In the Supreme Court

CFH 5712/01

Before:	The Hon. Chief Justice A. Barak
	The Hon. Deputy Chief Justice T. Orr
	The Hon. Justice E. Mazza
	The Hon. Justice M. Cheshin
	The Hon. Justice T. Strasberg-Cohen
	The Hon. Justice D. Dorner
	The Hon. Justice D. Beinisch
The Petitioner:	Yosef Barazani
	v.
The Respondents:	1. Bezeq – Israeli Telecommunications Company Ltd.
	2. Israel Consumer Council

A Further Hearing on the judgment of the Supreme Court of July 2, 2001 in CA 1977/97 by the Hon. Chief Justice A. Barak and Justices T. Strasberg-Cohen and I. Englard

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Facts: Respondent 1 (hereinafter: Bezeq) advertised an international dialing service (hereinafter: the Service), and represented that a customer would be charged only for the exact amount of time that he used Service. In practice, it turned out that the method that Bezeq used for its calculations resulted in overcharging the users of the Service relative to what was expected according to the advertisement.

The Petitioner, who used the Service supplied by Bezeq, but who had not seen the said advertisement, initiated a suit in the District Court for pecuniary damages against Bezeq. He claimed that the advertisement was one "liable to mislead a consumer" under sec. 2 (a) o the Consumer Protection Law, 5741-1981 (hereinafter: the Law), in regard to the actual cost of international calls. He also requested that the suit be certified as a class action.

The District Court certified the suit as a class action. However, on appeal, the Supreme Court reversed that decision, based upon the provisions of sec. 31 (a) of the Law, according to which an act or omission in contravention of sec. 2 of the Law "shall be treated as a tort under the Civil Wrongs Ordinance [New Version]". Therefore, and despite the finding that the advertisement was one that was "liable to mislead a consumer", the Court applied the causal-link test established by the Civil Wrongs Ordinance [New Version] (hereinafter: the Ordinance), and found that since the Petitioner had not been exposed to Bezeq's misleading advertisement, a causal link was not established between the advertisement and the damage putatively caused him. That being so, the Court held that the Petitioner did not have a personal cause of action against Bezeq under sec. 2 (a) of the Law, and in any case, was not a proper plaintiff in a class action.

The Further Hearing focused upon the question whether or not the prohibition of misleading under sec. 2 (a) of the Law constitutes a "regular tort" like every tort in the Ordinance, subject to the doctrines established under the Ordinance, among them the causal-link doctrine.

Held:

The Supreme Court held:

A. (1) The provisions of sec. 2 (a) of the Law, prohibiting deceit, create a prohibition upon conduct. A "dealer" contravenes that prohibition even if the thing that he does by act or omission is "liable to mislead", that is, whether or not a person was actually misled by that thing that he did. The standard of conduct required by the provisions of this section is one that is higher than that required by many statutes, which require a direct causal link between an act and a result – the harm caused the victim – whereas sec. 2 (a) prohibits conduct, as such, even if it does not lead to harm. That requirement is intended to protect consumers and ensure that they receive reliable information about the goods or services being offered, so that they can make informed choices about whether or not to make the transaction.

(2) Under sec. 31 (a) of the Law, an act or omission proscribed by sec. 2(a) shall be treated as a tort under the Ordinance. Nothing in the language of sec. 31(a) of the Law would show that the tort under sec. 2 (a) removes it from the fundamental principles or the doctrines of the Ordinance, and nothing therein might show that a consumer is entitled to compensation merely because a dealer contravened a provision of the Law. On the contrary, the Law unconditionally refers to the provisions of the Ordinance.

(3) In addition to the clear language of the Law, expediency also argues that the sec. 2 (a) of the Law establishes a tort like any other tort under the Ordinance, for if those same acts and omissions external to the Ordinance are tortious in nature, it is but natural that we should employ the same traditional, familiar doctrines that tort law created and developed over so many years such that they have become foundational to the legal system, subject, of course, to special, exceptional cases

(4) Nevertheless, there is a difference between the native torts of the Ordinance and those external to it that are treated as torts under the Ordinance. A tort external to the Ordinance should be scrutinized carefully in order to determine whether or not a particular doctrine of the Ordinance is compatible with the elements, nature and construction of the external tort.

B. (1) In accordance with the causal-link doctrine in sec. 64 of the Ordinance, there must be a causal connection between a person's act or omission – an act or omission that constitutes a tort – and the harm caused to the victim, for which he demands compensation. In the instant case, there was no causal connection between the advertisement and the "harm" caused to the Appellant, inasmuch as the Appellant did not read that advertisement, and in any case, was not influenced by it and did not rely upon it. While Bezeq perpetrated a tort by publishing that advertisement to the public, the existence of a tort is insufficient to entitle a person to compensation. Rather, that person must show that he was harmed as a result of that tort, and that precondition was not met in regard to the Appellant.

(2) Similarly, the compensation doctrine, enunciated in sec. 76 of the Ordinance, states that a person is not entitled to compensation except in regard to damage that arose from a tort. In regard to compensatory relief, the Law requires that the plaintiff prove the damage arising from the misrepresentation, that is, the existence of actual deceit, and an act arising from that deceit. In the circumstances of this case, the publication of something that might tend to mislead – the advertisement itself – is not sufficient to for a consumer to acquire a right to compensation if he suffered no actual damage. The rule is that damages will not be awarded unless harm was caused, and damages will be awarded only to the extent of the harm caused. In the absence of an express, unequivocal provision

granting a person damages for virtual harm without the proof of actual harm, it is difficult to imagine that a court will award damages. Such significant creativity is intended for the legislature, and not the courts.

(3) The causal connection (both factual and legal) required under sec 2 (a) of the Law does not require a consumer's explicit reliance upon the representation presented by the dealer. Unlike other legal provisions, which explicitly require a causal connection of reliance, it is possible that a consumer will not directly rely upon the dealer's representation, and the required causal connection will, nevertheless, exist, that is, that the dealer's representation "was the cause or one of the causes of the damage", as stated in sec. 64 of the Ordinance. That would be the case, for example, where it can be shown that an advertisement – capable of misleading the consumer – that was published by a dealer, initiated a factual chain of events that ultimately caused damage to the consumer. In such a case, it would be appropriate to interpret the concept of reliance broadly, such that it would not be restricted exclusively to direct reliance.

(4) However, there must be an appropriate causal connection between the misleading publication and the injury that a consumer incurs. The fact that the purchase of the goods or services occurred after the publication is not, in and of itself, sufficient to show a causal connection between the potentially misleading publication and the consumer's acquisition of the advertised goods or services. There must be an appropriate causal connection between the two occurrences, and that link will be deduced from the circumstances of each and every case with the help of the relevant evidence.

C. A class action is, in effect, an extension of the personal right to sue, and in the absence of a personal right to bring suit, there can be no class action. The import and scope of the personal suit will only be influenced marginally, if at all, by the class action. A class action does not grant a consumer an independent cause of action. It is merely a procedural tool for joining individual suits in a single proceeding. Class actions were added to the Law some thirteen years after its enactment, and its addition to the Law merely expanded the personal suit – procedurally – into many personal suits, but the principles of the personal suit remained unchanged. Therefore, sec. 2 (a) of the Law should be construed as it was prior to the addition of class actions to the Law, that is, without reference to such a class action.

D. (Justice T. Strasberg-Cohen, dissenting):

(1) The phrase "shall be treated as a tort under the Civil Wrongs Ordinance" should be construed as establishing a new cause of action that is like a tort. This cause of action is not identical to a tort, but is equivalent to a tort in the sense that it applies the same doctrines of the Ordinance to the act or omission – in the present case, the compensation and causal link doctrines. However, it is a cause of action that is unique to this Law. It is substantively independent, and must be construed in its own context,

in light of the objective it was intended to serve, while taking the said doctrines into account, and which must be given content that corresponds to the objectives of the Law and its enforcement in the framework of a class action.

(2) For the purpose of establishing a cause of action for compensation for damage caused by a publication liable to mislead, it must be shown, prima facie, that the publication was liable to mislead, that damage was incurred, and that there is a factual and legal causal connection between the publication and the damage. However, even in the absence of the consumer's reliance upon the potentially misleading publication, there may be a causal link between the publication and the damage. This is so because, first, establishing a prohibition upon conduct that is liable to mislead without recognizing the remedy of compensation for its contravention without proof of actual deception, renders the Law's primary prohibition lacking any real civil remedy. Second, there is little possibility that a consumer will devote significant effort and money solely for the purpose of obtaining a restraining order for the benefit of the general public. Third, over the years that the Law has been in force, the criminal sanction has been applied with measured restraint, and it would seem that the criminal sanction cannot provide significant deterrence for powerful dealers that expect to garner huge profits from misleading the public, and the same is true of administrative sanctions. Fourth, an approach that would require actual deception in order to obtain compensatory relief would limit the scope of a dealer's liability only to those consumers who could actually prove that they were indeed misled by the dealer's representations, and would make deception worthwhile from the perspective of the dealer. Fifth, a construction that would grant relief only to those consumers who were actually deceived would create an artificial distinction between the consumer public that used the goods or services that were the subject of the misleading advertising, but who were not exposed to it, and the consumer public who were exposed to the misleading information. Sixth, in other cases in the past, the Supreme Court did not hesitate to expand the available types of relief beyond those set out in a law, in order not to eviscerate the law. Seventh, the Law establishes other prohibitions that do not require proof of reliance, the violation of which grants the consumer a broad right to compensation. There is little reason to granting an independent remedy of compensation, which includes granting broad discretion to the court, for the violation of those prohibitions, while not doing so in regard to the Law's central prohibition – the prohibition upon misrepresentation.

(3) The tort perpetrated by publishing something liable to mislead does not require reliance in order for the consumer to be entitled to compensation for damage incurred due to the publication, and it is not tied to the demand of reliance. Had the legislature intended to limit the prohibition of deceit to one of the torts requiring reliance, one would expect that it would have done so explicitly. Reliance is not required by the language of the Law or by its objective for the purpose of the existence of a causal connection. Thus, there can be a causal connection without reliance.

(4) Holding that there is no requirement that the consumer rely upon the misleading publication does not obviate the need for a causal connection, and in the instant case, the representation made by the dealer should be deemed a binding promise to the consumer public that requires that it act in accordance with the promise. That promise bestows a right upon the consumer, and places the dealer under an obligation in regard to the consumer public. If the dealer does not meet the obligation it undertook by means of the advertisement, and charges more than what was promised in the advertisement, it breaches its duty, and as a consequence of that breach, the consumer incurs damage. Therefore, even if the consumer was not exposed to the misleading publication, and did not change his behavior in regard the use of the product or service, he will still be deemed harmed, since the price he was charged for the product or the service was higher than the price at which he was entitled to purchase the product or service.

(5) The consumer incurs injury in the form of a "price differential", which is a real loss. Appropriate construction of the required causality would see this injury as connected to the breach of the proscribed misrepresentation, as due to the misleading advertisement and the difference between it and the manner in which the dealer actually acted, the consumer suffered injury. Such a construction would meet the requirement of a causal link, both factually and legally. Factually, the said injury caused to the consumer is a consequence of the fact that the dealer made a representation that it did not honor. Legally, the injury is causally related to the representation under the foreseeability test, in that when a dealer makes a false representation, it foresees that charging contrary to the representation will cause harm due to the "price differential", under the risk test, since that harm falls within the scope of risk of the dealer's act, and under the common-sense test, by which we examine the overall actions of the tortfeasor and their contribution to the harmful result.

E. (Justice E. Mazza, dissenting):

(1) It is possible and proper to restrict the application of traditional tort law to consumer causes of action. Such restriction is clearly required by the significant, substantive difference between the purpose of consumer torts and the purpose of regular torts.

(2) The consumer laws of deceit must contend with the requirements of reliance and causality differently than tort law. Instead of the personal reliance of each and every consumer – that of traditional tort law – we should adopt a doctrine that recognizes "constructive reliance" of the consumer public to which the advertiser directed its misleading advertisement, while instead of requiring proof of a factual causal connection between the deception and the injury caused to each of the complaining consumers, we should adopt a doctrine that recognizes a "consumer causal link" that would be inferred from the merger of the potentially misleading publication and the intention of the advertiser that the advertisement reach the consumers, mislead them, and thus influence their conduct.

(3) Consumer deception would give rise to a (personal or class) cause of action for monetary relief upon the fulfillment of three elements: an offending publication, injury, and a "consumer causal link". As opposed to this, we should also recognize a defense that would be available to the advertiser if he can show that the plaintiff was aware of the true facts, and that the offending advertisement could not, therefore, negatively influence his situation.

(4) The reliance requirement undermines the objectives of consumer protection laws –leveling the playing field for the parties; increasing personal autonomy; the concept of consumer sovereignty; protection of the public welfare and of social rights; advancing commercial fairness; protecting the credibility of the local market and public confidence in the social regime – and it frustrates their realization. Once a potential to mislead is proved, and it is shown that the advertiser indeed intended that the misleading advertisement reach the public and influence its consumer conduct, we should properly hold that there is constructive consumer reliance upon the misleading advertisement. The question whether the dealer actually achieved its purpose, i.e., that the misleading publication actually reached its audience and actually influenced it, is of limited importance.

F. (Justice D. Dorner, dissenting):

(1) The Law, which intervenes in contracts between unequal parties, and subjects the stronger party – the supplier – to an increased duty of fairness towards the weaker party – the consumer – is firmly anchored in the established doctrines of contract law. Many consumer transactions are anchored in the accepted contractual doctrines under which if a supplier charges a higher price than the correct, advertised price, consumers are entitled to a refund of the difference. In the reality created by those doctrines, and in which consumers actually operate, consumers trust suppliers without verifying that each and every transaction conforms to the advertised price.

(2) A supplier's advertisement of a specific price creates a consumer right not to pay a higher price. If the supplier charges a higher price, that will, in any event, constitute a breach of contract that would give rise to monetary relief even for consumers who were not exposed to the advertisement.

(3) That entitlement can be grounded at least three ways. The first deems the dealer's publication about the price an irrevocable offer to the public, which can be accepted by the objective performance of its conditions, while the supplier is bound to the publicized price, and provides an opportunity for the public to purchase the product or service for a price that will not be higher. In accepting the offer, the parties agree to the published price, and the supplier must refund any additional amount charged. The second approach deems the contract to have an implied term under which the supplier undertakes not to charge the consumer more than the advertised price. Such a term reflects the expectations of the parties. Overcharging constitutes a breach of that term. The third approach would classify such overcharging – particularly if it targets only

consumers who were not exposed to the publication – as a breach of contractual good faith.

Judgment

Justice M. Cheshin:

A Further Hearing on the judgment of the Supreme Court in CA 1977/97 *Yosef Barazani v. Bezeq – Israeli Telecommunications Company Ltd*. (55 (4) IsrSC 584).

2. The Consumer Protection Law, 5741-1981 (the *Consumer Protection Law* or the *Law*) – true to its name – places various obligations upon a "dealer" – one who sells goods or provides a service by way of dealer – to a "consumer" – one who purchases an commodity or obtains a service from a dealer in the course of his business for use that is primarily personal. One of those obligations is stated in sec. 2 (a) of the Law: "A dealer must not do anything…which is liable to mislead a consumer in regard to any material element of a transaction …". Section 31 (a) further informs us that "Any act or omission in contravention of Chapters Two, Three or Four shall be treated as a tort under the Civil Wrongs Ordinance [New Version]". And this is the heart of the matter before us: To what extent do the doctrines and principles of the Civil Wrongs Ordinance apply to the "tort" created under sec. 2 (a) of the Law? Shall we treat it as a "normal" tort – as if it were a tort comprised by the Civil Wrongs Ordinance – that integrates itself into the fundamental principles and doctrines of the Civil Wrongs Ordinance, or shall we say that the legislature created a special quasi-tort – a *sui generis* tort – that is not subject to the doctrines and fundamental principles of the Civil Wrongs Ordinance as they are usually construed?

A company advertises one of its products in a way that is "liable to mislead a consumer" in regard to a material matter. Reuben buys the product without having seen the misleading advertisement, and thus, without having been misled. Reuben later discovers the misleading advertisement, and sues the company for monetary compensation for his claimed loss, solely because the company did not keep its advertised promise. Reuben does not make do with a personal suit, but requests that the court certify it as a class action: He asks to sue on behalf of

the entire public that purchased that product, and obtain relief for that entire public. Can Reuben prevail in that suit?

3. The Supreme Court ruled – by the majority opinion of Chief Justice Barak and Justice Englard – that Reuben cannot prevail in his personal suit. The reason is that in purchasing the product, Reuben did not rely upon the publication that was liable to mislead, and therefore no causal connection was shown between the publication and the injury allegedly caused to Reuben. As he could not prevail in his personal suit, he was not an appropriate plaintiff in a class action. Justice Strasberg-Cohen, dissenting, thought otherwise. In her opinion, considering the purpose of the Consumer Protection Law and the nature of a class action suit, such a person should be entitled to proceed with the suit, and there is, indeed, an appropriate causal link. Those, therefore, are the disagreements and the core of the issue that we will address in this Further Hearing. But first, the facts.

The Basic Facts

4. I will begin with a brief, preliminary statement: Reading the briefs submitted to the Court surprisingly reveals that the parties do not only disagree on the legal questions – as is usual in a Furhter Hearing – but on no small number of factual issues. The appeal is even directed at findings of fact in the Supreme Court's judgment. We will not address those disputes, and the factual foundation that we will address is the factual foundation that grounded the Supreme Court's judgment.

5. And now to the matter before us. Over the course of the years 1989 through 1996, the Respondent, Bezeq – Israeli Telecommunications Company Ltd. (*Bezeq*), conducted an advertising campaign to encourage the use of its international direct-dialing service, a service meant to replace the "188" service by which international calls were placed through an operator. The advertising campaign emphasized that "the call will be charged only for the exact time that you spoke, even if you only spoke for half a minute…", and published the tariff that Bezeq was meant to charge for calls to various places around the world. The advertisement added that the quoted price was for a time unit of "one minute of conversation". For example, a direct-dial call to the United States…NIS 3.53 per minute; a direct-dial call to France…NIS 3.14.

6. In practice, it turned out that call time was not calculated on the basis of minutes, but rather on the basis of meter units. The length of each meter unit – whose length is set according to the country called – was several seconds, and Bezeq calculated the last meter unit of a call as if it had been entirely used, even if the customer spoke for only part of the unit. The customer did not, therefore, pay for the "exact time" that he spoke on the phone, as several seconds were added from the meter unit to every call – or to be precise – to almost every call. Due to that manner of calculation, the price of (nearly) every call was higher than the advertised price. For example, a "one-minute call" to the United States – 60 seconds – was calculated as comprising 14.23 meter units, the price of which was NIS 3.53, which was the advertised price. But in practice, Bezeq charged more for a (precisely) one-minute call. The reason for that was that Bezeq "rounded up" the 14.23 units to 15 units, and charged the customer for 15 units, whose price – needless to say – was higher than the advertised price. That, of course, was also the case for every call that was longer than a minute. The caller was charged for the last meter unit even if he did not completely use it.

7. The Petitioner, Barazani (*Barazani* or the *Petitioner*) was a "consumer" as defined by the Consumer Protection Law, and Bezeq was a "dealer". In 1996, Barazani initiated a monetary suit against Bezeq, along with a request that the suit be certified as a class action. Barazan claimed that Bezeq's advertisements were "liable to mislead" consumers in regard to the true price of international phone calls, and that Bezeq had, therefore, contravened the prohibition of deceit under sec. 2 (a) of the Consumer Protection Law. Barazani claimed that the injury incurred by him was equal to the difference between the price that Bezeq advertised and the price that it actually charged him for international calls. Although Barazani incurred negligible injury, the total harm to Bezeq's consumers – all those who had made international direct-dial calls in the relevant period – amounted to tens of millions of shekels. And, Barazani argued, Bezeq had pocketed those vast sums by misleading its customers. Barazani therefore asked that his suit be certified as a class action under the Consumer Protection Law, *viz*., that he be permitted to sue on his own behalf, and on behalf of all of Bezeq's customers who made direct-dial international calls, and that he be awarded compensation for the injury incurred, i.e., compensation for the difference between the advertised price and the price actually paid by all of Bezeq's customers.

8. But Barazani himself was never exposed to the misleading advertisement. When he made his international calls, he had no knowledge of the misleading advertisement, and thus, in any case, did not rely upon it, was not influenced by it, and was not misled by it. The question, therefore, arose whether Barazani had a personal cause of action against Bezeq by reason of the misleading advertisement of which he was not aware. We would add – and this is the main point – that under the provisions of the Law, a person cannot present himself as a plaintiff in a class action unless he has a personal cause of action. Therefore, the absence of a personal cause of action by Barazani led to the collapse of the entire suit.

9. The District Court decided that the conditions for a class action had been met, but further held that the class action could be submitted solely for declaratory relief and not as a suit for a monetary remedy. Both parties appealed that decision, and the Supreme Court decided (by a majority decision) to grant Bezeq's appeal and deny Barazani's appeal.

The Relevant Legal Provisions

10. The three key legal provisions in this matter are as follows: first, sec. 2 (a) of the Consumer Protection Law, which establishes the prohibition upon deceit:

> *Prohibition of Deceit*
>
> 2. (a) A dealer must not do anything – by deed or by omission, in writing, by word of mouth or in any other manner … which is liable to mislead a consumer in regard to any material element of the transaction …

This provision limits itself to relations between a "consumer" and a "dealer" as defined under sec. 1 of the Law: A "dealer" is "a person who sells a commodity or performs a service by way of dealer and includes a producer", and a "consumer" is "person who buys a commodity or receives a service from a dealer in the course of his business for mainly personal, domestic or family use". The prohibition is one of conduct, and a dealer contravenes the prohibition even if he does something – by act or omission – that is only "*liable* to mislead" a consumer, i.e., even if no one was misled by it. Therefore, as stated in sec. 23 (a) (1) of the Law, a dealer commits an

offense and is liable to punishment if "did anything liable to mislead a consumer in violation of the provisions of section 2". The standard of conduct required under sec. 2 (a) is higher than the usual standard in other laws. Such is the case, for example, in regard to the torts of fraud and injurious falsity under secs. 56 and 58 of the Civil Wrongs Ordinance, and misrepresentation under sec. 15 of the Contracts (General Part) Law, 5733-1973. In those provisions – and in many others – a direct causal connection is required between an act and a result – injury to a victim – whereas sec. 2 (a) of the Consumer Protection Law prohibits the conduct *per se*, even in the absence of resultant injury. This requirement of the Consumer Protection Law is, of course, intended to protect the consumer – to ensure that the consumer will receive reliable information about a commodity or service offered to him, so that he may make a reasoned decision whether or not to make the transaction. See: Explanatory Notes to the Consumer Protection Law Bill, 5740-1980, 5740 *H.H*. 302; and compare: CA 1304/91 *Tefahot Mortgage Bank for Israel Ltd* v. *Liepart*, 47 (3) IsrSC 309, 326.

11. The second legal provision is that found in sec. 31 (a) of the Consumer Protection Law, from which we learn that an act or omission under sec. 2 (a) – and many other provisions – is to be treated as a tort:

> *Compensation*
>
> 31. (a) Any act or omission in violation of Chapters Two, Three, or Four shall be treated as a tort under the Civil Wrongs Ordinance [New Version].

It would appear, therefore, that contravening the prohibition of deceit – as specified in sec. 2 (a) of the Law – is to be treated as a tort under the Civil Wrongs Ordinance, and therefore, should be adjudged according to the principles and doctrines established by the Civil Wrongs Ordinance that apply to torts under Ordinance.

12. The third relevant legal provision is sec 35A of the Law, which treats of class actions under the Law:

> *Class Action*

> 35A. (a) A consumer… (hereinafter – the plaintiff), may bring suit subject to the provisions of this chapter, on behalf of a group of consumers for a cause of action under which, in accordance with this law, he could personally bring suit, and against every defendant that the consumer could personally sue (hereinafter – a class action).
>
> (b) Where the cause of action is damage, it is sufficient that the plaintiff show that damage was caused to a consumer.
>
> (c) …

The plain-meaning of this legal provision is that an individual victim can present himself as a representative plaintiff in a class action – subject to these and other provisions – if and only if he has a personal cause of action. In other words: there is no "public" class action. The possibility of an *actio popularis* in the field of class actions is ruled out by the Consumer Protection Law.

13. Let us examine the opinion stated in the judgment before us in light of these provisions.

The Opinion in the Judgment under Appeal in the Further Hearing

14. The starting point for this interpretive journey is that Bezeq's advertisement was (purportedly) something that was "liable to mislead a consumer in regard to any material element of the transaction", as stated in sec. 2 (a) of the Consumer Protection Law. Therefore, as all three justices agreed, Bezeq breached a prohibition established by under sec. 2 (a) of the Law. However they disagreed on the question whether Barazani was harmed as a result of the advertisement. Did Barazani incur damage even though he had not rely upon those advertisements, and even though there was no causal connection, in the accepted sense, between the advertisement that *ex hypothesi* did not mislead him, and the harm he claims that he incurred? Or, as Justice Strasberg-Cohen stated the matter (*ibid*., 594):

> Section 2 (a) of the Law, titled "Prohibition of Deceit", forbids a dealer from doing anything that "is liable to mislead" a consumer in regard to any material element of a transaction, and sec. 31 of the Law establishes that violating the

prohibition upon deceit is to be treated like a tort, which entitles the victim to compensation. We learn from the two sections that in order for a consumer to have a cause of action against the dealer for a breach of the "prohibition of deceit", the consumer must show that the dealer breached the duty imposed by the "prohibition of deceit", that the consumer suffered harm as a result of the breach of that duty, and that there was a causal connection between the breach of the prohibition established under sec. 2 (a) of the Law and the harm suffered by the consumer.

15. In her dissent, Justice Strasberg-Cohen argued that the purpose of the Consumer Protection Law – and the purpose of class actions, as well – both require that we interpret the provision of sec. 2 (a) of the Law as granting a consumer a cause of action even if he did not rely upon the misleading representation. After all, the Law speaks of something that is "liable to mislead", and not about something that "misleads". Therefore, once an advertisement that is "liable to mislead" is published, the dealer is under an obligation to fulfill what it promised in the advertisement, while opposite that duty stands the right of the consumer that the dealer will act in conformance with the advertisement. If the dealer breach that duty, the consumer incurs damage that entitles him to compensation. The dealer causes damage to the consumer by the very breach of the duty imposed upon him, even if the consumer was unaware of the advertisement. Indeed, the causal connection between the advertisement and the damage is not the accepted one that we know from tort law, but one that is not bound by the provisions of the Civil Wrongs Ordinance in this regard.

16. That view was not acceptable to Chief Justice Barak. The Chief Justice agreed, as we noted, that Bezeq had breached the prohibition upon publishing an advertisement that was "liable to mislead a consumer", but he did not share the opinion that that breach entitled Barazani to sue for compensation. The reason for that was that, as we know, Barazani did not rely upon the advertisement when he made international calls – inasmuch as he was unaware of it – and there was, therefore, no (factual or legal) causal connection between Bezeq's breach and the alleged damage caused to Barazani. In the opinion of Chief Justice Barak, as stated in sec. 31 (a) of the Law, the normal doctrines of tort law – among them the causal-link doctrine, and the rule that compensation is granted only for damage that is causally connected to the tortfeasor's wrongful

act – apply to the breach of the duty established by sec. 2 (a) of the Consumer Protection Law. Thus, in light of that, in the matter before us there was no causal connection – a *causa sine qua non* connection – between the advertisement and Barazani's alleged damage, and a necessary condition for compensation was not met. Since Barazani did not have a personal cause of action for a suit for damages, he could not, in any case, act as a representative plaintiff for compensatory relief.

17. Justice Englard was of the opinion that Bezeq's advertisements were not liable to mislead the consumer public, and that Bezeq had not, therefore, breached its duty under sec. 2 (a) of the Law. In regard to the disagreement between my colleagues Justice Strasberg-Cohen and the Chief Justice, Justice Englard concurred with the view of the Chief Justice, holding that compensation should not be awarded to a consumer who was not actually misled by the misleading advertisement. The reason for this was that "no obligation for compensation should be imposed in the absence of a causal connection between the wrong and the damage".

The Question at Issue

18. This, therefore, is the question at issue: Reuben, a dealer who sells commodities or supplies services, publishes an advertisement that is "liable to mislead a consumer" in regard to a material element. We all agree that by doing so, Reuben violates a prohibition established under sec. 2 (a) of the Consumer Protection Law. Simon, a consumer, purchases one of those commodities or services that Reuben offers for sale. Does Simon acquire a cause of action against Reuben for damages even if he never saw the advertisement, and thus was neither influenced nor misled by it? Is a consumer who purchased some commodity or service from a dealer entitled to damages from that dealer merely by virtue of the fact that the dealer violated sec. 2 (a) of the Law by publishing an advertisement liable to mislead the consumer public in regard to that commodity or service – which is the view of Justice Strasberg-Cohen – or, as Chief Justice Barak and Justice Englard argue, is the burden upon the consumer to show not merely that he purchased the commodity or service, but also that he did so in reliance upon the misleading advertisement?

A Methodological Note concerning the Core

19. Before delving into the heart of the dispute, we would preface with a methodological observation that we deem of singular importance.

20. When Barazani's petition for a Further Hearing on the Supreme Court's judgment was granted, the Israel Consumer Council (the *Consumer Council* or the *Counci*l) requested to join as a party to the proceedings. The Court granted that request, and in lengthy pleadings, brimming with arguments and supporting sources, the Council lent its support to Barazani's position and arguments. Central to the Council's arguments is the view that adopting the majority's opinion would eviscerate class actions in the framework of the Consumer Protection Law, and would thus entirely frustrate the purpose of sec. 2 (a). Here is a typical example of the Council's arguments:

> It would be hard to overstate the importance of the rule established in the *Barazani* case. As will be explained below, in accordance with that rule, in every instance of a misleading advertisement it will be necessary to prove that each of the consumers saw the advertisement, read it, understood it and acted in reliance upon it. Where we are concerned with a consumer class action in which tens of thousands were harmed, it is not at all practical to examine which of them saw the advertisement, which of them relied upon it and to what extent the advertisement influenced their discretion in purchasing the commodity or service.
>
> Inasmuch as consumer class actions generally represent a very large number of consumers, and are often the result of advertisements by the relevant companies, all such cases will be denied at the stage of requesting certification, based upon the argument that personal reliance of each and every member of the class cannot be proven. In other words, it will be possible to block almost every consumer class action. Moreover, as will be explained below, this construction will inflict substantial harm upon the Consumer Protection Law, at least in regard to the civil remedies that the Law provides.

> If the construction under which personal reliance of each consumer is accepted as the relevant construction for the remedy of damages under the Consumer Protection Law, the result will be that it will be impossible to sue for damages by way of a class action in cases of false advertising. This rule is liable to result in abuse, and a situation in which advertisers will not worry about making imprecise statements, as the primary remedy of a class action will not be available to the consumer public.

The Council and Barazani (the Petitioners) further explain that the Consumer Protection Law – and sec. 2 (a) thereof, with which we are concerned – was intended to protect consumers from large companies, and to deter such companies from harming consumers. In the opinion of the Petitioners, class actions are vital to the realization of that objective, as without them, the Law will not be enforced, and the obligations it places upon dealer will come to nothing. The other enforcement measures in the Law are secondary measures and inadequate. The primary means for enforcing the Law is by class actions, which place enforcement in the hands of the individual consumer, and thus appropriately lead to a distribution of enforcement. The Petitioners argue that the majority opinion would sound the death knell for class actions and should, therefore, be rejected. The Petitioners find further support for their position in the American consumer protection laws, which, they argue, do away with the need for reliance, and that, they claim, is also the case in regard to Israeli securities law. They therefore pray that we interpret secs. 2 (a) and 31 (a) of the Law broadly and generously, as does Justice Strasberg-Cohen. I believe that I would not exaggerate in saying that the class action constitutes the central pillar of the Petitioners' argument, as if class actions are the whole Torah on one foot, and all the rest of the Consumer Protection Law is but commentary.

Bezeq replies to the Petitioners' arguments at length and in detail, and we shall briefly refer to part of that reply.

21. We have no intention of delving into the subject of class actions for the purpose of deciding the instant case. However, we will make some observations in regard to how class actions are integrated into the provisions of sec. 2 (a) of the Law, and primarily in regard to the consequences of such actions upon the interpretation of sec. 2 (a).

22. In accordance with the provisions of sec. 35A (a) of the Law (see para. 12 above), a person cannot initiate a class action unless he has a personal right to bring suit. Compare (in regard to actions under the Securities Law, 5728-1968): CA 2967/95 *Magen vaKeshet Ltd.* v. *Tempo Industries Ltd.* IsrSC 51 (2) 312, 329, and in regard to an action on the basis of sec. 29 of the Civil Procedures Regulations, 5744-1984, see: LCA 3126/00 *State of Israel* v. *A.S.T Project Management and Manpower Ltd.*, IsrSC 57 (3) 220, at para. 24 of the opinion of Strasberg-Cohen, J. A class action is a type of extension of the personal suit, and in the absence of a right to bring a personal suit, there can be no class action. A class action is like a chamber within a chamber. You cannot enter the inner chamber without first passing through the outer one. If that be the case – and I believe that to be so – then it would be difficult to conjecture from class actions to personal actions. If a person must first show that he has a personal right to sue, and if overcoming that hurdle is a precondition to a class action, then the interpretation and scope of personal actions can be influenced but little, if at all, by class actions. If that is the general case, then clearly class actions cannot be seen as independently granting causes of action. A class action is nothing but a procedural means for joining several personal actions into a single proceeding. That being the case, we cannot say that class actions might provide inspiration for interpreting sec. 2 (a) of the Law, let alone that the fundamental basis for its construction is to be found in class actions.

23. Moreover, the provisions of sec. 2 (a) of the Law, along with sec. 31 (a) – legal provisions that grant a consumer a personal right – were part of the original Law as enacted in 1981. At the time, class actions were not included in the Law. Class actions only boarded the moving train of consumer protection some thirteen years later in the Consumer Protection (Amendment No. 3) Law, 5754-1994. And see: the Explanatory Notes to the Consumer Protection Law (Amendment No. 3) Bill, 5754-1994, *H.H.* 5754, 396:

> It is recommended that an additional chapter be added to the Consumer Protection Law, 5741-1981, that would make it possible to initiate a class action.
>
> A class action, which saves the need for submitting a large number of individual consumer suits, is the efficient, and sometimes the only way by which consumers

> can contend with powerful economic bodies for which an independent suit of a single consumer, or even of several consumers together, is meaningless.

Knowing this to be the case, we can return to the question of how class actions influence the interpretation of personal suits, and say: until the institution of class actions, we had to interpret sec. 2 (a) on its own, from within and in the general context of the Law as it then was, and in the broad context of the existing legislation and the general principles for the interpretation of statutes, as normally applied. Class actions were not part of that interpretive process, as they had not yet been recognized, and therefore could not have influenced our interpretation. The interpretation of sec. 2 (a) of the Law was thus grounded before class actions were part of the Law. With the introduction of class actions in 1994, we find nothing among its provisions but the procedural expansion of the personal suit into very many personal suits. The fundamentals of personal suits did not change. As Justice Strasberg-Cohen notes in LCA *A.S.T.* (above, at para. 26 of her opinion):

> The arrangement for submitting a class action is essentially a procedural one. It facilitates joining the individual suits of many, mostly unknown, plaintiffs, into one suit. The fact that a class action has many ramifications for various areas does not change its basic procedural nature.

Indeed, "a situation in which a single plaintiff (or a number of plaintiffs) sue on behalf of a group of individuals for harm (of a similar kind), where each member of the group was harmed by an identical breach of duty, stands at the base of class actions" (LCA 4556/94 *Tazat* v. *Zilbershatz*, IsrSC 49 (5) 774, 783). A class action "represents a collection of personal suits" (the *Magen vaKeshet* case, above, 324), and it does not create causes of action for the representative plaintiff or for the members of the group. Class actions are an important tool – of great value and power – and in being what they are, they influence the material rights of the parties – the defendants, the representative plaintiff, and the members of the group. However, their influence is in providing an opportunity to realize rights, rather than in the creation of new causes of action. The power and importance of a class action are expressed in its size, and in making it possible to join a large number of existing actions in one procedure, where treating each action individually would lack significance. At the same time, the class action does not grant the representative plaintiff, or any

member of the group, a cause of action that he would not have were it not for the class action. How, then, do class actions influence the interpretation of what preceded them in time, as alleged?

24. We would emphasize that, of course, it is not our intention to say that a later law – that of 1994 – cannot influence the interpretation or scope of prior rights. However, in a case such as ours, we would expect that the new law would send us some sign or signal that would inform us – expressly or impliedly, directly or indirectly – that it is intended to change the mode or manner of the prior law, or, in the case before us, that it would entirely change the interpretation of sec. 2 (a). But in the 1994 law "there was no response, no one answered, no one paid attention".[1] It is simply that sec. 2 (a) of the Law should be interpreted after 1994 as it was understood before that year, i.e., without reference to class actions as such (see and compare: HCJ 6194/97 *Nakash v. National Labor Court*, IsrSC 53 (5) 433, 455-456; and see: A. Barak, Interpretation in Law, v. 2 (Nevo, 1993) 51-54).

25. We would add that we do not mean, and have not said, that the provisions regarding class actions cannot, by their very nature, affect the interpretation of the personal suit. It can be argued that had the class action been created in the original law – joined at birth to the personal suit – then it could retroactively, so to speak, influence the interpretation of the personal suit. "There is no early or late in the law",[2] and all of its provisions are part of a unified whole. Thus, provisions that, in terms of the internal logic of the law, appear to "precede" other provisions of the same law, will not be interpreted independently, in isolation from the "later" provisions. The law is like a living creature, and each of its organs affects the others, and vice versa (see and compare: CrimA 4389/93 *Mordechai v. State of Israel*, IsrSC 50 (3) 239, 260 ff.). However, in this regard, we would expect that the later law would send us some message telling us that it is intended to shed new light on the preexisting law. But the 1994 amendment – that which introduced class actions – says absolutely nothing that might affect the interpretation of sec. 2 (a) as it stood prior to the amendment.

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[1] Translator's note: I Kings 18:29.

[2] Translator's note: The phrase is a reference to a rabbinic principle of biblical hermeneutics, see, e.g., Mekhilta deRabbi Ishmael, Masekhta deShira 7; Sifrei Numbers, Beha'alotekha 64; Babylonian Talmud, Tractate Pesaḥim 6b.

26. Our conclusion is, therefore, that, as opposed to the argument of the Petitioners, class actions will not play a decisive role in the interpretation of the provisions of sec. 2 (a) or of sec. 31 (a) of the Law. That is not to say that we may not glance in the direction of class actions in the course of interpretation, since, after all, after the amendment of the Law, a class action is one of the organs of the Law (and that, bearing in mind, as we said, that had class actions been created with the Law, then it would be appropriate to interpret personal suits differently). However, the influence of class actions, to the extent that they may exert some influence – which is a separate question – will only be marginal.

27. This matter of interpretation that we just addressed is of singular importance. As we all know – and as stated – class actions are an important, valuable tool. But first and foremost – and this is the main point – it is a powerful tool. However, the synergetic power of a class action makes it a non-conventional weapon, and not surprisingly, it strikes fear into the hearts of dealers. For that reason – and primarily for that reason – we must take special care in treating of the class action, as it is a hand-grenade with the pin pulled out. We celebrated the birth of the class action, as in the "balance of terror" between dealers and consumers – particularly in a society such as our own, in which we are assured that "it will be alright" and "you can rely on me" – consumers require that power they would not otherwise have in confronting dealers. But that joy can be a mixed blessing, and we must take care that the class action not exert undue influence over the scope of personal suits.

Let us now, first and foremost, turn to the question of Barazani's right to bring a personal suit against Bezeq.

The Nature and Category of the Right established under Section 2 (a) of the Law

28. Section 2 (a) of the Law does not inform us of the remedy that a consumer may seek from a dealer that did something "liable to mislead a consumer" in regard to a material element of the transaction. This gap – if it is a gap – is filled by the provisions of sec. 31 (a) of the Law, which informs us that an act or omission contrary to Chapters Two, Three or Four of the Law is to be treated as a tort under the Civil Wrongs Ordinance (see para. 11, above). Section 2 (a) is located in Chapter B of the Law – the chapter comprising secs. 2 through 7, titled "Deceit and

Exploitation" – and we therefore know that an act or omission prohibited under sec. 2 (a) is to be treated as a tort under the Civil Wrongs Ordinance. It would appear as if the Consumer Protection Law planted sec. 2 (a) – like many other provisions – into the "Civil Wrongs" chapter of the Civil Wrongs Ordinance, and that sec. 2 (a) is the same as any of the other torts under the Ordinance. One of the necessary conclusions to be drawn from that would be that sec. 2 (a) is subject to the doctrines and principles set out in the Civil Wrongs Ordinance, which are applicable to all the torts in the Ordinance. And as Justice Strasberg-Cohen instructed us in LCA 6567/97 *Bezeq – Israeli Telecommunications Company Ltd. v. Estate of Eliahu Gat*, IsrSC 54 (2) 713, 717:

> In practice, Bezeq cannot be directly attacked in regard to the applicable tariff, as its actions are under the aegis of the Regulations [Bezeq Regulations (Payments for Bezeq Services detailed in Schedule Two of the Law – Services in Israel), 5756-1996], and, therefore, enjoy apparent immunity by virtue of sec. 6 of the Civil Wrongs Ordinance [New Version], which grants a defense to an action under a statute, and according to sec. 31 (a) of the Law, an act or omission contrary to Chapters Two, Three or Four is to be treated as a tort under the Civil Wrongs Ordinance [New Version].

29. My colleague now reads sec. 31 (a) of the Law differently, and sec. 31 (a) no longer directs us to the Civil Wrongs Ordinance as it stands, but rather to a general law that is similar but not identical to the Civil Wrongs Ordinance, or as she describes it (at p. 605):

> In my opinion, we should bear in mind that an act or omission contrary to the prohibition upon deceit established by the [Consumer Protection] Law is not a "regular" tort but it is to be treated "*as* a tort". Therefore, we are not limited to "traditional" tort law – upon which my colleague the Chief Justice bases his opinion – and we should also give appropriate weight to the purpose of the Law and the purpose of class actions … [emphasis original – M.C.].

I find it hard to accept such reasoning.

30. In my opinion, sec. 31 (a) should be read and understood in accordance with its plain meaning, and the plain meaning is that the prohibition stated in sec. 2 (a) of the Consumer Protection Law is a tort for the purpose of the Law. Or, as stated in the Explanatory Notes of the bill (Consumer Protection Law Bill, 5740-1980, *H.H.* 5740, 302, 313), Explanatory Notes to secs. 30 through 33):

> The granting of civil remedies to the harmed consumer allows him to compensate himself with relative ease for damage he incurred as the result of an act or omission contrary to Chapters B through D.

And further on (*ibid.*, 314, in the Explanatory Notes to sec. 35):

> The basic concept grounding the law is that deceiving a consumer, defrauding a consumer, and similar acts or omissions stated in the law are torts, and the consumer should be compensated for the damage caused him.

My colleague does not interpret the prepositional "*kaf* of comparison" prefix "as"[3] in forming the phrase "as a tort"[4] in the usual way. In my opinion, the interpretation of the prefix is "as this so this, the two are exactly identical" (Even Shoshan, The New Dictionary, 1991, *s.v.* "*kaf"* (Hebrew)), or as Jehoshafat King of Judah said to Jehoram King of Israel: " I am as thou art, my people as thy people, my horses as thy horses" (I Kings 22:4; II Kings 3:7) (and notwithstanding the statement of the Sages that "an egg is superior to anything as an egg…" (Babylonian Talmud, Tractate Berakhot 44b), which is clearly not applicable here, as is easily seen from the context[5]). Of course, the legislature could have worded the provision of sec. 31 (a) such that an act or

[3] Translator's note: The original Hebrew employs the letter *kaf* as a prepositional prefix, called the "*kaf* of comparison", meaning "as" or "like".
[4] Translator's note: The original Hebrew phrase is "*ke-din avla*".
[5] Translator's note: The Talmudic quote is a wordplay that exploits the use of the word *beitza* to mean an egg and to designate a measure of volume. In its original context, the phrase means "an egg is superior to any other food of an equal amount".

omission etc. would constitute a tort under the Civil Wrongs Ordinance – it would be a tort rather than be treated as a tort – but I fear that the preposition is not strong enough to support the superstructure that my colleague wishes to build upon it.

I also do not find any merit in the arguments of the Consumer Council comparing the phrase "as a tort" in our case to similar but not identical wording in other statutes. Thus, for example, sec. 11 of the Commercial Torts Law, 5759-1999, states "The violation of the provisions of Chapters One and Two is a tort, and the Civil Wrongs Ordinance [New Version] … shall apply to it…". At times we find this wording and at times other wording, and we will not hang mountains by a hair.[6] The same is true in regard to other statutes that employ various wordings. See, for example: sec. 28 of the Adoption of Children Law, 5741-1981; sec. 5 (a) of the Prohibition of Discrimination in Products, Services, and Entry into Public Places, 5761-2000; sec. 15 of the Banking (Customer Services) Law, 5741-1981, and others. In my opinion, the purpose of the Law in this case is crystal clear, and comparisons to other laws will not succeed.

31. Indeed, nothing in the language of sec. 31 (a) of the Law would show that the tort under sec. 2 (a) removes it from the fundamental principles or doctrines of the Civil Wrongs Ordinance, and nothing therein might serve to show that a consumer is entitled to damages merely because a dealer contravened a provision of the Law. On the contrary, the Law refers us clearly and unreservedly to the Civil Wrongs Ordinance. Section 2 (a) situates itself as one of the native torts of the Civil Wrongs Ordinance, and it would therefore appear that the fundamental principles and doctrines of the Civil Wrongs Ordinance apply, in their entirety, with the same effect and force with which they apply to the native torts.

Moreover, not only is the language of the Law crystal clear, but efficiency also points to the solution presented by the Law. Inasmuch as the acts and omissions external to the Ordinance are tortious in nature, it is but natural that we should employ the same traditional, familiar doctrines that tort law created and developed over so many years such that they have become foundational to the legal system, subject, of course, to special, exceptional cases.

[6] Translator's note: The reference is to Mishna Ḥagigah 1:8 "The laws concerning the Sabbath, festival offerings and the trespass of consecrated objects are as mountains hanging by a hair, that have few supporting scriptural verses but many laws".

Application of Fundamentals Principles and Doctrines of the Civil Wrongs Ordinance to Torts external to the Ordinance

32. We have stated that the doctrines of the Civil Wrongs Ordinance "appear" to apply to the prohibited acts under sec. 2 (a) of the Consumer Protection Law. Indeed, there are differences between the native torts of the Ordinance and those external to it that are treated as torts under the Ordinance. The native torts were created together with the Ordinance's doctrines, and they reside in the same structure. Other than in exceptional cases, the doctrines of the Ordinance will apply with full force to every tort in the Ordinance. In regard to those exceptions, see Cheshin, *Chattels in the Law of Torts* (Magnes, Jerusalem, 1971), secs. 168-172 (pp. 167-170). As opposed to the native torts, the external torts, among them those under sec. 2 (a) of the Consumer Protection Law, are different. Indeed, the general doctrines of the Ordinance apply to them, however, here we must take special care. Since we are concerned here with transplanting a new organ into the body of the Civil Wrongs Ordinance, we must closely examine whether any particular doctrine of the Ordinance is compatible with the foundations, essence and structure of the new tort. This question was addressed in I. Englard, A. Barak & M. Cheshin, *The Law of Civil Wrongs – General Principles of Tort Law*, G. Tedeschi, ed. (2nd ed., Jerusalem, 1977) pp. 74 *ff.* and especially p. 81, and we shall elaborate no further. And see: CA 3666/90, 4012/90 *Zukim Hotel Ltd* v. *Netanya Municipality* IsrSC 46(4) 45, 73 [1992]; CA 804/80 *Sidaar Tanker Corporation* v. *Eilat-Ashkelon Pipeline Company Ltd*., IsrSC 39(1) 393. And so we stated in CrimA 3417/99 *Har Shefi* v. *State of Israel*, IsrSC 55 (2) 735, 766-767 [English translation: http://versa.cardozo.yu.edu/opinions/har-shefi-v-state-israel]:

> And indeed, this is – in general – the relationship between the general definitions and doctrines which cut across the law lengthwise and widthwise, and specific statutory provisions. General definitions and doctrines will attach themselves to all statutory provisions and laws they wish to apply to. But where a certain specific statutory provision seeks to expel from within its bounds the general definition or doctrine—and this expulsion is derived by way of "interpretation", in the broad sense of the concept of interpretation, including from the basic tenets of the system: logic, justice, first principles, social doctrines, etc. — the specific

statutory provision prevails, while the general definition and doctrine will retreat. The general definition and doctrine will apply, as per the language of the Interpretation Law 5741-1981 in section 1, "… if there is no other provision as to the said matter, and if there is nothing in the said matter or its context which cannot be reconciled with…" the general definition or doctrine.

Elsewhere I raised the theory that the term "tort" in the Civil Wrongs Ordinance [New Version] is not limited only to those torts listed in the Ordinance. I opined that the concept "tort" is a conceptual term, and from this I concluded that there are "torts" outside of the Civil Wrongs Ordinance [New Version]. Against this background I further asked myself, what is the relationship between the doctrines that were established in the Civil Wrongs Ordinance [New Version] and those unspecified torts. I answered the question by saying that an unspecified tort will not "be controlled mechanically by the doctrines established by the Ordinance." And that the doctrines in the Ordinance will apply to unspecified torts only "… if the application of a certain doctrine from the Ordinance is consistent with the foundations, essence, and structure of the tort at issue, and with the framework in which it is found".

Causal Connection and Awarding Damages

33. Barazani claims damages from Bezeq by virtue of the advertisement that it published, and which – as stated in sec. 2 (a) of the Consumer Protection Law – was liable to mislead a consumer in regard to a material element. We are all in agreement that Barazani did not see the advertisement, that he was not influenced by it, and that he did not rely upon it when he made international calls. Nevertheless, and deeming himself wronged, he demands damages – and asks to sue for those damages in a class action on behalf of all those harmed – claiming that he incurred harm for which he is entitled to compensation. The damage, he argues, is the difference between the advertised price and the price he actually paid Bezeq. Here, Barazani confronts the doctrines of the Civil Wrongs Ordinance, and the question is whether those doctrines bar his path to compensation.

34. Among those doctrines, two concern us here. My colleague Chief Justice Barak addresses those doctrines in his opinion, and inasmuch as I agree with his opinion, I will be brief rather than elaborate at length.

35. One doctrine is that of causation, under which – in accordance with sec. 64 of the Civil Wrongs Ordinance – there must be a causal connection between a person's act or omission – an act or omission that constitute a tort – and the harm incurred by the victim, for which he seeks redress. As stated in sec. 64 of the Civil Wrongs Ordinance: "… a person shall be deemed to be at fault for such damage when the fault was the cause or one of the causes of the damage". In the matter before us, there was no causal connection between Bezeq's advertisement and the "damage" caused to Barazani, if only by reason of the fact that Barazani never read that advertisement, and therefore, in any event, he is not entitled to sue on that basis. Indeed, Bezeq committed a tort by publishing the advertisement – that is the basic assumption in this case – but the mere existence of a tort is insufficient to entitle a person to redress. That person must show that *due* to that tort, he incurred harm, and that precondition was not met in regard to Barazani.

36. This is also the case in regard to the compensation doctrine. In accordance with sec. 76 of the Civil Wrongs Ordinance, and as has always been the case: a person is entitled to compensation only for harm caused as a result of the tortious act. A person will be entitled to compensation only to the extent of the harm incurred, and as stated in sec 76: "only in respect of such damage which may naturally arise in the usual course of things and which directly arose from the defendant's civil wrong". A fundamental principle of tort law is that of *restitutio ad integrum*, and therefore, a person who did not suffer harm will not be entitled to compensation. See and compare: LCA 378/96 *Sagi Weinblatt* v. *Moshe Burstein Ltd*., IsrSC 54 (3) 347, 361; CA 5465/97 *Kenny Housing Ltd.* v. *Netanya Local Planning and Building Board*, IsrSC 53 (3) 433, 440-441.

That is also the opinion of Prof. Sinai Deutch in his book *Consumer Protection Law*, vol. 1 (2001) 376 (Hebrew), who wrote the following about the causal link required under sec. 2 of the Law and the compensation to which a victim is entitled:

> In a tort claim under the Consumer Protection Law (sec. 31 of the Law), there is no need to prove a causal connection between the mistake and the contractual agreement, but a causal connection must be shown between the deceit and the harm caused to the consumer. While sec. 2 of the Consumer Protection Law prohibits doing anything liable to mislead the consumer, and it would therefore appear that there is no requirement of actual misleading, the sanction attendant to such an act can only be administrative or penal. If, in fact, there was no misleading and no harm, damages cannot be awarded. Compensation owing to a tort can be awarded only for demonstrated harm.

Thus, publishing something that is liable to mislead, *per se*, does not grant a consumer a right to compensation if he was not actually harmed. That is also the view of Dr. Orna Deutch, who writes in her book *The Legal Status of Consumers* (Nevo, 2002) 414-415 (Hebrew):

> As far as the remedy of damages is concerned, a suit under the Consumer Protection Law would require proof of the harm deriving from the deception, in other words, the existence of actual deception and action on the basis of that deception. There must be a causal connection between the deception and the harm, as is the normal rule in regard to damages. That was the majority opinion in *Barazani v. Bezeq*. Indeed, there is no justification for allowing a person to collect damages where he did not incur harm as a result of the deception. The purpose of damages is to require that the person responsible make *restitutio ad integrum*. There is no need for a causal connection in relation to any harm when a declaratory order is sought to stop the misrepresentations…

And see: Prof. Miguel Deutch, *Commercial Torts and Trade Secrets* (Nevo, 2002) (Hebrew) 48-50.

And if that is not sufficient, we would note the opinion of Chief Justice Shamgar in the *Liefert* case (Note to editor: I assume the reference is to CA 1304/91 *Tefahot Mortgage Bank v. Liefert*, IsrSC 47 (3) 309). In that case, the Court addressed sec. 3 of the Banking (Service to

Customers) Law, 5741-1981, that prohibits a banking corporation from doing anything "liable to mislead a customer as to anything material to the performance of a service to the customer". In that regard, Chief Justice Shamgar wrote (at p. 326):

> The prohibition in the Banking (Service to Customers) Law is broad, and prohibits any act or omission *liable* to mislead. In other words, it is not necessary that there be actual deception (although in the absence of such deception, it is doubtful that it would be possible to point to some harm that might support a cause of action for damages under the law) [emphasis original – M.C.].

Of course, the legislature is free to deviate from this principle, and decide – for various reasons – that a victim be granted compensation without showing harm. See, for example: sec. 7A of the Defamation Law, 5725-1965; sec. 11 of the Contracts (Remedies for Breach of Contract) Law, 5731-1970; sec. 10 (a) (1) of the Employment (Equal Opportunities) Law, 5748-1988; sec. 6 (b) of the Prevention of Sexual Harassment Law, 5758-1998; sec. 3A of the Copyright Law; sec. 13 (a) of the Commercial Torts Law, 5759-1999. However, these are but exceptions to the rule. The rule is that compensation will be granted only if harm was done, and compensation will be granted only to the extent of the harm done. In the matter before us, and inasmuch as Barazani was unaware of Bezeq's advertisements and did not rely upon those advertisements, we cannot say that he is entitled to compensation. Indeed, depriving Barazani of the right to compensation primarily derives from the absence of a causal connection between the tort and the "harm" he allegedly incurred, and the compensation doctrine simply confirms the lack of a claim for compensation against Bezeq.

37. The absence of Barazani's right can also be demonstrated in another way. An action in tort that concerns an injury to a person, begins with that injury. When a person incurs injury as a result of the act or omission of another, we examine whether that injury was caused by a tort perpetrated by that person against the injured party, or whether that person breached some duty toward that injured party. See and compare: LCA 5768/94 *A.S.I.R Import, Manufacture, and Distribution* v. *Forum Accessories*, IsrSC 52(4) 289, 334. If that examination show that a tort

was committed or that a duty was breached, and that the tort or breach of duty was the cause of the harm, then the tortfeasor will be liable for damages. However, if no connection be found between the act or omission of the tortfeasor and the harm, then damages will not be awarded, and the injury will be *damnum sine injuria* – a loss without a wrong.

38. In the matter before us, things appear topsy-turvy. Unlike the situation of a normal tortious event, Barazani cannot show the actual "harm" that was caused him unless we first say that the provision if sec. 2(a) of the Consumer Protection Law entitles him to damages. In that case, we would say that Barazani incurred "harm" because he is entitled to damages by virtue of the Law. His "harm" is a sort of "statutory harm" – harm *ex lege*. However, unlike other statutory provisions that grant a consumer a monetary right – see, for example, the provisions of secs. 10 and 17B of the Consumer Protection Law – sec. 2 (a) of the Law does not establish a consumer's right to damages in the absence of proof of injury, or a consumer's right to pay a particular price advertised by a dealer. And see: LCA *8733/96 Robert Langbert* v. *Israel Lands Administration*, IsrSC 54 (1) 168. Thus, while in a normal tort case, the injured party can easily point to the harm he incurred, in the matter before us, Barazani cannot show that he suffered any real "injury", if only because he never saw Bezeq'a advertisement. The existence of an "injury" must be derived from sec. 2 (a), which does not address compensation. We thus find ourselves locked in a vicious circle. We assume the existence of "injury", and then find that injury has been caused on the basis of that assumption. We therefore state that just as a person is not entitled to sue a person for negligence unless that negligence caused him harm, a person cannot sue a dealer for publishing something liable to mislead in regard to a material element of a transaction if that deceit did not cause him harm. We therefore declare that in the absence of an explicit, unambiguous provision granting damages for virtual harm, like that suffered by Barazani, we cannot imagine that a court will award damages. Such significant creativity is a matter for the legislature, not the courts. The legislature did not say what the petitioner wishes to put in its mouth, and we will not usurp the role of the legislature to say what it did not.

39. Having said all that in regard to causation and damages, we would add that the (factual and legal) causal connection required by sec. 2 (a) of the Law does not unambiguously require a consumer's explicit reliance upon a dealer's representation, as opposed to sec. 56 of the Civil Wrongs Ordinance that explicitly requires a causal connection of reliance. It is possible for the

necessary causal connection to exist even where a consumer does not directly rely upon a representation, as where the dealer's representation (as stated in sec. 64 of the Civil Wrongs Ordinance) "was the cause or one of the causes of the damage". That would be the case, for example, where it can be shown that a dealer's representation that was liable to mislead a consumer in regard to a material element motivated a chain of events that resulted in injury to the consumer. For example: a certain advertisement misled a person, and it is possible to show a sufficiently proximate causal link between that person and the consumer who suffered the injury. In other words, in this context, we should broadly interpret the concept of reliance such that it comprises more than just direct reliance.

However, there must be some (appropriate) causal connection between a misleading advertisement and the injury incurred by the consumer. Thus, the two successive events for our purposes are: first, a publication that is liable to mislead a consumer in regard to a material element of the transaction, and the second, that the consumer purchased the commodity or the service that was the subject of the advertisement. In this regard, the fact that the purchase of the commodity or the service followed the advertisement in time is not sufficient, in and of itself, in order to show a causal connection between the two events, or to put it in terms of the well-known Latin fallacy, *post hoc, ergo propter hoc*? – after this, therefore because of this? The mere fact that event B follows event A does not mean that event B was caused by event A. There must be an appropriate causal connection between the two events, and we learn of that connection from the circumstances of each case, by the usual procedure of examining the relevant evidence.

40. A publication that is liable to mislead a consumer gives rise to a tort under sec. 2 (a) of the Law, and when there is an appropriate causal connection between that publication and the injury caused – whether a direct connection deriving from reliance, or an indirect connection deriving from an appropriate chain of causation from the publication to the consumer – the consumer will be entitled to compensation. In other words, the complaining consumer must show that the misleading publication initiated a chain of events that reached him and caused him injury.

Let us look at the case of securities. In accordance with the Securities Law, 5728-1968, the tort resulting from deceptive conduct does not require a consumer's reliance upon a misleading publication. A party signing a prospectus that comprises a misleading element "is

liable to anyone who bought securities from the offeror … for damage caused to them by the inclusion of a misleading item in the prospectus" (sec. 31 of the Securities Law. And further see: secs. 32 and 52K of that law). And as held in LCA 8268/96 *Dan Reichert* v. *Moshe Shemesh*, IsrSC 55 (5) 276 (*per* Strasberg-Cohen, J.), there must be a causal connection between the misleading publication and the injury incurred by the consumer (reduction of value of the security), although it is not necessary that there be direct reliance upon the publication. And see, *ibid*., 311-312. What applies there can be instructive here, and I believe that it should be.

41. In conclusion, what we set out above merely establishes general guidelines for the interpretation of sec. 2 (a) of the Consumer Protection Law. In the case before us, we would say that since Barazani was unaware of Bezeq's misleading advertisement, and knowing that Barazani was neither directly nor indirectly influenced by that advertisement, we have no need to explore the issue of reliance or that of the appropriate causal connection between a misleading advertisement and the injury incurred by a consumer who purchased an commodity or service that was the subject of the advertisement. In the future, the courts will address those issues and corollary issues, and the law will develop from case to case. For our purposes, the main point is that we will always require the existence of an appropriate causal connection between a misleading publication and the injury incurred by a consumer, and in establishing that causal connection, we will find a place for including "constructive reliance" where appropriate. In other words, sec. 2 (a) will be interpreted as comprising not only direct reliance – as would be the case were we addressing the tort of fraud under sec. 56 of the Civil Wrongs Ordinance – but also indirect reliance, reliance whose practical import is an appropriate causal connection between the publication and the injury such that we might say that the plaintiff was misled in purchasing the commodity or service. The questions that present themselves are not simple at all, as the sharp disagreements testify. Indeed, American jurisprudence overflows with examples in both directions, upon which we will not elaborate for the purpose of the matter before us, but by way of example, see *Mark Oliveira* v. *Amoco Oil Co.*, 776 N.E. 2d 151 (2002) and the cases cited there.

On the Uniqueness of the Consumer Protection Law

42. "We cannot suffice with literal interpretation, and must continue to seek the purpose of the law in order to discern the appropriate interpretation". Having said this (at p. 598 of the judgment), my colleague Justice Strasberg-Cohen turned to the purpose of the Consumer Protection Law. In doing so, she found that the provision under sec. 2 (a) of the Law – in terms of its substance – does not accord with the fundamental principles of injury and the causation doctrine established in the Civil Wrongs Ordinance. In my colleague's opinion, we are have a duty to interpret the Consumer Protection Law in accordance with its purpose, and that purpose leads to the conclusion that sec. 2 (a) would award damages to a consumer even if he did not himself rely upon the dealer's offending advertisement. As my colleague writes:

> The Law is meant to impose modes of conduct upon the commercial sector, and establish fair rules-of-the-game in the relationship between consumers and dealers. The Law intends to ensure that a dealer will not exploit its greater economic power in order to profit unlawfully at the expense of the consumer. In order to protect the consumer, the Law established "… a line of obligations and prohibitions for dealers – producers, importers, dealers and service providers – with the overall purpose of preventing deception of consumers, providing the consumer with as much information as possible about the nature of the transaction he intends to make, and giving him the tools for realizing his rights …" … the tool of class actions was intended to ensure efficient enforcement of the norms established by the Law, and to deter those with an economic advantage from any attempt to abuse the consumer's innocence, his weakness in the contest between the two, and the inherent lack of worthwhileness in bringing suit against dealers for the injuries caused by their conduct, which may be very small relative to each consumer, yet a source of unlawful wealth for the dealer. The prohibition of deceit under sec. 2 (a) of the Law should be interpreted against the background of these objectives. Therefore, in my view, the legislature did not choose its words by accident. The statement that the "prohibition of deceit" applies to any act or omission *liable to mislead* a consumer was intended to establish an objective-normative test for evaluating a dealer's conduct, and to raise the normative bar

> that a dealer must pass in order to meet the requirement that the Law establishes to protect consumers. A construction that would grant relief only to those consumers who were actually deceived would create an artificial distinction between the consumer public that used the goods or services that were the subject of the misleading advertising, but who were not exposed to it, and the consumer public who were exposed to the misleading information. An approach that would require actual deceit would limit the liability of a dealer only to those consumers who could show that they were actually misled by the dealer's representation. Such an approach would reduce the deterrence that is one of the purposes of the Law, if not its main purpose. It would make deception worthwhile from the point of view of the dealer, and would undermine enforcement of the Law. Such an approach would undermine the achievement of the Law's purpose, in general, and class actions in that framework, in particular.

And further on (*ibid.*, 602):

> In my opinion, a consumer suing on the basis of the Law is not required to show that he was actually misled in order to for him to enjoy a cause of action for damages due to a breach of the "prohibition of deceit" established under sec. 2 (a) of the Law. It is sufficient that he show that the dealer committed an act "liable to mislead a consumer".

43. Needless to say, the Petitioners agree with the opinion of Justice Strasberg-Cohen, and add that another interpretation of sec. 2 (a) – one that would require reliance upon the misleading representations of a dealer in order for a consumer to demand compensation from the dealer – would eviscerate the Law. How? An interpretation like that of the majority would, in practice, prevent the submission of class actions for deceit, and seeing as an individual action (like that of Barazani) would not be initiated, if only due to the negligible injury to each individual consumer, the result would be that the Law would not be given effect. It would be a voice crying out in the wilderness. The benefit of the Law would be lost, and we would be left with an empty shell.

44. We addressed the issue of class actions above (see paras. 19-26), and we will comment only briefly. We do not intend to minimize the distinguished place of class actions, nor in any way detract from their importance. We would, however, add that in the absence of a clear, explicit provision –which there is not – we will not permit class actions to rule the entire field of consumer protection, while allowing it to trample fundamental principles and doctrines that have been adopted over the course of time. In this regard. We would particularly note that, from its inception, the class action was not created as a substantive right or a cause of action. A class action, for all its importance – and it is of great importance – is nothing but a procedural tool for the joining of many actions under one roof. Being what it is, we find it hard to interpret it such that it would have the retroactive power, so to speak, to change substantive principles of tort law, and among them the rules concerning causation and the principles for awarding damages. While one can question the conception created by my colleague Justice Strasberg-Cohen, it cannot be entirely ruled out. But that conception deviates so drastically from what has long been accepted, that we would expect that the Law would explicitly instruct us in this regard, and it does not.

45. When a new law is enacted, it becomes an integral organ of the legal corpus. That is true of every law, and it is true in regard to the Consumer Protection Law. A new law is not a Robinson Crusoe who comes to a place uninhabited by laws, fundamental principles, doctrines, classifications, modes of thought and legal culture. A new law must find its place and integrate itself into the thick forest and become part of the landscape. That is the background of sec. 31 (a) of the Law, which instructs us that a prohibited act under sec. 2 (a) of the Law is to be treated as a tort. Chief Justice Barak instructs us that even without sec. 31 (a), we would classify conduct contrary to sec. 2 (a) of the Law as a tort of breach of a statutory duty. But by enacting sec. 31 (a), the legislature made that unnecessary. But either way, the main point is that the Law recognized the need to weave the new law into the cloth of the general law, and found a place for it in the Civil Wrongs Ordinance. The Law thus informs us that a prohibited act in contravention of sec. 2 (a) of the Law – and contrary to other legal provisions as well – is a tort, and thereby saved us the trouble of classifying it in one way or another. As we stated elsewhere (Cheshin, *Chattels in the Law of Torts*, sec. 161 at p. 161, fn. 2 (Hebrew)):

> Classification organized "Julian laws", and is based upon fundamental principles established therein. Commonalities and distinctions among the rules to be classified is a fundamental principle of thought. The doctrines that apply to the rules that unify a category (capacity, consideration, proximity, etc.) are causes and effects of classification. At a given point in time, classification is made on the *basis* of the equivalence of doctrines that apply to various rules of law. After making the classification, and the creation of the doctrine that applies to a particular cluster of laws, the doctrine will govern all that is within that cluster *because* they are members of a single legal class. That will also hold, *mutatis mutandis*, with the creation of any specific legal rule that is a member of a particular legal class (whether explicitly or by its "explication"), which will then be governed by the doctrine pertaining to that class.

Classification in law (and in general), is intended to simplify the task of the researcher and the interpreter, but we must always bear in mind that what we are concerned with is "nothing more than a guideline, and while it would seem proper that we employ it, there is no a priori requirement that it apply, in practice, to a given legal issue" (*ibid*., 161). Indeed, functionality is the main thing, while "doctrines, classifications, and definitions, we have created these for our own use; they were intended to serve us; we will control them and not allow them to control us; the power is in our hands, and we will now allow our own creations to rise up against us" (the *Har Shefi* case, 767, and see: CrimA 4675, 4961, 4962/97 *Yisrael Rozov* v. *State of Israel*, IsrSC 53 (4) 337, 377). As for the matter before us, we find no good reason to distinguish the cause of action under sec. 2 (a) of the Consumer Protection Law, and treat it differently than any other tort.

The Consumer Protection Law – A Multidisciplinary Law

46. The Petitioners place class actions at the center of Creation, and in reading their briefs, it is hard to rid oneself of the impression that the substantive provisions of the Consumer

Protection Law were created solely, or at least primarily, to honor class actions. Thus they conclude that in denying Barazani a right granted under sec. 2 (a) of the Law, we render the Law an empty vessel. The claim is readily refuted by the fact that class actions were introduced into the Consumer Protection Law only in 1994, that is, some thirteen years after the Law was enacted. It seems to me that portraying class actions as the prime purpose of the Consumer Protection Law, around which all other provisions of the Law orbit and bow down, does injustice to the Law.

47. We can all agree that the purpose of the Consumer Protection Law is to achieve an appropriate balance between the individual consumer and dealers – particularly large dealers – and the Law achieves this by placing greater burdens upon the dealers. See, e.g., the Consumer Protection Law Bill, 302; LCA 8733/96 *Langbert* v. *State of Israel*, IsrSC 55 (1) 168, 175; LCA 2701/97 *State of Israel* v. *Chertok Daniel*, IsrSC 56 (2) 876, 884. For a general survey, see especially, Dr. Orna Deutch, *ibid*., 27-37; Prof. Sinai Deutch, *ibid*., 118-128. However, the Consumer Protection Law is a multidisciplinary law. It simultaneously situates itself in private law and in public law, in public administrative law, and in criminal law. The Law integrates provisions form these various fields of law in order to serve the purpose of protecting the consumer.

48. Indeed, we find three different enforcement mechanisms in the Consumer Protection Law: an administrative enforcement mechanism, a criminal enforcement mechanism, and a civil enforcement mechanism. These three mechanisms can be found in Chapter Five (The Consumer Protection and Fair Trade Commissioner), Chapter Six (Penalties and Remedies), and Chapter Six 1 (Class Actions). These mechanisms are separate from the substantive provisions that impose specific obligations upon dealers.

49. In regard to the Consumer Protection and Fair Trade Commissioner, an examination of the relevant provisions of the Law reveals that the Commissioner enjoys many potent powers for overseeing the execution of the Law, for addressing complaints, etc. As stated in the Bill (*ibid*., 301, 311):

> For the purpose of enforcing the law, a Consumer Protection and Fair Trade Commissioner will be appointed, who will be granted many powers to enable him to ensure that the provisions of the law are indeed carried out, and to enforce them upon dealers that do not comply.
>
> …
>
> The powers granted by the law to the Commissioner will grant him the status of an independent authority that can act efficiently … to this end, the Commissioner is granted powers that are not generally granted to authorities, among them – the authority to obtain an undertaking by a dealer to abstain from repeating offenses, accompanied by a guarantee of up to NIS 10,000, and the authority to publish the findings of his examinations, and to obtain a restraining order from the court. In addition to those powers, the Commissioner will have the authority to investigate, to seize documents and chattels, and additional executionary powers.

The above receives full expression in the Law. Here are a few of the powers of the Commissioner, as set out in secs. 21-22 of the Law:

> *Powers of the Commissioner*
>
> 21. If the Commissioner or the person appointed by him for that purpose concludes that it is necessary to do so for the implementation of this Law, then he may –
>
> (1) Enter any place used for a business, and there check whether the provisions of this Law are observed, examine documents, samples and goods, and seize anything, if it is reasonable to presume that in its respect an offense against the provisions of this Law was committed or is planned;
>
> (2) Interrogate any person who is connected to the matter or has information about it, and demand that he appear before him, deliver to him documents, samples and information related to the investigation, on condition that

the date of a person's appearance under this paragraph shall – as far as possible – be set in coordination with him and be at a reasonable time;

(3) Carry out tests of goods or services and publish their results, but he shall not publish anything that is liable to injure any person, if he had not been given an opportunity to present his arguments;

(4) Inform dealers of their obligation to stop or not to repeat practices that constitute prima facie violations of the provisions of this Law.

Auxiliary Powers

22. (a) The Commissioner or a person appointed by him for that purpose shall have the powers of a police officer of the rank of inspector under the provisions of section 2 of the Criminal Procedure Ordinance (Testimony), and section 3 of the said Ordinance shall apply to information recorded by him.

In addition, the Commissioner also enjoys additional powers, such as the power to demand an undertaking that a dealer will abstain from violating the Law (sec. 28), the authority to apply for a court order that a dealer abstain from violating the Law (sec. 30), and more.

In addition to the Commissioner, the Law backs up the obligations that it imposes upon dealers with criminal sanctions, upon which we need not dwell. However, we would especially note sec. 23 (a) (1) of the Law, under which a dealer is subject to a year imprisonment and a fine "if it did anything liable to mislead a consumer in violation of the provisions of section 2".

50. These consumer protection mechanisms do not impress the Petitioners. They argue that public enforcement by means of the provisions of the Law is not enough, and add that in practice, there is under-enforcement by the authorities. They further argue that class actions are the – with a capital "T" – primary tool for the enforcement of the provisions of the Law, and we must not let this valuable tool slip from our hands. And see and compare: the *A.S.T.* case, para. 7 of the opinion of Beinisch, J.; the Consumer Protection Law (Amendment No. 3) Bill, 5754-1994, *H.H.* 396; Bar-Niv (Bornowski), "The Limits of the Consumer Class Action," 19 *Iyunei Mishpat* 251 (1994) (Hebrew); Bar-Niv, "Enforcement of the Consumer Protection Law by the

Commercial Sector," 17 *Iyunei Mishpat* 299 (1992) (Hebrew). And compare: M. Agmon & D. Lachman-Messer, "Theories of Enforcement in the New Companies Law Bill," 26 *Mishpatim* 543, 577 (1996) (Hebrew).

51. We would answer the Petitioners' arguments as follows. First, we have not said – and will not say – that class actions are not an important means for the enforcement of the substantive provisions of the Consumer Protection Law. Second, and this is the main point, examining the Law from within shows that, in principle, the Law rests upon several foundations. Reviewing the powers of the Consumer Protection Commissioner and examining the penal section of the Law will show that the legislature is of the opinion that those powers and sanctions greatly strengthen the position of consumers. If the authorities have demonstrated laxity in enforcing the Law, that retrospective laxity cannot influence the interpretation of the law. We would recall how other authorities operated in the past and how they operate today. We would recall the Antitrust Commissioner and the Securities Authority – how those two operated in days gone by and how they stand today. We should remember, and hope that the Consumer Affairs Commissioner will similarly gain strength, and that the enforcement authorities of the Consumer Protection Law will follow suit in regard to penalties. But that is for the future. As for the present, the Petitioners' arguments say nothing that would directly influence the interpretation of the Law.

52. One last comment in this regard. We have stated elsewhere (see para. 12, above) that the Consumer Protection Law does not accept the *actio popularis* "in blank". The proof is that a person does not acquire a right to bring a class action unless he also has an actionable personal right (see sec. 35A (a) of the Law). If we were to adopt the interpretation of sec. 2 (a) of the law advanced by the Petitioners, we would find ourselves indirectly introducing the *actio popularis* into the Law, if not in its fullest sense, at least in principle. By this interpretive process, we borrow a concept of public law – from constitutional law, administrative law, and primarily, from criminal law – and make it part of private law. It is as if we have returned to the days of old, when the enforcement of the law – civil and criminal – was in the hands of the individual. In those days, and in the absence of a central government that could impose its will upon the entire state, law enforcement was decentralized, and the powers and authority of the individual were of primary importance for the enforcement of the law. Granting Barazani a right to sue, as the

Petitioners understand the Law, returns us to those early days, if by a sophisticated, modern apparatus. We would immediately add that we do not mean to criticize the need for decentralization of enforcement. We say this because we do not believe that the Law intended, as the Petitioners argue, to affect such a mini-revolution as that we have described without saying anything expressly to that effect. But we have not heard the Law say anything – neither loud nor clear.

Presumption

53. Justice Strasberg-Cohen recommends that we establish a presumption that would assist consumers in their battle with dealers, or in her words (at p. 603):

> Were I of the opinion that actual deception of the consumer, and reliance upon the dealer's representation were required – and I do not – then, in light of the relative power in the relationship between the consumer and the dealer, and in order to deter the commercial sector, I would favor a presumption by which when a dealer makes a representation that is liable to mislead the consumer, and that representation is widely publicized in order that it reach the consumer public, the consumer who purchases the goods or services that were the subject of representation would be deemed to have been exposed to the representation and had relied upon it…

Chief Justice Barak preferred to leave that question in abeyance, inasmuch as there was no need to decide it (*ibid.*, 621). Careful examination – even without delving deeply into it – shows that the subject of the presumption raises no small number of difficulties. Inasmuch as it is not necessary that we decide the issue, we will leave it for the future.

Does this spell the End of Collective Actions on the basis of the Consumer Protection Law?

54. The Petitioners raise the fear, and even argue, that the conditions of reliance, or if you prefer, the conditions of causation – as established in the judgment under review – between the conduct of the dealer and the harm to the consumer will put an end to class actions under the Law, by which we will call down great harm upon ourselves. I cannot agree. Our opinion is centered upon the question of when, and under what circumstances, does a plaintiff under the Consumer Protection Law acquire a personal cause of action against a dealer. Indeed, each one of the plaintiffs in a class action must himself have a personal right to compensation – like the representative plaintiff – and have suffered harm causally connected to the conduct of the dealer. So much for the right itself. However, the legislature and secondary legislature took a significant step toward the members of the class insofar as proving the cause of action. Thus, if the consumer prove the existence of a personal cause of action, and if the complaint be certified as a class action, then the court may decide how the members of the class are to prove the injury they incurred. Or, as set forth in reg. 9 of the Consumer Protection (Procedures in regard to Class Actions) Regulations, 5755-1995:

> *Actions deriving from Judgments*
>
> 9. (a) If a court decides that a cause of action has been proven, it may order that every member of the class prove his right to the requested remedy by means of an affidavit in which he details the harm he incurred.
>
> (b) …
>
> (c) Subsection (a) notwithstanding, the court may, at the request of the plaintiff, exempt the members of the class, or part of them, from submitting affidavits if it finds, under the circumstances of the case, that submitting them will unduly burden the members of the class, and it may order that the damage be proven in another manner as it shall see fit.

In terms of the matter before us, if Barazani had a personal cause of action, and the court had recognized his right to submit a class action, and if the court had accepted the class action as such, then the court would have been free to establish appropriate means for proving the causal connection between the misleading advertisement and the harm caused each of the members of the class, as well as the harm caused to each of them, as it saw fit. Or, as stated in reg. 9 (a) above: "that every member of the class prove his right to the requested remedy by means of an affidavit in which he details the damage he incurred". So, by affidavit, or as stated in reg. 9 (c), even in any other way that the court shall see fit.

55. Moreover, in CA 1337/97 *Tnuva* v. *Rabi* (recently delivered and as yet unpublished), Justice Naor (dissenting) stated that, in her opinion, the Consumer Protection Law should adopt an arrangement called "indemnification and special compensation" which is found in regard to class actions in several laws, among them sec. 46I of the Restrictive Trade Practices Law, 5748-1988, sec. 16I of the Banking (Service to Customer) Law, 5741-1981, and sec. 62I of the Insurance Business (Control) Law, 5741-1981. These provisions are identically worded, and we shall quote sec. 46I of the Restrictive Trade Practices law:

> *Indemnification and Special Compensation*
>
> 46I. (a) In the case that a ruling of pecuniary compensation is handed down by a Court in a Class Action, such Court may:
>
> …
>
> (b) In the case that the Court believes that pecuniary compensation of all or some of the members of the group is impractical under the circumstances, either because they cannot be identified and the payment cannot be made at a reasonable cost or for any other reason, it may provide for any other remedy as it deems fit under the circumstances, whether in favor of all or some of the group, or in the public interest.

A similar – though somewhat different – arrangement can be found in sec. 216 (b) of the Companies Law, 5799-1999, which addresses damages in class actions under that law. From these provisions, we learn that where awarding separate compensation to each member of the class is impractical, the court may impose special compensation arrangements or other remedies upon the defendant, as it may deem appropriate, as long as the defendant is not required to pay more than the damage it caused. And see: *Daar* v. *Yellow Cab Company*, 433 P. 2d 732 (1967).

Comparative Law

56. The attorneys for the parties, each in its own cause, relied upon comparative legal precedents, primarily from American consumer protection law. An examination of the case law serves to show that support can be found for (virtually) every approach. American law is state based, and despite the reciprocal influences of the laws of the various states, each state follows its own path. While the language of the laws is similar – and even similar in certain ways to our own Consumer Protection Law – the interpretive policy of the courts differs from place to place. The primary differences center, not surprisingly, upon the subject of reliance and causation. Thus, for example, there are places where a precondition to the tort of consumer deception is that the consumer relied upon the misleading representation. In other places, no reliance is required at all. And still in others, the case law has created a presumption of reliance. And we need not point out that each is unlike the others.

Moreover, reading the American case law reveals variations in the application of the various laws, both in regard to the conditions for reliance and in regard to causation. Thus, for example, in the case of *Miller* v. *General Motors Corp*., 2003 U.S. Dis., Lexis 1467 (a case decided in January 2003 by the United States District Court for the Northern District of Illinois, Eastern Division), the court addresses some of the differences between the laws of the various states – primarily in regard to issues of reliance – and we find the following marginal note by the court:

> Some of the issues on which differences exist include: … differences in standards of reliance.

The court adds that the law of the state of Illinois is also insufficiently clear in regard to reliance. And also see, for example: the *Oliveira* case (above, para. 41), *Connick* v. *Suzuki Motor Co., Ltd*., 675 N.E.2d 584 (1996); *Zekman* v. *Direct American Marketers, Inc*., 695 N.E.2d 853 (1998).

Precedents are thus brought to us from the four corners of the earth, and there is much confusion. Indeed, the legal provisions differ, as do the trends and social, economic and legal outlooks that characterize the different states and that guide the courts – each according to its own path – and we would be hard pressed to distinguish the universal from the particular. We may learn techniques and modes of thought from American law, but I fear, not much more.

57. In reviewing the sea of citations imported from the United States and laid out before us, I cannot but be reminded of the words of Justice Haim Cohn in FH 12/63 *Leon* v. *Ringer* IsrSC 18(4) 701 [1964], where the Supreme Court was asked to decide upon the "eggshell skull" rule. This is how Justice Cohn began his opinion in that case (*ibid*., 706):

> The rule established in CA 378/62 … it that the tortfeasor is responsible for the harm caused by his negligent act, even if – due to the "eggshell skull" of the victim – the extent of the injury exceeded anything that could be expected or foreseen. In the Further Hearing on this doctrine, the learned counsels called down upon us an abundant rain of precedent, sources, articles and comments, among them Israeli, American, South African, and Australian, to the point that the waters of the foreseeability doctrine flooded the banks. In fear of being swept away by such a torrent, and drowning in a sea of various decisions and statements, I cleared my desk of all the books – among them a compendium of nineteen articles published on the subject in various journals, which the attorney for the National Insurance Institute compiled and bound for us with discerning taste – and I commenced writing with only the Civil Wrongs Ordinance, 1944, and the said decision of this Court in CA 378/62; 390/62 set before me.

Indeed, in a moment of such distress – a distress of *lémbarras du choix* (*de richesse*) – we can but latch onto the fundamental principles of the law. That is what we have done, to the best of our ability, in this opinion. And see, for example: Gary L. Willson & Jason A. Gilmer, "Minnesota's Tobacco Case: Recovering Damages without Individual Proof of Reliance under Minnesota's Consumer Protection Statutes", 25 Mitchell L. Rev**.** 567 (1999); Samuel Issacharoff, "Class Actions in The Gulf South Symposium: The Vexing Problem of Reliance in Consumer Class Actions", 74 Tulane L. Rev. 1633 (2000).

Conclusion

58. The Petitioner before us, Barazani, did not see the misleading advertisement, did not rely upon it – either directly or indirectly – and in any case, was not misled. There is no appropriate causal connection between the advertisement and the injury allegedly incurred by Barazani, and, therefore, his suit must be denied. I would, therefore, recommend to my colleagues that we dismiss the petition and affirm the judgment of the Supreme Court.

And it came to pass after these things[7]

59. I have read the opinion of my colleague Justice Mazza. My colleague comments rather sharply upon my opinion. He primarily seeks to smash the wall I built around the judgment, and pulverize the foundations upon which I built my legal conclusions. Inasmuch as my colleague's opinion was not before me when I wrote my opinion, I would ask that what I wrote be seen as an answer to my colleague's remarks. And having thus replied to my colleague, I would add two observations in regard to the disagreements that have arisen between us.

60. My colleague is of the opinion – and so he holds – that in interpreting and deciding upon the scope of the Consumer Protection Law, we must bear in mind that we are in a "consumer

[7] Translator's note: Genesis 22:1

environment" as distinguished, for example, from a tort-law environment, and that we must give special force to the "uniqueness of the consumer cause of action". Because we are acting in a consumer atmosphere, we must realize that the causal connection between a prohibited act and the injury in the Consumer Protection Law must be a "consumer causal connection", that a prohibited act of deception is "consumer deception", that the injury incurred by the consumer is "consumer injury", etc. The borders and scope of each of these concepts – concepts whose core is the consumer as such – remain somewhat blurry. However, it is unambiguously clear that appending the term "consumer" to each of these long acknowledged concepts – the concepts of "causal connection", "deception", "injury", etc. – shows that the interpretation of those concepts is not the usual one, and may contradict the usual interpretation. A "consumer causal connection" is not a regular "causal connection", "consumer deception" is not the usual "deception", "consumer injury" is not regular "injury", etc. Thus, even though the Law clearly instructs us that acts and omissions prohibited under Chapters Two, Three and Four of the Consumer Protection Law are to be treated as torts under the Civil Wrongs Ordinance, my colleague intends to disengage himself – in practice – from the doctrines of tort law, while seeking to construct a new conceptual universe whose terms and expressions are the terms and expressions of concepts familiar to us from tort law, but whose content is a "consumer content" that is remote from tort law.

61. In essence, my colleague's words destroy the existing world – the old world – and create a new world in its place. Thus, the passes the old world and a new world comes into being, all on the basis of the purpose of the Consumer Protection Law. For my part, I would argue that I find such an interpretation problematic, and I fear "the disengagement from firmly-rooted, ancient legal traditions" (Prof. Sinai Deutch, "Consumer Class Actions: The Demand for Personal Reliance on Misrepresentations of the Deceiver," (2 *Moznei Mishpat* 97, 126 (2001-2002) (Hebrew)). Not only do I not find any firm anchor in the Law for my colleague's far-reaching interpretation, but the fears gnaw at me if only because the boundaries of the new world are not sufficiently clear, and the consequences that may result from the new conception are beyond me. My colleague seeks to disengage us from the gravitational center that we have become accustomed to orbit for so many years, but he does not provide us with a firm footing to tread upon. I would go so far as to say that in this new world that my colleague creates, we must begin

from the beginning. The sensation is of floating in space, and the spirit of God hovers upon the waters.

Thus we see that sec. 35A (b) of the Consumer Protection Law states: "Where the cause of action is injury, it is sufficient that the plaintiff show that the consumer suffered injury." On this provision, my colleague states as follows:

> I am of the opinion that we may learn from sec. 35A (b) that for the purpose of filing a class action, it is sufficient to show the existence of a consumer injury, and there is no need to show a factual causal connection between the breach and that injury. This construction accords with the special purposes of the consumer class action, which I addressed above, which are also not consistent with the requirement of personal reliance.

For my part, I would say that I tried but could not understand how we could award one person damages from another person for an injury that was not causally connected to that other person's acts or omissions. What would that be like? It would be like saying that Reuben and Simon make a binding agreement between themselves solely on the basis of Reuben's offer. Then, even if Levi breaches an obligation placed upon him, and even if Judah incurs the injury, Judah will not collect damages from Levi for that injury – so it appears to me – unless he can show some rational causal connection between Levi's breach and the injury that he, Judah, incurred.

My colleague's construct may have been appropriate to the formative period of the Common Law, but today, with statutes from horizon to horizon, I find it difficult to free myself from the feeling that adopting my colleague's approach – on its face – would tresspass the boundaries of the legislature by no small measure, and first and foremost, lead us into unknown territory. I would quickly add this: I did not say – and do not mean to say – that my colleague's approach (at least in part) is not the *lex ferenda*. I did not say – and do not mean to say – that it is not proper that we interpret the Consumer Protection Law in a "consumer spirit" and more broadly than tort law. I agree that it would be appropriate to do so. But I fear that my colleague may have gone too far in his interpretation of the Law.

62. A second comment: Over the course of his entire opinion, my colleague attacks the reliance doctrine, as well as my opinion allegedly based upon that doctrine. I am afraid that my colleague is mistaken. My opinion is expressly based upon the subject of the proper causal connection, and not upon the reliance doctrine in the narrow sense, and I believe that, in that regard, there are no deep disagreements between us. See, for example, paras. 39 through 41 of my opinion.

63. Unlike my colleague Justice Mazza, whose approach is a torts approach – "torts" in the broad sense of the term – my colleague Justice Dorner chose to follow a different path, one beginning in contract law and ending in the Consumer Protection Law. My colleague is of the opinion that a consumer's right against a dealer in circumstances like those before us "is firmly anchored in established doctrines of contract law," and upon those doctrines, she grounds her conclusion that the Petitioner is entitled to the status of a class-action plaintiff. More precisely, my colleague is of the view that the Petitioner incurred compensation-worthy injury even though he was not exposed to the misleading advertisement, and that injury can serve as a springboard to the status of a representative plaintiff.

64. I do not intend to argue with my colleague on the matter of the *lex ferenda*. The matter is too complex for me even to wish to express an opinion upon it, and we have heard no arguments grounded upon contract law. Our common assumption was, and is, that we are concerned with tort law. That was the field that was plowed by the plowers, and the one that we, too, plowed. For my part, I can say that to the best of my understanding, sec. 2 of the Consumer Protection Law – by its plain language and on its face – does not state what my colleague seeks to find there. The case law has always assumed that Section 2 of the Law addresses precontractual deceit, and in any case, it was the (alleged) existence of "deceptive advertising" that formed the basis of the Further Hearing with which we are concerned. That is the basis of the disagreement before us, and that – and only that – was addressed in our opinion above. See and compare: Prof. Sinai Deutch, *Consumer Protection Law*, *ibid*., 398-400, and the sources cited there.

Contract law indeed adds causes of action and remedies to those causes of action and remedies provided by the Consumer Protection Law, but consumer protection as expressed in the Consumer Protection Law did not situate itself in the field of contract law. On the contrary, consumer protection law distanced itself from the field of contracts, seeking to reside in the field

of tort law. That is, after all, what the Law says in stating that a deception such as that before us is to be treated "as a tort under the Civil Wrongs Ordinance [New Version]". Consumer protection law lives its civil life in the field of tort law, the doctrines of that field serve as the basis for the rights that the Consumer Protection Law grants to consumers, and the general atmosphere is one of tort law. Knowing that, we further know that a class action under the Consumer Protection Law – as provided under sec. 35A of the Law – treats of that "tort" action that the Law created. Thus, when sec. 35A of the Law states that a consumer may bring a class action "on behalf of a group of consumers on a cause of action under which he can bring suit in his own name *under this Law*, and against any defendant that the consumer may sue in his own name", it is speaking of nothing other than that cause of action in "tort" that the Law grants the consumer. Even if the consumer has a cause of action against a dealer in "contract law" – whether directly based upon contract law or more closely related to contract law – that suit will find its place – to the extent that it has one – in general contract law and not specifically in the Consumer Protection Law. In any case, the consumer will not be able to initiate a class action based upon the Consumer Protection Law for such a cause of action.

Justice

Chief Justice A. Barak:

I concur in the opinion of my colleague Justice Cheshin. I also concur with his comments in regard to the opinion of my colleague Justice Mazza. As for the opinion of my colleague Justice Dorner, I, too, am of the opinion that, inasmuch as arguments were not heard in regard to the application of contract law to this case in the District Court, or before the three-judge panel of the Supreme Court or in this Further Hearing, I would not wish to take a stand upon that issue in these proceedings.

Justice

Deputy Chief Justice T. Orr:

I concur in the opinion of my colleague Justice M. Cheshin.

Justice

Justice D. Beinisch:

I concur in the opinion of my colleague Justice Cheshin, and thereby also add my voice to that of the majority in CA 1977/97.

The approach of my colleagues, who seek – each in his own way – to construe the provisions of the Consumer Protection Law in a spirit of a consumer doctrine that would protect class actions, is very appealing. Protecting consumers against economically powerful dealers by levelling the playing field is not merely an appropriate purpose, but also expresses values that we seek to further as part of an overall economic vision. I also agree with the approach that sees class actions as an important tool for advancing consumer protection and for restraining economically dominant bodies from abusing their power.

Nevertheless, I do not see how one can extricate oneself from the legal framework that the legislature established, under sec. 33(a) of the Consumer Protection Law, for damages for a "consumer tort", which is a tort-law framework. For my part, I do not share my colleagues' fear that a demand for a causal connection between the tort and the injury will eviscerate the remedy of damages that the Law provides. One must distinguish between the substance of applying tort-law doctrines and the nature of the causal connection and its proof. The nature of the causal connection, the strength of its proof and the means for its proof may be decided in accordance with the circumstances of each case, and the consumer background may result in more lenient rules. One must not, in principle, confuse that with the foundations upon which the legislature

grounded the remedy of damages. The wording of sec. 31 (a) of the Consumer Protection Law bars the way to developing a theory of consumerism as a branch of compensation divorced from the foundational concepts of tort law.

We may assume that a theory of consumerism will develop, and that consumer suits will find their path in regard to the remedy of compensation, as well, and case law and practical experience will lay the appropriate groundwork for proving the causal connection, without casting off the foundational principles of the theory of compensation for loss.

Justice

Justice Tova Strasberg-Cohen:

1. The suit before us was filed on the basis of the Consumer Protection Law, 5741-1981 (hereinafter: the Law). It is based upon a cause of action and a remedy established in the Law, and it was filed as a class action in accordance with it.

The provisions of the Law that are relevant to these proceedings are sec. 2 (a), secs. 31 (a) and (a1), and sec. 35A of the Law. The central question that we must consider and decide is whether, under the prohibition upon deceit established in sec. 2 (a) of the Law, a plaintiff can be awarded pecuniary damages even if he was not exposed to the misleading representations and therefore, did not rely upon them. I addressed this question at length in my dissent in the Appeal that is the subject this petition (CA 1977/97 *Barazani* v. *Bezeq – Israeli Telecommunications Company Ltd.*, IsrSC 55 (4) 584 (hereinafter: the Appeal). I have reviewed all of the relevant material in the Appeal, and especially the opinions of my colleagues Chief Justice Barak and Justice Englard, who formed the majority, as well as that of my colleague Justice Cheshin in these proceedings, and the conflicting opinions in the publications of the various scholars (Prof. Sinai Deutch, whose opinion coincides with mine, and Prof. M. Deutch and Dr. O. Deutch, whose opinions correspond with that of my colleagues, see: S. Deutch, "Consumer Class Actions: The Demand for Personal Reliance on Misrepresentations of the Deceiver," 2 *Moznei*

Mishpat 97, 121 (2001-2002) (Hebrew) (hereinafter: Deutch, "The Demand for Personal Reliance"); O. Deutch, The Legal Status of Consumers (Nevo, 2002) 414 (Hebrew); M. Deutch, Commercial Torts and Trade Secrets (Nevo, 2002) 49 (Hebrew). After reading all of the above, I have concluded that my opinion remains unchanged. I will, therefore, clarify my position and focus upon the questions under debate, and preface my opinion with a few words on the integration of a cause of action under the Consumer Protection Law in a class action under that law.

The Consumer Protection Law

2. The Consumer Protection Law, which forms part of the consumer legislation, serves many purposes, but at their heart is the protection of consumers against economically advantaged dealers, and narrowing the power gap and lack of equality in the relative negotiating positions of the parties. Its purpose is to impose proper conduct upon the commercial sector, and to establish rules of fair play in the relationship between consumer and dealer. It was intended to reinforce the personal autonomy of the consumer and his right to dignity by ensuring his ability to make informed choices in regard to products and services on the basis of accurate, relevant information, and by preventing abuse of the consumer's relatively weaker position. It was intended to deny a dealer the ill-gotten gains obtained from the consumer for a product or service, and thereby restore to the consumer what had been unlawfully taken, and to make such conduct not only improper but also unprofitable. Consumer protection also serves to encourage fair competition among dealers, which is an important factor in proper market and economic activity (for a survey of the purposes of consumer law, see: O. Deutch, *supra*, at pp. 27-37, and see the Explanatory Notes to the Consumer Protection Law Bill, 5740-1980, at p. 302).

3. As for as consumer contracts, there are those who view them as a separate branch of general contract law. Each of those branches has its own point of reference. That of general contract law is the glorification of the autonomy of the parties. Its provisions are dispositive, and governmental intervention through criminal and administrative provisions is limited. As opposed to this, consumer protection law is obigatory, and in achieving its objectives, it comprises

criminal and administrative sanctions. (For a survey of the characteristics of civil law as opposed to consumer law, see: S. Deutch, "Consumer Contracts Law versus Commercial Contracts Law," 23 (1) *Iyunei Mishpat* 135, 150-152 (5760) (Hebrew); S. Deutch, *Consumer Protection Law – Fundamentals and Principles*, vol. 1 (5761) 294-289 (Hebrew)).

Class Actions

4. The Consumer Protection Law provided consumers with efficient enforcement mechanisms for the protection of their rights, and primary among them is the class action. I have had the opportunity to address the purposes of class actions on more than one occasion, and I shall not repeat what I have already stated (see: CA 2967/95 *Magen veKeshet Ltd.* v. *Tempo Beer Industries Ltd*. [1997], IsrSC 51(2) 312, 322-323; LCA 4474/97 *Tatzet* v. *Silberschatz*, IsrSC 54 (2) 577, 586-587; LCA 8268/96 *Reichert* v. *Shemesh*, IsrSC 55 (5) 276, 288-289; LCA 3126/00 *State of Israel v. A.S.T Project Management and Manpower Ltd.*, IsrSC 57 (3) 220). I will suffice in saying that in the broad sense, class actions are intended to prevent the unjust enrichment of powerful economic actors that concentrate production, industry and services for mass consumption at the expense of the man in the street who turns to such actors for the goods and services that he uses. They are also a means for enforcing the law at the civil level. The possibility afforded to the individual consumer of bringing suit, by class action, in the name of an anonymous group of consumers who were harmed by a violation of the law, achieves proper enforcement and prevents situations of under-enforcement that harm the individual consumer, the group of consumers and the general public. Under-enforcement leads to the undermining of public faith in the general social order and the rule of law. Class actions also serve the public interest in efficiency and economy of resources, and prevent a lack of uniformity in the decisions of the courts in similar individual cases (see: Nina Zaltzman, *Res Judicata* (Ramot, 1991) 427 (Hebrew).

Interpretation

5. The suit before us is based upon a cause of action in the Consumer Protection Law, and the request that it be certified as a class action is based upon the same Law. This brings about an merger that has consequences for the proper interpretation of the provisions of the Law relevant to our examination. That interpretation begins with the language of the Law but does not end there. From among the possible interpretations that the language of the Law makes available, we must choose the possibility that is consistent with the objective and purpose of the Law. We can learn the purpose from the Law, the placement of the provision in the Law, the general structure of the Law, from the normative economic and social context of the Law's provisions in relation to one another and in relation to other laws of similar character, and from extra-legal sources, such as the legislative and parliamentary history, all against the background of the accepted values of our legal system (CA 165/82 *Kibbutz Hazor* v. *Rehovot Assessment Officer*, IsrSC 39 (2) 70).

From reading the relevant legal provisions, and especially secs. 2 (a) and 31 (a) and (a1) of the Law, we find that the words of the Law alone are insufficient to exhaust the substance of these provisions. It seems to me that the use of the procedural device of initiating a suit as a class action, and the nature of the Law as a consumer law, pave the way for an appropriate interpretation of the Law, and for providing the correct meaning to its provisions.

What is Agreed and What is Disputed

6. At the outset, I would like to remove the stumbling blocks from the path that my colleagues and I are travelling, clarify what is and what is not in dispute, and focus upon what is in dispute.

There is no dispute that a class action does not create new causes of action and that it is but a procedural device that allows for the joining of many actions into one, for procedural and substantive reasons. There must be a personal cause of action as a precondition to making a class action available to the plaintiff. This requirement is common to all the laws that regulate class

actions (in this regard, see, for example, my opinion in CA 2967/95, above). My colleague Justice Cheshin addresses this matter at length, and I will not add to that. I will only state that, like him, I was and remain of the opinion that a class action does not create new causes of action and is nothing other than a procedural device available to a person who has a personal cause of action under the Law (sec. 35A (a) of the Law).

7. From here I will now proceeed to the cause of action of "prohibition of deceit", which is the cause of action in the matter before us, and I will begin by pointing out the questions that are not in dispute in regard to this cause of action established under sec. 2 (a) of the Law, which states as follows:

> *Prohibition of Deceit*
>
> 2. (a) A dealer must not do anything – by deed or by omission, in writing, by word of mouth or in any other manner, also after the transaction has been contracted – which is *liable to mislead* a consumer in regard to any material element of the transaction … (emphasis supplied – T.S.C.).

There is no dispute that the prohibition of deceit established under sec. 2 (a) of the Law is *not* a prohibition of "result" that requires actual deceit, but rather a prohibition of "conduct" according to which one may not do anything "liable to mislead a consumer". Therefore, in order for a cause of action to arise, there is no need to show actual deceit in practice. And so I stated in my opinion in the judgment under appeal:

> …in my opinion, the consumer who files suit under the Law is not required to show that he was actually deceived…it is sufficient that he show that the dealer committed an act that was "liable to deceive a consumer" (p. 602).

Similarly, Chief Justice Barak states in the same judgment:

> …sec. 2 (a) of the Law does not require deceit in actual practice. What is prohibited thereby is doing something "liable to deceive a consumer". The purpose of the prohibition is to ensure that the consumer receive full and accurate information. The prohibition established by sec. 2 (a) of the Law is not a prohibition of "result"; it is a prohibition of "conduct". The prohibition established in sec. 2 (a) of the Law… (p. 617).

And thus states Justice Cheshin in this Further Hearing:

> The prohibition is one of *conduct*, and a dealer contravenes the prohibition even if he does something – by act or omission – that is only "*liable* to mislead" a consumer, i.e., even if no one was misled by it. …The standard of conduct required under sec. 2 (a) is higher than the usual standard in other laws. … whereas sec. 2 (a) of the Consumer Protection Law prohibits the conduct *per se*, even in the absence of resulting injury (para. 10, emphasis supplied – T.S.C.).

(And see: Deutch, "The Demand for Personal Reliance"; O. Deutch, *supra*, p. 390; M. Deutch, *supra*, p. 49).

8. There is no question that Bezeq's advertisements appeared to be "liable to mislead a consumer" in regard to the manner of calculating charges for direct-dial international calls and their price (see: my opinion in the Appeal, at pp. 594-596); the opinion of the Chief Justice in the Appeal, at p. 617, opposite the marginal letter B). That being so, the consumer acquired a cause of action under sec. 2 (a) of the Law, and a restraining order and declaratory relief could be granted (the Chief Justice, *ibid*., at p. 617, opposite the marginal letter B). However, in the matter at hand, the class action that the court was asked to certify was not for declaratory relief, but rather for damages arising from injury incurred by consumers as a result of the advertisement that was liable to mislead. Here, too, my colleagues and I travel the same path, inasmuch as I

agree that in order to acquire a cause of action for damages for injury caused by a publication that is liable to mislead, one must make a *prima facie* showing that the publication was liable to mislead, that injury was incurred, and that there was a factual and legal causal connection between the publication and the injury (see my opinion in the Appeal, at p. 602, opposite marginal letter A, and at p. 604, opposite marginal letter C).

9. No one disputes that, in the case before us, the requirement of "liable to deceive" in sec. 2 (a) of the Law was met. My colleagues and I part ways in regard to the question of whether the Petitioner-consumer suffered harm, and whether there can be a causal connection between the publication and the injury in the absence of the consumer's reliance upon the potentially misleading publication. My answer to both questions is in the affirmative for a number of reasons. First, establishing deceit as a prohibition of conduct but recognizing a remedy of damages for its violation only if actual deceit is proven, renders the primary prohibition of the Consumer Protection Law lacking of any real civil remedy. Although sec. 32 of the Law grants the remedy of cancelling the sale, the limitations of that remedy are so numerous that there is almost no reason to employ it, and indeed, not a single example of the application of this provision of the Law is to be found in the case law. Second, it is unlikely that a consumer will go to the effort and expense involved in obtaining a restraining order for the benefit of the general public. Third, over the years of the existence of the Consumer Protection Law, only limited recourse has been made to the criminal sanction, and it would appear that the criminal sanction does not significantly deter a powerful dealer from misleading the consumer public when he can pocket large profits (*ibid*., at p. 106). The same is true of administrative sanctions. Fourth, an approach that makes damages contingent upon actual deceit limits the dealer's liability only to those consumers who can prove that they were actually misled by the dealer's misrepresentations, and makes deception worthwhile from the dealer's perspective. Fifth, an interpretation by which damages can be sought only by those consumers who were actually misled will create an artificial distinction between those consumers who actually used the misrepresented product or service but were not exposed to the misrepresentation, and those consumers who were aware of the misrepresentation. Sixth, in other cases in the past, this Court did not hesitate to broaden the choice of remedies beyond those delineated by a law, so as not to empty the law of content (thus, for example, in regard to sec. 12 (b) of the Contracts (General Part) Law, the case law established that even though the provision provides only the remedy of

damages, the available remedies should not be limited only to those set out in the law when broader remedies, like enforcement, are justified (CA 829/80 *Shikun Ovdim* v. *Zepnick*, IsrSC 37 (1) 579; CA 579/83 *Sonnenschein* v. *Gebso Bros.*, IsrSC 42 (2) 278; CA 986/93 *Kalmar* v. *Guy*, IsrSC 50 (1) 185)). Such an expansion is also appropriate in regard to the interpretation of secs. 31 (a) and 31 (a1) of the Law for the purpose of protecting consumers. Here I should note that such a partial expansion was made by my colleague the Chief Justice, who was of the opinion that even a consumer who was not misled and who did not suffer injury could be granted a restraining order against a dealer, although such a remedy does not appear in the Consumer Protection Law. Seventh, the Consumer Protection Law establishes other prohibitions that do not require proof of actual reliance, and their breach entitles the consumer to a broad right to damages (thus, for example, in regard to a failure to supply particulars in regard to a credit transaction (sec. 9), the court may – in addition to the provision for cancelling the transaction and refunding the consideration or part thereof to the consumer – "charge the dealer with the expenses caused to the consumer, and it may issue any other direction which it deems just" (sec. 11)). What reason is there to grant an independent remedy of damages that includes granting broad discretion to the court in regard to a violation of these prohibitions, while not for a violation of the Law's central prohibition – the prohibition upon deception? (also see: Deutch, "The Demand for Personal Reliance," at pp. 106, 121-127).

As a Tort

10. All of the above reasons constitute a conceptual foundation for examining whether it is possible to interpret the relevant sections of the Law in a manner that would grant damages to a consumer in the circumstances of this case, while remaining faithful to the principles grounding the rules of interpretation. The provisions of the Law relevant to the remedy of damages are secs. 31 (a) and 31 (a1) which state as follows:

Compensation

> 31. (a) Any act or omission in violation of Chapters Two, Three, or Four "A" *shall be treated as a tort under the Civil Wrongs Ordinance [New Version]*.
>
> (a1) Consumers injured by the wrong are entitled to remedies for the wrong and so are dealers, who in the course of their business are injured by deceit, as said in section 2 (emphasis added – T.S.C.).

The upshot of these sections is that the "prohibition of deceit" shall be treated "*as a tort*" under the Civil Wrongs Ordinance, and that the right to a remedy for the tort is granted to an *injured* consumer. The wording of these sections is problematic, and raises a question as to the meaning of the phrase "as a tort". Much was written on the meaning of that phrase in the Appeal and in the opinion of my colleague Justice Cheshin in this Further Hearing. It might be noted that a review of the statutes reveals a number of laws comprising various statements in regard to the definition of "tort" in regard to the Civil Wrongs Ordinance. Conduct in violation of the law has been defined as "constituting a tort and the provisions of the Civil Wrongs Ordinance [New Version] shall apply thereto" and a wrongful act has been defined as being "as a tort under the Civil Wrongs Ordinance [New Version]" or "as an injury for which damages may be sought under the tort law" [for a list of the laws, see: Deutch, "The Demand for Personal Reliance," at pp. 128-129). The differences in wording may be intentional or may be accidental. In any case, it is clear that this expression makes certain legal prohibitions into prohibitions that are like torts under the Civil Wrongs Ordinance. The question is whether they thus become torts for all intents and purposes. In my view, the statement "Any act or omission … shall be treated as a tort under the Civil Wrongs Ordinance..." should be understood as creating a new cause of action that is like a tort. Such a cause of action is not parallel to a tort but comparable to a tort in the sense that it applies the doctrines of the Civil Wrongs Ordinance to the act or omission. In the matter before us, it applies the compensation doctrine and the causation doctrine (see the opinion of Justice Cheshin, para. 34). However, this cause of action is special to the Consumer Protection Law. It is independent in nature, and it must be interpreted within its context, in the framework of the purpose it was intended to serve, and in relation to the said doctrines, which must be interpreted in a manner that is consistent with the purpose of the Consumer Protection Law and its enforcement by means of class actions. Chief Justice Barak's statement in his recent opinion in

CA 2622/01 *Director of Property Improvement Tax* v. *Aliza Levanon* (not yet published) are apt to the matter before us:

> A statute is a living entity that resides in its social environment. With changes in social conceptions, the meaning of the statute changes in the understanding of the social environment in which it operates. … Life is in constant motion, and with it, the law. This is the basis of the interpretive approach – accepted in England and Israel – that "the law is always speaking", and that the law must be given an updated interpretation. Interpretation is a renewing process. Old language must be given modern meaning that is consistent with the needs of modern life. Thus the statement of Prof. Radbruch, that "The interpreter may understand the law better than its creators understood it; the law may be wiser than its authors" (see G. Radbruch, "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch and Dabin*, K. Wilk, trans. (1950) 141). … The laws of a society move with it over the course of its history, and in that movement, their meaning changes in order to serve the society in which they act. I addressed this is the *Lindorn* case, noting:
>
> "The meaning to be given to a legal statement – like the statement 'his spouse' – is not fixed for all times. The law is part of life, and life changes. As reality changes, the meaning of the law changes. The language of the law remains as it was, but its significance changes along with the 'changing conditions of life' (*ibid*., p. 32)."

I need only adopt this appropriate, correct approach in the matter before us, and applying it requires an interpretation that is appropriate and proper to the issue of injury and causation. In my opinion – as opposed to the opinions of my colleagues – the requirements of injury and causation between the violation of the "prohibition of deceit" and the injury are met in the matter before us.

Injury

11. Injury how? Section 31 (a1) of the Law states: "Consumers *injured* by the wrong are entitled to remedies for the wrong…", while sec. 35A (b) states: "Where the cause of action is *injury*, it is sufficient that the plaintiff show that the consumer incurred *injury*". In the matter before us, monetary injury is claimed as the result of overcharging consumers in comparison to what should have been charged had the calculation been made as advertised. That differential is sufficient to meet the Law's requirement of injury. The injury incurred by a consumer who utilized the international direct-dialing service is expressed in the difference between the price advertised by Bezeq, and the price actually charged (hereinafter: the "price differential"). The price differential is an injury, inasmuch as had the advertised price been charged, the consumer would have saved the excess payment. That differential is an actual out-of-pocket loss that should be deemed an injury as required by the Law.

Causation

12. Causation how? As no one doubts that there was a publication liable to mislead, and having found that injury was caused to the consumer, we must consider whether there was a causal connection between the publication and the injury. I addressed the nature of causation in general in the Appeal, and I will not repeat what I wrote in that regard (p. 605). I will, therefore, consider the disputed issue of whether the consumer meets the requirement of causation when he was not actually misled by the misrepresentation. In my view, the required causal connection exists for the purpose of the cause of action granting a consumer damages for the injury incurred by him.

13. Inasmuch as the Law establishes that an act or omission (including a misleading publication) is to be treated as a tort under the Civil Wrongs Ordinance, and does not create a parallel to *specific* torts in the Civil Wrongs Ordinance, we cannot say that the prohibition of deceit under sec. 2 (a) of the Law is like the tort of fraud or the tort of negligent

misrepresentation, which require reliance as a precondition (on the tort of negligent misrepresentation, see: CA 106/54 *Weinstein* v. *Kadima Cooperative Association Ltd*., IsrSC 8 1317; and on the tort of fraud, see: CA 614/84 *Sapir* v. *Eshed*, IsrSC 41 (2) 225, 239). My position is that the tort perpetrated by a publication that is liable to mislead does not require reliance in order to entitle a consumer to damages for injuries incurred by him due to that publication, and we are not bound by the reliance requirement of those torts. Had the legislature intended to draw a parallel between the prohibition of deceit and one of the torts requiring reliance, we would have expected that it would have done so expressly. Moreover, there is no logic behind creating a separate tort in a special law with a special purpose that corresponds to a tort that already exists in the Civil Wrongs Ordinance, for if that were the case, what would be achieved by enacting the separate tort? We should not assume that the legislature wasted its words, and moreover, the Consumer Protection Law was enacted in order to create special causes of action for the special area of consumer protection. In addition, it should be noted that there is no small number of torts that do not require reliance, both in the Civil Wrongs Ordinance and outside it. It would appear to me that the reliance requirement is not required for establishing causation by the wording of the Law and its purpose.

14. As a rule, the reliance requirement comprises the assumption that were it not for the representation upon which you relied, and were it not for your reliance thereupon, you would not have negatively altered your situation, and would not have acquired the service or product misleadingly represented. In other words, you would have chosen to refrain from acquiring the product or service. In the case of the service in this matter – direct-dialed international calls – there was no such choice at the relevant time. It was a monopoly of Bezeq, which was a government corporation. The service itself is one that is incomparable. Modern life is inconceivable without it. And at the relevant time, it could not be obtained from any other provider. In such circumstances, one can say that the reliance requirement is of no consequence or significance. Moreover, in the modern age, in which the consumer receives services from large public corporations – sometimes exclusive in the field – the consumer public cannot be expected to keep abreast of the "flood" of advertisements published by the various corporations in regard to discounts, promotions, etc., as a condition for obtaining damages for injury incurred as a result of misleading advertising. Consumers cannot be expected to scrutinize the accounts and calculations of those corporations, and investigate whether they correspond to their

advertisements. It is not even clear that they could do so. In the matter before us, Bezeq conducted ongoing advertising campaigns, and the consumers cannot be asked to keep track of those advertisement as a condition for an award of damages. They should be able to rely upon the assumption that if a company decides to conduct a campaign or grant discounts or make calculations that are more beneficial to the consumers, and publishes that, then it will act in accordance with what it published and will grant the benefit to the consumers regardless of whether or not the consumers saw, read or relied upon the advertisements when making use of the service. Moreover, a large proportion of the consumers pay their telephone bills by means of standing bank orders. The details of the bills are not always examined before payment. I find no economic or other logic to awarding a refund for overcharging only to those few who keep track of advertisements and check bills. I do not believe that it is just or fair to "punish" the consumer who does not do so, and to allow the company to profit from the loss of the consumer that derives from the supplier's misleading advertisements. Indeed, Bezeq is under no obligation to advertise discounts, campaigns or beneficial charging plans, but if it does so, it must stand behind those advertisements and put them into practice for the entire consumer public. Having failed to do so, it committed a tort that resulted in injury for which it is liable for damages to all the consumers who used the service, whether or not they relied upon the advertisement and whether or not they were aware of it, and it must refund the overcharged fees to the consumers. All of the above leads me to the conclusion that there is no need of reliance in order to meet the causation requirement for the purpose of obtaining damages.

15. If I were of the opinion that actual deception of the consumer, as well as reliance upon the supplier's representation were required as a precondition to the remedy of compensation – and I do not so hold – I would favor adopting a presumption that when a supplier makes a representation that is liable to mislead a consumer, a consumer who purchases the product or service would be deemed to have been exposed the representation and to have acted thereupon. My reasons for adopting that presumption partially correspond to those that lead me to conclude that reliance is not required.

The import of the said presumption is that a consumer who purchases a product or service from a supplier may assume that the price charged for the product or service is the correct price in accordance with the supplier's advertisements, without regard for whether or not he was

exposed to the advertisements. This assumption is all the more justified when we are concerned with a product or service provided by a monopoly. Such a presumption would prevent the artificial distinction between the consumer public that used the product or service misleadingly advertised, while unaware of the misrepresentation, and the consumers who were aware of the misleading information. (in regard to the presumption of reliance, see; LCA 8332/96 *Shemesh* v. *Reichert*, IsrSC 55 (5) 276, and what was stated there in regard to securities is equally applicable to the matter before us).

16. Holding that there is no need for the consumer's reliance upon the misleading publication does not render the need for causation superfluous. In regard to the need for a causal connection between the publication and the injury, I am in full agreement with my colleague the Chief Justice and my colleague Justice Cheshin, but as opposed to them, I am of the opinion that such a causal connection exists in the case before us, as I explained in the Appeal, and I will quote what I stated there: "In my view, the representation created by the supplier should be deemed as a promise to the consumer public, which binds it and requires it to act in accordance with the representation. That promise grants the consumer a right, and places an obligation upon the party making the representation to the consumer public. When the supplier fails to meet the obligation that it assumed by means of the representation, and charges a price higher than that promised in the representation, it breaches its obligation, and the consumer incurs injury in consequence of that breach. Therefore, even if the consumer was not exposed to the misleading publication and did not alter his manner of use of the product or service – in the matter before us, the number or duration of calls – he still incurs injury, inasmuch as the price he was charged for the product or service was higher than the price at which was entitled to purchase the product or service" (the Appeal, at p. 605, between marginal letters D and E). Take, for example, a situation in which a consumer purchases a product in a supermarket, regarding which there is an advertisement at the entrance of the store stating that the price has been lowered. The consumer does not see the advertisement (or due to a language problem, does not understand it). He purchases the product, paying the full price at the checkout. Clearly, the advertisement that the price was lower than that actually charged is liable to mislead a consumer. Similarly, I believe that the consumer incurs an injury in the form of a "price differential", which constitutes a real, tangible loss. By an appropriate interpretation of the necessary causation, that injury is causally connected to the prohibition upon deceit, inasmuch as due to the misleading advertisement and the difference

between it and the actual conduct, the consumer suffered injury. That is sufficient to meet the causation requirement both factually and legally. Factually, the said injury caused to the consumer is a result of the fact that the supplier published a representation that it did not put into practice. Legally, the injury is causally connected to the representation by the foreseeability test, inasmuch as when a supplier makes a false representation, it foresees that charging contrary to the representation will cause a loss in the form of a "price differential". It also meets the risk test, as the injury falls within the scope of risk of the supplier's conduct, and the common-sense test, which looks at the total conduct of the tortfeasor and its contribution to the injurious result (on the legal tests for causation, see: CA 145/80 *Vaakin* v. *Beit Shemesh Local Council*, IsrSC 37 (1) 113, 145-146; CA 576/81 *Ben Shimon* v. *Barda*, IsrSC 38 (3) 1, 7; CA 119/86 *Keny Housing* v. *Netanya Local Planning and Building Board*, IsrSC 46 (5) 727, 749).

The issues before us in this case, and the proposed solutions, are not exclusively ours. In interpreting Israeli law in regard to the subject of consumer deception in general and class actions in particular, we should also look to American law, which inspired the adoption of class actions in our legal system.

Comparative Law

17. The consumer protection laws of various states of the United States establish the prohibition of deceit in language such as "an act liable to mislead a consumer", similar to the wording adopted in sec. 2 (a) of the Consumer Protection Law. Thus, secs. 349 and 350 of New York's General Business Law establishes that deceptive acts or practices by a business are unlawful, as are misleading advertisements. Although the sections speak of deception and its prohibition, the New York courts have held that they should be understood as prohibiting any act that is liable to mislead a consumer (*Oswego Laborers' Local 214 Pension Fund* v. *Marine Midland Bank*, 623 N.Y.S.2d 529 (Ct.App.1995); *BNI New York Ltd*. v. *DeSanto*, 675 N.Y.S.2d 752 (City Ct.1998), at p. 755; *Small* v. *Lorillard Tobacco Co. Inc.*, 679 N.Y.S.2d 593 (A.D. 1 Dept.1998, at p. 599).

Section 2 of the Consumer Fraud and Deceptive Business Practices Act of the State of Illinois expressly establishes that deception is unlawful, whether or not any person has actually been deceived or damaged thereby. Identical wording appears in the law of the State of Minnesota (sec. 325F.69 of the Consumer Fraud Act).

18. The various wordings there are similar to the wording of our Consumer Protection Law. It is worth noting that the construction given to similar sections in various states is not uniform insofar as the requirement of reliance upon the misrepresentation for the purpose of receiving a compensatory remedy. Three basic trends can be identified: The first requires proof of reliance upon the deceptive representation. The second does not require reliance upon the representation, and it is sufficient to prove a causal connection between the deception and the injury incurred. The third does not completely abandon the requirement of reliance, but it is a reduced requirement that is met by assumptions, presumptions and conclusions drawn from the circumstances (for a survey of the American legal situation in this regard, see the comprehensive article of G. Wilson & J. Gilmer, "Minnesota's Tobacco Case: Recovering Damages without Individual Proof of Reliance under Minnesota's Consumer Protection Statutes," 25 *Wm. Mitchell L. Rev*. (1999) 567). Below, I will note a number of cases from among the many available that demonstrate each of the said approaches. For the first approach, see *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 776 N.E.2d 151, 201 Ill. 2d 134, 267 Ill. Dec. 14 (2002); and see: *Zekman v. Direct American Marketers, Inc.*, 695 N.E.2d 853, 182 Ill. 2d 359, 231 Ill. Dec. 80 (1998). For the second approach, see: *Brooks v. Midas-International Corp*, 47 Ill. App. 3d 266, 361 N.E. 2d 515 (1977) in which the defendant guaranteed in its advertisements that it would replace a muffler for only an installation charge but charged the full replacement price. The suit was certified as a class action for the purpose of seeking damages, holding that reliance is not a requirement for the purpose of obtaining damages for consumer deception. This approach is consistent with mine. The same is true in regard to the judgment in *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 675 N.E.2d 584, 174 Ill. 2d 482, 221 Ill. Dec. 389 (1996), in which a class action was certified against a company, *inter alia*, for publishing the safety features of an automobile based upon allegedly incorrect information that the company gave to a magazine. The Supreme Court of Illinois held that the plaintiffs did not have to prove reliance as a condition to establishing a cause of action. It further held that in the absence of proof of an intervening cause, it was sufficient that the plaintiffs show that the automobiles were purchased

after the misleading information was published in order for there to be causation between the misleading publication and the injury incurred. For the third approach, see *Vasquez* v. *Superior Court of San Joaquin County*, 484 P.2d 964(S.Ct.Cal.1971), in which the Supreme Court of California held that there was no need to prove reliance upon the misrepresentations of the sellers by direct evidence, and that it could be proved implicitly by inference from the circumstances of the case, or even by a presumption of reliance. Similarly, in *Amato* v. *General Motors Corp*., 463 N.E. 2d 625 (Ct. App. Ohio, 1982), the majority of the Ohio court certified a class action against General Motors for equipping Oldsmobiles with less prestigious engines without informing the buyers. The court did not entirely waive the reliance requirement, but held that it could be inferred from the circumstances of the case, or by establishing a presumption of reliance.

As we see, people are the same everywhere, and not only are the issues and problems similar, but so are the disagreements among jurists in various states with similar, if not identical, legal foundations.

Weighing all of the considerations, balancing them, and giving due weight to each of them, tilts the scales in favor of the trend that deems misleading advertising to be an act that establishes a cause of action for damages, if injury was caused, without requiring reliance for the purpose of establishing causation between the act and the injury.

19. In conclusion, in my view, the Petitioner has a cause of action for damages for the injury caused him by the misleading advertisement, due to the overcharging. Therefore, if my opinion were adopted, the petition would be granted and the Petitioner's suit would be certified as a class action.

Justice

Justice E. Mazza:

I have reread the opinions of the majority in the Appeal – my colleagues the Chief Justice and Justice Englard – and the dissent of my colleague Justice Strasberg-Cohen. I have also read the opinions of my colleagues Justice Cheshin and Justice Strasberg-Cohen in this Further Hearing. I cannot concur in the opinions of the majority in the Appeal and that of Justice Cheshin in this proceeding. In my view, that approach does not give proper expression to the special purpose of the consumer class action. Instead, it transfers the traditional doctrines of tort law – foremost among them the doctrine of tortious causation – to the consumer environment, in which they are inappropriate, and sanctifies them as is. As a result of this view, the approach focuses too much upon Barazani the man, and too little upon the group of consumers that he seeks to represent, and the injury that it suffered. In this regard it is important to emphasize that it was never positively proven in the proceedings before the District Court that Barazani was not exposed to the misleading advertisement. The factual assumption in this regard, upon which the majority largely relied in the Appeal, as did Justice Cheshin in the Further Hearing, is based exclusively upon the fact that Barazani *did not claim* that he was exposed to the advertisement. Here, too, I believe that the view of my colleagues is deficient in its almost mechanical adoption of traditional rules of proof. That approach, which I do not believe represents the desired law, is also not required by the existing law. In presenting my dissenting opinion, I will first consider the uniqueness of the consumer cause of action and the appropriate scope of consumer class actions for misleading advertising. I will conclude by addressing the matter of Barazani and the question of whether he has a personal cause of action and for which remedies.

The Purposes of Tort Law as opposed to the Purposes of the Consumer Class Action

2. The purposes of traditional tort law are not congruent with the purposes of consumer protection law and do not exhaust them. It is commonly said that the primary purposes of tort law are achieving corrective justice, effective deterrence of potential nuisances, and distributive justice (see, for example: D. More "Human Rights from a Tort Law Perspective" 12 *Tel-Aviv U. Stud. L.* 81, 90-93 (1994); A. Porat, “Collective Responsibility in the Law of Torts," Mishpatim 23 (1994) 311, 330-333, 344-349, 369-371). We can agree that corrective justice and effective deterrence are common to both tort law and consumer protection law. However, other important

purposes are served by consumer protection law with which traditional tort law is not generally concerned. In her book, Dr. Orna Deutch lists no less than seven purposes that are special to consumer protection law: levelling the playing field; reinforcing personal autonomy; the concept of consumer sovereignty; protecting the rights to prosperity and social welfare; ensuring the credibility of the local market; and maintaining trust in the social order (O. Deutch, *The Legal Status of Consumers* (2002) 27-37 (Hebrew). She emphasizes that "the purpose of consumer protection is not limited to the law's support of the individual consumer. Improper conduct toward consumers harms not only the consumer, but also honest business people and the entire commercial sector, as well as public trust in the local economy and the public authorities that oversee the commercial sector" (*ibid*., p. 15). Prof. Sinai Deutch suggests a somewhat different division and definition of the purposes of consumer protection law (S. Deutch, *Consumer Protection Law*, vol. 1 (2001) 119-126, and see the purposes listed in paragraphs 2-3 of the opinion of Justice Strasberg-Cohen in this Further Hearing). However, each of the approaches undeniably leads to the conclusion that consumer protection law is intended to realize special objectives that go significantly beyond the basic objectives of traditional tort law.

3. To these general objectives of consumer protection law one may add the special objectives of consumer class actions. We can find an expression of this in a case recently decided by this Court:

> As a legal institution, the class action is of special importance in realizing objectives that individual actions cannot attain. It serves the interest of the individual by providing a remedy for injury in circumstances in which filing suit would not be worthwhile without the other members of the group. It serves the public interest that strives to deter large economic institutions from violating the law, and that seeks to achieve more effective enforcement of behavioral norms intended to protect citizens and prevent the exploitation of their weakness as individuals. It may also advance the objectives of procedural efficiency, uniformity of decisions, and reducing litigation (CA 1338/97 *Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel Ltd. v. Rabi Tawfiq* (not yet published), para. 2 of the opinion of Procaccia, J.).

And also see LCA 3126/00 *State of Israel v. A.S.T Project Management and Manpower Ltd.*, IsrSC 57 (3) 220, paras. 7-8 of the opinion of Justice Strasberg-Cohen, and the citations there.

4. The material difference between the purposes of tort law and consumer protection law yield the conclusion that the traditional legal doctrines of tort law must be examined carefully – and changed and adapted as necessary – before applying them to consumer law in general, and class actions in particular. Generally speaking, one might go so far as to say that no traditional doctrine is self-evident in the context of consumer law. We are concerned with a unique area that requires distinct treatment that accords with its special purposes.

The Meaning of Section 31 (a) of the Consumer Protection Law

5. Against this background, we can proceed to the interpretation of sec. 31 (a) of the Consumer Protection Law. This provision states: "Any act or omission in violation of Chapters Two, Three, or Four shall be treated as a tort under the Civil Wrongs Ordinance [New Version]". My colleagues are divided as to the meaning of the prepositional prefix "as" – referred to by Justice Cheshin as the "*kaf* of comparison" [8] – in the phrase "as a tort". In my opinion, this question is of little importance. Even were we to assume that the prefix was of no significance, and that sec. 31 (a) should be read as if it stated that an act or omission as stated were torts, it would not mean that certain parts of the Consumer Protection Law should be treated as if they were actually comprised by the Civil Wrongs Ordinance. And clearly, changing the physical location of consumer provisions does not alter their special objectives. So, let us take go even further: even were the Consumer Protection Law, in its entirety, comprised by the Civil Wrongs Ordinance, and even if it were subject to sec. 3 of the Civil Wrongs Ordinance, according to which "the matters enumerated hereinafter in this Ordinance shall constitute civil wrongs," even then we would have to interpret and apply these special torts in accordance with their consumer purposes, which, in general, are not identical to the purposes of the other torts established under the Ordinance.

6. Consider, for example, sec. 4 of the Civil Wrongs Ordinance, which states:

[8] See note 3, above.

Trivial Act

4. An act shall not be considered a civil wrong where had it been a repeated act it would not lead to establishing an adverse claim, and where a person of ordinary sense and temper would not complain with regards to it.

Obviously—and so it has also been held – sec. 4 expresses the traditional doctrine of *de minimis* in the context of tort law. See: CA 3901/96 *Ra'anana Local Planning and Building Board v. Horowitz*, IsrSC 56 (4) 913, pp. 928-929, and the citations there. Adopting the approach that would apply the doctrines of the Civil Wrongs Ordinance – as is and in in their entirety – to the consumer causes of action defined in sec. 31 (a) of the Consumer Protection Law would require that we apply sec. 4 of the Civil Wrongs Ordinance to those causes of action. One will readily realize that such an approach would entirely nullify the primary purpose of the consumer class action, which is of particular importance specifically in regard to cases in which each individual claim is, itself, *de minimis*, and "a person of ordinary sense and temper would not complain with regards to it". We would note that the facts of the case before us in this Further Hearing constitute a good example of such a situation. Applying the traditional *de minimis* doctrine to class actions would, therefore, lead to the result that most legitimate potential plaintiffs would have no personal cause of action, inasmuch as under the plain language of sec 4, the act (or omission) of the dealer who harmed them "shall not be considered a civil wrong". The conclusion to be drawn from this is that not only is it necessary to adapt the *de minimis* doctrine of sec. 4 of the Civil Wrongs Ordinance to collective consumer protection before applying it (and compare: the *Tnuva* case, *ibid*., at para. 11 of the opinion of Naor, J.), but that the same is true for all the other doctrines of the Ordinance as a precondition to applying them to the consumer causes of action and to consumer class actions.

7. My colleague Justice Cheshin concludes from the absence of any provision to the contrary in sec. 31 (a) of the Consumer Protection Law, that there is no alternative to applying the doctrines of the Civil Wrongs Ordinance to a consumer tort under sec. 2 (a) of the Law. As he states:

> Indeed, nothing in the language of sec. 31 (a) of the Law would show that the tort under sec. 2 (a) removes it from the fundamental principles or doctrines of the Civil Wrongs Ordinance … On the contrary, the Law refers us clearly and unreservedly to the Civil Wrongs Ordinance. Section 2 (a) situates itself as one of the native torts of the Civil Wrongs Ordinance, and it would therefore appear that the fundamental principles and doctrines of the Civil Wrongs Ordinance apply, in their entirety, with the same effect and force with which they apply to the native torts.

With all due respect, I am of the opinion that even in the absence of an express provision to that effect in sec. 31 (a) – and I question whether such an express provision is needed at all – the application of traditional tort law to consumer causes of action can and should be restricted. The need for such restriction is clearly required by the substantial material difference between the purposes of consumer torts and of the regular torts. Indeed, one can understand the problem and discomfort involved in new and different interpretation of first principles. My colleague Justice Cheshin explained it well in the case before us:

> Moreover, not only is the language of the Law crystal clear, but efficiency also points to the solution presented by the Law. Inasmuch as the acts and omissions external to the Ordinance are tortious in nature, it is but natural that we should employ the same traditional, familiar doctrines that tort law created and developed over so many years such that they have become foundational to the legal system.

However, despite the difficulty, it is unavoidable. Prof. Sinai Deutch (the attorney for the Israel Consumer Council in this Further Hearing) addressed this in an article that referred to the case under appeal:

> The Consumer Protection Law is an innovative law, inasmuch as Israel's highest court is first addressing its interpretation only at the present time. It may also be reasonably assumed that, in the early stages of its interpretation, there will be some fear of disconnection from firmly-rooted, ancient legal traditions. However, it is the understanding of the importance of the subject that must lead to reconsideration in this regard…there is no reason to apply the rules of civil law in their entirety to the Consumer Protection Law. Independent interpretation of the Consumer Protection Law's legal terminology is needed in accordance with its purpose and objective (S. Deutch, "Consumer Class Actions: The Demand for Personal Reliance on Misrepresentations of the Deceiver," (2 *Moznei Mishpat* 97, 126 (2001-2002) (Hebrew) (hereinafter: "Consumer Class Actions").

Even Justice Cheshin would appear to agree that the traditional tort doctrines are not "revealed truth". He expressly notes that, "Since we are concerned here with transplanting a new organ into the body of the Civil Wrongs Ordinance, we must closely examine whether a particular doctrine of the Ordinance is compatible with the foundations, essence and structure of the new tort". But after stating that – and referring to the sources he cited – he did not set out to "closely examine" whether the traditional doctrines were indeed compatible to the cause of action of consumer deception, but rather assumed their compatibility as if it were self-evident.

The Compatibility of the Tort-Law Causation Doctrine to a Class Action for Deceptive Advertising

8. As we have seen, the traditional doctrines of tort law must be adapted to the special purposes of the consumer class action. In regard to the case before us, it will suffice to focus upon the adapting of the doctrines of tortious causation to the special needs of a class action filed in regard to the mass publication of a misleading advertisement.

I refer to the "doctrines of causation" in the plural, inasmuch as even in traditional tort law, the subject of the existence of a causal connection between the tortious conduct and the harmful result is subject to a number of doctrines, which occasionally compete and occasionally

operate in unison (see, in general: I. Englard, "Causal Connection" in *The Law of Civil Wrongs – General Principles of Tort Law*, G. Tedeschi, ed. (2nd ed., Jerusalem, 1977) 178; I. Gilead, "Causation in Israeli Tort Law – A Reexamination," 14 *Mishpatim* 15 (5744) (Hebrew)). The need for creating different doctrines of causation derived from the need to contend with different aspects of a complicated and complex phenomenon that earned the nickname "indeterminate causation" (see: A. Porat & A. Stein, *Tort Liability under Uncertainty* (2001); A. Porat & A. Stein, "The Evidential Damage Doctrine: A Positive Analysis of the Law," 21 *Iyunei Mishpat* 191 (Hebrew); A. Stein, "How to Resolve the Indeterminate Causation Problem that Arises in Medical Malpractice Litigation," 23 *Iyunei Mishpat* 755 (Hebrew)).

Traditional tort law proposes practical solutions for situations of "indeterminate causation" in which it would be too much to ask the plaintiff to prove positively the existence of a direct, factual causal connection between the tort of the defendant and the injury incurred, under the "but-for" test (i.e., the "*sine qua non* test"). Under such circumstances, when the plaintiff proves the defendant's tortious behavior, that his injury, and the *possible existence* of a factual causal connection between the tort and the injury, then tort law may come to his aid and fill in what is missing for proving the existence of a factual causal connection. This legal "aid" may be expressed in various recognized ways: by transferring the burden of proof to the defendant, who will be required to prove the absence of a causal connection; by establishing presumptions against the defendant in regard to various aspects of the causal dispute; by imposing liability upon "joint tortfeasors", where their relative part in causing the injury is unknown; in defining an injury as an "indivisible injury" that the tortfeasor must bear in its entirety, even if he caused only part; and by recognizing alternative tests to the but-for test for factual causation (such as the "common man" test or the "substantial factor" test. See: Englard, *ibid*., at pp. 193-195; Gilead, *ibid*., at pp. 17-19; Porat, *ibid*., at p. 376). It should also be noted that new doctrines have been added to the traditional doctrines of causation over the last few years, which primarily serve to circumvent the problems and injustices that are sometimes involved in the strict application of the traditional but-for test. Among these new doctrines, some of which have already been adopted (in various contexts) by the case law, one can find the doctrines for probabilistic damages for the loss of a chance of recovery, or for loss of chance and creation of risk, and for MSL (Market Share Liability) suits; as well as the doctrine of mass

liability and the doctrine of evidential damage (see the survey in Porat & Stein, in the second, fifth and seventh chapters of their above book).

9. We can conclude from the above that even in traditional tort law – and all the more so in modern tort law – the but-for test is no longer the answer to everything. In many cases – where the purposes of tort law justify it – the right of a plaintiff to damages is recognized even when he is unable to show that no injury would have been caused but for the tort of the defendant. Against this background we may more sharply ask why the majority in the Appeal, and why Justice Cheshin in this Further Hearing, found it necessary to be so demanding in regard to the proof of reliance of Bezeq's customers upon the misleading advertisements, as part of their insistence upon the demand for a causal connection in accordance with the but-for test. As the Chief Justice stated in the Appeal (IsrSC 55 (4) 584, 622-623), in referring to the approach of Justice Strasberg-Cohen:

> As we know, the meaning of the factual causal connection is that but for the tort, the injury to the victim would not have occurred. This is the *sine qua n*on test. In the matter before us, the factual causal connection requires that but for the prohibited deceit, the consumer would not have talked on the telephone in the manner that he actually did. Such a causal connection occurs only if the consumer relies upon the misleading character of the advertisement. If the consumer does not rely upon the misleading advertisement, then the extent of his phone calls is not influenced by the content of the advertisement. My colleague emphasizes the creation of the representation, but she does not prove the existence of the factual causal connection between creating the representation and the occurrence of the injury. In the absence of a factual causal connection, there is no possibility of examining the existence of a legal causal connection, which is based upon the factual background of the factual causal connection.

Justice Cheshin also notes – although in less emphatic language – that:

> …there was no causal connection between Bezeq's advertisement and the "harm" caused to Barazani, if only by reason of the fact that Barazani never read that advertisement, and therefore, in any event, he is not entitled to sue on that basis. Indeed, Bezeq committed a tort by publishing the advertisement – that is the basic assumption in this case – but the mere existence of a tort is insufficient to entitle a person to redress. That person must show that *due* to that tort, he incurred harm, and that precondition was not met in regard to Barazani.

What derives from this approach is that in order to ground a (personal or class) action for pecuniary damages for misleading advertising, the plaintiff must show that he relied upon the misleading advertisement, which led to a *direct change in consumer conduct*. With all due respect, I am of the opinion – which I will explain below – that this demand is not necessarily required by the language of the Law. The question, then, is what is the purpose of this demand, and what rationale does it serve? To this, I have found no convincing answer in the opinions of my honorable colleagues. It would appear that their only explanation is that class actions are a powerful tool, comprising many dangers, and should, therefore, be used with caution (see, in this regard, the opinion of my colleague the Chief Justice in the Appeal, at p. 620). That is, of course, undeniable. But defining Barazani as not being a "proper plaintiff" for a class action is based solely upon the finding that he does not meet the reliance requirement. Even if that finding were well founded – and I have questioned that from the outset – I cannot agree that Barazani's non-reliance upon Bezeq's misleading advertisement disqualifies him as a representative plaintiff in a class action.

10. A requirement by which a consumer can acquire a cause of action only if he can prove that he relied upon the misleading advertisement and changed his consumer conduct as a direct result would frustrate *ab initio* the possibility of many potential suits based upon a cause of action of consumer deception by mass advertising. The reason for this is that in many such cases the requirement cannot be met. Few consumers can recall the details of the commercial advertisements to which they are exposed, directly or indirectly, and few consumers can honestly testify that were it not for the exposure to a particular advertisement, they would not have acquired the advertised product or service, or would have used it to a lesser extent. After all, it is

well known that modern mass advertising is often intended to influence consumers in strange and mysterious ways, and not necessarily by speaking directly to their consumer consciousness. Often, consumers are not even aware of being influenced by an advertisement, neither when they are exposed to it, nor after the advertisement is supposedly forgotten. And we need hardly mention that these assumptions are particularly true in regard to advertisements in regard to matters of little consequence, which are the ones that hold the primary potential for consumer class actions. Thus, the procedural solutions that Justice Cheshin mentions in paras. 54-55 of his opinion – such as that each consumer prove his right to a remedy by means of an affidavit – cannot be deemed practical.

Moreover, in many cases of consumer deception through advertising, it can be established positively that, as a result of the advertisement, there was no direct change in modes of consumer conduct of the sort that my colleagues require for "reliance". The case before us provides a good example of this. The deception in Bezeq's advertisements concerned a fraction of a meter unit – of several seconds – at the end of every international phone call. Would anyone imagine that a Bezeq customer, assuming he were aware of the deception, would put down the phone precisely at the end of a meter unit in order to avoid being charged for fractions of a unit as for whole unit? The obvious conclusion is that Bezeq's deceptive advertising did not lead to customer reliance upon the content of the advertisement, and certainly did not lead to a *direct* change in the modes of consumer conduct. The change that the advertising may have caused in consumer consciousness – and conceivably the one that Bezeq sought to achieve by the said advertisement – was a change of a general nature in the perception of Bezeq as a reliable, fair company that charges only for the services it provides. Such a change in the advertiser's reputation could cause – and we may assume that it indeed causes – a change in consumer consumption habits, which may be expressed in generally greater frequency of use of the advertised product or service, as well as other products or services of the advertiser. But this is an *indirect* – and generally *unconscious* – change in consumer consumption habits. It is doubtful that any of the consumers whose consumption habits were indirectly influenced by the advertisement could prove that he relied upon the advertisement, and the extent of the advertisement's influence upon his consumption habits. But the advertiser benefits from its deceptive advertising, which indirectly led to an *increase in its market share*. The additional profits that the advertiser realizes from the increase in its market share – which also involve

unjust enrichment at the expense of both its customers and its competitors – are, truth be told, the true injuries inflicted upon the consumer interest as a result of the misleading advertisement. It is only because those injuries are impossible – or, at least, are very difficult – to measure and quantify that the examination typically focuses only upon the direct damages that my colleague Justice Strasberg-Cohen refers to as "price differentials". As a result, insisting upon reliance in regard to misleading mass advertising would severely impact upon the very possibility of initiating class actions for misleading advertising.

11. In his opinion in the Appeal, the Chief Justice noted the possibility of creating a "presumption of reliance" in favor of consumers, but left the matter open for future consideration (*ibid*., at p. 621). In his opinion in this Further Hearing, Justice Cheshin adopted a similar position. He also notes that "we should broadly interpret the concept of reliance such that it comprises more than just direct reliance". These solutions present something of a desirable development, but I fear that their practical advantage is limited. Proving a consumer's reliance is no simple task, and it is sometimes impossible. That is not the case in regard to an advertiser's ability to contradict the presumption of reliance. It is sufficient that it ask each of the consumers if and how he would have changed the manner of his use of the advertised product or service were it not for the misleading element in the advertisement. At the very least, those consumers who used the product or service prior to the misleading advertisement will find it very difficult to answer that question. We can almost assume that most, if not all, will have to answer in the negative, or that they do not recall the advertisement or its details, or that they do not know the answer, and the dealer will be deemed to have met the burden of proof and refuted the presumption of reliance. On the other hand, it is clear that my colleagues do not suggest creating an absolute presumption of reliance in favor of consumers. Such a presumption would greatly improve the chances of success of a consumer class action, like that before us, but would entirely nullify the requirement – to which my colleagues cling – of a factual causal connection between the misleading advertisement and the injury incurred by the consumers.

12. It should be obvious that the requirement that a misleading advertisement lead to a direct change in modes of consumer behavior – which is what the "reliance requirement" demands –not only does not advance the special purposes of the consumer class action. Let us return to the seven objectives as set out by Dr. Orna Deutch: levelling the playing field; reinforcing personal

autonomy; the concept of consumer sovereignty; protecting the rights to prosperity and social welfare; ensuring the credibility of the local market; and maintaining trust in the social order. Clearly, the demand for reliance advances none of these objectives. Rather, it leads to negating many consumer causes of action that might advance those objectives. In practice, the demand for reliance undermines those objectives and frustrates their realization. The same is true in regard to the special purposes of consumer class actions. As Justice Procaccia pointed out in the aforementioned *Tnuva* case, the class action "serves the interest of the individual by providing a remedy for injury in circumstances in which filing suit would not be worthwhile without the other members of the group. It serves the public interest that strives to deter large economic institutions from violating the law, and that seeks to achieve more effective enforcement of behavioral norms intended to protect citizens and prevent the exploitation of their weakness as individuals". In those case in which the personal injury of each of the individuals is very small, one might say that there is no real importance to the personal interest involved in the class action. The primary importance of such cases is focused upon the public interest. But the public interest in enforcing law and integrity in the consumer field has little in common with the reliance requirement, and certainly not with requirement of a direct, factual, causal connection between the misleading advertisement and the harm to the consumers. The public interest focuses primarily on the violation itself and the *possible* harm to the public as a whole, and not upon the question of whether there was an actual causal relationship between the violation and the harm caused to some consumer. We thus find that strict observance of the demand for a causal connection – like the requirement of proof of reliance – will lead to the frustration of many consumer class actions, and the public interest that they were meant to serve suffers.

Constructive Reliance and a Consumer Causal Connection

13. From the perspective of the laws of consumer deception in advertising, the main thing is the very existence of an advertisement with the *potential* to mislead in regard to a material aspect of a transaction, which the advertiser *intended* to reach as large a public as possible, and influence modes of consumer behavior. Once the potential to deceive is proven, and once it is proven that the advertiser indeed intended that the misleading advertisement reach consumers

and influence their consumer behavior, it is only right that we hold that there is a basis for the existence of constructive reliance by the consumers upon the misleading advertisement. The question of whether the dealer actually achieved its goal – i.e., that the misleading advertisement indeed reach its intended audience and actually mislead it – is of limited importance. This expresses a central difference between the law of consumer deception and general tort law (as opposed to certain particular torts, such as the torts of fraud, deceit, etc.). The normal starting point in tort law is that the tortious event was not planned by the tortfeasor, and that the tortfeasor was not interested in its occurrence. The assumption is that potential tortfeasors do not have an interest in causing injury, and that they generally have an interest in preventing injury, unrelated to the risk of being required to pay damages to the victims. From this, *inter alia*, we derive the principle that tort law is not intended to punish the tortfeasor, but rather to compensate the victim for his loss. For the same reason, tort law does not impose liability for the mere creation of a danger, which, in and of itself, is not deemed an injury (for a broader discussion, see: A. Porat, "Compensation for Risk-Creating and Loss of Chances," 23 *Iyunei Mishpat* 605 (2000) (Hebrew)). That is not the case in regard to consumer deception. The typical situation that these laws address is one in which the supplier of a product or service who publishes a misleading advertisement *is interested in and intends to* cause the consumer injury, inasmuch as, from its perspective, it reaps direct profit from that injury. Therefore, the incentive to cause harm in the area of consumer deception is inestimably greater than the incentive to invest in preventing harm, which is the typical fear in the field of torts. Experience shows that the fear that consumer deception may harm the reputation of the advertiser is often distant and ineffective. In any case, when it is shown that the advertiser intended to mislead, the necessary conclusion is that, at least in that case, the said fear was not sufficient to deter. Indeed, the temptation to deceive consumers – as a means for increasing an advertiser's profits – is not inconsequential. The purpose of the tort regarding misleading advertising does not focus upon the harm caused by the advertisement to a particular consumer, but rather upon the existence of a potential for the causing of harm to the consumer public, and the advertiser's intention to cause that harm in order to reap profits. Conceivably, that was the reason that, in defining the prohibition of deceit in sec. 2 (a) of the Consumer Protection Law, the legislature chose the phrase "liable to mislead". Moreover, another interpretive conclusion that derives from the definition of the tort is that the legislature also intended to create a unique definition of the causal connection required for consumer

deception. With all due respect, assuming that this wording is relevant only to actions for declaratory and preventative remedies renders the definition of a publication "liable to mislead" as a tort nearly devoid of all practical content, inasmuch as it is hard to imagine that any consumer would be interested in filing a suit for the sole, ultimate purpose of merely obtaining declaratory or preventative relief.

14. The conclusion required from the distinctions I addressed above is that the laws of consumer deception must contend with the reliance requirement and the issue of causation differently than tort law. Instead of the requirement of personal reliance by each and every consumer – which is the requirement of traditional tort law – we should adopt a doctrine that recognizes "constructive reliance" of all the consumers at whom the advertiser directed its misleading advertisement. And rather than the requirement of proof of a factual causal connection between the misleading advertisement and the injury of each and every one of the plaintiff consumers, we should adopt a doctrine that recognizes a "consumer causal connection" that would be derived from the combination of a potentially misleading advertisement and the intention of the advertiser that the advertisement reach the consumers, mislead them and thereby influence their behavior. The elements of the suggested formula for establishing a consumer cause of action overturn the accepted formula for a cause of action in tort to some degree. Whereas in an action in tort, meeting the reliance requirement is a precondition to the existence of a causal connection, in a consumer action, the existence of constructive reliance is derived as a necessary result of proof of the elements of the consumer causal connection. But this reversal does not detract from the completeness of the formula, in all of its elements. And note: adapting the tort doctrines to the consumer tort does not contradict the legislative imperative. On the contrary, such an adaptation is part of an interpretive process that makes it possible to advance the special objectives of the consumer cause of action in general, and of consumer class actions in particular, and as I shall demonstrate below, does not contradict the language of the law.

A Pecuniary Remedy for Consumer Deception

15. When can consumers obtain a pecuniary remedy due to a potentially misleading advertisement? In my opinion, it would be proper to establish that consumer deception gives rise to a (personal and class) cause of action for pecuniary relief upon the fulfillment of three conditions: a violating advertisement, injury, and a "consumer causal connection". As opposed to this, we should also recognize a defense that would generally be available to the advertiser if it be found that the consumer-plaintiff knew the actual facts, and the violating advertisement could not, therefore, negatively influence his behavior.

The first element (the element of *breach*) is fulfilled upon proof of a breach of one of the prohibitions upon deceit established under the Consumer Protection Law for which one may sue for damages under sec. 31 (a) of the Law. For our purposes, the relevant prohibition is that established under sec. 2 (a) of the Law, according to which even an advertisement that is "liable to mislead" in regard to a material element of a transaction is deemed a violating advertisement. And note: once it is proved that the advertisement is liable to mislead, there is no further need to address the question of actual deceit.

16. The second element is that of *injury*. While achieving the consumer objectives could suffice with the *potential* for causing harm to the consumer interest that is presented by an advertisement liable to mislead, in the absence of proof of injury, damages cannot be awarded to consumers claiming to have been injured by the violating advertisement. That is the import of the reference of sec. 31 (a) – titled "Compensation" – to the Civil Wrongs Ordinance. That is also the import of sec. 31 (a1), which states: "Consumers *injured* by the wrong are entitled to remedies for the wrong and so are dealers, who in the course of their business are *injured* by deceit, as said in section 2" (for a different view, see M. Deutch, *Commercial Torts and Trade Secrets* (2002), p. 49). This is simply the legislature's decision to limit the scope of potential plaintiffs to that group of consumers and dealers who were actually injured and that, therefore, have a direct interest in suing and obtaining a pecuniary remedy. However, the injury that the plaintiffs must prove is not necessarily the injury that each victim can prove by direct evidence. Provable injury caused to a group of consumers can also entitle the group to global damages from the advertisers without a need for the court to determine the personal injury of each member of the group (see, in this regard, reg. 9 (c) of the Consumer Protection (Procedures in regard to a Class Action) Regulations, 5755-1995, and paras. 13-20 of the opinion of Naor, J. in

the *Tnuva* case, above). We should also recognize the possibility that bringing evidence of the profit that accrued to the advertiser from the misleading advertisement be deemed sufficient proof of the injury to the injured consumers. My assumption is that, on the basis of such evidence, the court can award pecuniary *damages*, which are not necessarily *restitution*, to the injured consumers. As we have stated, the injury to the consumers from a misleading advertisement constitutes profits for the advertiser, and evidence proving the extent of that profit would therefore prove the extent of the injury. I would parenthetically note that, in my opinion, defining consumer deception as a tort does not detract from the victims' right to sue for restitution, whether by force of contract (where the product or service was provided to the consumer in the context of a contractual undertaking), or upon a cause of unjust enrichment.

17. The third element addresses the existence of a *consumer causal connection*. As explained above, I am referring to a causal connection adapted to the special objectives of consumer protection law – both personal and collective – and in the case before us, the special needs of the laws of consumer deception. Some form of causal connection between the breach and the injury is, indeed, required. That, as my colleagues have shown, is required by the Civil Wrongs Ordinance referred to by sec. 31 (a) of the Consumer Protection Law, and it is also required by sec. 31 (a1) of the Law, under which (as earlier noted) the right to relief is granted to one "injured by the wrong". However, an examination of secs. 2 (a) and 35A (b) of the Consumer Protection Law reveals that the existence of a causal connection – required, as noted, by secs. 31 (a) and 31 (a1) of the Law – cannot be construed as identical to the requirement of the traditional causal connection of the Civil Wrongs Ordinance. Section 2 (a) expressly suffices with a publication that is "liable to mislead", and does not require that there be actual deception, while sec. 35A (b) of the Law – treating of "class actions" – states that "where the cause of action is an injury, it is sufficient that the plaintiff show that injury was caused to a consumer". In addressing the meaning of sec. 35A (b), Dr. Orna Deutch writes:

> The legislature provided a certain leniency in regard to consumer actions in that when injury is an element of the cause of action (such as in the tort of negligence), there is no need that the plaintiff show that he himself incurred an

alleged injury, but rather it is sufficient that an injury was caused to *some* consumer (O. Deutch, in her abovementioned book, at p. 244).

I am of the opinion that we may learn from sec. 35A (b) that, for the purpose of filing a class action, it is sufficient to show the existence of a *consumer injury*, and there is no need to show a factual causal connection between the breach and that injury. This construction accords with the special purposes of the consumer class action, which I addressed above, which are also not consistent with the requirement of personal reliance.

18. It would appear that in regard to the question of the existence of a causal connection between consumer deception and the injury caused to the victim, secs. 2 (a) and 35A (b) of the Law contradict secs. 31 (a) and 31 (a1) of the Law. Whereas the latter (which are of a "general" nature) appear to reflect a requirement of a causal connection, it would appear that one may understand from the former (which are of a "specific" nature) that no causal connection be proved. However, I do not believe that the contradiction between the general provisions and the specific provisions in this matter can be resolved by preferring the specific provisions (by virtue of their being *lex specialis*). In the matter before us, we should prefer the interpretive principle that requires that we find a way to harmonize the provisions so that they may coexist. The formula that I suggested above for a "consumer causal connection" accords well with the appropriate interpretive approach. The requirement of a consumer causal connection – based upon a merger of the requirements for injury together with potential causation and intention to injure – prevents the possibility that liability might be imposed for the mere creation of a danger by a tortfeasor acting in good faith, and thereby gives proper expression to the purposes of the general provisions. At the same time, this formula grants preference to the consumer objectives of the specific provisions. That is expressed in the replacement of the requirement for an actual factual causal connection between the misleading advertisement and the injury under the but-for test with a requirement that suffices with proof of a *potential* factual causal connection (similar to the concept of apportioning tort damages based upon probability), together with proof that the advertiser intended to create an actual factual causal connection. In other words, meeting the demand for a consumer causal connection would not require proof that the advertisement actually misled the victim and caused his injury, and not even that he was aware of the

advertisement and relied upon it in some way, but rather it would suffice to show that the advertisement was liable to mislead the victim and cause his injury, and that the advertiser intended that.

It would appear to me that, in the context of the prohibition of consumer deception, the requirement of a consumer causal connection also reflects the *lex ferenda*. Adoption of the said formula would advance the special objectives of consumer protection law and of consumer class actions, and would ensure protection of good-faith advertisers who do not intend to mislead and cause harm when the factual causal connection between their advertisements and the injury is in doubt (needless to say, when the factual causal connection is not in doubt, nothing would prevent the filing of a class action even for injury resulting from an advertisement that was not intended to mislead, but that nevertheless, actually misled). I would like to emphasize that even in the absence of secs. 2 (a) and 35A (b), which support my suggested interpretation, the tort requirement of a factual causal connection can and should be made more flexible and should be adapted to the special needs of consumer deception. I have already pointed out that such flexibility has been adopted in a variety of ways in tort law itself, for the purpose of realizing appropriate objectives of tort law. Thus, for example, Israeli law recognized the possibility of awarding tort damages based upon probability in cases in which it was not proved – as would be required by the balance of probabilities – that but for the tortious conduct of the defendant, the plaintiff would not have incurred injury. This was held in regard to the loss of a chance of recovery (see the landmark case, CA 231/84 *Histadrut Health Fund v. Fatach*, IsrSC 42(3) 312., which has been followed repeatedly in later cases), as well as in regard to not obtaining informed consent for medical treatment (CA 4384/90 *Vaturi v. Leniado Hospital*, IsrSC 51 (2) 171, 191-192, and compare CA 2781/93 *Daaka v. Carmel Hospital, Haifa*, IsrSC 53 (4) 526 (English translation: http://versa.cardozo.yu.edu/opinions/daaka-v-carmel-hospital). Having found that it is possible to arrive at a desired result by means of interpretation even within the confines of the Civil Wrongs Ordinance, that should be the case *a fortiori* in the framework of the Consumer Protection Law, whose special objectives justify and require that we not subject it to the regular doctrines of tort law.

19. On the other hand, as stated, a defense should be allowed to an advertiser on the claim that the victim was actually aware of the true facts of the situation and, therefore, the violating

advertisement could not have negatively affected him. The reason for this is that the prohibition upon consumer deception is not intended to protect such victims. The prohibition upon consumer deception is intended to protect consumers who are liable to be misled, and not those who cannot be misled. In effect, this can be seen as an aspect of the good-faith duty that applies to every person seeking pecuniary redress for consumer deception. After all, it would not be appropriate to obligate a supplier of a product or service, who published a misleading advertisement, to compensate a person who was not a potential victim of the deception, and an action for compensation in such circumstances might be deemed to constitute abuse of process.

The said defense must be positively proven by the advertiser. In other words, in order to meet the burden of proof, uncertain answers like "I don't know" or "I don't recall" to questions put to the consumer-plaintiffs will not suffice. It may be assumed, therefore, that an advertiser may make effective use of this defense primarily in response to suits by "special" plaintiffs, such as its employees, commercial competitors, or other experts in the relevant field, regarding whom it would be possible to bring evidence in regard to the state of their knowledge at the time they acquired the service or product.

The Matter of Barazani

20. At the outset I noted that the approach of the majority in the Appeal and of Justice Cheshin in the Further Hearing focuses overmuch upon Barazani himself, and too little upon the large pubic of victims of the misleading advertisement whose case Barazani sought to press. A perfect expression of this can be found in the very establishing of the Archimedean assumption that Barazani was not exposed to the misleading advertisement and did not rely upon it, and that this is sufficient for the conclusion that Barazani is not an "appropriate plaintiff". Of course, I do not disagree that a precondition for certifying a class action is that the representative plaintiff have a personal cause of action against the defendant. That is expressly required by sec. 35A (a) of the Consumer Protection Law. But, in my view, we should not exaggerate the importance of that condition. In ascertaining whether it has been met, the court need not split hairs in its examination of the details of the personal suit of the representative plaintiff, but should suffice

with facial proof that he has a personal cause of action, and that we are not concerned with a person who is merely hitching a ride on someone else's dispute. The court should concentrate its examination upon two other questions: Is the subject of the suit appropriate to a class action? And is the representative plaintiff qualified and equipped to properly represent the interest of the public on behalf of which he seeks to sue? These considerations are of special importance in a consumer class action. Dr. Orna Deutch addresses this (in her abovementioned book, at pp. 245-246):

> The personal interest of the injured plaintiff who files the class action is, in any case, negligible in relation to the amount of the suit for the entire class. In a realistic view of the significance of the suit, it is of no consequence whether the personal suit of the victim constitutes a negligible part of the entire suit, or is actually nonexistent. In both cases, he presumably "defends the honor" of the entire group, and actually advances a different personal interest, which is the benefit that accrues from his representative standing in the suit, which is expressed in the special damages and compensation awarded to the plaintiff for his efforts. Why condition standing in the suit upon a formal demand for the existence of such minimal involvement on his part?
>
> It would seem that it is, indeed, difficult to justify the said requirement. What must be ensured is that the representative of the group be a proper representative who can bear the burden of conducting the suit both in terms of its material and its costs, and that he not have a conflict of interests. However, there is nothing in common to these requirements and the question of whether the plaintiff was personally harmed by the act at issue. His personal injury represents but an insignificant part of the whole suit. In any case, the matter pursued is a "public suit", while the significance of the personal suit of the plaintiff is but symbolic. In that light, I think it proper to refrain from this demand in its entirety.
>
> The reason given for this demand, which I noted above, according to which if the plaintiff has no personal cause of action, the proceedings will focus upon the personal defense against the plaintiff, and the matter of the entire group will be

> sidelined, begs the question. If the law establishes that the question of the existence of a personal cause of action is irrelevant, then the defenses against the individual plaintiff are irrelevant, and the proceedings will, in any case, focus upon the entire class of plaintiffs.
>
> In the consumer framework, the requirement of a personal cause of action leads, in practice, to one of two results: either no appropriate plaintiff will be found who is willing to "contribute" his cause of action to the proceedings in the service of the general public, or, if such a consumer be found, he will often be nothing more than a kind of "straw man" backed by some commercial group organized for the purpose of obtaining the compensation attendant to succeeding in a class action.
>
> And indeed, the demand for the existence of a personal cause of action in the consumer context has drawn criticism in the legal literature.

(and see: M. Bar-Niv, (Bornowski), "The Limits of the Consumer Class Action," 19 *Iyunei Mishpat* 251, 257-258 (1994) (Hebrew).

21. On point, I am of the opinion that Barazani showed that he had a *prima facie* personal cause of action – and most important – that Bezeq's misleading advertisement, upon which his suit was based, was appropriate for a class action. Indeed, Barazani did not claim that he had been exposed to the advertisement, but he also did not state the opposite. In fact, in the proceedings before the District Court – which did not focus upon this question – Barazani was never asked if he had been exposed to the advertisement. Under these circumstances, we may, and should, assume that Barazani's situation is no different than that of most of Bezeq's other customers. Whether the consumers were exposed to the advertisement and remember it, or whether they learned of the matter of the advertisement at a later stage, it is clear that it would only have aroused their attention when it was discovered that the advertisement was misleading, and that as opposed to what Bezeq had promised its customers, it continued to charge them for whole meter units. It is clear from the apparent facts that the advertisement was intended to influence Bezeq's customers to increase their use of the advertised service, and that would

appear, on its face, to lead to a conclusion that the misleading advertisement could justify recognizing the concrete reliance of all the customers to whom Bezeq directed its advertisement.

The suit that Barazani submitted to the court was appropriate, by its nature, to be addressed as a class action. We are concerned with a large community of Bezeq subscribers whose accounts were charged for international telephone calls at a rate that was higher than the rate that Bezeq was entitled to charge according to its advertisement. Addressing the class action on the merits would allow the court to decide whether Bezeq's advertisement indeed comprised the elements of a misleading publication that warranted pecuniary relief. If the court were to answer this question in the affirmative, it could easily determine the extent of direct injury. Proving the direct injury is not contingent upon the question of whether the customers made greater use of the specific service as a result of the advertisement, but upon the difference between the amounts the customers who used the service were charged and the amounts that Bezeq was entitled to charge its customers based upon its advertisement. This can easily be determined, inasmuch as Bezeq undoubtedly has all of the necessary data for calculating the difference in regard to each customer, and I cannot imagine that Bezeq would seek to conceal that information from the court.

22. One last comment in conclusion. While the District Court decision that was the subject of the Appeal dismissed Barazani's request to permit him to file a class action for pecuniary relief, it accepted his alternative request to file a class action for declaratory relief. However, the majority in the Appeal granted Bezeq's counter-appeal and rescinded the permission granted to Barazani to submit the suit for declaratory relief. In stating the reasons for that decision in the Appeal, the Chief Justice wrote:

> Should we not recognize Barazani's ability to serve as a representative plaintiff for declaratory relief stating that Bezeq's advertisement was "liable to mislead" a consumer? This question raises several problems, which can be left for future consideration for the following reasons: In his complaint, Barazani defined the members of the group as the community of Bezeq customers who paid a higher fee than that advertised by Bezeq, and as a result incurred monetary harm. Barazani does not "properly represent the interests of all the members of the

group" (sec. 43B (4) of the Law), inasmuch as he did not himself suffer monetary harm as a result of the deception. Therefore, Bezeq's we should grant the appeal, and find that Barazani is also not an appropriate representative plaintiff in regard to the declaratory remedy.

Was it proper to deny Barazani the limited permission granted him to file a class action for declaratory relief? The answer to this question – that Justice Cheshin did not address in his opinion – must, in my opinion, be no. After all, even according to the approach of the Chief Justice in the Appeal, Barazani has a personal cause of action against Bezeq because its advertisements were "likely to mislead" him, in which framework he could have petitioned for non-monetary relief, such as a restraining order. The basis for denying his request to file his personal suit for declaratory relief as a class action could accord with the opinion of the majority in the Appeal if there were another representative plaintiff before the court – who met the reliance requirement and even suffered monetary harm as a direct result of the deception – who might represent the interests of the consumers better than Barazani. But I fear that such was not the case. To date, no such alternative representative plaintiff has presented himself before the court, and even if we were to assume that such a plaintiff may yet appear in the future, I fear that his suit may be denied *in limine* by reason of prescription.

Conclusion

23. Subject to the above, I concur in the opinion of my colleague Justice Strasberg-Cohen that the petition for a Further Hearing should be granted, and that the Petitioner should be allowed to file a class action, as requested.

Justice

Justice Dalia Dorner:

In my opinion, the Petition should be granted. The reason for this is that the Petitioner relied upon the misleading representations of Bezeq and was harmed as a result of that concrete reliance. In any case, all of the elements of the tort were present, and the Petitioner is an appropriate plaintiff for a class action.

The Legal Foundation

1. The Consumer Protection Law, 5741-1981 (hereinafter: the Law), intervenes in contracts between unequal parties, and imposes an increased duty of fairness upon the stronger party – the supplier – toward the weaker party – the consumer. See LCA 8733/96 *Langbert* v. *State of Israel*, IsrSC 55 (1) 168 (hereinafter: *CA Langbert*), at p. 174. The Law is firmly anchored in established doctrines of contract law. See Sinai Deutch, "Consumer Contracts Law versus Commercial Contracts Law," 23 (1) *Iyunei Mishpat* 135 (2000). The purposes of the Law – among them, reinforcing personal autonomy, advancing commercial fairness and the protection of market integrity – well accord with the freedom of contract, which requires the full realization of a true meeting of minds of the parties to a transaction. This freedom is infringed when the consumer is misled into believing that he is undertaking obligations under transaction conditions that are different from the actual ones. Moreover, the duties of the dealer clearly reflect the overarching good-faith principle of Israeli contract law, which justifies eroding the once accepted principle of *caveat emptor*. See Gabriela Shalev, *Contract Law* (2nd ed., 1995), 221.

The Law was intended to provide an additional layer of defense to the consumer public that is exposed to deception by means of well-developed marketing and advertising methods (see the Consumer Protection Law Bill, *H.H.* 5740 at p. 302). This is achieved both by augmenting the duties of suppliers, and by broadening the means available to consumers for enforcing their

rights. These means include criminal offenses and civil causes of action, among then the tort prohibiting deceit in sec. 2 (a).

The Contractual Framework for the Relationship between Dealers ad Consumers

2. Many consumer transactions are premised upon a significant amount of consumer faith in the suppliers. In the framework of such relationships, consumers are not expected to check, before purchasing a service, that they will be charged the declared price, and they can rely upon the suppliers not to charge more than that price. If the consumer should discover at a later date that he was overcharged, he can demand and receive a refund. That is well-established in the accepted contractual doctrines that require that if a supplier charge more than the correct, advertised price, the consumers will be entitled to a refund of the difference, as well as in the social reality grounded upon them, in which consumers actually tend to place their trust in suppliers without checking that every transaction conforms with the advertisements.

A supplier's advertisements concerning a specific price grants the consumers a right not to pay more. In any case, if the supplier charge a higher price, that would constitute a breach of contract that would entitle even consumers who were not exposed to the advertisement to a pecuniary remedy. That right can be grounded in the following three different ways.

The first way sees a supplier's advertisement of a price as an irrevocable offer to the public, which can be accepted by the objective performance of its conditions, while the dealer is bound by the advertised price, and makes the possibility of purchasing the product or service for a price that will not exceed it, available to the public. See Daniel Friedman & Nili Cohen, *Contracts*, vol. 1 (1991) 182; Shalev, *ibid*., at p. 115. The consumers are not expected to check the price prior to the transaction. In any case, by accepting the offer, the parties agree to the advertised price. The supplier will be required to refund any additional charge to the consumer.

The second way sees the contract as comprising an implied term that requires the supplier not to charge a consumer more than the advertised prices. Such a term is required by the expectations of the parties. Overcharging constitutes a breach of that term.

The third way classifies the said overcharging, particularly where it concerns consumers who were not exposed to the advertisement, as a bad-faith performance of the contract.

3. It is on the basis of this legal conception, independent of the precise manner of its grounding, that consumers actually behave in practice. Typical Israeli consumers do not check, and are not expected to check, that the prices they are charged for each and every product in the supermarket are identical to the price printed on the product, and certainly do not check, and are not expected to check, that they received the discounts that were advertised by the chain from which they made the purchase. Consumers rely that they will be charged the prices, and credited with the discounts, as advertised. Similarly, the consumers of the telephone companies do not check the prices and current discount campaigns before each and every phone call, relying that they will be charged in accordance with the correct advertised prices.

Section 2 (a) of the Law

4. When a supplier publishes notice that the price of a service is lower than a specific price, the consumer public to which the advertisement is directed – including consumers who are not exposed to the advertisement – acquires a right to receive the service at the price stated by the supplier. When consumers purchase the services of the supplier, they rely, in practice, on the fact that the price they will be charged will be the advertised price.

That reliance exists regardless of whether the advertisement is innocent and clear or whether it is ambiguous and misleading (and see, for example, CA *Langert*, above). In both cases, the consumers acquire a right, and the suppliers are subject to an obligation, that they will not be charged more than the maximum price reflected in the advertisement, less the deceit, that they would be have been charged in accordance with the advertisement. The difference between the two types of cases regards the consequences that directly result from the advertisement. Only in the case of a misleading advertisement can one acquire those remedies established by law that do not require proof of injury, such as restraining orders. Moreover, only a misleading advertisement can be deemed tortious conduct. The potential to mislead must be evaluated at the time of publication, in accordance with the factual situation at that time. An innocent

advertisement cannot be deemed misleading if its content is unambiguous, only as the result of the future conduct of the supplier. Otherwise, every advertisement would be deemed "liable to mislead", as suppliers always have the ability to breach their obligations.

However, a supplier commits a tort under sec. 2 (a) of the Law even in the absence of a misleading advertisement both when he presents a consumer with an invoice based upon a price that is different and higher than the advertised price, and when he charges a consumer – e.g., by means of a standing bank order – a higher price than that advertised. Such conduct constitutes an instance of doing "anything – by deed or by omission, in writing, by word of mouth or in any other manner … which is liable to mislead a consumer on any substantive element of the transaction". That is so because when a supplier demands or charges a particular price, he makes a representation upon which consumers rely, and according to which, that is the correct price as advertised. The consumers are entitled to purchase the service at the advertised price, whatever it may be, and when they pay the supplier the amount in the invoice, or permit the supplier to charge their accounts, they do so on the basis of reasonable reliance that the supplier will not charge more than what was advertised. There is a kind of "integrity of the price" (see *Basic* v. *Levinson*, 485 U.S. 224, 247 (1988)).

The difference between the amount the consumer should pay according to the advertisement and the amount actually charged is the injury caused to that consumer. This injury caused to the consumer is connected by a direct, factual connection to the tortious conduct of the supplier. The consumer paid the additional amount due to the supplier's deceit. Had the supplier not breached its duty, and had it charged the consumer the correct price, the consumer would have paid the correct price and would not have been injured.

Therefore, there is no need to prove exposure to the advertisement and conduct resulting from that advertisement in order to be entitled to damages for that deceit, and it is not required under current Israeli law. Other countries that have similar tort and consumer protection laws do not all have a similar requirement, particularly in regard to class actions. Compare, for example, *Slaney* v. *Westwood, Inc*. 366 Mass. 688 (1975); *Amato* v. *General Motors Corporation*, 463 N.E.2d 625 (1982); *Carpenter* v. *Chrysler Corporation*, 853 S.W.2d 346 (1993); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128 (1972); Seth William Goren, "A Pothole on the

Road to Recovery: Reliance and Private Class Actions Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law", 107 *Dick. L. Rev.* 1.

From the General to the Specific – Bezeq and Barazani

5. Bezeq does not currently expect its customers – and certainly did not expect its customers at the time relevant for this case, when it was a monopoly – to use its telephone services only after checking their price. Thus, there is a "standing payment order" arrangement by which the consumer grants Bezeq the right to access his bank account, and the consumer absolutely relies upon Bezeq, while Bezeq des not usually append to a consumer's bill the full details of phone calls charged. In doing so, Bezeq intends to create an equal arrangement for those who were exposed to the advertisement in regard to its fees and acted thereupon, and those who were not exposed to the advertisement and, therefore, did not act thereupon. As noted, according to the factual findings in the earlier proceedings, the meaning of the advertisement was simple and clear. Nevertheless, Bezeq made a different representation to the consumers, whether in the telephone bill or in charging their accounts, according to which the correct method for calculating was different from the method of calculation in the advertisement, and led to a higher charge. In doing so, Bezeq deceived the consumers, and committed the tortious act. There is no difference between this conduct by Bezeq's and a case in which it would include the advertised method of calculation in the telephone bill, except that, in practice, it charged a higher fee.

Considerations of "legal causation" also do not require reducing the tortious liability. Compare sec. 16 of the opinion of Justice Tova Strasberg-Cohen in this Further Hearing, and see FH 12/63 *Leon et al*. v. *Meshullam Ringer*, IsrSC 18 (4) 701, at p. 715 *per* Witkon, J.; CA 145/80 *Vaaknin* v. *Beit Shemesh Local Council*, IsrSC 37 (1) 113, at p. 145; and compare Itzhak Englard, Aharon Barak & Mishael Cheshin, *The Law of Civil Wrongs*, Gad Tedeschi, ed., (1970) 187.

It should be noted that in light of the finding that the meaning of the advertisement – that Bezeq would not charge "for the time period not actually used for the call" – was clear, the conduct could not have constituted tortious conduct under sec. 2 (a) of the Law. But even if it

had been found that the advertisement was misleading, there still would have been legitimate, concrete reliance by the consumer that he was being charged the correct amount as advertised, and therefore the elements of the tort would have crystalized on the basis of the tortious conduct committed in the charging.

Barazani therefore has a personal cause of action against Bezeq. The existence of Barazani's personal cause of action having been proved, whether or not he was exposed to the misleading representation, the path to representing the group in a class action is open to him.

I, therefore, concur with the result recommended by my colleagues Justices Tova Strasberg-Cohen and Eliahu Mazza, according to which the Petition should be granted and the filing of the class action should be allowed.

Justice

The petition is dismissed in accordance with the majority opinion, and the judgment of the Supreme Court in CA 1977/97 is affirmed.

Given this 13 day of Av 5763 (11 August 2003).

The Chief Justice	The Deputy Chief Justice	Justice
Justice	Justice (ret.)	Justice