

LCA 4740/00

1. Limor Amar
 2. Naftali Amar
- v
1. Orna Yoseph
 2. Ya'acov Schlesinger
 3. Yediot Tikshoret Ltd.

The Supreme Court sitting as the Court of Civil Appeals

[14 August 2001]

Before President A. Barak, Vice President S. Levin and Justice T. Or

Appeal by leave on the judgment of the Nazereth District Court (President Y. Abramowitz, *Vice President* M. Ben David and Justice N. Mamen) dated 1 June 2000 in CC 272/99, in which the Court overruled the judgment of the Magistrates Court in Nazereth (Justice A. Abraham) from 2 June 1999.

Facts: The appellants are a couple who had a baby girl born whom they did not take home from the hospital. She was born with birth defects. The respondents were involved in the publication of two articles on the matter of the girl. In one article details of her birth were given and it was written that she was abandoned by her parents. It was written in the subtitle of the article that the mother of the baby is a drug addict. In the other article the birth defects of the daughter and the abandonment were published. The appellants sued the respondents on the basis of the Defamation Law 5725-1965 for these publications. The suit was filed for the amount of 100,000 NIS for reasons related to filing fees. The Magistrates Court (Justice A. Abraham) determined as to what was written in the first article that the mother was a drug addict that this constituted defamation and the respondents did not fulfill the requirements for the defenses of truthfulness or good faith. The Magistrates Court awarded the appellants 100,000 NIS in compensation and also ordered the respondents to pay 15,000 NIS in court fees. The respondents appealed to the District Court which reduced the compensation to 40,000 NIS, the District Court also reduced the award of court fees and set it at 6,000 NIS, and determined that the compensation award would only be in favor of the appellant. The appellants were granted leave to appeal and appealed this decision.

Held: The Court determined that the non-economic damage had been proven in this case, including: damage to the appellant's reputation in that it was written about her that she is a drug addict; and severe injury to her feelings during her difficult times as it was hinted that the daughter was born with a birth defect due to the mother's drug addiction. Furthermore, the respondents did not minimize the damage by publishing a correction and increased the damage by continuing to claim the truthfulness of the publication though they knew that there was a mistake in the publication. In this situation the compensation that was determined in the Magistrates Court (100,000 NIS) was proper. Also, for the purposes of this appeal, the Court rejected the stance of the defendant that Amendment no. 6 of Prohibition of Defamation Law, in adding section 7A(b) to the law, established a maximum threshold for compensation without proof of

damages. The Court overturned the District Court's decision, reinstated the Magistrates Court award of 100,000 in compensation and ordered the respondents to pay the appellants' attorneys' fees in the amount of 30,000 NIS, as well as court fees.

Legislation cited:

Prohibition of Defamation Law 5726-1965 – ss. 1, 2, 6, 7, 7a(b), 9(a)(2), 14, 15, 16, 19.

Prohibition of Defamation Law (Amendment no. 6) 5759-1998.

Torts Ordinance [New Version] ss. 2, 71, 76, chapter 5.

Civil Torts Ordinance, 1944, ss. 2(2)-15, 55B, 58-61, 60, 63-68A.

Regulations cited:

Civil Procedure Regulations, 5744-1984, r. 513.

Israeli Supreme Court cases cited:

- [1] CA 214/89 *Avneri v. Shapira* IsrSC 43(3) 840.
- [2] HCJ 6126/94 *Senesh v. Broadcast Authority* IsrSC 53(3) 817.
- [3] FHC 7325/95 *Yediot Ahronot Ltd. v. Kraus* IsrSC 52(3) 1.
- [4] HCJ 153/83 *Levi v. Southern Command Commander of Israel Police* IsrSC 38(2) 393.
- [5] CrimA 255/68 *State of Israel v. Ben Moshe* IsrSC 22(2) 427.
- [6] HCJ 4804/94 *Station Film Company Ltd. v. Film and Play Review Board* IsrSC 50 (5) 661.
- [7] PPA 4463/94 *Golan v. Prison Authority* IsrSC 50(4) 136.
- [8] HCJ 2481/93 *Dayan v. Jerusalem District Commander* IsrSC 48(2) 456.
- [9] FH 9/77 *Israel Electric Company Ltd. v. 'Ha'aretz' Newspaper Publication Ltd.* IsrSC 35(2) 457.
- [10] CA 348/85 *BenZion v. Modiin Publication Ltd.* IsrSC 42(1) 797.
- [11] HCJ 6658/93 *Am K'Lavi v. Jerusalem Police Captain* IsrSC 48(4) 793.
- [12] CA 670/79 *'Ha'aretz' Newspaper Publication Ltd. v. Mizrahi* IsrSC 41(2) 169.
- [13] CA 30/72 *Freedman v. Segel* IsrSC 27(2) 225.
- [14] CA 802/87 *Nof v. Avneri* IsrSC 45(2) 489.
- [15] CA 1370/91 *Mashour v. Habibi* IsrSC 47(1) 535.
- [16] FH 15/88 *Melekh v. Kornhauser* IsrSC 44(2) 89.
- [17] CA 295/94 *Modiin Publication Ltd. v. Spiro* IsrSC 46(3) 48.
- [18] CA 5610/93 *Zeleski v. Local Committee for Construction and Planning, Rishon L'Zion* IsrSC 51(1) 68.
- [19] CA 1977/97 *Barzani v. Bezeq Israeli Communication Company* IsrSC 55(4) 584.
- [20] CA 22/49 *Levi v. Mussaf* IsrSC 4 558.
- [21] CA 70/52 *Grossman v. Rot* IsrSC 6 1242.
- [22] CA 467/77 *Horowitz v. Port Authority in Israel* IsrSC 33(2) 256.
- [23] CA 357/80 *Naim v. Barda* IsrSC 36 (3) 762.
- [24] CA 930/90 *Municipality of Netanyah v. Zimmerman* (unreported).
- [25] CA 541/63 *Reches v. Hertzberg* IsrSC 18(2)120.
- [26] CA 2055/99 *Ploni v. Harav Ze'ev* IsrSC 55(5) 241.
- [27] CA 492/89 *Slonim v. 'Davar' Ltd.* IsrSC 46(3) 827.

[28] CA 552/73 *Rosenblum v. Katz* IsrSC 30(1) 589.

American cases cited:

[29] *Sweeney v. Patterson* 128 F. 2d 457 (1942).

[30] *New York Times v. Sullivan* 376 U.S. 254 (1964).

[31] *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974).

Australian cases cited:

[32] *Theophanous v. Herald & Weekly Times Ltd.* (1993-1994) 182 C.L.R. 104.

[33] *Stephens v. West Australian Newspapers Ltd.* (1993-1994) 182 C.L.R. 211.

English cases cited:

[34] *Derbyshire County Council v. Times Newspaper* [1993] A.C. 534.

[35] *John v. M.G.N. Ltd.* [1996] 3 W.L.R. 593 (C.A.).

Canadian cases cited:

[36] *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130.

Israeli books cited:

[37] A. Shinhar *Slander Laws* (1997)

Israeli articles cited:

[38] H. H. Cohn, 'The Values of a Jewish and Democratic State – Studies in the Basic Law: Human Dignity and liberty', *HaPraklit – Jubilee Volume*, 1994.

[39] A. Barak, 'The Tradition of Freedom of Expression in Israel and its Problems' *Mishpatim* 27 (1996-1997) 223.

[40] A. Barak, 'Assessing Damages in Bodily Injury: The Desired Law and the Current Law' *Iyunei Mishpat* 9 (1983) 243.

Foreign books cited:

[41] I. England *The Philosophy of Tort Law* (Cambridge, London, 1993).

[42] J.C.C. Gately *On Libel and Slander* (London, 9th ed., by P. Milmo, W.V.H. Rogers, 1998).

[43] J.G. Fleming *The Law of Torts* (Sydney, 8th ed., 1992).

Foreign articles cited:

[44] R.C. Post 'The Social Foundations of Defamation Law: Reputation and the Constitution' 74 Cal. L. Rev. (1986) 691.

[45] J.G. Fleming 'Libel and Constitutional Free Speech' *Essays for Patrick Atiyah* (1991) 333.

[46] G.C. Cook 'Reconciling the first Amendment With the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits' 93 *Dick. L. Rev.* (1989) 265.

For the appellant – Ephraim Cohen

For the respondent – Zvi Shtourman

JUDGMENT

President A. Barak

What are the criteria for determining compensation in a suit for defamation – that is the question before us in this appeal.

The Facts

1. The appellants are a young couple that live in Tiberias. Their daughter was born (on 6 October 1994) with a rare syndrome. She suffers, among other things from severe distortions in her limbs and head. The appellants refused to take their daughter home. She was left in the hospital. The medical staff took care of her for many months. Respondent no. 1 is a reporter for respondent no. 3. It is a local paper distributed in Tiberias and the northern part of the country. The newspaper's editor is respondent no. 2. Two articles were published on the matter of the girl. In the first article (from 25 November, 1994) the details of her birth were given and it was noted that she was abandoned by her parents. In the subtitle of the article it was written that the mother of the baby is a drug addict. In the second article (from 25 August 1995) the birth defects of the daughter and the abandonment were published. The appellants sued the respondents on the basis of the Defamation Law 5725-1965 [hereinafter: 'the law'] for these publications. For reasons related to the filing fee they filed their suit for the amount of 100,000 NIS.

The Magistrates Court

2. The Magistrates Court (Justice A. Abraham) determined that what was said in the articles constitutes defamation (as stated in section 1 of the law). It was determined that the publications in the local paper led to the identification of the appellants as the parents of the baby. They damaged their reputation, humiliated them and degraded them before other persons. However, it was determined that the details in the two articles as to the physical condition of the girl and her abandonment were true, and there was an interest to the public in their publication. Therefore, the respondents had a defense from liability (see section 14 of the law). As to the publication of these details, the suit was dismissed. The Court examined whether the defendants had a good defense as to the publication in the first article, that the mother was a drug addict. In this matter it was determined that the mother does not take drugs, and is not a drug addict. The publication in this matter constitutes defamation of the appellants without them having the defense of 'I spoke the truth'. So too it was established that the defendants did not have the defense of 'good faith' (as stated in section 15 and 16 of the law).

3. As for the appellants damages as a result of the publication in the first article as to the mother being a drug addict it was determined, that indeed what was said in the article spread throughout the neighborhood

where the appellants lived. The publication poured salt on their wounds, as in addition to their difficult situation in the fact of the birth defect that befell their daughter, their pain was increased by the description of the mother as a drug addict, from which it one might understand that the mother brought the tragedy on her daughter and on herself for taking drugs. Proof was also brought that due to this publication the appellant's employer was forced to fire her, since a customer in the store where the appellant worked identified her as the one who gave birth to a daughter with birth defects because she was a drug addict. As to the conduct of the respondents it was determined that they did not undertake any reasonable effort to check before the publication whether the mother was a drug addict. Despite this they did not initiate any correction of the first article. Quite the opposite, during the course of the trial they did all that they could – including an attempt to reveal the guardianship file of the baby – in order to prove that the mother was in fact a drug addict, even though already in the pre-trial hearing respondent no. 1 admitted that there was a mistake in the article as to this matter. Finally, the Court noted that in the newspaper 'Ma'ariv' (on 27 September 1995) an article was published at the initiative of the appellants in which they told their story. It was determined that this did not reduce the compensation to which the appellants were entitled. It was also determined that this publication did not add to or detract from the publication of the respondents as to the appellant being a drug addict.

4. The Magistrates Court determined that that primary damage to the appellants was the damage to their reputation, their feelings and their spirit. It added that it was of the opinion that economic damage could also have been caused to the appellants, and in fact may possibly have been caused. It was determined that 'the totality of the considerations which surround the matter, and in particular the fact, that the erroneous publication was made when the plaintiffs were in a difficult emotional situation due to their eldest daughter being born with a birth defect, due to which they left the girl in the hospital, can increase the damage to the plaintiff, and from this is derived the amount of damages that the defendants are to be held liable for' (paragraph 33). The amount of damages was set at 100,000 NIS. The respondents were also ordered to pay 15,000 NIS in court fees. The Court emphasized that the respondents conducted a war of attrition to prove that the appellants was a drug addict, when they knew all along that this publication was erroneous.

The District Court

5. The defendants appealed to the District Court. The appeal revolved around both the matter of the liability and the matter of the compensation. The District Court (President Y. Abramowitz, Vice President M. Ben David and Justice N. Mamen) dismissed the appeal as to liability. The appeal on the amount of compensation was granted. It was determined that the Magistrates Court was excessive in the amount of compensation when it awarded the full amount of the suit without giving weight to the fact that additional arguments of the appellants

(before us) were dismissed. The District Court set the amount of compensation at 40,000 NIS. In determining this sum the District Court took into account that the circle of people who might identify the appellant as a drug addict, soon after publication, was fairly limited. So too, the District Court reduced the award of court fees and set it at 6,000 NIS. Finally, it was determined that the compensation award would be in favor of the appellant only and not her partner.

The Arguments before Us

6. The appellants applied for and were granted leave to appeal. They argued before us that it was not appropriate to intervene in the determination of compensation. According to their claim, the amount of compensation must reflect the importance of a person's reputation. The amount of compensation must clarify that a person's reputation is not 'cheap'. Harmful publication which is motivated by the journalistic goal of 'grabbing a headline' without prior fact checking is to be deterred. The appellants turned our attention to the fact that after the judgment of the Magistrates Court the Prohibition of Defamation Law (Amendment no.6) 5759-1998 (hereinafter: 'Amendment no. 6) was passed, according to which in a trial for a civil tort of defamation the court may require the defendant to pay compensation not to exceed 50,000 NIS without proving damages (section 7A(b)). According to the appellants' claim, against the background of this provision – which does not apply in our case – the amount that the Court awarded was not excessive. Finally, it was emphasized that the Magistrates Court did not award the full amount they asked for, as the amount of compensation in the petition was reduced to 100,000 NIS due to the economic hardship in paying the filing fee. According to the appellants claim, the re-evaluated amount of the suit at the time of the decision in the Magistrates Court stood at 150,000 NIS.

2. The respondents sought to leave the decision of the District Court standing. According to their claim, the Magistrates Court was excessive in the amount of compensation it awarded them. Amendment no. 6 establishes a ceiling on general damages of 50,000 NIS, and this can indirectly also impact the case before us. The respondents emphasized that they acted in good faith while seeking to assist in the adoption process of the minor. They also noted that the Magistrates Court accepted the stance of the respondents on the matter of the publications, apart from the appellant being a drug addict. This should also be reflected in the amount of compensation awarded.

The Prohibition on Defamation as a Balance between Conflicting Constitutional Rights

8. The laws as to the prohibition on defamation constitute a delicate balance among human rights central to every democracy: the right to one's good name and privacy on the one hand and the right to freedom of expression on the other. A liberty seeking society is not to exist without protection of the reputation of each one of the society's members (see CA 214/89 *Avneri v. Shapira* [1] (hereinafter: the *Avneri* case at p. 856). I explained this in one of the cases when I stated:

‘One who steals my property may compensate me with money. One who steals my reputation steals my reason for existing. A person’s reputation determines the way he relates to himself and the way his friends relate to him. It determines the attitude of society to him. The only asset that the multitude has – whether they serve in the governmental authorities or whether they operate in the private sector – is their reputation. It is as dear to them as life itself’ (HCJ 6126/94 *Senesh v. Broadcast Authority* (hereinafter: ‘the *Senesh* case’ [2], at p. 832).

Indeed, a democratic regime that protects the liberty of each of its individuals is permitted and must protect not only the body of the individual but also his spirit and reputation. In Israel the protection of one’s reputation is also derived from the protection of human dignity. (See FHC 7325/95 *Yediot Ahronot Ltd. v. Kraus* [3] at p. 74; H. H. Cohn, ‘The Values of a Jewish and Democratic State – Studies in the Basic Law: Human Dignity and liberty’, *HaPraklit – Jubilee Volume* [38] at p. 40 as well as *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130 [36] at p. 1175. So too it is possible occasionally to anchor the defense of one’s reputation in the right to privacy, as a publication that is defamatory more than once violates a person’s privacy and personal life.

9. Freedom of expression is a central component in every democratic regime. It has a ‘... a place of dignity in the hall of basic human rights’ (HCJ 153/83 *Levi v. Southern Command Commander of Israel Police* [4] at p. 398). It constitutes the ‘... life breath of democracy’ (Justice Agranat in CrimA 255/68 *State of Israel v. Ben Moshe* IsrSC 22(2) 427 [5], at p. 435. See also [39]). A democratic regime should not exist without freedom of expression being ensured. In Israel this protection of freedom of expression is also derived from the constitutional protection of human dignity (see HCJ 4804/94 *Station Film Company Ltd. v. Film and Play Review Board* [6], at p. 675; PPA 4463/94 *Golan v. Prison Authority* [7] at pp. 156-157; HCJ 2481/93 *Dayan v. Jerusalem District Commander* [8] at p. 468, and compare to the *Senesh* case [2] at pp. 864-865).

10. This being so, one’s reputation and freedom of expression are derived from the same ‘mother’ right itself, from human dignity. These two twins – one’s reputation and freedom of expression – toss about in the bowels of democracy. At times they complete each other. At times they clash with each other. The freedom of expression of one damages the reputation of the other. ‘... the liberty of the citizen stands against the right of the citizen, meaning, his **liberty** to sound out what is in his heart and to hear what others have to express, against his **right** not to be injured in his dignity and reputation...’ (Stand-in President Justice Landau in FH 9/77 *Israel Electric Company Ltd. v. ‘Ha’aretz’ Newspaper Publication Ltd* (hereinafter: ‘the *Electric Company Case*’ [9] at p. 343). It was rightly noted that anything that is added to the laws prohibiting defamation is detracted from freedom of expression (See *Sweeney v. Patterson* (1942) [29] at p. 458). Every legal system seeks to

balance between the two clashing liberties. ‘The balance is to be found between these contradictory social interests by a value-based choice, which gives the proper weight to each of these in the relevant context...’ (Justice Netanyahu in CA 348/85 *BenZion v. Modiin Publication Ltd.* [10], at p. 800) It is necessary to have (horizontal) balance in which each one of the liberties will retreat in order to fulfill the primary aspects of the other liberty. (Compare: HCJ 2481/93 *supra* [8]; the *Senesh* case [2], at p. 834; HCJ 6658/93 *Am K’Lavi v. Jerusalem Police Commander* [11]). This balance found its expression in Israel in the Defamation Prohibition law. This law establishes that exercise of freedom of expression which contains publication of defamation (as defined in sections 1 and 2 of the law) is a criminal prohibition (section 6 of the law) and a civil tort (section 7), as long as the publication is not truthful and does not have any public interest (section 14 of the law) and the publisher does not have the defense of good faith which is established in the law (section 15). In this way the border is established between protected expression and expression that is not protected; between protection of reputation and the denial of this defense. This border draws from the constitutional rights as to freedom of expression, reputation and privacy (see CA 670/79 ‘*Ha’aretz*’ *Newspaper Publication Ltd. v. Mizrahi* [12] at p. 199). The legality of this border is determined by the constitutional balance among these values (see the *Electric Company* case [9], and also (*New York Times v. Sullivan* (1964) [30]; *Gertz v. Robert Welch, Inc.* (1974) [31]; *Derbyshire County Council v. Times Newspaper* (1993) [34]; *Theophanous v. Herald & Weekly Times Ltd.* (1994) [32]; *Stephens v. West Australian Newspapers Ltd.* (1994) [33]; *Hill, supra* [36]). Indeed, our constitutional balance reflects the approach that both the right to one’s good name and to privacy and the right to freedom of expression are not absolute. Each of the rights is relative in its character, when each one ‘concedes’ to the next one while creating a delicate balance between the conflicting values. (See R.C. Post ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ [44]; J.G. Fleming ‘Libel and Constitutional Free Speech’ [45]). More than once criticism has been directed at this balance but the discussion of it deviates from the framework of our decision. (See I. England *The Philosophy of Tort Law* [41] at p. 135.)

11. The constitutional balance between the right to one’s good name and privacy and the right to freedom of expression extends both to establishing liability (both in Torts and in Criminal Law) for defamation and to the determination of the remedies when the liability exists. Therefore, this constitutional balance also extends over the civil remedies which the legal system establishes for violation of the (civil) prohibition of publication of defamation. From here stems the approach that the natural remedy for prohibited injury to one’s reputation is the remedy of compensation (J.C.C. *Gatley On Libel and Slander* [42], at p. 200; hereinafter ‘Gatley’). In general this remedy is preferable to the prior restraint as it prevents violation of freedom of expression before the question has been settled whether there is liability for defamation (see

the *Avneri* case (1) at p. 864). In light of the constitutional aspects, it is problematic to award compensation, for example, where defamation was caused with the intent to do harm. As is known, Israeli case law has recognized this remedy in suitable cases (See: CA 30/72 *Freedman v. Segel* [13]; CA 670/79 *supra* [12], at p. 205; CA 802/87 *Nof v. Avneri* [14], at p. 494; CA 1370/91 *Mashour v. Habibi* [15]). In the framework of this appeal we do not need to examine this issue (see J.G. Fleming *The Law of Torts* [43], at p. 596). On the other hand the remedy of a declaratory judgment can at times be an appropriate remedy (see G.C. Cook 'Reconciling the first Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits' [46]). Similarly, the remedy of publication of a correction which undoes the outcomes of defamation is appropriate, as it can provide a remedy (if only partial) to defamation without violating freedom of speech (see section 9A(2) of the law). In the appeal before us we are dealing with the remedy of compensation. We will therefore look more closely at this remedy.

Compensation

12. The law establishes (in section 7) that publication of defamation '... will be a civil tort, and subject to the provisions of this law the provisions of sections 2(2) to 15, 55B, 58-61, and 63-68A of the Civil Torts Ordinance, 1944 will apply to it'. This reference also includes, *inter alia*, reference to the provisions in the Torts Ordinance [New Version], which deal with compensation (section 60 of the Civil Torts Ordinance, 1944, which today constitutes section 76 of the Torts Ordinance [New Version]; (hereinafter: 'the ordinance'). These provisions are found in chapter 5 of the ordinance that deals with 'remedies to torts'. It is established in it that compensation constitutes remedies for a tort (section 71 of the ordinance), that:

'Compensation may be given on its own or in addition to an order or in its place, however if –

- (1) the plaintiff suffered damage, compensation will be given just for that damage which may occur in a natural manner in the normal course of events and which comes directly from the defendant's tort;
- (2) the plaintiff suffered economic damage, he will not be given compensation for the damage unless he gave details as to it in the petition or attached to it.

In this context the ordinance defines 'damage' in this language (section 2):

'"Damage" – loss of life, an asset, comfort, physical welfare or reputation, or their absence, and any loss or absence and the like.'

This definition also applies as to compensation for defamation. It is possible to learn from it that the compensation for defamation is given not just for the economic damage that defamation causes but also for non-economic damage.

13. This legislative regulation as to compensation for a tort is meager. It does not contain the necessary detail for a thorough and comprehensive regulation of the compensation laws. It does not have rules as to quantification of the damage. These rules were established by the case law. Indeed, the great majority of the compensation laws for a tort are the fruit of case law. However, the legislative direction is important. It is established in it that the injured is entitled to compensation (compensation in the original text). What are the criteria for determining compensation? This question cannot be answered without determining the objective of the compensation. This objective cannot be determined without determining the objective of tort law, in general and of defamation law, specifically. Indeed, the interpretation of the provision in the ordinance as to 'compensation' must take place in the framework of the purpose which is at the foundation of tort laws and defamation laws. And yet, there is no consensus as to this purpose. From an historical perspective tort laws have fulfilled various functions, including a remedy function, a deterrent (or educational) function and a punitive function (see FH 15/88 *Melekh v. Kornhauser* [16] at p. 95; CA 295/94 *Modiin Publication Ltd. v. Spiro* [17], at p. 57; CA 1370/91 *supra* [15] at p. 538). Similar purposes were laid at the foundation of compensation for defamation. Justice D. Levin writes:

'The compensation which the court is authorized to award to one who was injured by the tort of defamation has a dual end; first, to give satisfaction to the injured, both by him being able to know that it is recognized that a tort has been committed against him in that his reputation was damaged without justification, and by the fact that the amount of the compensation that will be paid to him could somewhat improve his situation and bring him closer to the extent possible – to the extent that money can contribute to this – to the situation that he was in prior to the occurrence of the tort.

Second – as has already been said in the decisions of this Court – the compensation determined for the tort of defamation was also intended to 'educate the audience and introduce into its consciousness that a person's reputation, whether he is a private person, or whether he is a public figure, is not a free-for-all, and there is substance in what has been said in the book of *Ecclesiastes* 'a name is better than a good oil'... meaning: compensation, which when awarded has a punitive end and an educational deterrent end as one...' (CA 802/87 *supra* [14] at pp. 493-494).

In a similar vein Justice Bach noted:

'... one of the objectives of compensation in defamation cases is to educate the public and introduce into its consciousness that a person's reputation is not a free-for-all. In determining compensation there is a punitive end and an educational deterrent end as one' (CA 259/89 *supra* [17] at

p. 57).

In the framework of the appeal before us there is no need to examine the punitive function, as punitive damages were not claimed in the appeal before us. In the appeal before us remedial damages were sought, and we will now turn to the criteria for determining these.

14. It is universally agreed, that one of the main objectives of compensation in tort law is remedial. Compensation was intended to remove the damage and better it. It comes to undo the results of the tort. It is directed at placing the injured in the same position in which he would have been had the tort not occurred. My colleague Justice Or explained this, in noting:

‘The starting point of the discussion of the compensation to which the appellants are entitled to is embodied in the general objective of compensation in tort law. This objective is, first and foremost, to repair the damage caused by the tort... therefore, the broad rule as to compensation in torts is that one is to award the injured that compensation which would place him in the same position in which he would have been had he not been subject to the tort.

...

As such, tort compensation was intended to restore the status quo that would have been were it not for the tort...’ (CA 5610/93 *Zeleski v. Local Committee for Construction and Planning, Rishon L’Zion* [18] at pp. 80-81).

And in a similar vein I noted in one of the cases:

‘From the essence of the term compensation, it stems, that this remedy was intended to remove the damage and improve it... the purpose of the compensation is to place the injured, to the extent possible, in the same position in which he was at the time of the occurrence of the tort had the tort not occurred...’ (CA 1977/97 *Barzani v. Bezeq Israeli Communication Company* [19] at p. 619).

Indeed, the principle that the objective of compensation is to restore the original situation (*restitution in integrum*) runs like a common thread through the laws of compensation in torts. (See: CA 22/49 *Levi v. Mussaf* [20] at p. 564; CA 70/52 *Grossman v. Rot* [21] at p. 1253; CA 467/77 *Horowitz v. Port Authority in Israel* [22] at p. 262; CA 357/80 *Naim v. Barda* [23] at p. At p. 775; CA 930/90 *Municipality of Netanyah v. Zimmerman* [24] and many others). This approach also applies in compensation for defamation (see A. Shinhar *Defamation Laws* [37] at p. 369). Indeed the compensation for defamation was intended to place the injured in the same position in which he would be in were it not for publication of the defamation (see CA 802/87 *supra* [14] at p. 493). In achieving this objective the proper balance is found between the right to one’s good name and freedom of expression. The infringement on the right to one’s good name – like the violation of a constitutional right to liberty and bodily wholeness – justifies remedial compensation which

returns the situation to its original state. Such compensation is consistent with the proper protection of freedom of expression. Indeed, the law of liability in torts establishes (horizontal) balance between the conflicting legal rights. It expresses the relativity of the various rights and the need to balance between them while preserving their core elements. So too, generally with the (horizontal) conflict between the autonomy of the personal will of the tortfeasor and the bodily and property wholeness of the injured. Once liability has been established, the tort laws come to actualize it. The remedial compensation brings about optimal actualization of the balance established by the laws of liability. This actualization is optimal, as the purpose of the remedial compensation is return of the situation to its original state. This 'return' places the two parties in the same situation they were in prior to the tort. Compensation which goes beyond remedial compensation – whether it is nominal compensation or punitive compensation – requires special justification. The high road of the compensation – which is derived from the proper balance between the conflicting constitutional rights in the realm of liability – is the remedial compensation. It preserves the constitutional balance in the realm of liability and fulfills it. Indeed, the nominal compensation operates beyond the remedial compensation. It places on the one end one's reputation, and on the other side the public interest in realizing freedom of expression. This is vertical balancing which operates beyond the bounds of the remedial compensation. It requires separate justification and separate examination. So too the law with punitive compensation. It too operates beyond the remedial compensation. It places freedom of expression on the one hand and on the other hand the public interest in preserving one's reputation. This too is a vertical balancing that operates beyond the bounds of the remedial compensation. It requires separate justification and separate examination. Not so the remedial compensation. This compensation reflects the horizontal balancing between rights of equal status which compete among themselves, while it returns the two parties to the situation they would have been in prior to commission of the tort.

15. This purpose of returning the situation to its original status does not raise special difficulties when the damage that is caused to the one injured by the defamation is economic damage, such as loss of wages or expenses. Assessment of this damage in the framework of the tort of defamation is not different from the assessment of this damage in a tort which causes bodily harm. The special difficulties arise in all those cases – and they are the majority of cases – in which defamation causes non-economic damage. These damages touch upon harm to a person's reputation, his status in society and his self-image. Justice Cory rightly noted in the Hill case *supra* [36], that:

'A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime' (at p. 1196).

How can these damages be assessed? How can the situation be

returned to its original state? This problem is not new to us. It arises in every case of non-economic damage with bodily damage (see A. Barak, 'Assessing Damages in Bodily Injury: The Desired Law and the Current Law' [40]) 'No money in the world will compensate for tortures of body and soul, on the reduced chances to start a family, or on the loss of the basic enjoyments of normal life' (Justice Berinson in CA 541/63 *Reches v. Hertzberg* [25] at p. 126). 'How is it possible to assess, exactly or even approximately, in money or in monetary value the pain and the suffering or the sorrow and shame of a person whose arm or leg was cut off, or who walks but the worry eats away at his heart that his days are numbered?...' (Justice S.Z. Cheshin in CA 70/52 *supra*, at p. 1254). Despite this the Court makes an effort and tries as best it can to assess the damage and determine the compensation. In assessing the damage occasionally attempts are made at standardization which distances the compensation from the real damage. The Court has come out against these tendencies more than once. Indeed, the non-economic damage is compensable. Occasionally this damage is significant, and the injured is entitled to real compensation and not just comfort compensation (see recently CA 2055/99 *Ploni v. Harav Ze'ev* [26]). The same is the rule with compensation when the non-economic damage is to one's reputation. The court must make an effort while examining each case on its merits, to assess the extent of the damage to reputation and determine that compensation that is capable, to the extent possible, of putting the injured in the situation he would have been in had the defamation not been published. And note, I am not of the view that the case law that applies in compensation for the non-economic damage in bodily damage can also be automatically applied as to the non-economic damages in damage to one's reputation. Bodily injury is not the same as injury to one's reputation. However, comparison is possible and it must be done in suitable instances (see *John v. M.G.N. Ltd.* (1996) [35]).

16. The remedial compensation for defamation is intended to achieve three ends: consolation of the injured who suffered injury from the defamation; repair of the damage to his reputation; vindication of his right to his good name which was harmed due to the defamation (see Gatley, *ibid* [42] at p. 201). In order to achieve these remedial objectives one is not to be satisfied with symbolic compensation, but also not award compensation which goes above the amount of damage that was caused. The remedial compensation was not intended to just declare the injury. It also was not intended to enrich the injured. The remedial compensation was intended to award full compensation for the damage that was caused – no more and no less (compare CA 357/80 *supra* [23]). Only in this way will it be possible – within the bounds of remedial compensation – to fulfill the proper (horizontal) balance between freedom of expression on the one hand and one's reputation and privacy on the other. And note, this symbolic compensation can serve as tool for declaration of the commission of the tort, but not as an expression of remedial compensation. Compensation which goes beyond the damage can be justified as punitive compensation, but not as remedial

compensation. It is also not to be said at all that the court must award a 'high' compensation in order to protect ones' reputation. The court must award full compensation which reflects the full extent of the damage – economic and non-economic–which is caused to the injured. (See CA 492/89 *Slonim v. 'Davar' Ltd.* [27] at p. 835).

In awarding damages for defamation the court will consider, *inter alia*, the extent of the injury, the status of the injured in his community, the humiliation he experienced, the pain and suffering that were his lot and expected results of all these in the future. The examination is individual. 'Rates' are not to be set. In each case the quality of the publication, its extent, its credibility, the degree of injury and the behavior of the parties are to be considered. Indeed, the behavior of the injured before the publication and following it may constitute a means with the help of which his injury may be assessed. Similarly the behavior of the tortfeasor may also impact the degree of compensation and its assessment. Thus, for example, an apology for the defamatory words may reduce the damage they caused and thereby impact the degree of compensation (see section 19 of the law). The severity of the injury to the feelings of the injured and his reputation is occasionally measured by the severity of the actions and expressions of the tortfeasor. And note, this does not constitute punitive compensation. These are aggravated damages which lead to increased compensation due to the behavior of the tortfeasor. Thus, for example, a tortfeasor who knows that his words are not true and who makes every effort in court to prove their truthfulness, may cause aggravation of the damage to the injured and thereby increase the compensation he is entitled to.

18. Does compensation for defamation fulfill a deterrent and educational role? There is no simple answer to this question. It returns us to the basic question as to the role of tort law. Struggling with this question is beyond the scope of this judgment. It will suffice if I state that even if the laws of compensation for defamation have an educational and deterrent role, this role is not sufficient to cause the remedial compensation to increase beyond its natural dimensions. Indeed the educational and deterrent aspect make find a place of honor in the bounds of punitive compensation, but where there is not applicability to punitive compensation – as is the case before us – it is not within the power of the educational and deterrent aspect to increase the amount of compensation that would be received according to the rules as to returning the situation to its original state. Within the remedial compensation the deterrent aspect and the educational aspect find expression in the very imposition of the duty of compensation, in the determination of the degree of compensation according to real criteria of returning the situation to its original state and in increasing the compensation where the behavior of the tortfeasor increases the damage. Increasing the compensation for deterrent and education reasons beyond that which is necessary to return the situation to its original state will undermine the proper balance between the constitutional rights which are battling for supremacy in the framework of defamation laws.

19. Frequently it is the media such as newspaper, radio or television which defame. In this situation there is generally an exacerbation both in the damage to reputation (due to the circulation of the newspaper) and in the violation of freedom of expression (due to the newspaper being a forum and spokesperson as one). These mutual 'exacerbations' balance themselves in the framework of the laws of defamation. From here the approach that the newspaper as a tortfeasor does not have special status in assessing the compensation for defamation. Justice Berinson discussed this in one of the cases, in noting:

'I do not see a contradiction between protection of the individual's reputation by awarding fair compensation for publication of defamation in the newspaper and ensuring freedom of the press. . . The law draws reasonable and fair boundaries as to the permitted in this area of publication of defamation... one who deviates from these areas must suffer the consequences. And as to this a newspaper has no special status. I would say the opposite. Because of the large circulation of the news media and its great power to do damage is needs extra reining in.

If there is sufficient self limitation – all the better; if not the court must bring this about by awarding appropriate compensation. In the situation existing in this country, where at times the newspapers get caught up in sensationalism and then do not always check the means and deviate from the realm of the permitted according to the law, award of appropriate compensation is perhaps the most tested and certain way to brake this tendency.' (CA 552/73 *Rosenblum v. Katz* [28] at p. 596).

Indeed, when the newspaper defames it must pay full compensation for the damage (economic and non-economic) that it causes. The greater the circulation, the greater the damage might be, and the greater the compensation. The behavior of the newspaper may increase the damages and the compensation. However – apart from the question of exemplary damages – which does not arise in this appeal – it is not appropriate to establish special laws for when the tortfeasor is a newspaper. The general law will apply in this case as well. The educational and deterrent value – outside of the bounds of the punitive compensation – finds expression in the very imposition of liability on the newspaper and obligating it to pay full remedial compensation while increasing the compensation when the inappropriate behavior of the newspaper exaggerates the damages.

20. Amendment no. 6 established (in adding section 7A (b) to the law) that:

'In a trial for a civil tort according to this law the court is entitled to order the defendant to pay to the injured compensation which will not be greater than 50,000 NIS, without proof of damages.'

Both parties relied on this provision in their arguments. This

provision was passed after the incidents the subject of this appeal, and it does not apply to them. Examining this provision therefore deviates from the bounds of this appeal. It raises questions about interpretation and validity which are not simple. It will suffice for us to say, for the purposes of this appeal, that the stance of the defendant is not to be accepted, according to which this provision establishes a maximum threshold for compensation without proof of damages. The purpose of this provision is to establish a minimum threshold which relieves the injured from the need to prove his damage.

From the General to the Specific

21. What is the remedial compensation to which the appellants are entitled? In the episode before us the non-economic damage has been proven. Damage to the appellant's reputation in that it was written about her that she is a drug addict; severe injury to her feelings during her difficult times was proven, as it was hinted that the daughter was born with a birth defect due to the mother's drug addiction. The respondents refrained from minimizing the damage by publishing a correction. They increased the damage by continuing to claim the truth of the publication when they knew, and even declared in the pre-trial hearing, that there was a mistake in the publication. In this situation the compensation that was determined in the Magistrates Court (100,000 NIS) is not high at all. It was not appropriate to reduce it in the District Court.

The result is that we accept the appeal, overturn the decision of the District Court and reinstate the decision of the Magistrates Court. The respondents will pay the appellants' attorneys' fees in the amount of 30,000 NIS, and will pay court fees – to be assessed by the registrar, as established in regulation 513 of the Civil Procedure Regulations 5744-1984.

Justice T. Or

I agree with the decision of the President.

Vice President S. Levin

1. I agree that the appeal should be granted, as stated in the decision of my distinguished colleague, the President.

2. In my opinion the rule set out in CA 214/89 has a flipside to it: the limitation on the power of the Court to grant a remedy in order to prevent in advance the publication of allegedly defamatory material, requires that once it has been proven, in retrospect, that in fact we are dealing with defamation, the publisher will bear all the consequences which stem from the publication, meaning: the full measure of compensation for the violation of the privacy of the injured person, the humiliation he experienced, his pain and his good name. I am of the view that the standards that have been acceptable until now in Israel for assessing the compensation in defamation suits do not reflect the desired law, and that subject to the detailed circumstances of each case, the level of compensation is to be very significantly increased. In my opinion, this is even more so where the publication is in the media: Indeed, as a rule, one is not to prevent in advance the publication of a notice in the media outlets which merely might be defamatory, and this – based on general principles of freedom of expression. Nonetheless, the raising of the appropriate standards for assessment of damages, where it turns out, in retrospect, that we are indeed dealing with defamation, serves to show the publishers the need to conduct a thorough examination before publication in order to avoid, as much as possible, damaging the reputation of the subject of the publication and his privacy. Indeed, subject to the individual circumstances of every case, the level of compensation should reflect, on the one hand, the great weight that our society attributes to a person's reputation, and also, on the other hand, the benefit to the publisher from a sensational publication that, after the fact, turns out to be defamatory, so that the violator will not end up benefitting.

3. In the case before us, the petition was already filed, from the start, for an amount that does not deviate from the range of previous case law as to amount of damages, and I agree with my esteemed colleague, the President, that the amount awarded in the Magistrate's Court is not at all high. In light of what was already said above, I would not have intervened in the amount of damages even if in the case before us an amount that was significantly greater than the amount of 100,000 NIS had been awarded.

It was decided as per the decision of President Barak

25 Av 5761

14 August 2001