a, “There is gratification [derived by the animal] from its damage, and [the animal] is your [the owner’s] property, and [the obligation of] watching it is on you.” (Similar expressions appear in *Bava Kamma* 6a). Note that the Vilna Gaon did not write that Maimonides has any fundamental legal basis (that is, that the basis for the tort liability is ownership). The expression “property damage”, too, is not a new coinage of Maimonides, but it comes from the Talmud. See, e.g., *Bava Kamma* 6b, where the distinction is made between “property damages” (*nizkei mammon*) and “bodily harm” (*nizkei gufo*).
Damages) fall within the wider category of “property that caused damage,” i.e., Laws of Property Damages include all the damage that is caused not by the act of a person himself, but by various objects. Maimonides adopts a similar method in relation to most of the rulings that open a group of rulings: he usually makes use of a term that connects the subject matter of the first ruling with the subject matter of the entire group. Further support for the proposed interpretation can be adduced from an examination of Maimonides’ interpretation of the first mishnah in Bava Kamma, where he writes: “The four heads of damage (mentioned in the Mishnah) are damages that are caused by a person’s property.” From Maimonides’ words it appears that he is simply noting a common characteristic of the types of damages mentioned in the Mishnah (damages that are caused by animals, a pit and fire), i.e., the damages that are caused by the person’s property but not those caused by the person himself, and it is hard to imagine that he is referring to more than that. This language used by the young Maimonides in his Commentary to the Mishnah would appear to parallel the language he used at a later stage in the Code, in the opening ruling of Laws of Property Damages. Thus it may be assumed that in the Code as well, the expression, “for it is his property that caused damage” must be understood in the same substantive sense (as in the Commentary to the Mishnah) that is concerned only with the technical nature of the property damages (that which is caused by property and not by the person himself) and not with the basis for theoretical-jurisprudential tort liability. Maimonides sought thereby to stress the difference between Laws of Property Damages that open the Book of Torts and Laws of Wounding and Damaging and the other rules in the Book of Torts that deal with damage caused as a result of the actions of the person himself. And indeed, the difference between property damages and wounding and damaging is a significant one in Maimonides’ tort theory, and the elements of this distinction and its implications will be discussed at length in the following chapters.

Careful examination of the draft of the first ruling in the Laws of Property Damages is likely to bring out another point that was ignored by most of the later authorities dealing with this ruling. It appears that the main expression in this ruling, to which attention must be paid, is the expression “under human control”. This expression, so it seems, is the mainstay of this ruling, and it has appeared in the various formulations of this ruling beginning with the first draft, up to the finished formulation (unlike the expression “for his property caused the damage”, which was added only at a later stage), in all of which the basic form of the ruling is preserved: “If any living creature under human control causes damage, its owners must pay compensation.” This expression, which highlights the element of a person’s control of the object that caused the damage rather than its ownership, reveals the central element underlying a person’s liability for property damages according to Maimonides. Conclusive proof of this can be found in Maimonides’ ruling on the matter of the exemption of the master from

166 And similar to what was said by one of the classical commentators on Maimonides, the author of Maggid Mishneh, at the beginning of the Book of Torts, says that “the rules of property damages and their concern is that the person’s property and its owner must pay.”

167 Maggid Mishneh wrote, ad loc., concerning the order of the rulings in the Book of Torts, that “initially the damages caused by the property were clarified, and then the damage done by a person was explained,” or in a slightly different version, in his introduction to the Laws of Property Damages, he asserted that Maimonides placed the rulings on property damages first “because these are the damages that do not involve the actions of a person because it was his property that caused the damage, and all the other rules deal with human activity.” It appears that Maggid Mishneh saw the term “property damages” as a substantive term that indicates the subject of the said rulings, as opposed to the matters discussed in Laws of Wounding and Damaging, as well as the other rulings in the Book of Torts (Laws of Theft, Laws of Robbery and Laws of Murder).

168 And cf. R. Shimon Shkop, supra n. 36, no. 1, s.v. ukhu khen – a second explanation of a person’s liability for his property (according to this explanation, control of the object, and not necessarily the proprietary right of ownership, is what defines the object as a person’s property for the purpose of liability in torts).
damages caused by his slave. This ruling, as we saw above,\(^{169}\) poses a thorny problem for those who attribute to Maimonides the ownership theory, for it is not clear why the master is exempt from liability for damages caused by his slave: the master is the owner of the slave, and what is the difference between a slave and other living creatures? Maimonides makes it clear, however, that the basic law is that a master is not to be held liable for damages caused by his servants, even though they are his property for “they [the slaves] have minds of their own and he is unable to keep watch over them.”\(^{170}\) What this means is that the important element for the purpose of tort liability is the practical possibility of maintaining effective control on the part of the master over the actions of the slave (which does not exist here, as slaves have minds of their own), and not the fact of his formal-legal ownership of the slave, which is insufficient to create liability, as emphasized by Maimonides.

Now, having identified the element that determines tort liability for property damages according to Maimonides, i.e., a person’s effective control over the damaging object, and not his ownership of that object, several of the exegetical difficulties mentioned above that confronted those who attributed the ownership theory to Maimonides disappear. As will be recalled, in various places the Code refers to different types of tortfeasors who are liable for damage caused by different objects, even though they are not the formal-legal owners of those objects, e.g., the person who breaches his neighbor’s fence enclosing his animal must pay for the damages caused by the animal, even though he is not the owner, and a person is liable for damages caused by a pit and fire even though he can hardly be called the owner from a proprietary-legal point of view. These examples are difficult to explain according to those who understand ownership as the basis of liability. However, if we say, as we suggest, that practical effective control, not ownership, is the decisive element for the purpose of tort liability, we see that this element indeed exists in relation to the person who breaches the fence allowing the animal to stray and cause damage, for although he is not the formal owner, in practice it was he who had control over the animal’s movements outside its enclosure from the moment that he decided to allow it to get out by breaching the fence. The element of effective control is also present in relation to a person for whom it is practically possible to cover the pit or douse the fire and he does not do so – he is then liable for the damages caused by the pit and the fire even though we would not call him the formal owner of these things.

It is not only the element of control that is emphasized in the first chapter of Laws of Property Damages, which is a key chapter for all the laws of tort. In a ground-breaking study, the findings of which will serve us as we proceed, Bernard Jackson\(^{171}\) identified another important innovation introduced by Maimonides, who deliberately chose not to open the first rulings in the first chapter of his Book of Torts with the famous enumeration of tort principles, \textit{arba’ah avot nezikin} – the traditional categories of damage caused by animals mentioned in the beginning of the \textit{Mishnah} and \textit{Talmud Bava Kamma}: shor, mav’eh, tam, mu’ad, keren, shein, regel. Rather than invoking the obvious classification of “four heads of damage”, Maimonides chose, later in the chapter, to emphasize the difference between an ox that is \textit{tam} and one that is \textit{mu’ad}:

> The one which did an act which it is its way to do always, in accordance with the custom of its species — that is the one (traditionally) called \textit{mu’ad};

> and the one which changes and does an act which all its kind so do always,

\(^{169}\) \textit{Supra} near n. 83.

\(^{170}\) \textit{Laws of Theft} 1:9.

\(^{171}\) \textit{Supra} n. 126.
for example the ox which gores or bites — that is the one (traditionally) called *tam*.  

Jackson correctly pointed out that Maimonides adopted the distinction between *tam* and *muʼad* not as a marginal distinction relating only to the exceptional law of the ox that gored, but as a major classification, affecting all property damages, by virtue of which a distinction must be made between cases in which full compensation must be paid and those in which only half compensation is due. If this is the case, the need to understand the reason for the said distinction becomes more pressing.

Jackson further argued that Maimonides took an independent look at the biblical scheme, and did not simply adopt the mishnaic/talmudic conceptualizations of the material (of which there are more than one, and therefore both choice and refinement were involved). According to Jackson, Maimonides came up with his own innovative conceptualizations of the relationship between the various components in liability for animals; these are not necessarily driven by the legal and economic issues, but sometimes by broader philosophical issues (as demonstrated in Jackson’s article).

F. CONCLUSION

In this chapter we saw that Maimonides’ approach to tort liability cannot be described as fault-based (*peshiah*) only, or based solely on strict liability. We saw the serious problems facing those who hold that the basis for liability in tort according to Maimonides is the element of ownership of the property that caused the damage, and in our view, this theory does not correctly reflect Maimonides’ opinion. We also discussed the centrality of the element of control. In light of Jackson’s research, we learned of the significance of the distinction between *tam* and *muʼad* and of paying attention to the role of interpretation of variant scriptural readings in Maimonides’ conceptualizations. Of course, Jackson’s work did not encompass the whole of Maimonides’ treatment of torts, but he taught us the importance of a keen awareness of the force that Maimonides attributes to the biblical categories and his understanding of them. It is surely not to be assumed that Maimonides operated on the same assumptions as modern tort lawyers, who tend to see torts as a unified whole dominated by negligence, all expressive of a single principle.

Exposure of the element of control, which – as opposed to ownership or fault – is the major, though not exclusive element underlying a person’s liability for damage caused by objects under his control, as emerges from our analysis of the ruling at the beginning of the *Code*, constitutes only a first step towards understanding Maimonides’ tort theory. Most of the problems raised above still require resolution, for we must still investigate the rationale for Maimonides’ approach. Why should a person who controls an object that caused damage be liable for compensation? What is the jurisprudential theory underlying this liability? How does the theory explain the various rulings mentioned above which are difficult to understand both under the ownership theory and the theory of *peshiah*? How does the element of *peshiah* mentioned by Maimonides in certain places in the *Code* fit in with the element of control? What is the rationale underlying the central distinction between *tam* and *muʼad*?

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172 Laws of Property Damages 1:4, as translated by Jackson, *supra* n. 126, at 168.
173 Jackson, *supra* n. 126, at 169.
174 This will be examined more comprehensively in the next chapter.
What is the required standard of care according to Maimonides in relation to different types of damages and why? What are the aims of tort law according to Maimonides, and how do they impact on the different laws?

These questions and others have no clear answer in the rulings in the Code that have been discussed till now. The puzzle therefore remains largely unsolved: a complete solution to the puzzle will be available only when after we obtain a more complete picture of Maimonides’ position in his other works, as discussed in the following chapters.