CHAPTER 6

MAIMONIDES’ STANDARD OF CARE: A DIFFERENTIAL LIABILITY MODEL

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A. PRESENTING MAIMONIDES’ DIFFERENTIAL LIABILITY REGIME OF THE EFFECTIVE DAMAGE AVOIDER (ACCORDING TO THE EAC TEST)

This chapter suggests that Maimonides adopted a differential liability model. As we noted in Chapter 2, Maimonides did not advocate the common fault-based regime and peshiah as the sole basis for tort liability. On the other hand, we disagreed with Warhaftig and Haut’s sweeping suggestion that Maimonides imposed absolute/strict liability on all types of tort cases.¹ We argued that Maimonides accepted a more complex liability regime, which we called a differential model. A careful examination of Maimonides’ writings reveals that he favored different liability regimes for different categories of damage. This differentiation means that he does not consistently apply one liability regime to all types of tort cases (as some contemporary monistic scholars do²). Maimonides’ tort theory, we argue, is based upon a fundamental distinction between two questions: (a) on whom to impose tort liability; and (b) what is the standard of care that should be imposed in each case, on the scale between negligence and strict liability. Attention to the distinction between these two questions may help us solve some of the

² See Chapter 1 (presenting monistic vs. pluralistic approaches).
difficulties mentioned in Chapter 2, which derive from incorrect, although common, interpretations.

Maimonides answered the first question by applying the EAC test, i.e., the test that determines who should be liable; this question does not necessarily depend only on peshiah (negligence), as noted in the previous chapters, but on whoever is the effective damage avoider, and this is determined by the element of control. Determination of the identity of the effective damage avoider, however, does not necessarily mean that the answer to the second question is that strict liability is borne by the avoider, as Warhaftig and Haut, and perhaps some contemporary law and economics scholars, argued. This is because according to Maimonides, the standard of care is topic-dependent. Often liability gravitates toward an optimal level that is higher than negligence but lower than absolute or strict liability. In other words, the question of the standard of care, which precedes determination of the identity of the avoider, might already depend on peshiah, due to economic-consequentialist considerations, with a separate rationale for every category of cases.

The distinction between these two questions may clarify why Maimonides included in his regime both the component of peshiah and the component of effective control (the EAC test). As we saw in Chapter 2, these two components – particularly according to the common interpretation (the yeshivah reading, which is framed in terms of peshiah vs. ownership) – appear to contradict each other. Even if there is no contradiction, it is difficult to explain the role of each component and how each operates in the normative tort-halakhic framework in general, and in Maimonides’ theory in particular. In this chapter, we will see that in fact these are two components which combine to form one complete theory of torts. The solution lies in the fact that each component relates to a different question. The EAC text determines, exclusively, who will bear the tort liability, whereas the component of peshiah (negligence) is one of the standards of care (alongside strict liability and intermediate standards) that should be applied to the effective damage avoider (the person who has control).

Maimonides conducts an innovative weighting of these two questions for the three types of cases. Admittedly, as we saw in Chapter 4, Maimonides’ analysis of the meta-objectives (prevention of damages) of the EAC test and the exceptions to this test in the Guide is short and general, and he does not discuss the specifics of the rulings in the various categories of tortious incidents. This is done in the Book of Torts in the Code, in which Maimonides discusses the details of the differences between laws of property damages, laws relating to wounding and laws relating to damaging. Prominent amongst the differences between these three types of laws is the different standard of care that he imposes for each.

In sec. A of this chapter, therefore, we attempt to define precisely the standard of care adopted by Maimonides in his Code, based on his interpretation of the talmudic texts, regarding those same three

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3 See esp. Chapter 2, sections C(1) (presenting the fact that Maimonides did not impose strict liability on the tortfeasor in a comprehensive fashion) and D(3) (asking whether the standard of care in damages caused by a person to the property of another is that of strict liability or negligence).
4 Even though, as we saw in the earlier chapters, the element of peshiah is liable to have an effect in the sense of contributory negligence (“is at fault (posheah) toward himself” as Maimonides says in the Guide 3:40), which is similar, as we saw, to Posner’s contributory negligence. Nevertheless, the element of peshiah appears to be of secondary importance vis-à-vis the EAC test which, as stated, is the central test for determining tort liability according to Maimonides.
6 Chapter 2, section C(2).
types of damage: (a) damage caused by a person to the property of another; (b) damage caused by a person who injures another; and (c) damage caused by property. In each of these three categories, Maimonides proposes a standard of care that is on the scale between negligence and strict liability. In sec. B of this chapter we describe the hierarchy of liability regimes and standards of care, from the highest level (closest to strict liability) to the lowest (negligence). We present a scheme that illustrates Maimonides’ differential model and explains its rationale for the hierarchy amongst the standards of care used in different cases. Finally, we describe the historical background, circumstances, and nature of the tortfeasors in Maimonides’ time and in the present era. This is essential in order to understand the differential liability model in itself and as compared to contemporary models.

1. Damage Caused by a Person to the Property of Another: Strict Liability and Exemption Only in Cases of Force Majeure

In discussing difficulties in understanding some elements of tort liability mentioned in the Code we raised the question of the correct standard of care in cases of damage caused by a person to the property of another, and asked whether this is a strict liability or a negligence standard.7 Understanding the differential liability model helps answer this question.

Regarding a person who causes damage to the property of another, we learn from the Mishnah that a person is liable for all accidents he caused,8 and the Talmud comments that the tortfeasor must pay, whether the damage occurred unintentionally, through unavoidable mishap (ones), or willfully.9 Commentators were divided about the degree of lack of intention or ones that the tortfeasor must demonstrate. Some maintained that he was liable if there was no total ones, but in the case of total ones, e.g., if a man fell off the roof in an uncommon wind and caused damage,10 he was exempt.11 However, many interpreted Maimonides’ opinion as being that a man who injures must be held liable even in a case of total ones;12 in other words, Maimonides’ ruling regarding the tortfeasor was based on a standard of strict liability. In his words in the Code:

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

7 See Chapter 2 section D(3).
8 M. Bava Kamma 2:6.
9 Sanhedrin 72b.
10 As in the ruling in Tur, Hoshen Mishpat 378, 1-2 (exempting from liability a person who fell in an uncommon wind and harmed another person’s body or property).
11 See, e.g., Tosafot, Bava Kamma 27b, s.v. veshmuel (distinguishing between compulsion that is a type of theft, in which case liability is imposed, and compulsion that is a type of loss, in which case liability is not imposed); Rosh, Bava Kamma 3:1; Rama, Hoshen Mishpat 378,1 (1911-13).
12 See, e.g., Maggid Mishneh on Maimonides’ Laws of Wounding and Damaging 6:1; Schach, Hoshen Mishpat 378, 1 (explaining that in the opinion of Maimonides and of Shulkan Arukh he is also liable in a case of total compulsion). Nahmanides also rules according to this opinion in his commentary to Bava Metzia 82b, s.v. ve’ata.
According to this source it seems that Maimonides adopts a strict liability standard for the effective damage avoider, at least as far as damages caused by a person to the property of another are concerned. But there appears to be an exception in a case of force majeure. Maimonides believes that a person who causes damage to another’s property is exempt from payment in cases that he defines as a “strike from heaven”, as he ruled in the case of the liability of the person who climbed a ladder:

If one is climbing a ladder and a rung slips from under him and he falls and causes damage, the rule is as follows: If the rung was not strong and firmly fixed, he is liable. But if it was strong and firmly fixed and yet it slipped, or if it was rotted (eaten by worms), he is exempt, for this damage is a strike from heaven.
The same rule applies in all similar cases.

Commentators struggled to explain this rule. As we saw in Chapter 2, Ra’abad questioned the definition of the breaking of a rung or the fact that the rung was eaten by worms as an act of heaven. It could be considered an unavoidable mishap (ones); however, at the beginning of the same above-cited chapter of the Code, Maimonides had already ruled that even though there is an unavoidable mishap the tortfeasor is liable – for example, if he accidently falls off the roof. Here is a case of a person causing damage in an unavoidable mishap, and nevertheless he is liable. We have mentioned the difficulty in understanding the difference between such a tortfeasor under ones and one who climbs a ladder and a rung breaks under him.

It is clear that Maimonides draws a careful distinction between ones and “a strike from heaven”, and that if a man climbs a ladder and a rung breaks under him when the ladder was tight and strong, this is not compulsion but a “strike from heaven”. But how do we define a “strike from heaven”, and how does it differ from regular compulsion? Halakhic authorities have offered various definitions for exemptions on account of a strike from heaven. Some defined this as the highest possible level of total compulsion “where it was clear that the damage was from heaven,” or in the more modern formulation of a contemporary rabbinical judge, “which was an entirely uncommon act, and one could not imagine such a thing in any way” (does he actually mean foreseeability?). Rabinovitch offers a clear definition of a strike from heaven, which matches the use Maimonides makes of the term on several occasions:

13 Laws of Wounding and Damaging 6:1.
14 Ibid., at 6:4. See also Laws of Property Damages 14:2 (providing an additional example of a strike from heaven).
15 Laws of Wounding and Damaging 6:4. And see Chapter 2 section D(3).
16 Kesef Mishneh, Laws of Wounding and Damaging 6:1 (Frenkel ed., 1975), which because of the difficulty mentioned above (regarding the ruling of the person climbing a ladder) wrote that according to Maimonides, in cases of absolute necessity the tortfeasor should be exempt. But the interpretation of Kesef Mishneh does not seem consistent with the simple language of Maimonides’ first rule, which holds the tortfeasor liable even when he was under ones and Maimonides did not distinguish between different types of ones, as inferred by Maggid Mishneh, id.). By contrast, ruling no. 4 exempts the tortfeasor from liability in the case of a strike from heaven, which is not defined as ones in Maimonides’ method. See also Resp. Radbaz, part 5, no. 1, 1905 (302).
18 See Arukh Hashulhan, Hoshen Mishpat 378, (3 explaining Maimonides’ opinion).
19 Avraham Sheinfeld, Torts 251, note 5 (1992) (Heb.).
... [t]he definition of “strike from heaven” includes two components. On the one hand it is a very rare phenomenon, an unnatural event that occurs very rarely. On the other hand there is the possibility of another force involved in the occurrence, which one cannot foresee how and when it operates.20

In light of all this, Rabinovitch seeks to settle Ra’abad’s question and explain the difference between the cases of ones when one falls off the roof and when the rung breaks on a ladder. According to this explanation, Maimonides imposes liability only in the case of ones where had the tortfeasor acted with proper caution, the damage would have been prevented. But:

[O]ur case is different because “it was strong and tight,” he looked and checked the ladder and saw that the rungs were tightly held and there was no sign of weakness of the rungs and that they were strong, so what else could he have done? It is not he who removed the rung, and this is nothing but a strike from heaven, which is unforeseeable, that the tight joint suddenly loosened or the rung was eaten by worms from inside in a way that was not visible from the outside. . . It is because of the rarity of such an occurrence that we treat it as if an external force is involved in it, such as that the fact that it was eaten by worms inside has no visible sign outside.21

According to this explanation, although Maimonides believes that the tortfeasor should be held liable for unforeseeable damage as well, this is only in cases in which he could have prevented the occurrence by taking proper precautionary measures.22 This means that Maimonides imposed a standard of care of almost strict liability; it is not a complete strict or absolute liability, however, because the tortfeasor who caused unforeseeable damage but took all required precautions should not be liable, as in this case the damage is a strike from heaven. This approach of Maimonides is different from a completely strict liability standard of care of the tortfeasor, which would impose liability on him even in the case where the injured person climbed the ladder and a rung which had been strong and tight fell out. The latter standard of care is imposed according to Calabresi’s doctrine of best decision maker, which is a strict (almost absolute) liability standard,23 higher than the standard of care used by Maimonides, and according to which there is no limit to the investment in safety and testing to prevent damage; we can therefore assume that Calabresi would impose liability even in this case. In his opinion, strict liability means that the best decision maker must bear the liability if any damage occurred, even if the damage is unforeseeable and even if he had no opportunity in the actual circumstances to prevent the damage, and his only option was to invest in measures to prevent future damage. This is the goal of optimal deterrence, and a shift to the right or to the left erodes this goal. Maimonides differs on this point; it is reasonable to assume that Maimonides is trying to achieve optimal deterrence by imposing liability that is not entirely absolute, and leaves open the option of exempting tortfeasors from liability in cases in which there is no practical way of preventing the damage.

20 Nahum L. Rabinovitch, Yad Pshuta Lehilkhot Hovel Umezik 6:4, at 143 (Ma‘ale Adumim: Ma‘aliot 2007) (Heb.).
21 Rabinovitch, ibid., at 142-43. Emphasis supplied by the authors.
22 See also Hazon Ish, Bava Kamma 11, 100:21 (making a similar clarification regarding the approach of Nahmanides, who, like Maimonides, imposes liability for damage caused under ones because “it appears that he admits that in the case of complete ones the tortfeasor is exempt, unless the person who caused the damage took every measure to exercise caution, even if the damage is entirely not common”).
23 See Chapter 4 section C(1).
That being the case, Maimonides proposes a type of liability that falls within the range between negligence and strict liability, closer to strict liability. This type of liability exempts the tortfeasor who did everything he could do in order to effectively prevent the damage but the damage occurred nevertheless, in which case it must be defined as a strike from heaven.

The nature of the standard of care that entails liability proposed by Maimonides can be clarified further by comparing the strike from heaven exemption according to Maimonides with the force majeure exemption granted by some modern tort laws to damage caused by an uncommon natural event. Izhak Englard offers two possible definitions of the term “force majeure”. The first is of a natural occurrence that a reasonable person could not have foreseen and that could not be avoided. This is a strict concept, far-removed from simple negligence, and the test is not the degree of reasonableness of the behavior but a person’s physical capabilities. The other is of a natural occurrence that a reasonable person does not take into consideration because the likelihood of it happening is small, and that cannot be prevented by taking regular precautionary measures. This latter concept of force majeure is very close to the absence of negligence, because the test is based on the behavior of a reasonable person regarding natural occurrences. It appears that the first approach is closer to Maimonides’ standard of care in this category, which is certainly of a higher level than negligence, and the test is the person’s effective physical ability to prevent the damage (the EAC test). But even according to the first approach – and in our opinion it quite accurately reflects Maimonides’ position – this does not amount to absolute liability of the tortfeasor, because he is exempt from liability for damage he could not have foreseen and which cannot be prevented.

In short, with regard to a person who causes damage to the property of another, Maimonides adopts a regime of almost strict liability of the effective damage avoider, with one exception, namely, in the case of force majeure.

*Chart 1: A Person Causing Damage to the Property of Another—*

<table>
<thead>
<tr>
<th>Almost Strict Liability</th>
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<tbody>
<tr>
<td>Negligence / Fault.</td>
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<tr>
<td>Almost strict liability. Maimonides: Person causing damage to the property of another. Exempt only in cases of strike from heaven.</td>
</tr>
<tr>
<td>Strict / Absolute liability of the tortfeasor</td>
</tr>
</tbody>
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25 *Id.*
26 Some argue that this is not necessarily consistent with the approach of other decisors. See Sheinfeld, *supra* n. 19, at 251 (referring to the relations between the above two approaches mentioned by Englard and the position of Jewish law).
2. Damage Caused by a Person bho Injures Another: Slightly More than Negligence

Regarding a person who causes bodily injury to another, Maimonides again proposes what seems to be at first sight a standard of absolute liability: “A person is always deemed forewarned whether he acts inadvertently or deliberately, whether he is awake, asleep, or intoxicated, and if he wounds another person... he must pay compensation from the best of his own property.”

Note, however, that unlike in the previous ruling concerning the person who caused damage to another’s property, Maimonides does not include an unavoidable mishap (ones) in the ruling concerning the person who causes bodily injury to another. Why was it omitted?

Several contemporary scholars explained that this is not an indication of a difference between Maimonides’ position regarding a person who causes damage to another’s property and one who causes bodily injury to another, as both are subject to the same standard of care. But others inferred – and we agree with them – that there is a difference in principle between the person who causes bodily injury to another and one who causes damage to another’s property: the standard of care of the person who causes bodily injury is lower than that of the person who causes damage to property. The former is not liable in situations of an unavoidable mishap (ones), whereas the latter is liable in cases of ones as well.

Why does Maimonides propose a standard of strict liability for the effective damage avoider in the case of the person who damages another’s property and a lower standard of care (exempt under ones) for the person who causes bodily injury to another? It would appear that Maimonides regards bodily injury to another as a wrong of the punishable tort type, and considers the compensation paid by the person causing bodily injury (or at least some components of it) to be a type of punitive fine. Therefore, Maimonides requires minimal mens rea to impose liability on someone who causes bodily injury (as is required for the imposition of criminal liability), and exempts those who were under ones, where no such mental element exists. In any case, the liability of the person who causes bodily injury to another is not strict, unlike that of the person who causes damage to another (where the compensation payments are not a type of punishment), because the fault implicated is typical of a punitive type of liability.

In Chapter 3 we already discussed the connection of parts of tort law to penal law in Maimonides’ approach. The connection to penal law is particularly evident in the Laws of Wounding and Damaging in the Book of Torts, which constitute an intermediate area between tort law and criminal law, with patently penal characteristics such as the requirement of criminal intent (mens rea). As specified above, the

27 Laws of Wounding and Damaging 1:11.
28 See, e.g., Rabinovitch, supra n. 20, 1:11, s.v. ben shogeg; Asher Gulak, “Gdarim Mishpati’im Bayad Chazaka Lerambam”, 6 Tarbiz (1935) 383; Haut, supra n. 1, at 32; Warhaftig, supra n. 1, at 224. The various interpretations of the question regarding the laws of the tortfeasor and of the person who causes bodily injury vary: some argue that both are exempt in case of an unavoidable mishap (ones) (Gulak) and others argue that both are liable even in the case of ones (Rabinovitch, Haut, and Warhaftig).
29 See Levush Mordechai, Bava Kamma, sec. 43.
30 According to Maimonides, an example of someone who is exempt from payment (or at least from a portion of the payment) is one who falls off the roof in an uncommon wind, such as a storm that broke out suddenly, or someone who had a stone in his pocket and the stone caused damage, and the man did not know it was there or knew but forgot. In these cases, the tortfeasors are exempt from payments of a criminal nature because this was an unavoidable mishap, but they owe the damage component. For details, see Laws of Wounding and Damaging 1:12, 15.
31 Levush Mordechai, supra n. 29.
component of mens rea is a necessary element in penal law but not in a tort that results in damage of property only (such as property damages and a person who damages property). This point will be discussed further in sec. B below.

**Chart 2: Damage Caused By a Person Who Injures Another—**

*A Bit More than Negligence (Mens Rea)*

| Negligence / Fault. | A bit more than negligence. Maimonides: Person who injures another. | Strict liability on the tortfeasor |

3. **Property Damage: Negligence**

Regarding damages caused by a person’s property, such as his animal, it appears that although Maimonides proposes that here too, liability should be imposed on the effective damage avoider, he does not adopt a standard of absolute or strict liability.\(^{32}\) Rather, he imposes at most a standard of care at the level of negligence (if not fault-based liability similar to that in its economic sense, of the Hand formula type). Based only on Maimonides’ statement in the *Guide*, “[t]o provide great incentive to avoid damages a man is held liable for *all damage* caused by his property,”\(^ {33}\) it may appear that Maimonides proposes a standard of absolute liability for damage caused by property. But careful examination of the detailed rulings in the *Code* shows clearly that Maimonides does not propose comprehensive absolute or strict liability in cases of damage caused by one’s property.

According to Maimonides, the owner of the animal is obligated to guard his animal carefully.\(^ {34}\) However, if the owner does everything that is required of a good watchman, and damage nevertheless occurs, he is to be exempt from payment. Thus, Maimonides rules:

> If one brings sheep into a fold and secures them with a door able to withstand a normal wind, and a sheep gets out and does damage, the owner is exempt. If, however, the door is unable to withstand a normal wind, or if the walls of the fold are weak, [it means that] he has not secured his sheep adequately and he is liable if a sheep gets out and causes damage.\(^ {35}\)

He rules similarly that the owner or watchman of animals is exempt from damages caused by the animals if they were guarded carefully,\(^ {36}\) which means guarding that requires the constant presence and

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32 As Warhaftig argued. See *supra* n. 1.
33 3:40.
34 Laws of Property Damages 4:4.
36 As required in Laws of Property Damages 4:1.
If one ties up his ox with a halter and shuts it in securely, and it gets out and causes damage, the rule is as follows:... but if it is forewarned [mu’ad, inclined to misbehave], he [the owner] is exempt. For Scripture says, “and he hath not kept it in” (Exodus 21:29), from which it is inferred that if he does guard it, he is exempt, and this ox was guarded. Similarly, if it causes damage by an act with a respect to which it is forewarned from the outset, such as by eating things suitable for it, or by breaking things with its feet while walking, the owner is exempt from paying compensation.

It would seem that the exemption granted by Maimonides to a person who guarded his beast carefully is not because his behavior is not at fault in the simple sense of the term, but because it is not at fault within the meaning of the Hand formula of economic negligence, which is very likely to be compatible with Maimonides’ approach. According to Maimonides, the basis of liability in the case of property damage is not the fault or inappropriate behavior of the owner of the property but, as we saw in the Guide, the effective prevention of damage. In other words, the objective of tort law is to prevent damage being caused, and therefore the owners of damaging property or those by whose action damage was caused are held liable “to guard them so that they cause no damage.” If the person guarded his animal properly and nevertheless damage was caused by it, there is no reason to hold him liable for any damage so caused, because he did everything in his power to prevent it. In other words, imposing absolute liability on the owners of animals for all damage their animals caused, including damage that would not have been prevented by careful guarding, does not necessarily prevent the occurrence of damage. Furthermore, it is possible that it will cause over-deterrence, which will result in the owners of animals incurring costs in respect of damage that they have no effective way of preventing, whereas tort laws commonly seek to promote optimal deterrence rather than over-deterrence, at a level that does not impose excessively high damage and prevention expenses. Therefore, there is ample logical-consequential reason for the exemption that Maimonides grants to those whose animals, although guarded carefully, nevertheless caused damage.

That being the case, this is not strict liability. For example, the result according to Calabresi’s best decision maker criterion, presented in Chapter 4, will presumably be different, and the owner of the beast will pay in any case because there is no limit to the improvement of the ways of prevention. Imposing liability on him as the best decision maker will at least provide an incentive for him to think of better ways of prevention in the future, even if he believes that at present it is not possible to guard better and to prevent the damage. By contrast, one may argue (although we do not necessarily agree) that imposing liability on the person causing the damage for unexpected damages promotes over-deterrence; therefore is

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37 According to the definition of Rabinovitch, supra n. 20, 4:4.
38 Laws of Property Damages 7:1.
39 Such as the approach of Tur, Hoshen Mishpat 399:1, where liability is based on the fact that the person did not watch over his damaging property. It has already been noted that this is not Maimonides’ opinion. See, e.g., Warhaftig, supra n. 1; Sheinfeld, supra n. 19, at 169.
40 Guide of the Perplexed 3:40, 574.
it is not advisable and should be avoided, leaving the injured party to bear the damage. This claim may support Maimonides’ approach.\textsuperscript{42}

The question that arises is whether Maimonides’ exemption of owners from damage caused by their property is necessarily grounded in a fault-based liability regime. One later halakhic authority explains that according to Maimonides, in cases of alleged damage caused by property the burden of proof that no damage was caused is shifted to the tortfeasor.\textsuperscript{43} Nevertheless, as we argued in Chapter 2,\textsuperscript{44} this interpretation is problematic and thus less probable.

In our opinion, however, there is a more plausible way of explaining Maimonides’ theory. In the \textit{Code} he uses the term \textit{peshiah} quite often,\textsuperscript{45} and therefore it seems that he adopted a standard of care of negligence for the effective damage avoider. But rereading the \textit{Code} in light of the consequentialist approach of the \textit{Guide} (as suggested in the previous chapter), we may consider the possibility of interpreting Maimonides’ negligence standard for property damages as similar to Posner’s Hand formula. Indeed, as argued in Chapter 4,\textsuperscript{46} there appears to be a great similarity between the approach of Maimonides in the \textit{Guide} and Posner’s Hand formula. Posner’s approach, in effect like that of Maimonides, provides incentives to the tortfeasor to take precautions when the cost of such measures is lower than that of the damage caused by the behavior of the tortfeasor. In our case, whoever tied his animal properly took the necessary precautions to prevent damage. If damage nevertheless occurred, it was a rare occurrence because only rarely will the animal be able to break free; therefore, even if the loss is high, the probability of its occurrence is low. In this case, it is sufficient to have tied the animal properly in order to prove a presumption of no negligence. This is compatible with the Hand formula.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart3.png}
\caption{Property Damage—Negligence}
\end{figure}

\begin{itemize}
\item Negligence / Fault.
\item Posner’s Hand Formula.
\item \textbf{Maimonides:}
\item Property damage.
\item \textbf{Strict liability of the tortfeasor}
\end{itemize}

\textsuperscript{42} Unless Calabresi also agreed that the injured party is the cheaper cost avoider whenever the damage or he himself (the injured party) is unpredictable.

\textsuperscript{43} See \textit{Commentaries of Rabbi Shmuel Rozovsky, Bava Kamma} sec. 1:2, s.v. vehine, suggesting that the consequence of the two main theories of tort liability – the theory of \textit{peshiah} and the ownership theory (concerning property that caused damage, the theory attributed to Maimonides by the \textit{yeshivah} reading) – is related to the question of who bears the burden of proof. This was discussed in detail in Chapter 2, section B(2).

\textsuperscript{44} See Chapter 2, section C(2).

\textsuperscript{45} See Chapter 2, section C(2).

\textsuperscript{46} In our view, a similarity can be found between Maimonides’ words in the \textit{Guide} and this formulation. See Chapter 4, section C(1)(b).
B. **DIFFERENTIAL LIABILITY: SCHEME, RATIONALE, AND HISTORICAL BACKGROUND**

1. **Scheme**

Section A presents Maimonides’ approach of differential liability. According to Maimonides’ method, liability is indeed imposed on the most effective damage avoider. At times, however, this standard of care is close to strict; at other times, it is negligence; at yet other times it is an intermediate level of liability. It all depends on the type of case at hand.

We tried to define the standard of care adopted by Maimonides, based on his interpretation of the talmudic texts, regarding three categories of damage: (a) damage caused by a person to the property of another; (b) damage caused by a person who injures another; and (c) damage caused by property. In each of these categories, Maimonides proposed to impose on the effective damage avoider liability that is on the scale between negligence and strict liability.

We described the hierarchy of the standards of care step by step, from the highest one, closest to strict liability (category a), which Maimonides espouses in cases in which a person caused damage to another’s property, to the lowest standard of care, negligence (category c). We also presented an intermediate standard of care which was slightly more than negligence (category b).

The following chart illustrates Maimonides’ differential model:

**Chart 4: The Complete Scheme of Differential Liability**

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Posner’s Hand Formula.</td>
<td>Maimonides: Person who injures another.</td>
<td>Maimonides: Person causing damage to the property of another. Exempt only in cases of strike from heaven.</td>
<td>Calabresi: Strict liability of the tortfeasor or injured party.</td>
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<td>Maimonides: Property damage.</td>
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The rationale of the hierarchy is clear, especially in light of the EAC test and the emphasis on control in the *Guide*. Imposing a higher standard of care for damage caused by a person than for damage caused by his property can be rationalized both deontologically and economically.

Here we should once again mention the contrast between Jewish law and modern approaches to law
and economics regarding tort laws in particular, and law, ethics, and justice in general, as we saw in Chapter 3. According to many of the proponents of law and economics, the law must create efficient incentives to prevent damage, and the emphasis is not on the deontological dimension; it is not concerned with the behavior of the tortfeasor nor with the shaping of his morals. In contrast, Jewish law, especially according to Maimonides as we have seen, emphasizes not only the prevention of damage but also the deontological, corrective justice, and religious dimensions that are related to the behavior of the tortfeasor, as part of the overarching objective of “perfection of the body” and shaping the good morals of people living together in society.

There are deontological and economic rationales for imposing a higher standard of care for damage caused by a person than for damage caused by his property. A person’s effective ability to control his own body and prevent his body from causing damage is usually much greater than his ability to control his property. Therefore, the standard of care is a function of the actual effective ability to control the actions and prevent the damage. It is easier, and probably less costly from an economic point of view, for a person to control his own actions than to control the actions of others, including animals, slaves, fire, or a pit. Obviously, the costs of oversight of workers and slaves, and of property that may cause damage such as fire or a pit, are generally likely to greatly exceed the costs incurred by a person who is careful not to cause injury himself. True, a person might not pay attention, or he may be drunk or he may cause damage while he is asleep, but in most cases, when he is awake and alert, it would be more difficult for him to watch over the actions of others in order to prevent them from causing harm than not to cause harm himself. The point here is not only economic, but of course, deontological as well. There is also greater logic, from a moral perspective, to imposing a higher standard of care on a person who causes injury himself than on a person whose property caused damage, even if the conclusion is that he should and could have watched better and supervised in order to prevent the damage caused by his property, since greater moral fault attaches to a person who is able to prevent injury to others easily than to one for whom it is more difficult. Thus, the basic rationale behind differentiation between property that causes damage and damages caused by a person, whether with his body or with his property, may be justified from various aspects.

Another, no less important, consequentialist rationale for imposing the low standard of care of negligence (rather than a higher standard) for damages caused by property lies in considerations of optimal deterrence. We voiced concerns about over-deterrence in cases of strict/absolute liability that could lead to a decline in desirable activities. It is reasonable to assume that this standard of care will cause serious harm to the related industries. There may be a difference between guarding an animal, especially at a time when animals were of great importance for their owners and were used as beasts of burden as well as for their work, meat, and milk, and the case of a manufacturing process or driving a car. In the case of manufacturing that may be dangerous and can cause damage, such as the manufacture of modern electronic and mechanical devices, reality has proven over the years that it is possible to achieve ever greater safety even if at any given time it may appear that the product has reached a maximal level of safety. Nevertheless, there may be good reasons here to impose liability on the manufacturer. Even if he

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47 Supra sec. A(3).
can prove that at the moment there is no possibility of reaching a higher level of safety, imposing strict liability would induce him to employ experts whose function is to further improve the safety of the product and to develop an even safer product in the future. By contrast, it is possible that the owner of the animal who guarded it in the best possible way cannot, at a given time or in the future, guard it any better, and for that reason imposing strict liability would not be efficient. On the contrary, it could discourage him from engaging in socially-desirable activities related to animals.

Up to this point we have explained the rationale underlying the difference between damage that is caused by a person’s property and the entire array of damages caused by a person. However, as we saw, there is a difference in the standard of care between different types of damage caused by a person. In relation to damages caused by a person to the property of another (laws relating to a person who causes damage), the standard is close to strict liability, whereas in relation to injuries caused by a person to the body of another (laws of wounding) the standard is slightly higher than negligence. How can we explain these two different standards for damages caused by a person? Furthermore, in relation to these kinds of damages, why do we not impose the same standard of care that is imposed for damages caused by property?

The proximity of Jewish tort law to criminal law, especially with regard to bodily injuries caused by people, was discussed in Chapter 3. The deontological orientation of tort law is clearly expressed in the classification of the laws of physical injury (hilkhot hovel) as laws which also have typical criminal characteristics (as well as some tort characteristics), because a person’s body cannot be measured by economic values alone. A person’s body is not his own property but that of his Creator. Injury to the human body is perceived as an injury to “God’s image”. This conception is important in itself from a value-based perspective, and it is meaningful not only because of its practical effect on the attitude of society toward injury to the human body. Although the law of the tortfeasor is not exactly “an eye for an eye”, as Maimonides points out, this does not alter the essence of the tortfeasor’s act, “which is deserving of him losing an limb or being injured when he did it, and thus paying for his damage,” because “all eternity, and all the money in the world cannot heal the wound of the injury we caused to man,” as noted by the well-known philosopher Emmanuel Levinas.

Therefore, as demonstrated in Chapter 3, Maimonides’ tort theory consists of various objectives and considerations that operate in concert, without Maimonides perceiving them to be contradictory. Different objectives predominate in different types of damage. It is therefore important to pay attention to the legal classification used by Maimonides in the Book of Torts (Sefer Nezikin) in the Code. This is a detailed and sophisticated classification that has far-reaching consequences with regard to the various objectives of tort law. Below are some of its main characteristics.

First, in the Code, Maimonides combines rulings of a purely civil character (for example, concerning the return of lost property) with rulings of a purely criminal nature (such as those governing murder). In general, it appears that Maimonides does not consider the Book of Torts to be an integral part of classic tort law, which he included in the Book of Civil Laws and the Book of Acquisitions, but rather as situated somewhere between civil and criminal law. We can also identify a gradual transition from rulings of a

48 Laws of Wounding and Damaging I:3.
more civil character, included in the first part of the Book, for example those relating to property damage and loss, to rulings of a more punitive nature that are included in the last part of the Book, such as those concerning bodily injury (Laws of Wounding) and murder.

Secondly, the classification that Maimonides applies in the Book of Torts makes extensive use of certain parameters, on the basis of which he differentiates between various rules: (a) How was the damage caused? Was it caused by an animal owned by the person or as a result of a wrong that the person caused by his actions? (b) Who suffered the damage? Was it an animal, property, or a person? (c) What damage was caused? Was it property damage only or was it bodily injury? In light of these parameters, the tort laws are ordered from least to most serious. They begin primarily with rulings concerning damage caused to property by property owned by the tortfeasor (Laws of Property Damages), and with damage caused by a person who robs or steals the property of another (Laws of Theft and Laws of Robbery). They then move on to bodily injury (Laws of Wounding) and finally to manslaughter (Laws of Murder). In light of these parameters, Maimonides makes a basic distinction regarding what today we would call tort law per se (not including criminal issues such as murder and robbery) between the rules of damage caused by one’s property – property damages – and the rules of damage caused by the person himself – the causer of bodily injury and damage. Among the rules of causers of bodily injury and damage he clearly distinguishes between a tortfeasor who damaged another’s property (Laws of Damaging) and one who injured another’s body (Laws of Wounding).

Here it should be noted that Maimonides’ distinction between different types of damage, on the basis of which his differential model is constructed, is also liable to be affected by the distribution of the different types of damages mentioned in the Book of Exodus. Jackson’s comprehensive study of the biblical law expounded in the Mishpatim portion of the Book of Exodus includes extensive discussion of the tort laws and criminal laws included therein, as well as a detailed analysis of the differences between the various categories mentioned in the verses, including assault, the goring ox, theft, pit and fire. We have no intention of becoming involved and deciding between the different interpretations that have been given to the scriptural verses. It would appear, however, as discussed at length in Chapter 3, that many parallels may be found between Maimonides’ formulations in the Code and his distinctions between different types of tortfeasors and between the verses in the Mishpatim portion. The similarity between Maimonides’ formulation and the scriptural verses is also evident in several of the prominent characteristics of the various categories, such as the required standard of care in each, as well as the

50 Within these rules there are secondary distinctions, such as those between rules of property damage, damage caused by beasts belonging to a person (ox damages), and damage caused by persons (pit and fire). Moreover, Maimonides distinguishes between an ox which gores another ox and one which gores a person.
51 Exod. 21:1-22:16
53 Exod. 21:18-19; Jackson, ibid., at 172-208.
54 Exod. 21:28-36; Jackson, ibid., at 255-289.
55 Exod. 21:37-22:3; Jackson, ibid., at 291-312.
56 Exod. 21:33-34; Jackson, ibid., at 313-321.
connection of the various payments to the criminal law. These findings support what we said in the previous chapters, following Jackson’s research, that Maimonides’ formulations in the Book of Torts and in the Guide at times appear to have been strongly influenced by the scriptural formulations. Let us now return to the third and last characteristic of Maimonides’ classification in the Book of Torts.

The various distinctions that Maimonides makes between the different types of damage based on the parameters mentioned above are also relevant from the point of view of the dominant objective of each one of them. For example, whereas the dominant objective in property damage is generally the prevention of damage and the imposition of liability on the effective damage avoider, in the case of damage caused by people, deontological considerations have greater weight. Accordingly, Maimonides divides tortious events into two groups and in each group assigns dominance to a certain goal.

The civil-criminal divide, too, is manifest in the distinction that Maimonides makes between various types of damage. In cases of bodily injury the punitive aspect of compensation acquires prominence and fulfills the role of ransom, regardless of whether the injury was caused by a person or by an ox. By contrast, in cases where the damage occurs to a person’s property, the compensation is of a clear and purely civic nature, especially when the damage is caused by one’s property and not by the person himself.

In view of the above, one can understand why Maimonides assigned to a person who wounded another a special mens rea at a higher level of standard of care than regular negligence but lower than strict liability. A person who wounds another is substantively different from those who commit other civil wrongs, including a person who damages the property of another and one whose property causes damage. The person who causes bodily injury to another is executing an act that contains something of a criminal offence, and therefore a mens rea of criminal intent is required, for according to the halakhah, an offence that was committed unintentionally only (regular negligence) is not punishable. The requirement of intention is not unrelated to the compensation made by the tortfeasor to the injured party, for this compensation contains punitive elements as well as tortious ones.

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59 See e.g., the verses that deal with injury in the Torah (Exod. 21:18-19), according to Jackson’s interpretation (ibid., at 173): “… deal with assault which occurs in the course of a quarrel – a case of intentional but unpremeditated injury.” And see also ibid., at 180. A similar requirement of intention also arises from Maimonides’ formulations in the rulings in Laws of Wounding and Damaging mentioned in n. 62 below.

58 See e.g., Jackson’s discussion, ibid., at 133-138, of the essence of the biblical ransom (kofer) which replaces the punishment (death). A similar approach emerges from what Maimonides writes in the Code and in the Guide, as mentioned below in n. 64.

60 Mainly Chapter 3; see also Chapter 2, sec. E, and Chapter 4, sec. B(1)(a).


62 See, e.g., Laws of Wounding and Damaging 1:16 (which requires the element of premeditation in order to incur liability for all the payments of the tortfeasor); ibid., 5:1 (that the person who injures another violates a biblical prohibition; also mentioned there is a type of special, specific intention – that the injury is inflicted against a background of hostility).

63 See e.g., Laws of Murder 1:1 (which requires criminal intention in order that the killer be liable for punishment); ibid., 6:1-4 (which exempts from punishment those who did not kill intentionally but with different degrees of inadvertence).

64 And see Maimonides, Laws of Wounding and Damaging 1:3, who writes that a person who injures another ought to be wounded, in the sense of “an eye for an eye”, but this is not done; rather, payment is made for the damage, which is a type of ransom payment that acts as atonement instead of the corporal punishment (in this vein see the Guide, 3:41). And see Laws of Wounding and Damaging, 5:9-11 (which distinguishes between a person who causes injury to a person’s body and one who damages his property, and emphasizes the clearly criminal elements attaching to a person who causes bodily injury, such as the requirement of requesting the pardon of the victim). For further discussion see Ilan Sela, Payment for Inflicted Personal Injuries in Jewish Law: Between Civil and Criminal Law (PhD thesis, Ramat Gan: Bar-Ilan University, 2007).
The special requirement of intention, when criminal offences are involved, is also evident in Maimonides’ responsum in the matter of the brigands, discussed in Chapter 2. As will be recalled, in that responsum Maimonides distinguished between one whose intention it was to steal and one who intended to cause damage. Admittedly, emphasis on the element of intention raises a problem, as we said, if our context is tort law (which deals primarily with unintentional torts). However, by virtue of our present discussion Maimonides’ responsum can be understood easily, for he requires special intention precisely of the person who intends to commit the criminal offence of theft, but not of the person who only causes damage (in relation to whom the intention is less relevant).

In sum, within the reality in which Maimonides operated, the fact of a person exercising control over the damage had great significance. Because Maimonides’ aim was to prevent damage, he was prepared to impose a higher standard of care on the effective damage avoider to the extent to which he was capable of exercising control over his actions. Therefore, Maimonides chose to regard a person who himself caused damage to another’s property as the effective damage avoider and impose on him almost strict liability, similar – although not identical – to Calabresi’s best decision maker. The only exemption is the case of force majeure (“a strike from heaven”), where a person truly has no control. When he has control over his actions a strict and absolute liability is to be imposed on him, without examining his fault in each case. It other cases, however, lower standards of care are imposed for reasons mentioned above – each category of cases and its rationale. In the category of bodily injury caused to another, an element of quasi-punishment is added, which is characteristic of Maimonides’ theory and Jewish tort law in general at this point, in its intermingling with criminal law. In this case Maimonides requires a specific mens rea, an absolute requirement in criminal law that is hardly ever present in tort law (except, for example, in intentional torts in the Common law). In the category of damages caused by a person’s property, Maimonides’ approach cannot support the imposition of strict liability on the owner of the property: he needs to be treated more leniently, i.e. liability is imposed under a fault-liability regime in the economic sense which resembles the Hand formula. Any other standard in that reality, such as strict liability or almost strict liability, may cause over-deterrence. Imposing the lower standard of negligence enables the effective damage avoider who caused damage to defend himself if the required prevention costs were higher than the expected damage, as in the cases of the binding of the animal and the uncommon wind.

3. The Historical Background, Circumstances, and Nature of the Tortfeasors: Between Maimonides’ Times and the Contemporary Era

A description of the historical background to Maimonides’ activity and of the circumstances in which the rulings that constitute the differential model were devised are also essential to an understanding of the Maimonidean model. Moshe Halbertal has shown that what Maimonides wrote must be viewed through the prism of “Maimonides of his Generation”. As we will see in the following chapter, similarities may

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66 Chapter 2, section D(1).
67 Moshe Halbertal, Maimonides: Life and Thought (New Jersey: Princeton University Press, 2014), at 7. In Chapter 3 we presented a more comprehensive analysis of the Maimonidean tort theory in the context of his time and place. Above we discuss briefly some aspects which are relevant to our discussion.
be found between Maimonides’ differential model and various contemporary theories, but there are also quite a number of differences. This is not surprising in view of the difference between the period in which Maimonides flourished and the present time. This difference finds expression on several planes. We will begin with contemporary reality.

Firstly, contemporary tort law operates in a reality of industry, with its employers and employees, producers and consumers, drivers and pedestrians, physicians, surgeries, and hospitals. In classic contemporary tort cases, it is easy to find mass tortfeasors with deep pockets, risk managers and entities calculating damages and the economic viability of their businesses. It is also common to manage risk by using data in order to calculate expected costs versus benefits, probabilities, precautions and risks. In such circumstances, it is easier, for example, to impose strict liability – according to the supporters of this standard of care – on those who can prevent the damage in a cheaper and more effective way. Even if occasionally, complete and full liability without a dimension of fault and negligence is imposed on large entities that employ economic calculations and risk managers, it is likely that this imposition will not bring about the cessation of their activity or reduce their viability. At most it would result in better risk management and a more serious effort to prevent damages, which is useful to society as a whole. This is especially true in cases of mass torts (such as mass exposure to pollution or radiation) and serial torts (such as medical malpractice recurring in the same institution), which were practically non-existent in Maimonides’ time.

Secondly, contemporary torts operate in the age of insurance, perhaps the most significant distributor of loss in society, alongside employers. Most of the activities at the basis of tort claims today are insured activities, and most contemporary scholars not only take this into account but see insurance as an important factor in tort law theory. Insurance directs behavior and provides information, and it is compatible with optimal deterrence, loss distribution, deep pockets, and sometimes also with distributive justice. In this reality it is sometimes much easier to impose strict liability. In most cases the direct tortfeasor anyway does not pay: the insurance does. The tortfeasor’s participation takes the form of premium payments (and the premium increases with more dangerous and less careful behavior), deductibles, cancellation of no-claim discounts, criminal liability if the tort has criminal aspects to it, risk of being fired or denied promotion in the case of employees, and so on.

Thirdly, and in regard to the former point, contemporary torts operate in a reality of liability of employers, who in many cases are insured and are loss distributers. At times the state obligates them to purchase insurance to distribute losses and protect the rights of workers. Contemporary torts also operate within a reality of state regulation. At times the legislator regulates the field, for example by introducing a requirement to purchase a certain safety device to help prevent damage, even if it is not economical for the driver or for the manufacturer. The legislator enforces the regulation through insurance (insurance is not underwritten until it has been proven that the insured purchased the device in question) or through state mechanisms (such as denying a vehicle test without proof of a required device having been installed). This reality helps prevent damages according to many contemporary approaches, and thus is used widely in today’s world.
Maimonides experienced a completely different reality, which to a certain degree exists even today, albeit only in a minority of cases. It was a simpler reality, which usually allowed identification of the effective damage avoider from a limited list of two or three actors, contrary to the reality of mass tortfeasors. Maimonides issued his rulings in the reality of the type of damages mentioned in the Talmud, which were caused mainly by individuals to other individuals: an ox belonging to one person gored another, ate the produce, or trampled on it; a person fell on another or on his property; a person damaged another in his sleep; a person’s animal roamed freely on another’s premises; a person was not careful enough and water or a fire from his field passed into the neighboring field; and similar damages between immediate neighbors. Following the Talmud, Maimonides in his Code hardly addressed a reality of mass and serial torts, of large and powerful entities causing massive or serial damages to numerous private individuals. He spoke of masters and slaves rather than employers and employees. It is important to note that today, many claims are against employers, based on vicarious liability.68 In some countries employers carry mandatory insurance, so that each claim against an employer means necessarily a claim against an insurance company. Maimonides does not deal with the reality of insurance and torts caused by mass production and modern industry, which is only natural, as the time of Maimonides precedes by centuries that of the industrial and consumer revolutions; neither did the practice of insurance exist, or at least it was not as common in Maimonides’ days as it is in ours.69

Indeed, the difference between Maimonides’ time and the modern era can be illustrated tangibly by various examples from each. Maimonides’ examples, mostly from the Talmud, relate to a traditional agricultural society. The issues concern mainly the damage caused directly by a single person or his beast to another single person. In this situation compensation is paid directly from the tortfeasor’s pocket to the pocket of the damaged party. By contrast, today’s tort reality provides examples from the world of modern concepts: means of mass production, damage caused by defective products, and producer-consumer relationships including, for example, damages caused by controlled explosions in construction or industry, road accidents and work accidents, liability of employers employing numerous workers, and more. What is common to most of these activities is that they are usually insured. Insurance is therefore the mechanism by which compensation is often paid. In the world of Maimonides there was no insurance and there are no significant loss distributors. The damage fell in its entirety on the injured person or on the tortfeasor; therefore, careful thinking was required in each case about what kind of liability should be imposed on the effective damage avoider. Neither was there regulation. It should be remembered that during most periods, Jewish law developed clearly as a non-state or extraterritorial law; as such it contains almost no regulation to help prevent damages.

As we have seen, Maimonides believed that one of the two main purposes of tort law is to prevent damages, and not necessarily to correct an injustice or to restore the status quo ante. As noted above, this is quite an innovation. In Maimonides’ days, the cost of strict liability in cases of damages caused by

68 This difference between Maimonides’ times and our own helps to explain why Maimonides did not adopt the model of vicarious liability in relation to the liability of a master for the damage caused by his slaves. See Laws of Theft 1:9.
69 Indeed, the halakhic decisors of recent generations had to expand on the questions involved in the application of modern tort law in a context of modern reality in which the tortfeasor and/or the injured party are insured. See, e.g., Sheinfeld, supra n. 19, at 332-35.
one’s property was occasionally too heavy. In a world in which a domestic animal was the equivalent of a private vehicle, truck, or motorcycle of today, the imposition of strict liability on the owner of an animal that caused damage, in every case and under all circumstances, without the owner of the animal being able to distribute the loss over other members of the community (as does the driver with respect to other drivers through the loss-distribution mechanism of insurance), could be a real disincentive to owning an animal. It is difficult to control an animal, at times more so than a car. Paying full compensation exacts a heavy toll in the case of strict liability. In the reality of those days, for people who had a vital need for transportation, milk, and meat products, etc., not owning an animal could deliver a death blow to all economic activity. Full payment as an expression of strict liability of the owner, repeatedly for every instance of damage caused by the animal, would reduce the level of activity and leave ownership of animals only to the rich, something that is undesirable both from the economic and the social-distributive point of view.

The differences of historical background and circumstances are not minor. These significantly different realities result in differences in the rulings that emerge. It is reasonable to assume that if contemporary tort scholars were operating within the reality of Maimonides’ time, and vice versa, their approaches would have been more similar.

C. Conclusion

Maimonides’ model of differential liability solves many of the problems mentioned in Chapter 2 relating to unresolved matters in the Talmud. It was not possible to provide appropriate responses to these problems in the form of a unitary standard of care of negligence or of absolute liability that would be applicable to all tortious events. Opting for differential liability, according to which for each group of cases there is a different standard as appropriate, constitutes a fitting compromise between a sweeping selection of a single fixed standard – either negligence or strict liability – that is not always appropriate for the case at hand.

Maimonides attributes importance to effectiveness, and examines, at the first stage, who is the effective damage avoider – the tortfeasor or the victim. At the second stage, however, Maimonides chooses to examine, independently, the standard of care, and he does not rush to assert that the liability of the effective damage avoider will always be absolute, as does Calabresi, or that negligence will be looked at per se, in accordance with the degree of moral fault and the principles of corrective and distributive justice, or according to an examination of the costs of precautions as against the probability of damage, as in Posner’s Hand formula. The differential model makes it possible to impose liability on the effective damage avoider at the standard of negligence in some categories; in some others, at a standard closer to strict (but not absolute); and in yet other cases, liability that is situated on the scale between these two extremes. Understanding the rationales for imposing a different standard in each category of cases constituted the key to presenting a scheme of a differential model of tort liability according to Maimonides.

In our days, too, states sometimes adopt different standards of care in accordance with the category of cases.70 Thus, for example, states might adopt the standard of negligence in the majority of cases, but

70 We discussed this at length in Chapter 1.
nevertheless impose absolute or almost absolute (strict) liability in cases of road accidents, defective products, or individual incidents of damage in which the state wishes to allow the victim to receive compensation in every case, for different reasons. However, the historical background and the different circumstances in which Maimonides operated are of importance in the context of the differential model that we are presenting as reflecting in effect Maimonides’ approach. Thus, for example, attaching absolute liability to property damage could have involved over-deterrence in the context of an agrarian society in which the animal that caused damage sometimes constituted the sole source of family income, and thus there was a disincentive to engage in the major occupation of that period. The reality in our day is different. Nevertheless, as we shall see in the following chapters, even if the cow or the ox of Maimonides’ times are not at center stage, but rather, a motor vehicle, the defective product or the polluted air, and despite the changes in the historical background, it is possible to conduct a conversation at a certain level between the old, Maimonidean theory and the contemporary tort theories, and even to achieve certain results – some of them surprising.