CHAPTER 5

REVISITING THE PROBLEMATIC TEXTS OF THE CODE IN LIGHT OF THE GUIDE AND CONTEMPORARY SCHOLARSHIP

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In this chapter we revisit several of the rulings in Maimonides’ Code, most of which were discussed in Chapter 2, which were problematic for those scholars who explained Maimonides’ approach primarily on the basis of the ownership theory; we do so in view of the understanding of Maimonides’ approach in the Guide of the Perplexed as presented in Chapters 3 and 4, with its two central objectives, i.e., the prevention of damage (the consequentialist aspect) and the removal of wrong (the deontological aspect).

Note: Here we present only the first part of the chapter – the part that revisits the rulings in the Code in light of the consequentialist analysis in the Guide, and which relies in effect on Chapter 4 that was presented in the framework of the sample chapters. The second part of this chapter (sec. J), which does the same in relation to a deontological analysis, that relies in effect on Chapter 3 that was not presented in the framework of the sample chapters, will be submitted, like Chapter 3, in the framework of the complete manuscript.
A. USING A CONSEQUENTIALIST RATIONALIZATION IN VARIOUS PLACES IN THE CODE

After fully understanding the Guide’s EAC test and how the rules of liability, including the splitting of liability and the exceptions, are rationalized – with the assistance of contemporary law and economics methods – by the consequentialist view of the Guide, we can return and revisit the earlier texts of the Code. Many of the problematic texts in the Code that were mentioned in Chapter 2 of this book are revisited in this chapter, and these texts are reinterpretated and explained in light of the consequentialist view of the Guide’s EAC test, the cheapest cost avoider doctrine, and Posner’s Hand formula.

Again, we should note that the Guide speaks in a different idiom from the Code. Some scholars have even spoken generally of “two different Maimonides”: the traditional halakhist of the Code, and the controversial and innovative philosopher of the Guide.1 Many scholars and commentators have addressed the contradictions between the Guide and the Code.2 In relation to torts, too, we note the difference between the two works. The focus in the Guide is on a general overview of the consequentialist and “policy” considerations and the formulation of the EAC test; all of this is absent in the Code.

It is certainly not our intention here to decide profound questions such as the extent to which a halakhic/legal approach is reflected in the Guide, and whether it is possible to use the Guide in order to explain Maimonides’ legal theory in a particular area. We note that the classical yeshivah curriculum, reflected in the writings of Lithuanian scholars in the last 150 years (whose interpretation of Maimonides’ Code was discussed previously),3 does not usually refer to the Guide as a source that can enlighten the perplexed in the ways of the Code. Nevertheless, many scholars were in fact able to find a link between the Guide and the Code in various areas, and we intend to follow this path, with due caution. We are convinced that it is not possible to present the complete tort theory of Maimonides based on the Code alone, with its contradictions and premature statements, without the statements about the incentives to prevent damage and the EAC test that appear in the Guide. These statements in the Guide represent a crystallized, clear, and more mature overview of the foundations of tort liability, probably fully-developed at a later stage of Maimonides’ life. Indeed, we argue that at least regarding tort law, the two works are in many ways complementary. One may therefore revisit the earlier texts of the Code and find that many of the views expressed there may be rationalized in the best, most comprehensive way in light of the later Guide’s overview, even though Maimonides used a formulation in the Code that is closer to the concept of peshiah4 and that does not consistently fit, both literally and conceptually, with the terms and concepts he used in the Guide.

Of course, there are significant differences between Maimonides’ formulations with respect to the reasons for the tort laws in the Guide, in which the emphasis is primarily on the consequentialist-social aspects, and his formulations in the Book of Torts in the Code, where he places greater emphasis, as we demonstrated at length in Chapter 3, on the deontological and religious aspects, and his formulations are closer to the talmudic, and sometimes even biblical, sources. Nevertheless, we should stress here that despite

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1 See, e.g., Jacob S. Levinger, Maimonides as Philosopher and Codifier (Jerusalem: Bialik Institute, 1989) (Heb.).
3 In Chapter 2 of this book.
4 See Chapter 2, section C(2).
the said differences, it is certainly possible to find formulations in the Code that are similar in spirit to the consequentialist-economic orientation of the Guide. In this section, we will confine ourselves to presenting two rulings in the Code in which Maimonides openly invokes consequentialist-economic rationalizations.

A consequentialist rationalization emerges from Maimonides’ instructive explanation of the difference between Jewish and non-Jewish law regarding the liability imposed on a person for the damages caused by his animal, which also affects the amount of compensation paid by the owner of an innocent ox that gored. Maimonides explains that the reason that damages caused by the ox of a gentile owner must always be compensated in full, whether the ox was innocent (tam) or forewarned (mu’ad), whereas a Jewish owner does not make full payment for damages caused by his innocent ox, lies in the differences between Jewish and gentile-Islamic law: the gentiles do not impose liability on a person for damages caused by his animal (referring apparently to Islamic law in force at that time). In Jewish law, by contrast, not only is liability imposed on a person for damages caused by his animals, but the causing of damage is also prohibited per se. Maimonides explains the reason for imposing liability on gentiles for full compensation of the damage caused by their animals:

This is a fine imposed on the gentiles because, being heedless of the scriptural commandments [not observing carefully the biblical commandments prohibiting causing damage] they do not remove sources of damage. Accordingly, they would not take care of them and thus would inflict loss on other people’s property.

It appears from Maimonides’ statement that careful observance of the commandments (he refers primarily to exercising care not to cause damage – the causing of damage being prohibited by Jewish law) makes a decisive contribution to damage prevention and to the welfare of society. Therefore, in non-Jewish legal systems, such as an Islamic system, if there are no accepted norms that prohibit causing damage in general, and damage by animals in particular, it is necessary to create an appropriate deterrent for owners of animals (full payment for damages) because if they are not charged for the damages of their animals, “they do not take care of them and thus would inflict loss on other people’s property.”

The consequentialist justification offered by Maimonides in the Code is an innovation on Maimonides’ part, and to the best of our knowledge it does not exist in earlier sources. The said explanation is not based on the Talmud, in which completely different reasons were given for the differences in the rules applying to Jews and gentiles with respect to the amount of compensation paid for damages caused by an ox. The explanation in the Code is indeed intended to relate only to a particular rule, but the tone of Maimonides’ words indicates that in his opinion, the full payment that is imposed on the non-Jewish owner of the ox is intended to create a real incentive to increase the means of oversight of the ox and thus to prevent the damage and to internalize costs rather than transferring the costs to others. This is a clearly

5 Laws of Property Damages 8:5.
6 See Chapter 3, presenting the basis for Maimonides’ assumption regarding Islamic law, and a survey of commonly accepted positions about important streams in Islamic law that exempt owners of animals from damage caused by their animals.
7 Laws of Property Damages 8:5.
8 See Bava Kamma 38a. In his Commentary to M. Bava Kamma 4:3, Maimonides offers a completely different explanation to that offered in the Code. The explanation in the Commentary to the Mishnah is based on the fundamental difference, in Maimonides’ opinion, between Jews and those who are not Jews.
consequentialist explanation, and it is very similar to the consequentialist approach that is evident in the Guide. It is possible that Maimonides’ formulation in the Code constitutes an early, undeveloped stage of the approach that was later presented in a fuller and more consolidated form in the Guide.

Another point which must be noted in Maimonides’ unique rationalization of the liability imposed on the non-Jewish owner of an ox relates to the nature of the prohibition against causing damage. This prohibition was emphasized more strongly in the Code, as part of the religious dimension of tort law, which is more prominent in the Code than in the Guide.

As discussed in Chapter 3, in his Code Maimonides regards the religious-moral prohibition against causing damage as a very important component of his tort theory, alongside the utilitarian objective of preventing damage. We already noted the emphasis that Maimonides places on the fact that “… one is forbidden to cause damage willfully, with the intention of paying for the damage he causes. Even to bring about damage indirectly with this intention is forbidden.” This is reminiscent of one of the rules of liability presented by Calabresi and Melamed – the third liability rule in favor of the tortfeasor – which states, in conjunction with the inalienability rules, that there are many circumstances in which one is permitted to cause damages and pay for those damages. In light of the prohibition against causing damages, it is not likely that Maimonides would normally agree to apply this rule, except in extreme circumstances. In all events, he rules with regard to a long list of tort events that the tortfeasor is “exempt by human law [from liability for the cost of the damage] but is liable by divine law.”

Note, however, that the prohibition against causing damage is not a purely religious prohibition: at times it has real legal consequences. It is by virtue of this prohibition that Maimonides permits the owner of the field to slaughter an animal that strayed onto his property several times, despite the fact that it had not yet caused damage. This is a preventive-deterrent measure against the owner of the animal who did not guard it adequately. Similarly, from the prohibition against causing damage Maimonides derives the general ban that the Sages issued against the raising of small domestic animals and small beasts in the Land of Israel in regions that contain fields and vineyards, since it is the nature of the animals to enter fields and vineyards and cause damage. And because it is prohibited to cause damage even if one intends to pay for it, the raising of small animals has been allowed only in places where they can cause no damage, i.e., in forests and deserts. Note further that from the text quoted above (regarding the liability of the gentiles for damages caused by their animals) it seems that Maimonides believes that the prohibition against causing damage also serves as a social tool that promotes socially-efficient behavior, i.e., the consequences of the prohibition against causing damage affect not only the religious-deontological

11 Indeed, according to Maimonides’ rulings there may be circumstances in which causing damage is permitted in order to achieve important objectives, but even in these cases the tortfeasor must pay for the damage. See, e.g., Laws of Property Damages 13:3, 13:15; Laws of Wounding and Damaging 8:2.
12 See Laws of Property Damages 4:2, 14:14; Laws of Witnesses 17:7.
13 Laws of Property Damages 5:1.
14 Ibid., 5:2.
dimension but also the consequentialist one. The prohibition also contributes to social solidarity, the forging of civil responsibility, and concern for the other. Moreover, it promotes community spirit, which is a characteristic of Jewish law in general and of Maimonides’ philosophical theory in particular.

Nevertheless, as argued in Chapter 3, it is important to stress that the religious-moral prohibition is a salient characteristic of Jewish law, which consists primarily of a discourse of obligations and behaviors rather than rights, unlike most present-day Western legal systems.15

Indeed, as argued in Chapter 3, although the prohibition against causing damage constitutes a significant element in Maimonides’ writings, the importance of the prohibitive-religious element in his tort theory should nevertheless not be overstated. At no time do Maimonides or the talmudic sources give any indication of a conception whereby every payment for property damages must be regarded as a punishment based on the prohibition against causing damage; rather, these payments should be considered civil compensation. This conclusion is based partially on the difficulty in identifying a source in the Torah for the prohibition against causing property damage,16 and Maimonides himself does not mention any such source.17

It appears, therefore, that according to Maimonides’ conception, the prohibition against causing property damage is an important element, although not necessarily the most important one (as other halakhic sages assumed),18 and it co-exists alongside other elements that are no less important, such as the prevention of damage, deterrence, emphasis on the moral conduct of the tortfeasor, and more.

Furthermore, from Maimonides’ ruling in the Code it appears that at times it is permitted to cause damage in order to achieve important objectives, although the tortfeasor must also pay for the damage. For example, there are cases in which a person is permitted to create potential damage, when the activity as a whole is economically desirable, but if damage ensues, that person must pay because he is the main beneficiary of the activity.19 This also illustrates the importance of economic considerations in the Code as well as in the Guide.

Let us now consider a second example of a formulation in the Code that is based on consequentialist-economic reasoning.

According to Maimonides, considerations of efficiency justify exempting the master from paying for damages caused by his slaves –

… for one is not liable for the damage caused by his slaves, although they are his chattels [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.

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16 Indeed, although there is no dispute that the Torah forbids one to damage another’s property, there is no explicit warning about this in the Bible, the Mishnah, or the Talmud. The question of the source of the prohibition on damaging property is raised by the early authorities, but it is discussed explicitly and in detail for the first time by the later authorities (see, e.g., the writings of R. Kanievsky, Kehilot Ya’akov, Bava Kamma 1; Birkat Shmuel, Bava Kamma 2; Kuntres Shiurim, Bava Kamma 1).
17 Contrary to the prohibition against causing bodily injury, for which Maimonides explicitly notes the source of the prohibition. See Laws of Wounding and Damaging 5:1.
18 See, e.g., Tur, Dinei Nezikin, Hoshen Mishpat 378.
Moreover, should he [the slave] be annoyed at his master, a slave might go and set a fire to wheat stack [in order to make his master liable] worth a thousand dinar or do similar damage.²⁰

Thus, it is certainly possible to find certain expressions of consequentialist-economic thinking in various rulings in the Code, alongside other aspects (deontological and religious) even if they do not amount to that abstract-conceptual approach and broad consequentialist-social rationalization that emerges from what Maimonides writes in the Guide. Indeed, we believe that in the Guide, Maimonidean theory reached its pinnacle of sophistication and clarity, but there is not necessarily a contradiction with what appeared earlier in the Code: on the contrary, various rulings from the Code are easily understood in light of what Maimonides wrote in the Guide.

Finally, we turn to contemporary writings as opposed to those of Maimonides. We are aware of the danger of reading medieval texts and medieval scholars in modern ways, and we try to avoid anachronism. Nevertheless, as noted, in our opinion there is room for a dialogue between Maimonides’ and contemporary theories, but it is important to examine the substance of the dialogue carefully. Halakhic sages, including Maimonides, obviously had no knowledge of modern economics and of the method of law and economics. They did not invoke the categories of this method in their thinking, and they did not formulate their views to fit its principles and details. It is possible, however, that in certain cases the halakhic sages intuitively adopted a position that modern scholarship would explain well. This is particularly evident in the case of Maimonides’ tort theory. First, we showed (in Chapter 2) that it is difficult to understand the basis for tort liability in Maimonides’ work, especially in the Code, and that the common interpretation (provided by scholars and rabbis) failed to address this difficulty adequately. Next, we showed (in Chapter 4) that Maimonides stressed various consequentialist considerations and displayed initial and basic signs of economic analysis in the Guide. Nevertheless, we note that it is difficult to find in Maimonides’ work, even considering what he wrote in the Guide, a coherent, modern law and economics theory, embracing all its principles and details. However, by drawing an analogy with some law and economics methods, we are able to provide a logical explanation of the basis for tort liability according to Maimonides. We think this is exactly the point: the new literature of contemporary law and economics sheds new light on the medieval sources.

### B. THE EAC TEST AS THE BASIS FOR TORT LIABILITY

In Chapter 2 we saw how difficult it was for scholars and rabbis of recent generations to explain in a satisfactory manner the basis for tort liability according to Maimonides. We discussed the fact that the proposed ownership theory suffered from conceptual and exegetical difficulties, in its inconsistency with what Maimonides wrote in the Code. Moreover, the ownership theory is also inconsistent with what appears in the Guide regarding the basis for tort liability.

It seems to us that there is no need to seek forced justifications for Maimonides’ words,²¹ because his theory in the Code is made perfectly plain in light of the clear explanations he provides in the Guide. As

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²⁰ Laws of Theft 1:9.
we saw in Chapter 2, the inference derived by Warhaftig and the heads of the Lithuanian yeshivot (which we call “the yeshivah reading”) from the beginning of the Book of Torts is incorrect, and it seems that Maimonides did not consider ownership as the most important element of tort liability. Furthermore, they ignored the fact that at the beginning of the Book of Torts, Maimonides explicitly mentioned two bases (and not just one, as they wrote) for imposing liability for damages caused by a living being. One basis is control: “If any living creature under human control causes damage the owner must pay compensation”; the other basis is a property connection: “… for it is their property that caused the damage.” The combination of these two elements explains many laws in the Code. This is particularly the case if the Code is interpreted in light of the consequentialist rationale in the Guide. As we saw in Chapter 4, from what Maimonides writes in the Guide it emerges that the basis of liability does not necessarily lie in ownership; rather, one of the two meta-objectives is to prevent damage, and this is determined according to the EAC test. According to this test, liability should be imposed on the most effective damage avoider, who is not necessarily the owner: it is he who has control of the object causing the damage or the defect that has been created at his hands (i.e., the object which caused the accident), and therefore in order to encourage him to prevent the damage, he is held liable for the damage that occurred. The rationale of this test is clear: it is consequentialist and its purpose is to prevent damages effectively and efficiently, and it is very similar, as we have said, to Calabresi’s cheapest cost avoider doctrine, which is very helpful for an understanding of the economic rationale underlying the said test. According to Maimonides in the Guide, as stated, tort liability should be imposed on the person who has effective control of the “property” (damages caused by animals) or of that which he brings about (fire, pit and causing injury himself), for this incentivizes the person who can effectively prevent the damage.

From this explanation it follows that the requirement of ownership in the Code for the imposition of liability does not refer specifically to the formal owner of the damaging property, because at times even a person who has some form of property connection (and not necessarily one that amounts to actual ownership) is liable by virtue of a broad understanding of ownership. It also follows that the element of ownership is required only for damage caused by a living being, and not necessarily for every type of tort liability, such as pit and fire, as many commentators incorrectly believed. The rationale offered by Maimonides in the Code for the fact that the master is exempt from damages caused by his slave, which those advocating the common interpretation (the ownership theory) had trouble explaining, becomes very clear according to Maimonides’ explanation in the Guide. It is clear from what Maimonides writes in

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21  We discussed the difficulty of finding a satisfactory rationale for the ownership theory in Chapter 2, section C(4).
22  Chapter 2, section E.
23  Laws of Property Damage, 1:1.
24  See R. Nachum L. Rabinovitch, Mishneh Torah by Maimonides with commentary Yad Peshuta, Sefer Nezakim (Jerusalem: Ma’alot, 2006), Hilkhot Nizkei Mamon 1:1, at 22) (Heb.).
26  According to Rabbi Rabinovitch, supra n. 24, who learned this from Maimonides’ rulings that hold liable also those who have some monetary legal connection, such as a guard (Laws of Property Damages 4:10), a court-appointed guardian (ibid., 6:3), and even a robber has a certain monetary connection in the robbery he commits, for “it thus remains in the possession of the robber and is his responsibility until he hands it back” (ibid. Laws of Robbery and Lost Property 1:7.
27  Our method solves the problem facing those who advocate the common interpretation of Maimonides (the ownership theory): see Chapter 2, section C(3).
28  See Chapter 2, section C(3).
the Code\textsuperscript{29} that the nature of the exemption of the master from liability for his slave is consequentialist, and it stems from the fact that even though the slave is his property, the master has no control of him and therefore he cannot be considered as the effective damage preventer, under the EAC test in the Guide, who must be incentivized to prevent damage. Quite the contrary: as Maimonides writes, the slave has a clear incentive to caused damage in order to harm his master and therefore it is more effective to hold him – the slave – liable, and thus reduce the damage.

Again we must stress that we are not arguing that all the details of tort law can be explained on the basis of the EAC test in the Guide. Obviously there are other major elements that determine tort liability and that are mentioned in the Code but not in the Guide. Good examples of this are causation, which is mentioned extensively in the Code but not in the Guide, as well as the deontological and religious aspects that are emphasized in the Code. In addition, the standard of care that is required from different categories of tortfeasors is discussed in various rulings in the Code, as elucidated in the following chapter – Chapter 6 – and this discussion is absent from the Guide. All this notwithstanding, it definitely appears to us that certain rulings in the Code are satisfactorily explained by the EAC test in the Guide.

C. BEST DECISION MAKER IN THE MAIMONIDEAN TEXTS

Maimonides believes that liability should be imposed on the most effective damage avoider, a doctrine that seems very close to Calabresi’s cheapest cost avoider. But as we have seen, in his later writings (and especially in his joint article with Hirschoff), Calabresi improves the test, imposing tort liability on the best decision maker, i.e., the party that is in the best position to weigh the costs of the damage and of its prevention. This test involves not only the efficient or effective ability to prevent damage but primarily the information available concerning the expected damage and its associated risks. Can we find a parallel for this in Maimonides? Naturally, Maimonides does not invoke terms similar to “cheapest cost avoider”, but as we have seen, it is possible to detect in his writings a great degree of similarity to Calabresi’s theory. We shall now see whether it is possible to find rationales that are similar to Calabresi’s best decision maker in Maimonides’ writings, alongside the rationales of the effective damage avoider.

Maimonides makes no mention of a “best decision maker”, as distinct from the most effective damage avoider (more similar to a “cheapest cost avoider”) that is the basis for tort liability in the Guide. But it appears that the basic elements of the “best decision maker” can serve to elucidate several of Maimonides’ rulings, indicating that he also attributes decisive importance to the question of who has the information to weigh the costs of the damage and of its prevention better than others.

With regard to the imposition of liability for damages caused by a pit owned by partners, Maimonides wrote as follows:

\begin{quote}
A pit of two partners... The first covers it, and the second finds it uncovered and does not cover it: the second is liable. And until when is the second liable? Until the first one knows that the pit is uncovered so that he hires workers and fells
\end{quote}

\textsuperscript{29} Laws of Theft 1:9. The text is cited \textit{infra} near note 20.
According to Maimonides, a partner who finds that the pit is uncovered has exclusive liability for the damage as long as his partner is not aware of the fact that the pit is uncovered. The innovation of this ruling is that although the first partner is also liable for the maintenance of the pit, if in the meantime “the second [partner] finds it uncovered and does not cover it, the second is liable.” But in this case, why absolve the first partner until it becomes known to him that the pit is uncovered? According to the best decision maker test, the answer is evident: liability should be imposed only on the party that is in the best position to weigh the costs of the damage and of its prevention, and in this case it is clear that the best decision maker is the second partner, who discovered that the pit was uncovered. The first partner lacked the *information* about the pit being uncovered; therefore it is not right to hold him liable until he learns about the fact of the pit being uncovered and nevertheless does not take the necessary measures to cover the pit within the amount of time reasonably required to rectify the situation. Thus, imposing liability for damage depends on the information about the damage as well as on the ability to effectively prevent it.

Clearly, the ruling here is not consistent with the ownership theory, for from a formal point of view, both partners are owners, and therefore both ought to have been either liable or exempt; however, it is clear from the ruling that ownership is not a sufficient condition for liability – rather, the dominant element is *information*. Neither is this a fault-based liability regime, for if the tort lies in the existence of the open pit, there should be no difference between the liability of the first partner and of the second partner, as a person may be liable for omissions on his territory without his concrete knowledge. It is sufficient, for example, for a hole to be found in the fence of a building site and for a child go through it and be injured to render the contractor liable for his omission, even if he did not know about it. The condition for imposing liability according to the logic of fault and negligence is that it is possible to prove the expectations of the defendant, and the liability of the contractor is based on the fact that he should and could have known about the omission, even if he had no actual knowledge of it. In our case, actual knowledge (based on information) is what distinguishes between the two partners, and it can be attributed to a regime of best decision maker and not one of fault and negligence.31

The importance that Maimonides attributes to the element of information as the basis for liability is also apparent in other rulings in the Book of Torts.32

It should be emphasized, however, that Maimonides did not adopt all the elements of Calabresi’s best decision maker rule, as far as the regime of liability imposed on the best decision maker is concerned. As noted, in Calabresi’s approach the best decision maker always bears strict liability, whereas Maimonides,

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31 One may see this example as similar to the “the last-clear-chance” doctrine, which is employed in contributory negligence jurisdictions and has been replaced in some of them with comparative negligence. This doctrine means that: (a) a negligent plaintiff can argue that the defendant had the last clear chance, and thus mitigate his contributory negligence; and (b) a negligent defendant can argue that the plaintiff had the last clear chance to avoid the accident, and thus he should not be held liable. See Restatement (Second) of Torts, §§ 479-80. It seems that the Third Restatement rejects the “the last-clear-chance” doctrine in cases of comparative negligence. See Restatement (Third) of Torts (Apport.), §3, Comment b.
32 See, e.g., Laws of Theft 4:12.
as we will see in the next chapter, imposes differential liability, which is not always strict but at times is less than that, i.e., closer to negligence.

D. IMPOSING LIABILITY ON THE INJURED PARTY

In Chapter 2, the reasons for exceptional rules in which the tortfeasors were exempt from liability were discussed. In that context, the following questions were asked *inter alia*: Why are the owners of animals that caused damage in the public domain by eating or trampling exempt, and why are they liable for damage caused by their animals by means of goring even when such damage occurred in the public domain? And why is the owner of a dog held liable when the dog was incited by a second person against a third person and that third person suffered injury, whereas the owner is exempt if the inciter himself was the victim of his own incitement?

Different answers have been offered for these questions by scholars and commentators, some more and some less convincing. To us the answer to them all seems patently clear in light of Maimonides’ explanation in the *Guide* as discussed in Chapter 4, which examines who is the most effective damage avoider: is it the owner of the ox as in damages by goring, or rather, the victim, as in regular tooth and foot damage, in which the injured person is considered as one who “is at fault (*posheah*) toward himself”? This is a question that depends on various consequentialist considerations, similar to those of Posner and Calabresi. According to this explanation, as will be recalled, this is not a matter of an exception to a rule of liability, but rather, of the consistent application of the consequentialist rule of liability of the effective cost avoider, whereby it is sometimes the victim, rather than the perpetrator, who is the effective cost avoider. There is nothing to prevent us from explaining the relevant rulings in the *Code* in this way as well, alongside a possible explanation of some of the issues according to the theory of economic negligence of Posner and Hand.

Here it should be emphasized that according to some of the explanations of Maimonides’ approach, such as the theory of ownership and strict liability (proposed by Warhaftig following the *yeshivah* reading presented in Chapter 2), the major element by virtue of which liability is imposed is ownership. These explanations made scant reference to Maimonides’ use of terms related to *peshiah* in certain rulings in the *Code*: on the contrary, they sought to stress that Maimonides adopted ownership as the basis of liability – a basis that is completely different from that of the theory of *peshiah*. However, as we saw in Chapter 4, there is certainly room for the element of *peshiah* in what Maimonides writes in the *Guide*, albeit in a very specific context – the contribution of the victim to the damage (“is at fault (*posheah*) toward himself”). This can be explained, as we saw, both in a manner similar to contributory negligence and to Calabresi’s best decision maker.

We should immediately point out that other explanations of these rulings are certainly possible, including deontological explanations relating to the moral fault of the tortfeasors and the victim, as we will see in the second part of this chapter (sec. J). And admittedly, the consequentialist explanations whose rationale is similar to that of Calabresi or Posner and which will be discussed below are not necessarily the

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33 Chapter 2, section D(2).
34 Chapter 4, section C(1).
only correct explanations, for in those rulings in the Code, Maimonides did not always adopt consequentialist terminology as in the Guide. We will mention that in accordance with Maimonides’ method in the Code, in most cases no explanation or rationalization is given for the rulings (as it is in the Guide), so that it is hard to know with certainty what was his reason for each ruling.

Below we will examine several rulings from the Code. In relation to each, two possible explanations will be proposed, one according to the EAC test of the Guide and the rationales of Calabresi or Posner, and the other according to the rationale of the peshiah theory.

We will begin with the ruling in the Code concerning the person who incites another person’s dog—a ruling that as we saw in Chapter 2 seemed difficult to explain, but which is easily explained in light of the EAC test in the Guide, and in fact, also in light of Calabresi’s best decision maker criterion. As will be recalled, the question arises as to the basis for the difference between the case in which one person incites the dog of another (the owner) against a third person, in which case the owner is liable, and the case in which that same person incited the dog against himself (the dog bit the inciter), in which case the owner is exempt. This discrepancy raises difficulties, as will be recalled, according to both the theory of ownership and that of peshiah.

Indeed, Maimonides’ ruling could be easily explained using a rationale similar to that mentioned by Calabresi regarding the exceptional and non-standard use of a product (the example of the lawn mower). As mentioned, Calabresi identifies the user as the best decision maker and exempts the manufacturer from liability due to the impossibility of taking into account a type of exceptional activity such as riding on the lawn mower on the road, even in order to bring a wounded person to the hospital. In the case of the dog, Maimonides bases his ruling on the talmudic rule that “anyone who performs an unusual act and another causes him injury, he [the other] is exempt.” This means that the injured person is viewed as someone who brought the damage upon himself by his abnormal behavior, and therefore the halakhah exempts the injurer from liability. In this case, given the fact that the injured person deviated from standard behavior and behaved abnormally by inciting the dog, the owner of the dog is not liable for the damage subsequently caused by the dog, despite the fact that a dog bite is considered generally as an aberration and the owner is liable for the damage caused by the bite.

It should be noted that in the ruling in the Code, Maimonides emphasizes that the liability of the owner of the dog is related to information and knowledge, and therefore, it makes sense to explain the basis for the ruling in its entirety in terms of the best decision maker. As such, when a person incites a dog against another person, the owner of the dog is liable, because he is the best decision maker, and in Maimonides’ words, “since he knows that his dog bites when incited, he ought not to have left it loose.” As opposed to this, when that same person incites the dog against himself, he is liable for the damage

35 Laws of Property Damages 2:19.
36 See Chapter 2, section D(1).
37 Chapter 4, section C(1)(a).
38 Bava Kamma 24b and 20a.
39 See Chazon Ish, Bava Kamma 8:7. See also Birkat Shmuel, Bava Kamma 16.
because he himself is the best decision maker: in Calabresi’s words,40 “because he is better able to take care of himself, since he made an unexpected use, and therefore has better knowledge than the owner, just like in the lawn mower example.”

It is noteworthy that some modern legal systems adopt an approach of strict or almost strict liability in relation to damage caused by dogs, as an exception to the fault-based regime.41 Indeed, the ruling relating to the inciter can also be explained according to the assumption of risk defense, which in modern law entails not the division of liability but rather, the imposition of liability for all the damages in their entirety on the shoulders of the victim, who knowingly put himself in that situation – which is very appropriate for the case of a person who incited the dog of another against himself. Thus, what we have here is more than a division of damage according to Posner’s contributory negligence.

Another type of case in which the damage remains on the shoulders of the victim and the owner of the animal is not considered the effective damage avoider can be seen in Maimonides’ ruling in the matter of one who entrusts his animal to a watchman, and the animal causes damage. In the Code,42 Maimonides rules that “a person who 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.” Hence, entrusting the animal to watchmen also transfers to them the liability in tort if the animal causes damage. Even though they are not the formal owners of the animal, they “assume the owner’s responsibilities,” for they are the effective damage avoiders due to the fact that they have the ability – as well as the obligation – to guard the animal effectively, and they also have a financial connection for they are responsible for the animal.43 However, further on in the ruling (according to Maimonides’ corrected text), Maimonides distinguishes between various cases in which the animal caused damage: (1) if the owner entrusted 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, too, is not liable in this case for the damage caused by his animal; (2) If the owner entrusted the animal to an unpaid watchman, who guarded it in an inferior manner, the owner is held liable. The question that was raised in Chapter 244 is, what is the difference between the two cases, and what is the basis for tort liability which can explain the said ruling? As we said there, not only is it not possible to explain this ruling according to the theory of ownership and strict liability, but it is also difficult to explain it according to the theory of peshiah: in both cases the owner

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40 In a conversation with the authors on May 28 2014, New Haven, Connecticut.
41 For example, in part D1 of the Civil Wrongs Ordinance (New Version), 5728-1968, 2 LSI 12, (1968) (Isr.), the legislator stipulated that the owner of the dog or whoever is in charge of it has strict liability for damage caused by the dog regardless of fault (§41a). There are three exceptions to this rule, whereby the liability is imposed on the injured party and not on the owner of the dog (§41b). (To be precise, the injured party is liable in the sense that he is unable to sue on the basis of this special provision. However, in such cases he could, for example, sue on the basis of regular negligence (§§ 35-36 of the Ordinance), and he might then be awarded compensation with a reduction due to the contributory negligence.) One of the exceptions is incitement of the dog by the injured party (§41b(1)). The second exception is assault by the injured party on the owner or on his relative of first degree (§41b(2)). The third exception is trespassing by the injured party on the owner’s property (§41b(3)). It appears that this statutory arrangement, unusual in that it seems to have no parallel in other legal systems and is also relatively alien to Israeli tort legislation, which is overwhelmingly fault-based and contains only rare provision for strict or almost strict liability, relies on the same foundations and rationale as the theories of Calabresi and Maimonides.
43 As Maimonides writes, Laws of Property Damages 4:10.
44 Chapter 2, section C(1).
entrusted the animal to a watchman, and it was the latter who guarded it at a particular level; from the point of view of the owner, however, it is difficult to point to different conduct in the two cases which could lead to the first case being considered as one of unavoidable mishap (ones), thus exempting him from payment, whereas in the second case he will be considered to be at fault and will be liable for payment.

In light of Maimonides’ consequentialist approach and the EAC test in the Guide, and in light of Calabresi’s best decision maker criterion, it is now possible to revisit this problematic ruling and to answer the question. An examination of other rulings relating to watchmen disperses the fog and proves that the decisive criterion in Maimonides’ method is the effective damage avoider, and in the present case, the effective damage avoider may be the owner or the watchman, depending on the circumstances pertaining to the conditions of guarding: to whom did the owner entrust his animal to be guarded, and what was the level of guarding that was required from the watchman. If the owner indeed entrusted the animal to a watchman, the watchman “assumes the owner’s responsibilities” in that he is the effective damage avoider; therefore he is required to guard the animal and his liability is sometimes like that of the owner of the animal, who is totally exempt, and sometimes the outcome is the opposite. But the question of the liability of the watchman or the owner for the damage depends on the level of guarding required of the watchman, as emerges from what Maimonides writes elsewhere, for there is a difference in the level of guarding required from the four types of watchmen: the paid watchman (and the renter and borrower) is required to guard “in an excellent manner”, whereas the unpaid watchman need only guard “in an inferior manner” (this is logical, for he has no benefit from guarding, as opposed to the other three types of watchmen). What is the different between “an excellent manner” and “an inferior manner” of guarding? Guarding in an excellent manner requires constant physical presence and attention on the part of the watchman, i.e., active guarding, as opposed to inferior guarding on the part of the unpaid watchman, who need only to create secure conditions, such as putting up a fence, whereas he himself is not obliged, for example, to stand guard actively and constantly. Indeed, Maimonides rules that if the watchman “guarded it [the animal] in an excellent manner as he should and it got loose and caused damage – the watchman is not liable,” and the owner, too, is exempt from payment, for he entrusted the animal to the watchman at the level of “excellent guarding” that can serve as the effective preventer of damage, and “they ensured that there would be excellent guarding as there should be, and what else could they have done?” As opposed to this, if the owner entrusted his animal to an unpaid watchman, the outcome is otherwise, for this watchman is not required to guard in an excellent manner, and only if he was at fault in his guarding will he be liable to pay. Accordingly, in such a case the unpaid watchman does not “assume the responsibilities of the owner,” for he is not the effective damage avoider – rather, that role is filled by the owner. Therefore, Maimonides ruled that if he guarded in an inferior manner, “if he is an unpaid watchman – he is not held liable, and the owner is liable.” Imposition of liability on the owner in the said case will create a disincentive

46 Rabinovitch, supra n. 24, at 122.
47 According to Rabinovitch, ibid., at 123. The basis for this becomes clear in light of what is said in the following chapter concerning regimes of liability. If an owner entrusted an animal to a watchman in order that he guard it an excellent manner, and the watchman did indeed guard it excellently, even if not in a water-tight manner, the owner has acted appropriately, for he weighed his decision well, whereas the watchman prevented damage as efficiently as he could – even if it was not perfect, but we do not require perfection. Consequently, both are exempt.
for the owners from the outset to entrust the animal to an unpaid watchmen – something that is desirable from the point of view of efficiency, which prefers encouraging owners of animals to entrust their animals to watchmen who are held to a high standard (“guarded it in an excellent manner”), who are able to prevent potential damage more effectively. It is also for this reason that if the owner entrusted the animal to a paid watchman or to a renter or a borrower who is held to a higher standard of guarding, the owner is exempt, even if in practice these watchmen guarded in an inferior manner. The watchmen themselves will be liable, because they did not meet the required standard of guarding – “in an excellent manner”.

In fact, this is very reminiscent of the best decision maker (as per Calabresi) who by means of the information available to him locates the cheapest cost avoider. In fact, if we explain Maimonides by using Calabresi’s terminology, the owner of the animal, by entrusting the animal to a paid watchman who guards it in an excellent manner, can thereby locate the cheapest cost avoider, and not make do with an unpaid watchman whose guarding is inferior. Accordingly, the paid watchman is the cheapest cost avoider, and the owner of the animal is the best decision maker. The latter can “induce” the former, by paying for his guarding, to guard in an excellent manner.

Alternatively, it may also be possible to explain the matter in terms of negligence: the owner who entrusted his animal to a watchman who guards in an excellent manner was not negligent, as opposed to a person who entrusted the animal to a watchman who from the outset has no great interest in guarding in an excellent manner. The latter owner will be required to bear the cost of the damage and cannot claim it from that watchman. It may be that the very choice of that unpaid watchman constitutes a type of negligence and fault, and the owner in such a situation has no one to blame but himself. Nevertheless, it should be noticed that although deeming the owner to be at fault due to the very choice of an inferior watchman is logical according to the modern common law doctrine of negligence, it seems that it would be quite difficult to accept this argument in the context of the talmudic theory of peshiah, at least according to the approach of some halakhic authorities.48

The imposition of tort liability on the owner or on the watchman depending on who is the effective damage avoider appears in other rulings of Maimonides as well. Thus, for example, Maimonides writes:

When [a person] entrusts his animal to a deaf mute, a mentally incompetent individual or a minor to watch, the owner is liable. [This applies] even if the ox is tied, for an ox - and similarly other [animals] - will break open the knot and go out and cause damage. Even if the animal was guarded in an excellent manner, and it dug [under the fence] and escaped and caused damage, the owners are liable. 49

In this case, Maimonides rules that the owner must pay for the damage caused by his animal, even if he entrusted to the deaf mute, the mentally incompetent person or the minor an ox which is properly guarded and tied up, and the watchman ultimately guarded it in an excellent manner. Ra’avad disputed this ruling,

48 See, e.g., Tosafot Bava Metzia 93a, s.v. i hakhi (where it is written that the decision of the owner of the animal to entrust it to an unpaid watchman instead of a paid watchman should not be viewed as peshiah on the part of the owner, because ultimately he entrusted it to a “sane person” (ben da’at), and any sane watchman, even if he is unpaid, normally watches at a high standard, even beyond what is required of him by law).
saying: “I have not found a source for this,” for the owner handed over a bound ox, and he did not rely on the guarding of the deaf-mute, the mentally incompetent person or the minor, and there is no reason to impose strict liability on the owner. In this case too, it would appear that the basis of the matter is that entrusting an animal to a deaf-mute, a mentally incompetent person or a minor cannot be considered as entrusting the animal to watchmen who “assumed the responsibilities of the owners” as in the previous ruling, for these are individuals “who do not have reason” and their guarding cannot be relied upon, since the knot is liable to loosen and one cannot rely on those watchmen to know how to fix the problem. Consequently, they are not the effective damage avoiders, and liability is therefore imposed on the owner, who is a more effective damage avoider than they. Moreover, by imposing liability on the person who entrusted the animal to such watchmen, that person will have an incentive not to entrust his property to watchmen who are not sane, but to those who are possessed of reason, and who therefore, in Calabresi’s terms, are the best decision makers; as such it is a desirable thing in itself, from the point of view of avoiding damage.

Alternatively, and similar to the example of entrusting an animal to an unpaid watchman, here too it appears that opting for a deaf-mute, a mentally incompetent person or a minor to guard the ox, even if it is tied, may very well involve negligence on the part of the owner, and it may therefore be possible to explain this ruling on the basis of negligence.

The examples that were discussed at the beginning of this section (liability for tooth, foot and horn damages in the public domain) are based on Maimonides’ specific words in the Guide, which explain the exemption from liability for damage caused by animals by means of the EAC test (and according to our explanation, what he says is also consistent with the test of the best decision maker). It would appear possible to explain several other exemptions for damages of pit and fire – exemptions which various commentators and scholars struggled to understand – on the same basis. We will confine ourselves here to an analysis of two cases in which an exemption from liability was given to the tortfeasors in cases of fire. The Mishnah and the Talmud mention a major exception to a person’s liability for the damage caused by a fire that he lit, namely, an exemption from payment for articles that were buried in a grain heap and were damaged in a fire. Many struggled with the reason for this exemption, and one of the great early authorities even stated with certitude that this rule is irrational and therefore “it is scriptural decree that the Bible exempted in the case of fire damage to [utensils that were] buried.” Here is not the place to elaborate on the laws of fire damage to buried property, but we will offer one possible – although neither necessary nor

50 According to Maimonides in the parallel ruling, ibid., 12:8
51 Maimonides clarified this by saying “even if the animal was guarded in an excellent manner.” Rabbi Rabinovitch, supra n. 24, at 126, explains that according to Maimonides, in keeping with his abovementioned method, guarding in an excellent manner means constant guarding.
52 It might be possible to explain in a similar fashion Maimonides’ ruling concerning the watchman who entrusted the animal to another watchman (Laws of Property Damages 4:11), “the first watchman is liable to pay the person who suffered the damage, for whenever one watchman delegates to another watchman he is liable. For the person whose property was damaged will tell him: ‘Why didn’t you watch it yourself instead of delegating it to someone else? Pay me yourself, and sue the watchman to whom you delegated it.’
53 M. Bava Kamma 6:7, and gemara ad loc., 61b.
54 Piskei HaRosh, Bava Kamma 6:13. For a similar approach in interpreting what is written as the basis for an exemption according to some of the Amoraim see: Westreich, “Tort Law – Between Religion and Law: Exegetical and Legal Processes in Talmudic Tort Law”, 26 Shenaton Hamishpat Ha Ivri, (5769-5771), at 212.
55 See Encyclopaedia Talmudit vol. 2, 235-236.
exclusive – explanation for Maimonides’ ruling on this matter:

When a fire spread and consumed wood, stone or earth, [the person who kindled the fire] is obligated to make restitution, as it is written: ‘[When a fire] spreads through thorns [and consumes...] a field (Exod. 22:5). [When] a fire consumes a grain heap or the like and there were articles hidden in the grain heap: if [the articles include] a thresher, a yoke for cattle or other articles that it is likely for farmers to hide in their grain heaps, [the person who kindled the fire] is liable. If [the articles include] clothes, glassware and the like, he is not liable for the damage to the articles.56

The liability of a person who lights a fire in a grain heap in which items were hidden is limited to payment only for “articles that it is likely for farmers to hide in their grain heaps such as a thresher or sower” as Maimonides writes in his commentary to the Mishnah, “but other than for these types of articles he is not liable.”57 It seems only logical that agricultural implements are hidden in the field at the end of a day of work in the field, and in this case the kindler of the fire will be liable and not exempt, but it is less likely that a person hides other utensils and valuable objects in the field, and in this case he will be exempt. True, Maimonides does not explain the reason for the exemption from liability for the damages given to the lighter of the fire in respect of articles that are not normally hidden in the heap, and he does not explain how these are different from utensils “that it is likely for farmers to hide in their grain heaps.” However, according to what Maimonides writes in the Guide and in light of the Calabresian best decision maker test, a reasonable explanation can be proposed, whereby imposition of tort liability on the person lighting the fire depends on the question of whether the tortfeasor – the lighter of the fire – is in the best position to consider the costs of the anticipated damage and of its prevention, or whether the best decision maker is the victim. As will be recalled, Maimonides wrote in the Guide that the owner of an ox is not liable to compensate a “person who leaves something in the public domain” for tooth and foot damages, for the victim “exposed his property to loss,” and therefore the victim should be deemed to be in the best position to weigh the costs of the damage and its avoidance, for he knowingly endangers himself by exposing his property to the foreseeable risks. If so, it seems that this may also be the rationale for the rule relating to the person who buries articles in a grain heap when such utensils are generally not buried in such places. The person who buries the articles in this unusual place – and not the tortfeasor who lit the fire – is in the best position to weigh the costs of the damage that is likely to be caused, for he is aware of the aberrant act of burying and the risks it entails.58

In this example too it may be possible to explain the law alternatively, according to the test of

56 Laws of Property Damages 14:9.
57 Commentary to the Mishnah, Bava Kamma 6:7.
58 The tortfeasor should be held liable for the damage caused by the fire only to the extent that such damage is not abnormal and it was not caused by abnormal behavior on the part of the injured party. Therefore, Maimonides ruled as follows in Laws of Property Damages 14:12: “When a person sets fire to a home belonging to a colleague, he must compensate for everything it contains, for it is the ordinary practice for people to keep all their articles and possessions in their homes.”
negligence and foreseeability or the theory of *peshiah*.\(^{59}\) Nevertheless, such an explanation is not problem-free, because the test of foreseeability may not distinguish between the person who buries agricultural implements and one who buries other articles. It is possible that in both cases, it is not to be expected that objects will be buried there, but it is also possible that in both cases this is foreseeable, or that in all events, one can expect to find agricultural implements buried in the field although not other objects that are unconnected to working the land. It may be that it all depends on the usage of the particular time and place, so that here too, matters are less unequivocal according to the test of foreseeability than according Calabresi’s doctrine.

We wish to propose a similar explanation for another of Maimonides’ rulings, which exempts the person who lights a fire from the damage caused by the fire:

[When] a camel that is loaded with flax passes through the public domain, and the flax that enters the shop is ignited by the lamp belonging to the shopkeeper and then sets fire to the entire building – the owner of the camel is liable, because he overloaded [his camel].\(^{60}\)

Here too it is possible, using the EAC test from the *Guide*, to explain that the owner of the camel will be liable because he is the effective damage avoider. In fact, in his conscious, aberrant action of overloading the beast, the owner of the camel created the danger, and he is therefore liable for the damage, more so than the shopkeeper whose candle was alight in the shop. Alternatively, on the negligence test, it is possible that the shopkeeper’s contributory negligence would entail some level of deduction, but he would nevertheless be entitled to partial compensation, unless the damage was totally unforeseeable; in that case, even according to the negligence test the owner of the camel would be liable in respect of the entire damage.

In the last ruling that we shall discuss, Maimonides, in the *Code*, actually cites the reason for the ruling, and that reason is amazingly similar to the reason that he cited for a similar case in the *Guide*. We are referring to the person who is sleeping: in the *Code* Maimonides exempts him from liability for damage that was caused in a situation in which another person came and lay down beside him or laid articles beside him.\(^{61}\) The explicit rationale suggested by Maimonides in the *Code* in relation to the person who is sleeping is that “if one places an article alongside a person who is asleep and the latter breaks it, he is exempt, seeing that the one who put it down is deemed forewarned (*mu’ad*) and commits an act of negligence (*hamu’ad shepashah*).”\(^{62}\) However, this need not necessarily be understood in terms of moral fault, for this reasoning in the *Code* is very similar to the rationalization cited in the *Guide* whereby the owner of an animal that caused damage in the public domain is exempt for damages of the type of tooth and foot, since he who puts a thing in a public place “is at fault (*posheah*) toward himself and exposes his property to destruction.”\(^{63}\) We have already seen that this reasoning sits very well with Posner’s doctrine.

\(^{59}\) Indeed there were those who explained the exemption for the case of the buried implements according the the method of *peshiah* as the basis for liability. See Shalom Albeck, *General Principles of the Law of Tort in the Talmud* (2nd ed., Tel-Aviv: Dvir, 1990), at 75-77, 163-167 (Heb.).

\(^{60}\) Laws of Property Damages 14:13.

\(^{61}\) Laws of Wounding and Damaging 1:11.

\(^{62}\) *Id.*

\(^{63}\) *Guide* 3:40, 575.
of contributory negligence and with the Hand formula of economic negligence. Indeed, the ruling of the sleeping person, too, can be explained according to Posner as well, for if the negligence of the tortfeasor is compared to that of the injured party, one can say that the negligence of the injured party is gross. However, if his negligence is so great as to render him liable for all the damage, it may be that the more accurate explanation in the spirit of modern tort law is assumption of risk, for all the damage is imposed on the injured party, and there is no partial reduction due to comparative fault. But one cannot ignore the fact that the reasoning itself is very similar to that of Posner – “is at fault (posheah) toward himself.”

Even though Maimonides’ reasoning appears to be different from that of Calabresi, in that it invokes terms of peshiah, the result whereby liability is imposed only on the injured party can be explained satisfactorily according to Calabresi’s method as well: a person who lies down next to a sleeping person or places an object beside him acts in an abnormal fashion and he – and not the sleeping tortfeasor – must bear liability for the damage he incurs. It is he who knowingly entered that situation and therefore, if we use Calabresi’s best decision maker terminology, he is better situated than the sleeping person to weigh up the costs of the damage and to prevent the occurrence of the accident more easily. Therefore liability passes over to him, in effect similar to the cases of the person who buries articles that are damaged by fire or the person who leaves articles in the public domain.

We would once again stress that we are not claiming that the consequentialist analysis proposed above for the rulings in the Code is the only possible one: it is entirely possible to understand some of the rulings according to other theories as well (such as moral fault as part of the deontological approach). Our main purpose is to show, in this revisiting of the rulings in the Code, how the rulings can be explained well also by virtue of the consequentialist conception of the Guide and by recourse to modern tort doctrines.

E. SPLITTING THE LIABILITY BETWEEN THE PARTIES (THE TAM OX)

Unlike the rulings in the Code that have been discussed thus far, which may be explained according to the consequentialist rationale contained in the Guide, an analysis of the ruling relating to the tam ox, which is among the most difficult rulings in Jewish law, is indicative of fundamental differences between the Code and the Guide. Indeed, when we examine the Code through the prism of what Maimonides wrote in the Guide concerning the tam ox, as discussed above in Chapter 4, we will discover several fundamental differences in the law of the tam ox as this law is elucidated and explained in each of the two works. The first difference relates to the reason and the legal basis for the monetary obligation, and the second difference relates to the specifics of the laws concerning payment of half damages in the case of a tam ox and full damages for a mu’ad ox. In the Guide, the law of payment of half damages by the owner of the tam ox is the inevitable outcome of the rule of general financial liability i.e., the rule that examines who is the effective damage avoider. In the context of what Maimonides writes in the Guide, it appears, according to our explanation in Chapter 4, that in Maimonides’ view, the owner of the tam ox pays half damages for damage that was caused as a result of the ox going. This is because it cannot be said in

64 Id.
65 Chapter 4, section B (1)(c).
relation to a *tam* ox that the owner is a more effective damage avoider than the victim, for the act of goring is still defined as an aberration that is not part of the regular actions of the *tam* ox, and therefore the owner pays only half the damages.

However, this is not the explanation given by Maimonides in the *Code* for payment of half damages in relation to the *tam* ox. In the *Code*, Maimonides rules in a manner similar to the reason given in the Talmud. As will be recalled, the talmudic sages disagreed as to whether the obligation to pay for half the innocent horn damages is a (civil law) monetary payment of a tort type of liability or a fine. The opinion that Maimonides endorses in his *Code* as the rule is that payment for half the damage is defined as a fine (*kenas*). In the Talmud this opinion was explained by the fact that the assumption is that oxen do not gore without a reason and therefore they do not require special guarding. The liability of the owner of an innocent ox that gored does not stem from the owner’s fault or negligence, because by that standard he should be totally exempt from payment, as most oxen do not gore and therefore the owner is not considered negligent. Nevertheless, the Torah imposed on him payment for half the damage in order that he guard his animal more carefully in the future.

Indeed, as we saw in Chapter 4, even though the rule is the same – half damages – there is a difference between the explanation for the talmudic rule and Maimonides’ ruling in the *Guide*. Whereas it appears that the talmudic rule imposing partial compensation by the owner for damages caused by the innocent ox that gored is an exceptional law that deviates from the standard rules of liability in talmudic tort law – in particular according to the opinion that the payment is defined as a fine (*kenas*) and not as a (civil law) monetary payment – according to Maimonides’ explanation in the *Guide* this is not an exceptional law, but rather, a rule stemming from that rule of liability whereby in every case, the effective damage avoider must be found. Moreover, the very fact of imposing tort liability on the owner of the ox, according to Maimonides, both in tooth and foot and in damages caused by an innocent ox, is designed to serve as a type of deterrent and an incentive to prevent the damage, and there is no difference for the purposes of this rationale between payment of full or payment of half damages. However, it is possible that in the *Code*, too, one can discern the first buds of the Maimonidean conception which does not differentiate in principle between the liability of the owner of the goring ox for half damages (when the ox was innocent) and his liability for full damages (when the ox was forewarned). This conception emerges from what Maimonides writes in a very specific context in the *Code* in explaining why gentiles must pay full compensation for damage caused by an innocent ox that gored, as opposed to a Jew, who must pay only half damages:

> This is a fine imposed on the gentiles because, being heedless of the scriptural commandments [not observing carefully the biblical commandments prohibiting causing damage], they do not remove sources of damage. Accordingly, should we not hold them liable for the damage caused by their animals, they would not take care of them and thus would inflict loss on other people’s property.

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66 *Bava Kamma* 15a.
68 *Bava Kamma* 15a.
69 Laws of Property Damages 8:5.
It will be noted that according to this explanation in the Code, which is very similar in it consequentialist tone to that in the Guide, payment of the damage that was caused by the goring of the tam ox is designed – both in relation to a Gentile and to a Jew – to create an incentive for the owner of the tam ox to guard his ox and to prevent damage. According to Maimonides, the difference in the level of payment – half damages paid by the Jew as opposed to full damages paid by the gentile – does not stem from the fact that the basis for payment of full damages is entirely different from the basis for payment of half damages, as could be explained according to the Talmud (i.e. that half damages is a fine and full compensation is a civil law monetary payment), but from the fact that the level of deterrence that is required for the Gentile (who is not bound by the religious prohibition against causing damage) is greater than that required in relation to the Jew (who is assumed to heed the prohibition against causing damage).

Nevertheless, and despite the similarity between the Maimonidean reasoning in this specific ruling in the Code and the general, principled conception in the Guide, it is difficult to ignore the fact that many of the details of the laws in the Code, which distinguish between the liability for half damages in the case of a tam ox and liability for full compensation in the case of a mu’ad ox, are difficult to explain according to Maimonides’ method in the Guide. Thus, for example, Maimonides ruled in the Code, similar to the talmudic law which imposes strict liability in the case of a tam ox that gored, that the owner must also pay even in the case where “an ox breaks loose and causes damage after its owner had tied it with a rope and locked it [in a corral] in an acceptable manner. If it is a tam, he is required to pay only half the damages.” However, rules Maimonides, if the ox was mu’ad, the owner is exempt. In other words, in relation to a mu’ad ox and payment of full damages, the owner does not bear strict liability, whereas in relation to a tam ox strict liability is imposed and the owner pays for half the damage that was caused even if he guarded the ox appropriately – of course, as distinguished from contemporary law in which strict liability means liability on the part of the tortfeasor for all the damage, and not half or any other proportion thereof. This difference in the standard of care between a tam ox and a mu’ad ox, which is emphasized only in the Code, may be explained with relative ease if we accept the assumption that the basis for liability for the damage caused by the tam ox is fundamentally different from that in the case of the mu’ad ox, i.e. that payment of half damages in the former case is imposed irrespective of the level of guarding on the part of the owner, whereas the payment in the latter case is a payment in tort that is connected to the level of guarding that is required of the owner. Needless to say that this distinction relating to the required level of guarding on the part of the owner of each type of ox receives no mention at all in the Guide, and indeed, as we stressed above, it would appear that in the Guide Maimonides was not seeking to explain all the details of tort law. It is therefore difficult to say that the puzzle of the innocent ox was fully resolved in the Guide and that the text in the Guide succeeded in this case as well to illuminate the ruling in the Code. On the contrary, this ruling highlights the difference between the two works.

70 See details of the laws in Laws of Property Damages 7.
71 Laws of Property Damages 7:1.
72 Id.
73 Chapter 4, section B (1).
Another possible connection between Maimonides’ rationalization in the *Guide* and the details of the rulings in the *Code* relates to his fundamental distinction between *tam* and *muʿad* at the beginning of the Book of Torts in the *Code*. In Chapter 2 we saw, following Jackson, the importance attributed by Maimonides in the *Code* to his basic and innovative distinction between *tam* and *muʿad* (which is different from what appears in the Talmud), upon which Maimonides placed great emphasis. As will be recalled, Maimonides distinguished between two types of acts on the part of animals: the first – “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 *muʿad*”; and the second – “which changes and does an act which it is not the way of all its kind to do always, for example, the ox which gores or bites – that is the one (traditionally) called *tam*.”

One scholar explained that what Maimonides’ meant by saying that the owner of an animal is liable for “an act which it is its way to do always,” is that “it is standard for it to cause damage.” However, it appears that this is not the correct explanation of what Maimonides wrote, in light of the fact that in the *Guide* he wrote explicitly that tooth and foot damages in the public domain are not standard. Even though tooth and foot damages are not necessarily standard, as Maimonides wrote in the *Guide*, he defined them in the *Code* as acts that “it is the way” of the animal to do. Assuming that there is no contradiction between the sources, this would mean that these damages are defined as “the way” of the animal to do, even though they are not necessarily standard, i.e., the animal may indeed cause damage of this type, but this is less standard than other potential damage that it is liable to cause in the public domain. It would therefore appear, as Jackson says, that according to Maimonides, “[t]he distinction between *tam* and *muʿad* thus no longer relates to the attestation of the same type of activity on previous occasions; *tam* and *muʿad* now denote different types of activity.”

What is Maimonides’ rationale for the distinction between these two types of acts? It may be that the explanation for this fundamental distinction is related to the existence of the element of knowledge on the part of the owner of the ox, which defines him as the best decision maker in Calabresi’s terms. In other words, full liability should be imposed on the owner of the animal only in those cases in which the damage was caused as a result of behavior which is normal and habitual, and who, if not the owner, knows the normal patterns of behavior of his animal – did the animal, in practice, and unlike other animals, gore three times with its left horn, thereby becoming forewarned (*muʿad*)? Therefore the owner’s ability to weigh the anticipated damage before it occurs is better than that of the injured party, who is not necessarily aware of that unusual behavior of the animal. This is not the situation regarding behavior that is unexpected, in relation to which the element of the owner’s knowledge is weaker and therefore he is not to be made to bear the full damage. A similar distinction was drawn by Calabresi (following Common

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74 In the first chapter of the Book of Torts. On the centrality of this distinction in Maimonides’ method see above, Chapter 2, section E.
75 Laws of Property Damages 1:4, according to Jackson’s translation, regarding Maimonides’ distinction between *tam* and *muʿad*.
76 Albeck, *supra* n. 59, at 107.
77 *Guide* 3:40: “A tooth or a foot in a public place …. And also damage is seldom caused in this way.”
78 Laws of Property Damages 1:8.
80 Laws of Property Damages 7:2.
81 He pays only half damages, unlike Calabresi’s method. See Chapter 4, section C(1)(a).
law precedents) in the context of the best decision maker when he spoke of a cow that trespassed and a
cow that bit a neighbor, or a tiger that mangled somebody and a tiger that is simply chewing grass rather
than tearing at meat. These animals are capable of causing damage in different ways, but some ways are
more normal and some are less so.

Here too, it may be possible to explain the law in accordance with the principles of negligence and
the theory of peshiah, for if the owner knows his animal and knows how it acts, even if this is unusual, it
may be that this should be regarded as a type of foreseeability of the damage that the animal is liable to
cause, which could serve as a basis for holding him liable for full damages.

F. INCENTIVE FOR PREVENTING DAMAGES: IMPOSING LIABILITY ON RISK-CAUSING BEHAVIOR

A good illustration of Maimonides’ fundamental attitude toward prevention of damage (emphasized in the
Guide) is shown in his rulings in the Code. Maimonides suggests a far-reaching approach that mandates
deterrence of risk-causing behavior even if it did not cause actual damage. He writes:

A beast that was grazing and broke away and entered fields and vineyards, even
if it did not yet cause damage, its owners are warned three times. If he did not
guard his beast and prevent it from grazing, the owner of the field has the right to
slaughter the beast ritually and say to its owner: “come and sell your meat.” For
one is forbidden to cause damage willfully, with the intention of paying for the
damage he causes. Even to bring about damage indirectly with this intention is
forbidden.83

Maimonides’ ruling is far-reaching as it entitles the person who may sustain damage on the part of
the beast, “even if it did not yet cause damage,” to seek relief on his own and slaughter the beast. We have
already dealt with this ruling and the opposition to it on the part of some of the great halakhic sages.84

This ruling has extensive ramifications from various aspects, both tortious and non-tortious
(including deontological, religious, property-related and criminal aspects), such as: self-help on the part of
the victim under the aegis of the law, with the victim serving as a type of long arm of the law, e.g. in cases
of forcing the trespasser off the property, or preventive regulation of risk-creating behaviors even though
they have not caused damage, such as behavioral rather than consequentialist offences85 and others. We
dealt with such possible ramifications in Chapter 3. Of course, it is possible to examine the matter in
accordance with the laws of injunctions that are designed to pre-empt risk-creating behavior that is likely
to develop into actual risk. However, we are not dealing here with the reality of formal submission to the
court prior to the act in order to obtain such an injunction to prevent future damage, but with the ability of

83 Laws of Property Damages 5:1.
84 See Chapter 2, section D (4).
85 Thus, for example, in penal law it is common to suspend the license of a driver who was speeding even if he has as yet not
causd damage, because many traffic offenses and offenses relate to conduct and not to consequences. It may even be possible in
different systems to impound the vehicle in the case of reckless driving or drunken driving, even if no damage was caused, purely
as a preventative measure. But this is penal regulation. In general, the nature of tort law is different, because damage is one of the
elements of the tort.
a potential victim, even without the enforcement authorities, to avoid the obstacle and even to eliminate it. Below we will deal only with the consequentialist aspects of this ruling.

Revisiting this ruling in the Code in light of what Maimonides’ wrote in the Guide suggests that his approach that proposes deterrence and focuses on efficient means of “preventing damages” is not prepared to embrace the view that tort law relies exclusively on corrective justice, a view which brings into relief the operation of tort law in relation to the past only, minimizing the significance of its deterrent effect with respect to the future.86

It is possible to regard the Maimonidean ruling in this case as a type of regulation and as the imposition of a fine. However, we can also perceive it as a type of preventive order that allows for harming the potential tortfeasor precisely by means of a preventive act on the part of the potential victim, without the need to involve the authorities (inspectors or police officers). Due to the need for immediate action – for in some cases it is not reasonable to wait for judicial intervention, and the passage of time is a critical factor – the potential victim even serves here in some way as the long arm of the authorities, an agent of the court. As such, this is not a case of compensation for future damage, but more of prevention and perhaps regulation, which also sheds light on Maimonides’ approach to the prevention of damage and deterrence. According to Maimonides it is possible to prevent the injurer, who in this case is the owner of an animal and the most effective damage avoider (we assume of course that the neighbors erected a fence), from continuing the activity that can cause damage to another even if the animal has not yet caused such damage in practice, if it transpires that the owner of the animal is a “serial tortfeasor” who did not take serious supervisory measures and precautions with regard to his animal despite having been warned three times, and did not prevent his animal from entering private lands. This may be compared to revoking the operating license of a business that does not meet safety regulations mandated by law.

As part of the discussion of Maimonides’ ruling that it is permissible to slaughter an animal that entered a field more than three times even if it did not cause damage, we must emphasize that this is dictated both by consequentialist considerations (prevention of future damage and incentive for the tortfeasor to reduce the level of his dangerous activities, in this case through fear that potentially injured parties will slaughter his animal), and by ethical (deontological) considerations, which is why he mentions the prohibition against causing damage. It is possible that Maimonides’ integration of deontological considerations as a basis for imposing liability for risk-causing behavior is likely to provide an alternative basis for liability, circumventing a possible argument that deterrence based on something other than damage that has actually occurred may constitute overdeterrence.

Maimonides believes that the prohibition against causing damage also serves as a social tool that promotes efficient social behavior, i.e., that the consequences of the prohibition against causing damage are not strictly religious and deontological but also consequentialist. This can be seen in another of Maimonides’

86 Indeed, Aristotelian corrective justice approaches require actual damage as a condition for triggering tort laws, unlike Maimonides who talks about the prohibition against causing damage even when no damage was caused. Such corrective justice approaches require payment specifically by the tortfeasor, specifically to the injured party. See, e.g., the idea of correlativity in the work of Ernest J. Weinrib, The Idea of Private Law (1995) 56-83. And see the tort liability scheme described in Chapter 1.
rulings which suggests that caution in observing the commandments (he referred primarily to caution not to cause harm that is prohibited by Jewish law) plays a decisive role in preventing damage and in contributing to the welfare of society. It is possible to characterize Maimonides as having adopted an economic approach to damage prevention, primarily on the basis of the effective damage avoider. These considerations coexist with deontological-moral ones, which also characterize Maimonides’ tort theory and are complementary to the economic considerations.

Having reached the said understanding, we can revisit Albeck’s question discussed in Chapter 2 concerning the apparent contradiction between Maimonides’ said ruling on the manner of slaughtering an animal that strays into the field of another, and the ruling that follows it:

[b]ecause of this [that animals are not properly guarded and they enter the fields of others and cause damage] the Sages forbade the rearing of small domestic animals or small beasts 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.

One must understand why Maimonides offered different legal solutions in these two rulings, which not positioned one after the other by accident – in the first ruling, he fined only the person who was at fault in his guarding of the animal, and in the second ruling he totally forbade the rearing of the animals for all. It should be noted that not only are these consecutive rulings; Maimonides connected these two rulings to each other (saying at the beginning of the second ruling, “because of this”), hinting that the jurisprudential policy is the same for both. What is this policy, and on what is it based?

Moreover, elsewhere Maimonides ruled that every person is permitted to take his compost and manure out into the public domain during the set hours for this activity and to amass them there for thirty days in order that it be trodden upon by people and by animals. And nevertheless, he ruled that if these substances causes damage, the owner is liable. Here too one must ask why Maimonides allowed the owner of the waste products to cause damage to many, and nevertheless ruled that if he causes damage he must pay. Why did Maimonides not rule – similar to his fundamental ruling mentioned at the beginning of this section, that “one is forbidden to cause damage willfully, with the intention of paying for the damage he causes”? In other words, one ruling contains a prohibition against causing damage, and if a person did not take care not to transgress this prohibition, in that he allowed his goat to trespass in the neighbor’s yard, even if the goat had not yet caused damage – the goat is slaughtered. In the following ruling, there is a blanket prohibition on raising small domestic animals for fear that they will cause damage. In the third ruling we see that it is in fact

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87 Laws of Property Damage 8:5.
88 Cf. Izak Englund, The Philosophy of Tort Law (Dartmouth: Aldershot, 1992) 43 (explaining that the deterrent ability of tort law is limited, and it is necessary to consider the deterrence resulting from social and criminal norms as well. This seems to be consistent with Maimonides’ view concerning the careful observance of the commandments as a social norm conducive to deterrence.
89 See Chapter 2, section D(4).
90 See the wording used by Maimonides in the Commentary to the Mishnah Bava Kamma 7:7: “It is prohibited to rear small domestic animals in the Land of Israel because they [the animals] trespass in the fields.”
91 Laws of Property Damages 5:2.
92 Ibid. 13:15.
93 Ibid., 5:1.
permitted to cause damage by depositing waste in the public domain, but the damage must be paid for.

It would appear that the basis for the differences in Maimonides’ rulings lies in economic-consequentialist considerations. In this context, we accept what Rabinovitch writes,94 that on the one hand, we have seen that there are some things that were prohibited by the sages, such as raising small domestic animals or small beasts within the settled area, even though this is detrimental to the livelihood of the farmers, because the damage that is likely to occur from raising the livestock is great and very common. On the other hand, however, there are some things which were permitted, but anyone “owning” the defect must pay for the damage, e.g., depositing waste in the public domain; this applies, in our opinion, to an animal that grazes and strays onto the property of others, whose owners were fined by the slaughter of the animal only if it strayed three times. Clearly, the welfare of the public was weighed up against the damage to the individual, and in any case the case was discussed on its merits and regulations were enacted in order to encourage the economy without causing loss to the injured party. In view of the fact that the person taking out his waste products was held liable for the damages this caused, even though the act itself was not forbidden, there is no doubt that someone who does not really need to do so will refrain from taking the waste out into the public domain, for he will not wish to put himself needlessly at risk of having to pay for the damage from that waste. In any case the number of those taking out the waste in the community will decrease, and therefore the damage will also be reduced. The same holds true, in our opinion, in relation to the goat that grazes in the fields of others, in relation to which it will not be worthwhile, from the aspect of economic welfare, to totally prohibit the goat’s grazing activities, due to their importance to the ancient agricultural economy, despite the concern that from time to time goats will enter the fields of others. We have therefore not found a rule whereby it is forbidden for the goat to graze in those fields altogether, just as there was no prohibition on the goat remaining in the public domain even though it was liable to cause tooth or foot damage there; just as we would not expect today to outlaw driving completely in places in which driving is likely to do more damage than in other places, even though the driver will be liable for damage caused in that area. On the other hand, a fine was imposed on the owner if he did not guard the goat and it trespassed on the property of another three times, in order to encourage him to prevent future damage. In other words, from the point of view of probabilities, what we have here is the prevention of private damage, to a certain degree, in addition to the utility to the agricultural economy as a whole. This explanation is in keeping with Maimonides’ line of thinking, as expressed in the Guide, and there is no reason not to interpret thus the relevant rulings in the Mishneh Torah as well.

G. Using a Deontological Rationalization in Various Places in the Code

To be submitted with the full manuscript.

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H. CONCLUSION

In this Chapter we revisited some of the problematic texts in the Code and attempted to cast light on them in view of the consequentialist objective of tort law elucidated in the Guide. In this way we tried to resolve some of the difficulties that were raised in Chapter 2. At the same time, we clearly saw that the Guide and the Code do not always speak with one voice. Sometimes, a general rationalization offered in the Guide in relation to a particular ruling, such as that relating to the tam ox, cannot be reconciled with the details of the ruling as specified in the Code.

Maimonides’ tort theory is constructed, according to what we have shown in Chapters 3 - 5, on three different levels. The first two levels are based primarily on texts from the Guide, but as we saw, they have different parallels in rulings in the Code, and it is even possible by means of these texts, as well as with the insights of modern scholars of tort law, to elucidate some of the rulings that are difficult to understand on the yeshivah reading of the Book of Torts in the Code, mentioned in Chapter 2. As opposed to this the third level clearly derives from the Code.

At the first level are the two objectives of tort law. One objective is the deontological aim of removing wrong (a type of corrective justice), and the second is the social-consequentialist objective of preventing damages (which has some similarity to basic approaches of the economic analysis of the law). These objectives, presented by Maimonides in the Guide, constitute the foundation-stone of his tort theory. At the second level stands the Maimonidean test of liability in torts, which we defined as the “effective ability to control test” [EAC test]. At the third level of Maimonides’ tort theory we present the standard of care (or liability regime) that is required from the effective damage avoider in order to hold him liable. This will be discussed in the following chapter.