FH 4693/05 (summary)

1. Carmel Haifa Hospital
2. Clalit Health Fund

v.

1. Eden Malul
2. Tzipora Malul
3. Armond Malul

The Supreme Court
[29 August 2010]

Before President Beinisch, Vice President E. Rivlin, and Justices A. Procaccia, E.E. Levy, A. Grunis, M. Naor, E. Arbel, E. Rubinstein, and S. Joubran

Petition for a Further Hearing on the Judgment of the Supreme Court dated 31 March 2005 in CA 7375/02, issued by the Honorable Justices Mazza, Naor and Joubran.

Facts: The first respondent was born with multiple defects. She was delivered through a Caesarean section performed on her mother, the second respondent. The trial court found that the appellant hospital had negligently delayed the surgery, but there was no certainty as to whether the respondent's defects were caused by her premature birth (for which the appellants were not at fault) or by the delay in her mother's medical treatment (a result of the first appellant's negligence). The lower court awarded the respondents compensation in the amount of 40% of the full damages amount and an appeal was brought to the Supreme Court. The original three judge panel that heard the appeal held that the hospital was to be held proportionally liable for its negligence, even though the respondent had not proven, by the normal preponderance of the evidence standard, that the negligence had actually caused the damage. A rehearing of the appeal, before an expanded panel of the Court, followed.

Holding: **Majority view, opinion by Vice President Rivlin**. Vice President Rivlin ruled that proportional liability was desirable as an exception to the preponderance of the evidence standard only in circumstances in which that standard loses its advantage as an evidentiary norm. Primarily, those circumstances occur when a joint, repeated risk has been created; when this risk has been created vis-à-vis multiple potential plaintiffs and when the application of the preponderance of the evidence standard, combined with "all or nothing" damages standard, leads to a recurring distortion regarding the assignment (or non-assignment) of liability to the defendant. In such cases only, the use of the preponderance of the evidence standard achieves

neither corrective justice nor optimal deterrence. However, the assignment of proportional liability in other situations, based on a desire to do justice in the individual case, leads to an unacceptably high level of uncertainty. **President Beinisch** approved of the recurring distortion standard as the only permissible narrow exception to the normal evidentiary requirement, agreeing with **Justice Grunis** that a general use of the proportional liability rule would lead to a slippery slope of expanding tort liability, for which, the President emphasized, the public would be required to pay. **Justice Procaccia** emphasized that the preponderance of the evidence standard should not be changed absent a legislative enactment. **Justice Levy** concurred with the Vice President's opinion in full.

Minority view, opinion by Justice Naor: Justice Naor wrote that the decision in the original appeal should be allowed to stand. The requirements set out in the Vice President's majority opinion refer to a different type of ambiguity than was present in this case, dealing as they did with ambiguity regarding the identity of the injured party. In the instant case, the ambiguity related to the actual causation of damage itself, and in such cases the recurring distortion and multiple potential plaintiff components are irrelevant. The "all or nothing" approach for awarding damages should be abandoned in favor of the proportional liability exception, in cases such as this, meaning cases that involve inherent ambiguity regarding the actual causation of damages, and in which the defendant's negligence towards the plaintiff — even a single plaintiff — has been established using the preponderance of the evidence standard, and in which it has been determined that negligence of the type committed by the defendant is a potential cause of the damages suffered by the plaintiff in the particular case. In such cases, the innocent injured party must be favored over the party whose negligence has been proven, and compensation should be awarded based on the probability that the defendant had in fact caused the damage; such causation can be proven using evidence of general probability or of scientific estimations of the actual causation. However, for the time being, as the law develops, the exception should be applied only in cases involving bodily injury, which are the most typical cases for inherent ambiguous causation. **Justice Joubran** agreed with Justice Naor's views, except for emphasizing that the proportional liability exception is to be applied specifically to cases of scientific ambiguity, and that it should be recognized as an evidentiary exception, not a change in the substantive law. **Justice Rubinstein** noted that recurring cases are the best examples of the need for proportional liability, and that the professional expertise of the judges who will use the proportional liability exception is adequate protection against "slippery slope" and judicial uncertainty concerns. In his view, proportional liability is required for reasons of justice. He also presented the positions taken by Jewish law in this regard, in cases of doubt as to the actual fault of the various parties. **Justice Arbel** noted that the proportional liability exception as outlined by Justice Naor provided the optimal balance in terms of deterrence against negligent behavior, and that the decisions issued by courts since the decision in the original appeal showed that judges can apply the exception without breaching the boundaries of judicial certainty.

Legislation cited

Courts Law (Consolidated Version), 5744-1984, s. 79A.
Foundations of Law Statute, 5740-1980.

Compensation for Victims of Road Accidents Law, 5735-1975, s. 4(c).

Israeli Supreme Court Cases Cited

[1] CA 2781/93 *Daaka v. Carmel Hospital* IsrSC 53(4) 526 (1999).
[2] CA 8279/02 *Golan v. Estate of Albert* (2006) (unreported).
[3] FH 15/88 *Melech v. Kornhauser* [1990] IsrSC 44(2) 39.
[4] CA 600/86 *Amir v. Confino* [1992] IsrSC 46(3) 233.
[5] CA 5604/94 *Hemed v. State of Israel* [2004] IsrSC 58(2) 498.

American cases cited

[6] *In re Agent Orange "Prod. Liab. Litig* 597 F. Supp. 740 (E.D.N.Y. 1984).
[7] *Summers v. Tice* 199 P.2d 1 (Cal., 1948).
[8] *Sindell v. Abbott Laboratories* 607 P.2d 924 (Cal., 1980).

English cases cited

[9] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.
[10] *Barker v Corus Plc Ltd* [2006] UKHL 20.
[11] *McGhee v National Coal Board* [1973] 1 WLR 1.

Estonian case cited

[12] *Case No. 3-2-1-78-06*, 3 October 2006.

French case cited

[13] *Appeal No. 06-109767*, 22 May 2008.

For the petitioners — Ran Shapira, Avimor Yaakov.
For the respondents — Joseph Leon.

JUDGMENT
(Summary)

Deputy President E. Rivlin

The respondent, Eden Malul, was born prematurely by way of a Cesarean section in the petitioner's hospital. The trial court found that the hospital was negligent in not conducting the Cesarean section as fast as was medically necessary, and the respondent was born with certain mental deficiencies. However, it was not clear whether these deficiencies were the result of the premature birth — which is a no-fault factor — or the result of the hospital's negligent delay in conducting the Cesarean section.

The trial court decided that the hospital's negligence may have caused the respondent's injury, and awarded the respondent damages covering 40% of her damage. The petitioners (the hospital and the HMO) appealed this decision to the Supreme Court. The Supreme Court decided that in cases of ambiguity regarding factual causation it is sometimes justified to assign "proportional liability", if the probability that factual causation exists is substantial and yet does not exceed 50%. In this case, the Supreme Court determined that assigning proportional liability was justified, but reduced the damages to 20% of the damage.

The issue of assigning proportional liability in cases of ambiguity regarding factual causation, as an exception to the preponderance of the evidence standard, was brought for further hearing before a wide panel of the Supreme Court judges.

Normally, the plaintiff must prove all the elements of her claim according to the preponderance of the evidence standard in order to receive compensation. If she does not manage to do so, she will receive no compensation. This is often called the "all or nothing" rule. This rule must not be replaced altogether by a rule of "proportional liability". First, the "all or nothing" rule reflects the basic conception that factually, only one reality exists — the defendant has either caused the injury or not. Second, this rule, along with the preponderance of the evidence standard, minimizes judicial errors and divides the risk of such errors equally between the plaintiff and the defendant (see: David Kaye, "The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation," 7 *Am. B. Found. Res. J.* 487 (1982)). Thus, this rule is socially efficient. The "all or nothing" rule also reflects principles of fairness and corrective justice, as it leads to full compensation whenever it is more likely than not that the defendant has negligently caused the plaintiff's injury.

Despite these advantages, courts in Israel have recognized certain exceptions to the preponderance of the evidence standard, and to the "all or nothing" rule which follows it. One such exception is the recognition of "lost chances of recovering (in the medical sense)" as an actionable loss. When applying the loss-of-chances doctrine, compensation is not awarded for the physical injury, as it is not known whether that injury is causally linked to the negligent conduct. Therefore, the physical injury merely assists in calculating the damages for the alternate head of damage — lost chances. Damages for lost chances are calculated as a percentage of the monetary value of the physical injury. As can be seen, the loss-of-chances doctrine shifts the difficulty in proving causation, so that partial damages may be awarded *de facto*, without deviating from the preponderance of the evidence standard. It may be noted that in some cases, courts in Israel have applied the loss-of-chances doctrine when the lost chances were above 50%, even though in

these cases the preponderance of the evidence standard allowed for full damages. Also, the mirror-image of lost chances — "increased risk" — was not recognized as an actionable loss, although it could be argued that the distinction between the two is not very well founded. Recognizing "increased risk" as a head of damage, however, could lead to a significant deviation from the preponderance of the evidence standard.

Another exception to the preponderance of the evidence standard was suggested by courts in Israel in the context of informed consent to a medical procedure. It was decided that the question of how the plaintiff would have acted if her consent had been properly obtained is largely hypothetical; therefore, the causal link between the lack of consent and the physical injury is usually ambiguous. In the case of CA 2781/93 *Daaka v. Carmel Hospital* [1], it was suggested that the court should estimate the probability that the plaintiff would have rejected the procedure, had her consent been properly obtained. If the probability is significant, albeit lower than 50%, the court may award partial damages. This suggestion had not been adopted as a rule, as the majority opinion recognized "infringement of autonomy" as an actionable tort, rendering the proof of causation regarding the physical harm unnecessary.

In this petition, it is suggested that a more general rule be set as to the conditions under which exceptions to the preponderance of the evidence standard should be made. In forming such a rule it must be remembered that generally, the preponderance of the evidence standard is the optimal way of dealing with uncertainty in the civil law. Its advantages are achieved when it is applied consistently and therefore it must not be abandoned merely because it does not alleviate the ambiguity in a specific case. However, under certain specific conditions, applying the preponderance of the evidence standard will nullify its usual advantages. These conditions are the creation of a joint, repeated risk towards a group of potential plaintiffs by a potential defendant; and the existence of an inherent, recurring distortion in the application of the preponderance of the evidence standard. A joint, repeated risk may be created by a single tortious act, such as environmental contamination; it may also be created by a series of tortious acts conducted by the defendant, each one exposing some members of the group to the risk. Such is the case when the defendant sets a negligent medical care policy. A recurring, inherent distortion in the application of the preponderance of the evidence standard would lead, under the current legal regime, to a fixed legal result in any litigation between any of the plaintiffs and the defendant. The legal result would always be biased in one direction: if the probability of factual causation is lower than 50%, no plaintiff will succeed in proving her case, although it is clear that in some cases the defendant did indeed cause the injury. If the probability is higher than 50%, all plaintiffs will succeed in

proving their case, although the defendant did not actually cause the injury in all of the cases.

Therefore, under the aforementioned conditions, the application of the preponderance of the evidence standard would lead to undesirable results. Corrective justice is not achieved when the defendant is not held liable for damage she has truly caused by her negligence, or if the defendant is held liable for damage she has not caused. The status quo is not restored. Also, in order for efficient deterrence to take place, the defendant must be held liable for no more and no less than the damage she negligently caused. Applying the preponderance of the evidence standard in such cases as described above could make the defendant immune to liability — if the probability is inherently lower than 50%, in which case there would be no deterrence at all. On the other hand, if the probability is inherently higher than 50%, the preponderance of the evidence standard would lead to over-deterrence. In contrast, under the proportional liability rule, the expected liability of the defendant equals the actual losses caused by the tortious conduct. Finally, applying the preponderance of the evidence standard when there is a recurring distortion in its application, and it affects a group of plaintiffs, does not minimize the cost of judicial errors, and has a negative distributive effect. If a recurring distortion exists, the same party will always bear the cost of a judicial error. Normally, the risk of a judicial error is distributed equally between both parties.

Indeed, proportional liability in cases of a recurring distortion and a group of potential plaintiffs does not entirely restore the status quo, as some plaintiffs will be compensated for damage that was not caused by the defendant, and others, whose damage was caused wholly by the defendant, will be under-compensated. However, the defendant's total liability will equal the true value of the injuries she caused — an outcome which could not have been achieved under the preponderance of the evidence standard. Also, under the preponderance of the evidence standard, the plaintiffs who are under-compensated would not have received any compensation at all (if the probability is lower than 50%). The requirement of a group of plaintiffs ensures that a defendant will not be held liable if she had not caused any damage at all, as may happen if proportional liability is assigned with regard to a single litigant. Although this result is achieved by shifting the perspective from the specific plaintiff to a group of plaintiffs, and thereby it somewhat differs from the concept of corrective justice in its most strict sense, it is the closest possible result to restoring the status quo. Corrective justice is achieved in the aggregative sense.

Of course, the proportional liability rule must apply both when the probability is higher than 50% and when it is lower, in order for the advantages of this rule to be achieved. Therefore, it is to be expected that

both plaintiffs and defendants will attempt to prove the conditions set for the application of the proportional liability rule (of course not in the same case). Any party who wishes to apply a proportional liability rule must prove the existence of 4 conditions: the existence of a tortfeasor, of a group of plaintiffs, a joint and repeated risk, and a recurring distortion in the application of the preponderance of the evidence standard (hereinafter: "a recurring distortion"). The group of plaintiffs must be actual and not theoretical or hypothetical, although the plaintiff does not necessarily have to identify the individual members of the group. The party attempting to prove these conditions will naturally have to also supply the court with evidence regarding the probability that there is a causal link between the tortious act and the injury. This evidence may be scientific or statistical evidence. As the court's perspective shifts from a single-plaintiff to a group of plaintiffs, many of the difficulties associated with relying on statistical evidence become irrelevant, and the court may rely on such evidence, as long as it is credible and relevant to the case.

In summary, the preponderance of the evidence standard remains the general rule for most cases. The "recurring distortion" doctrine serves as a well defined exception to that rule. It should not be understood too widely, but neither should it be understood too narrowly. When the conditions for the "recurring distortion" doctrine's application are met it can serve as a suitable framework for different types of cases characterized by ambiguous causation, including environmental toxins and tobacco cases.

How should the "recurring distortion" doctrine affect different exceptions to the preponderance of the evidence standard, which have been suggested by courts in Israel as well as in other legal systems? As mentioned previously, courts in Israel have discussed two such exceptions: the loss-of-chances doctrine (possibly including liability for increased risk) and cases of lack of informed consent in the medical context. Of these, only the loss-of-chances doctrine has been accepted as a rule. Considering the difficulties and disadvantages associated with this doctrine, as well as the need for an all-encompassing framework for proportional liability, it is suggested that the "recurring distortion" doctrine replace the recognition of loss-of-chances as an actionable loss.

Other exceptions to the preponderance of the evidence standard, which have been suggested in other legal systems, are the cases of "market share liability" and "mass" or "Toxic Torts". These can be understood as examples of the type of cases in which the "recurring distortion" doctrine applies. Market Share Liability can be understood as part of the "recurring distortion" doctrine, if it is seen in the following manner: each of the manufacturers has created a joint risk to a group of plaintiffs. The probability that each plaintiff's damage is due to a specific manufacturer's tortious conduct is

equal to that manufacturer's market share, so there is a recurring, inherent distortion in applying the preponderance of the evidence standard in such cases. Although in the case of Market Share Liability there are typically several defendants, this is not a necessary condition for applying the "recurring distortion" doctrine. What is required in this regard is a group of plaintiffs — and indeed such a group exists for each defendant.

The term "Mass Torts" applies to a situation in which a large number of people are exposed to a certain risk, but in each individual case it is unclear whether the damage is linked to the tortious exposure to risk. Such was the case in the Agent Orange cases (*In re "Agent Orange" Prod. Liab. Litig.* [6]). In these cases many American soldiers were exposed to toxins which increase the risk of different illnesses. When seen as a population, it was evident that many of those soldiers were indeed ill. However, it could not be proven, in each individual case, that it was "more likely than not" that the illness was due to the tortious exposure to toxins, and not caused by other factors. These attributes are basically those required by the "recurring distortion" doctrine. It is important to note that although Mass Torts usually meet the requirements of the "recurring distortion" doctrine, the latter are usually wider than the former. The "recurring distortion" doctrine does not include any requirement that the group of plaintiffs will be unusually large, and it would apply also to such cases as a negligent medical policy.

One of the most significant advantages of the "recurring distortion" doctrine is that it serves as a general, well defined framework for all types of ambiguous causation, rather than offering specific and narrower solutions to each type of ambiguous causation separately. It is a solution that is not based on the characteristics of any specific case, but rather on wide theoretical considerations. Finally, it should be noted that the "recurring distortion" doctrine applies to cases in which the defendant is the common figure to all the individual cases. Some — though not all — of the justifications for this doctrine also apply to cases in which the plaintiff is the common figure, such as when a plaintiff is exposed to several tortious acts and it is unknown which one caused her injury. The question of whether the doctrine of "recurring distortion" should also apply in some of these cases remains undecided.

Justice E.E. Levy

Justice Levy agreed with Deputy President Rivlin's clear and comprehensive opinion and with the result at which he arrived.

Justice M. Naor

Justice Naor wrote that Israeli tort law allows for a probability-based award of damages in the event of an inherent difficulty in proving a factual causal connection between the proven negligence and the proven damages. This is an exception to the traditional rule allowing for compensation to be awarded on the basis of a preponderance of the evidence. Justice Naor outlined a test to determine when proportional liability may be assigned — which she defined as the "proportional liability exception". According to her, Deputy President Rivlin's proposed outline for the exception is not the only possibility.

Justice Naor proposed that the test should require that all the following conditions be met:

a. Negligence: the plaintiff must prove by a preponderance of the evidence that the defendant was negligent;

b. Damage: the plaintiff must prove by a preponderance of the evidence that the plaintiff has suffered damages;

c. Inherently ambiguous causation: the plaintiff must prove by a preponderance of the evidence that there is inherent ambiguity regarding the factual causal connection, which makes it impossible to prove the causational process that actually occurred, as is normally required when the "but for" test is applied;

d. The negligence was a potential tortious risk factor: the plaintiff has proved by a preponderance of the evidence that the negligence is a risk factor for the particular damage caused to the plaintiff and that the defendant should have foreseen such damage (hereinafter: "the tortious risk factor");

e. A significant tortious risk factor: the plaintiff must prove that there is a substantial chance — although less than 50% — that the tortious risk factor actually caused the damage;

f. Failure to award compensation for the damages would be an unjust result.

According to Justice Naor, when these conditions are met, the court may be satisfied with a finding of a probability-based factual causal connection, which can be established on the basis of statistical evidence or on the basis of an estimation. In these cases, all possible factors —those that involve fault and those that do not — can be accorded their proper weight under the circumstances, for the purpose of establishing the appropriate scope of compensation.

Justice Naor emphasized that she does not seek to create a new uniform theoretical framework for deciding the issue. The issue has been discussed at length in the legal literature in Israel and throughout the world, and it is doubtful whether a comprehensive solution can be found (para. 9). There is no need for concern regarding measures that move in new directions. But such movement needs to be connected, at its core, to the concrete facts in the case under discussion. The general norm that is proposed is therefore directed at resolving the specific case — the particular case of a single plaintiff who has suffered damages, and not a multiple potential plaintiff (hereinafter: "multiple-plaintiff") case.

Justice Naor's opinion in the rehearing of the case covered several matters: the presentation of the ambiguous causation problem; the justifications for resolving the ambiguous causation problem through the proportional liability exception in the particular case; the response to the criticism directed at her approach; and finally, a description of the criteria for awarding compensation under the proportional liability exception. These are the main points.

The preponderance of the evidence rule. The starting point is that it must be proven that the defendant was negligent and that the plaintiff suffered damage. The purpose of the causation rules in tort law is to establish whether, from a legal perspective, there is a sufficient connection between the defendant's negligence and the damage suffered by the plaintiff. Causation is the dividing line between, on the one hand, an individual's freedom to act as he wishes, to take chances and even to be negligent — and on the other hand, the responsibility that an individual must bear for his acts and for the damages caused by his behavior. The problem of ambiguous causation refers to uncertainty regarding the *factual* causal connection, which makes it impossible to determine whether or not such a connection exists. The uncertainty is an inherent aspect of the bodily injury that arises in these cases, because of the limitations of the available medical knowledge regarding the factors that cause the injury, and because medical illnesses and defects can be the result of many factors.

Definition of the proportional liability exception: Justice Naor wrote that the proportional liability exception should apply *only to the law of torts, only when bodily injury has been proven, and only when the matter involves ambiguity with respect to the actual causation of the injury*. The exception and its limitations are derived directly from tort law policy considerations that require a relaxation of the preponderance of the evidence rule as applied to the law of torts, and from the adjustment of that rule for the purpose of conforming it to the objectives of the law of torts. This relaxation will, in turn, lead to a "proportional" compensation outcome rather than an "all or nothing" decision. This is therefore a substantive exception to the law of

torts, and not an evidentiary exception applicable to all legal fields. The starting point for this "relaxation" is, as stated, the problem of ambiguous causation.

Focusing the exception among the different categories of ambiguous causation: We can point to four typical categories of ambiguous causation cases. The first group of cases involves ambiguity regarding the scope of the damage. The second group consists of cases in which there is ambiguity regarding the identity of the party who caused the damage. The third group consists of those cases in which there is ambiguity regarding the actual causation of the damage. The fourth group involves ambiguity regarding the identity of the party that has been injured. This division into categories is not absolute and there may be sub-categories as well, but the proposed division can refine the analysis and simplify the discussion of the complex problem of ambiguous causation. The test that is proposed in Justice Naor's opinion involves the third group (ambiguity regarding the actual causation of the damage). This group includes those cases in which the ambiguity pertains to the factual causal connection between the wrongful behavior and the plaintiff's injury — when it is inherently impossible for the plaintiff to prove, using the ordinary preponderance of the evidence standard, that the negligent defendant has caused *any damage to him whatsoever.*

In light of the importance of the ambiguous causation problem, Justice Naor also discussed the other three categories briefly — categories which are described and analyzed in depth in articles by Israeli legal scholars (I. Gilead, "Comments on the Tort Arrangements in the Legal Codex — Liability and Remedies," 36 *Hebrew Univ. L. Rev. (Mishpatim)* 761 (2006), at p. 775; A. Porat and A. Stein, "Liability for Uncertainty: Making Evidential Damage Actionable," 6 *Cardozo L.R.* 1891 (1997)).

Ambiguity regarding the extent of the damage: Ambiguity regarding the extent of damage arises when it is known that *some part* of the damage was undoubtedly caused by the behavior of a *particular defendant*, who is *unquestionably at fault*, but what is unknown is the percentage of the damage that was caused by the defendant, relative to the percentage caused by other factors, *whether or not such factors are at fault*. Regarding this category, the norm under Israeli tort law is to award proportional compensation according to probability, including through the use of an estimation (CA 8279/02 *Golan v. Estate of Albert* [2], *per* President Barak, at para. 5). The primary reason for this is that there is no justification for ignoring the interest of an innocent injured party and giving absolute preference to the interest of the culpable tortfeasor, who is, with certainty, responsible for a part of the damages that have been caused to the injured party. The starting point for tort law has always been to prefer the innocent injured party over the party whose tortious behavior has undoubtedly caused harm.

Justice Naor referred to English law as providing support for the proportional liability exception for this category of cases (*Fairchild v. Glenhaven Funeral Services Ltd* [9]; *Barker v. Corus UK Plc.* [10]). The *Fairchild* case appears to belong to the category of cases involving uncertainty regarding the scope of the damage; in that case, it was certain that a portion of the injured party's damage had been caused by at least one of the defendants.

Justice Naor tends to understand the Israeli jurisprudential recognition of a head of damage for loss of chance of recovery as relating to ambiguity regarding the scope of the injury that has been caused. This is because the norm is to view a loss of chance of recovery as an independent head of damage, the causation of which can and must be proved by a preponderance of the evidence. Justice Naor has a similar understanding of the Israeli jurisprudential recognition of a *violation of autonomy* arising from the lack of informed consent to medical treatment as an independent category of damage. The reason for this is that in such cases, there is no uncertainty regarding the fact that damage has been caused, as it has been proven by a preponderance of the evidence that the defendant tortiously caused independent damage in the form of an impairment of the plaintiff's interest: the defendant caused an injury to a person's "well-being", and this injury falls within the definition of the term "damage" in s. 2 of the Civil Wrongs Ordinance.

Ambiguous causation regarding the identity of the wrongdoer: Ambiguous causation with respect to the *identity of the party causing the damage* relates to a situation in which *a single injured party* faces a series of behaviors all of which are at-fault (i.e., two or more negligent parties) but it is not possible to know which of these caused the damage. Here, unlike the category of ambiguous causation regarding the extent of the damage, there is uncertainty as to whether a particular defendant, as opposed to any other member of the group of negligent actors, is the actual tortfeasor. The difficulty is in identifying the "correct defendant". Israeli tort law has no single standard approach regarding this category. In certain circumstances, the case law has adopted the solution of transferring the burden of proof to the defendants, in order to allow the injured party to be awarded *full* compensation. Thus, for example, if it has been proven by a preponderance of the evidence that *each one* of the culpable defendants has caused *some damage* to the plaintiff, even if the plaintiff's damage is by its nature a single inseparable injury, the defendants are viewed as joint tortfeasors who are all jointly and severally liable for *all the damage* (FH 15/88 *Melech v. Kornhauser* [3], at pp. 109-112, 115). However, *Melech v. Kornhauser* [3] is not one of the "hard cases" of ambiguous causation regarding the identity of the party causing the damage; it involved, as stated, a certainty that each of the defendants had

indeed caused some damage. In a "hard case" in which it has not been proven by a preponderance of the evidence that a particular party has caused any damage whatsoever to the plaintiff, the Israeli case law has upheld the concept of personal responsibility, even in cases in which all the defendants are at fault (see the majority opinion in CA 600/86 *Amir v. Confino* [4]).

In light of this, Justice Naor reviewed the issue from a comparative law perspective. In the United States, it has been held that when there are two possible defendants/wrongdoers, the burden of proof is transferred to the defendants so that effectively, they are each held to be jointly and severally liable for the full amount of the damage (for example, in *Summers v. Tice* [7], two hunters had fired their guns and it was not possible to establish which of them had hit the injured party). In this typical case there was *no certainty* that *any part whatsoever* of the damage was caused by a *particular* defendant. The transfer of the burden of proof to the defendants as a resolution of this issue was adopted in s. 28 of the Third Restatement of the Law of Torts. This solution is implemented, as stated, when the ambiguity relates to the identity of the wrongdoer and arises in connection with bodily injury only. In other circumstances, such as when there are more than two possible negligent defendants, the practice has been to charge the defendants with proportional liability according to the market share doctrine (see the DES case, involving medications marketed by hundreds of manufacturers of a generic oil, which had been marketed to pregnant women for the purpose of preventing miscarriages and which many years later caused serious illnesses in the daughters of these women: *Sindell v. Abbott Laboratories* [8]). In that case as well, there was *no certainty* that any *particular* portion of the plaintiff's damage had been caused by a *particular* wrongdoer. The case therefore appears to belong to the category of cases in which there is ambiguous causation regarding the identity of the wrongdoer. Nevertheless, the DES case can also be classified as falling within the category of cases involving ambiguous causation regarding the identity of the injured party; the identity of the wrongdoer-defendants was known because the damage was caused by *all* the wrongdoers, such that their identity was known, but the division of the liability among them was not. In these circumstances, in which the danger presented by each of the defendants was identical, the division of liability according to market share was a solution that was both attractive and capable of being implemented. Alternatively, the DES cases could be categorized as a combination of two categories — ambiguous causation regarding the identity of the wrongdoer and that of the injured party (see: J. Spier and O.A. Haazen, "Comparative Conclusions on Causation" in *Unification of Tort Law: Causation* 127 (J. Spier, ed., 2000), at p. 151) — or as belonging to each one of those two categories separately (T.K. Graziano, *Digest of European Tort Law, Volume 1: Essential Cases on Natural Causation* (2007), at pp. 452-457).

On the other hand, the Principles of European Tort Law (PETL) use a different solution for this category of cases — that of probability-based proportional liability. The objective of these principles is to establish a common tort law foundation for application in the European Community states, with the ultimate aim of harmonization in this area. The PETL, which are based on in-depth and comprehensive multi-country research, have served as a source of inspiration for the case law of the various national courts (see B.A. Koch, "Principles of European Tort Law," 20 KLJ 203, at pp. 203-205; Article 3:103(1) of the PETL).

The common basis for these different approaches to the issue of ambiguous causation regarding the identity of the wrongdoer is the understanding that the injured party cannot be left without compensation: the multiplicity of "tort suspects" is a consideration in assigning liability and not in limiting it. "There is blatant injustice in the fact that an entire group of tortfeasors, each of whose behavior is at fault and one of whom has caused the damage [will be freed] of the obligation to compensate the injured party, only because the nature of the wrongful activity is such that the plaintiff is prevented from knowing who, out of the entire group, had caused the damage" (B. Shnor, "Factual Causal Connection in Claims for Bodily Injury Caused by Environmental Pollution," 23 *Bar Ilan Univ. L. Rev. (Mehkarei Mishpat)* 559 (2007), at p. 618).

Ambiguous causation regarding the identity of the injured party: Ambiguity regarding the *identity of the injured party* arises when there is a *group of injured parties*, on the one hand, and a series of behaviors, *some of which involve fault and some of which do not*, and it is not possible to determine which of the injured parties was affected by the at-fault behaviors and which were injured by the other causes. Here as well — unlike the issue of ambiguous causation regarding the scope of the damage — there is no certainty that *any portion whatsoever* of a particular injured party's damages were caused by a *particular defendant*. The uncertainty concerns the matter of whether a particular plaintiff, as distinguished from any other member of the group of plaintiffs, was injured by the negligent party. The difficulty involves the identification of the "correct plaintiff".

In this category too, the PETL apply the concept of probability-based proportional compensation, as described in Article 3:103(2) with respect to multiple victims. This category was discussed in the United States in the Agent Orange case (*In re "Agent Orange" Prod. Liab. Litig.* [6]). In that case, the court offered the plaintiffs a settlement arrangement that provided for *pro rata* compensation. There was certainty regarding the identity of the factor causing the damage — Agent Orange. The uncertainty arose in relation to the identity of the individual injured parties (*ibid*. [6], at p. 833). It was apparently possible to prove that a certain number of the plaintiffs, out of the

entire class, had been injured due to the exposure to the dangerous substance. However, it was not possible to determine which particular members of the plaintiff class were those who had been injured. The court noted that the identification of the injured parties on an individual basis was impossible (*ibid*. [6], at p. 837). The Agent Orange case therefore appears to represent an example of ambiguous causation regarding the identity of the injured party. The court held that because, as stated, no individual solutions could be reached according to the normal preponderance of the evidence rule, it was necessary to use a collective "class action" solution (*ibid.* [6], at pp. 837-838).

Discussion of Deputy President Rivlin's recurring distortion test: Deputy President Rivlin proposes a "collective" solution, similar to that proposed in the Agent Orange case, based on a delineation test that he defines as the "recurring distortion test". This test is relevant to the "set of cases characterized by the creation of repeated and shared risks to a *group of injured parties*" (para. 21 of his decision). The recurring distortion test is *conditioned* on the existence of a *group of injured parties* (para. 22 of his decision). In this situation, the difficulty is "the *inability to distinguish among the injured parties* [in a manner that] may lead to some of them being compensated for damage that was not the result of the commission of a tort" (para. 24). The test that he proposes is "[to] distribute the compensation among all the members of the *group of injured parties* — when it is not possible to determine in relation to *which of them* the risk created by the wrongdoer reached the level of actual damage" (para. 26 of his decision).

According to Justice Naor, the delineation test proposed by the Deputy President applies to the category of ambiguous causation regarding the identity of the injured party; it is not intended to deal with the category of cases discussed in the decision which was the subject of the original appeal (hereinafter: *Malul*) — i.e., cases of ambiguity regarding the actual causation of damage. The examples cited by the Deputy President suppose the existence of an at-fault wrongdoer who is indisputably responsible for at least part of the damage suffered by the group of injured parties, with the only question being the identity of those members of the group who actually suffered the damage. This is ambiguous causation regarding the identity of the injured party. It appears that the "recurring distortion test" is intended, in the main, to resolve the issue of ambiguous causation which is characteristic of "mass tort" lawsuits. The Deputy President thus allows the main remedy requested by the petitioners, which is to qualify the proportional compensation exception such that it would "apply primarily to cases of torts that involve the exposure of a large population to mass risk factors, such as the suits involving DES, Agent Orange, Benedictine [a medication prescribed for morning sickness], cigarettes, etc."

Justice Naor remarked that she is inclined to adopt Deputy President Rivlin's position as a useful solution for cases of ambiguous causation relating to the identity of the injured party, but ultimately left the issue for further review. According to her, the Deputy President's approach abandons the actual facts discussed in *Malul* and establishes a rule for the determination of liability in group tort cases — a category that is not an issue at all in *Malul*. In Justice Naor's view, the desired legal approach should be formulated on the basis of the facts of the case at hand. She added that in her view, the recurring distortion test is too narrow, in that it rules out the possibility of awarding probability-based compensation in single-plaintiff cases, and thus, in principle, rules out compensation in cases such as the one presently before this Court. The main outcome of the Vice President's approach appears to be that in principle he believes that the respondents should not be awarded damages; however, due to practical considerations, he proposes that the judgment reached in the original appeal should be left intact. Justice Naor's approach is that there are principled standards for probability-based compensation in a *single-plaintiff case*, and the award of partial damages to the respondents here was correct. According to Justice Naor, the operative result of the *Malul* decision cannot, in the absence of agreement, be allowed to stand, if probability-based compensation is possible only according to the recurring distortion test. Justice Naor also believes that the recurring distortion test is in a certain sense too broad: when it is invoked, according to the Vice-President, the traditional preponderance of the evidence rule will not apply at all — neither in favor of the injured parties nor in favor of the wrongdoers. On the other hand, the exception that Justice Naor has proposed is more limited and benefits only a single injured party, and does not operate in favor of the wrongdoer (as will be explained below). In any event, as stated, the policy considerations set out by Vice President Rivlin deal with a different category of cases, and they therefore do not apply in the same way to the category discussed in *Malul*. Justice Naor therefore believes that the Vice President's opinion does not negate the probability-based compensation approach in the case of ambiguity regarding the actual causation of damage. Such compensation has its own separate and independent justification.

Ambiguity regarding the actual causation of damage — the Malul case: The division of cases into different categories refines the discussion and focuses the delineation test proposed by Justice Naor here on the situation which constitutes the very core of ambiguous causation, i.e., uncertainty regarding the actual causation of damage. Ambiguity regarding the actual causation of damage arises when the injured party cannot prove by a preponderance of the evidence that any at-fault behavior of the defendant's caused any damage whatsoever. As opposed to ambiguous causation regarding the extent of the damage or the identity of the wrongdoer, it is not

possible in these cases to prove that any at-fault behavior *whatsoever* caused any damage *whatsoever*. Unlike cases of ambiguous causation regarding the identity of the injured party (in which it is certain that the defendant, through his negligence, has tortiously caused damage to a group of individuals and the plaintiff suffered the same type of damage), there is in this case an inherent uncertainty regarding the question of whether the defendant caused any damage at all through his negligence, to any individuals whatsoever. Ambiguity regarding the *actual causation of damage* can arise when, as in *Malul*, there is an at-fault risk factor as well as a risk factor that does not involve fault (a "natural" factor), and it is not known whether the tortious risk factor caused any damage *whatsoever*. Justice Naor believes that the following weighty reasons will justify, in certain cases, a deviation from the preponderance of the evidence standard in situations in which there is ambiguity regarding the actual causation of damage:

The justifications for probability-based compensation when there is ambiguity regarding the actual causation of damage:

a. *First justification: corrective justice*: The main consideration in favor of "relaxing" the normal preponderance of the evidence rule is justice itself. When there is ambiguous causation, the injured party may be unable to prove the elements establishing a tort of negligence according to the normal rules of evidence applied in civil law, even though leaving the injured party without any compensation is contrary to the objectives of the law of torts and is unjustified. A review of the decisions that have been rendered in the trial courts in reliance on this Court's opinion in *Malul*, which is the subject of this further hearing, indicates that the rule has been widely assimilated and invoked. The desire to reach a just result under the circumstances of a concrete case is the heart of the judicial process. Justice is the ideal towards which we must strive. According to Justice Naor, the principle of corrective justice is the key policy consideration involved in the law of torts.

Definition of corrective justice: If the principle of corrective justice is identified with the idea of personal liability of the wrongdoer, the imposition of liability on the negligent party in a situation of ambiguity regarding the actual causation of damage is one that undermines the principle of corrective justice. Nevertheless, a different definition of the principle of corrective justice may be adopted — one which is adjusted for situations of ambiguous causation and which conforms as closely as possible to the principle of corrective justice. This definition involves a "relaxation" of the concept of personal liability, in a way that makes it possible under certain circumstances to order the negligent party to pay *partial* damages. The principle of corrective justice is a conceptual framework which can be filled with normative content that varies according to the society's standards.

Justice Naor believes that the courts can adopt a definition of corrective justice that focuses on a *certain level of correction of the injured party's situation, even at the expense of the negligent party*. This definition of corrective justice is not neutral vis-à-vis the negligent party; in fact, it puts that party in an inferior position. Once negligence has been proven, there is no longer a situation of equality between the negligent defendant and the injured plaintiff. The reason for favoring — to a certain degree — the injured party is the flawed behavior with which the negligent party has been tainted. Even if there is some uncertainty regarding the actual causation of the damage, it is still a *certainty* that the defendant was negligent vis-à-vis the plaintiff and that his behavior has been improper. The determination that the defendant was "negligent" means that the defendant has failed to maintain the level of care required by society from a reasonable person under the circumstances of the case. The defendant is tainted by a sort of "social guilt". *This guilt has been proven* according to the ordinary preponderance of the evidence test and using the standard evidentiary proofs. Under these circumstances, the guilt with which the negligent party's behavior is marked also has ramifications for the issue of the factual causal connection and overrides the "mantle of individual ambiguity". (An Austrian scholar, F. Bydlinski, has proposed an approach which is similar in theory — an approach that creates a relationship of reciprocal balance between the element of responsibility and the element of causal connection: see H. Koziol, "Causation under Austrian Law" in *Unification of Tort Law: Causation* 11 (J. Spier ed., 2000) at p. 14; H. Koziol "Problems of Alternative Causation in Tort Law" in *Developments in Austrian and Israeli Private Law* 177 (H. Hausmaninger, H. Koziol, A.M. Rabello, I. Gilead eds., 1999), at pp.178-180; B.A. Koch, *Digest of European Tort Law*, at pp. 396-398).

This definition of corrective justice, used when there is ambiguity regarding the actual causation of damage, prefers the innocent plaintiff over the negligent defendant with respect to the final remedy. The reason for this is that when the wrongdoer has been proven negligent, it would be unjust to allow the entire burden of the damages to be borne by the entirely innocent injured party. This preference with regard to the final remedy, in connection with ambiguity regarding the actual causation of damage, means that a party who is negligent will bear a certain part of the cost. This cost is translated into partial compensation for the injured party. The individual injured party's demand that the damage or a part thereof be compensated only by a negligent party (or parties), when there is ambiguity regarding the actual causation of damage, is not without a moral basis. The negligent party (or parties) and the individual injured party are part of a single relationship. The event creating the damage occurred as part of the relationship between the specific injured party and the specific negligent party (or parties). In the context of this

relationship, according to Justice Naor, the injured party's right to redress for his injury corresponds to the negligent party's obligation to redress the injury that was caused, even if only partially, based on a consideration of the probability of there being a factual causal connection. According to the said definition of the principle of corrective justice, it is preferable to assign partial liability and to impose a duty to provide partial compensation on the negligent party, including in a single-plaintiff case, and not to apply an "all or nothing" rule, the consequence of which is that no liability will be assigned at all and the injured party will receive no compensation. The justification is therefore based on the choice of the lesser evil. This solution is preferable to a situation in which an injured party is left without any compensation. There is, it is true, a chance that the defendant is *not* the party that caused the damage to the plaintiff; this possibility is reflected in the fact that the duty to compensate imposed on the defendant is *partial* and not full. This definition of the principle of corrective justice does not limit the concept of probability-based compensation to cases in which torts have been committed against a group of plaintiffs.

Justice Naor does not believe that it is practical to apply a "multiple-plaintiff" limitation in situations in which there is ambiguity regarding the actual causation of damage, as Vice President Rivlin proposes. How can the plaintiff be required to prove anything regarding a "group of injured parties" when the plaintiff has no information concerning the group's existence or its characteristics? Is there an appropriate litigation process for this purpose under the existing law? And if not, should a special litigation process be created, and how would that be done? And even if these procedural issues can be overcome, the multiple-plaintiff claim is not accorded any preference within the framework of the corrective justice concept: corrective justice can be obtained with regard to the entire system on the basis of an accumulation of judicial decisions involving single-plaintiff cases. The objective of achieving corrective justice does not require the abandonment of the individual solution and a transition to either a multiple-plaintiff or class action. According to Justice Naor, the objectives of tort law can also be realized through probability-based compensation in the individual/single-plaintiff case. In her view, the choice of the "multiple-plaintiff only" solution means foregoing the possibility of achieving a just solution in single-plaintiff cases, and she therefore believes that it is inappropriate.

b. *Second justification: deterrence*. Optimal deterrence considerations are based on the view that tortious liability should be assigned in a manner that will contribute to a maximum reduction of the total damages from accidents and of the expenses involved in preventing them. According to Justice Naor, the principle of deterrence and considerations of economic efficiency cannot constitute the only objective: "The reasonable man is not

only the efficient man. He is also the just, fair and moral man" (CA 5604/94 *Hemed v. State of Israel* [5], at p. 511c).

In the past, the standard position was that with regard to factual causal connection, the "all or nothing" approach would give rise to optimal deterrence. This approach proved to be flawed, and the belief was expressed that under certain circumstances, proportional compensation could bring about optimal deterrence as well (see J. Makdisi, "Proportional Liability: A Comprehensive Rule to Apportion Tort Damages Based on Probability," 67 *N.C.L. Rev.* 1063 (1988), at pp. 1067-1069 (1988); S. Shavell, "Uncertainty over Causation and the Determination of Civil Liability" 28 *J.L. & Econ.* 587 (1985), at pp. 589, 594-596; D. Rosenberg, "The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System," 97 *Harv. L. Rev.* 849 (1984), at pp. 862-866 (1984)). Vice President Rivlin limits these circumstances to those of the recurring distortion test, which is primarily intended to avoid insufficient deterrence resulting from application of the standard preponderance of the evidence rule in a multiple-plaintiff case. According to Justice Naor, deterrence considerations do not require this limitation, for the following reasons.

First, it seems that Vice President Rivlin is of the opinion that the application of the "all or nothing" rule in a single-plaintiff case does not cause any significant harm. The scholars Porat and Stein have made similar remarks, to the effect that injustice and inefficiency in the single-plaintiff case are matters "far removed from the judge's desk" (see A. Porat and A. Stein, "Indeterminate Causation and Apportionment of Damages: An Essay on Holtby, Allen, and Fairchild," 23 *Oxf. J. Leg. Stud.* 667 (2003), at p. 671). This position conflicts with Justice Naor's view of a judge's function. Every case that reaches a judge is of the greatest importance for the litigant, and the judge's decision regarding that case does not depend, and should not depend, on the existence or non-existence of other cases that are similar to it. The complaint is personal and not representative; the cause of action is personal and not shared by a group; the injustice or inefficiency are personal and are not shared by other plaintiffs. Policy considerations must not ignore the single-plaintiff case as "negligible". The "multiple-plaintiff" criterion is based, *inter alia*, on the condition that the case involves an incident that is likely to recur. Justice Naor believes that this is an artificial criterion. It reflects a procedural rather than a substantive consideration. Thus, for example, it is argued that a complaint may be moved from the single-plaintiff category to the multiple-plaintiff category through the change of the name of the defendant from that of a single doctor to that of the hospital in which the doctor is employed, or through the use of the doctrine of agent liability (Porat & Stein, "Indeterminate Causation," *ibid.*, at p. 682, n. 41). Of course, this change is a procedural one, while the substantive cause of action of the

injured party — the existence of negligence vis-à-vis the plaintiff — remains in place.

Second, it should be recalled that the factual causal connection is examined after negligence has been proven, taking into account, *inter alia*, the deterrence issue. The deterrence consideration as it is weighed at the stage of determining negligence interacts with the deterrence consideration as it is weighed at the stage of determining the causal connection. In the final analysis, these considerations are the same. If the defendant is freed of any liability due to ambiguous causation, the deterrence consideration that was a guiding factor in the determination of the (proven) negligence loses its value. In such a case, the determination that the "defendant did not take sufficient precautions and was therefore negligent" does not translate, *in terms of relief*, into an award of any damages whatsoever arising from the breach of the duty of care, and the negligent party effectively avoids any obligation to provide compensation. This result undermines the same deterrence principle that provided guidance at the stage of determining negligence. This important point emerges from the British decision, *McGhee v. National Coal Board* [11]. That was a clear case of "scientific" ambiguous causation resulting from the limitations of medical science (see Lord Rodger's comments in *Fairchild* [9], at para. 153). The House of Lords there ordered an employer to compensate an employee, finding that it was sufficient that a failure to provide showers had increased the duration of the employee's exposure to asbestos, which is recognized as a possible risk factor for disease. Lord Simon held that an acquittal of the negligent party in that case of ambiguous causation, after the party's negligence had been proven with respect to the failure to take the necessary precautionary measures, would amount to a grant of judicial permission to employers to fail to take such precautionary measures (*McGhee* [11], at pp. 8E and 9B).

Third, Justice Naor believes that in a single-plaintiff case, a policy consideration relating to deterrence, by itself, is weak as compared to the main consideration of corrective justice. This is because the assignment of any particular level of liability is of no relevance with respect to the achievement of the deterrence objective in a case that is singular and inherently exceptional, and which is unlikely to recur in the future. Thus, even if an injured party is overly compensated, no real harm will have been done to the principle of deterrence. The recurring distortion test leads, Justice Naor believes, to *under-compensation* and to a *violation* of the optimal deterrence principle in single-plaintiff cases (in effect, the test leads to under-deterrence). Vice President Rivlin's approach absolves the negligent party from any liability in a single-plaintiff case and thus gives a "green light" to the causation of tort damages in such cases. In contrast, Justice Naor's approach, applied both to multiple-plaintiff and single-plaintiff cases, leads

to a minimal violation of the principle of optimal deterrence in the single-plaintiff case. In fact, in certain cases, it leads to over-deterrence. However, in a case in which the damage is bodily injury, a certain measure of over-deterrence is acceptable.

c. *Third justification: reducing the magnitude of judicial errors*. The preponderance of the evidence rule, and apparently the multiple-plaintiff restriction proposed by the Vice-President as well, are intended to limit the number of judicial errors. However, restricting the number of legal mistakes is not the only possible goal. The objective of reducing the magnitude of a legal error in a single-plaintiff case, i.e., reducing the number of "large errors", is also a valid goal. According to this approach, the effect of a legal error on an individual is weaker, and may even be more proportionate (Shnor, "The Factual Causal Connection," *supra* at p. 588). The decision to set as an objective the reduction of the *magnitude* of a legal error and to prefer that objective to the reduction of the *number* of legal errors is a value choice. The court is obligated to decide a dispute within the restrictions of existing knowledge. This is done by dividing the risk of an "erroneous" factual decision (risk of error) between the plaintiff and the negligent defendant. In cases of ambiguity regarding the actual causation of damage, in which a negligent actor is juxtaposed with an innocent injured party and it is not possible to directly trace the real path of causation that actually took place, even on an approximate basis, the proportional liability exception is justified. This view reflects a value judgment that prefers, as an objective, the reduction of the impact of a legal error with regard to an individual injured party over the objective of reducing the overall number of legal errors. This option is consistent with the case law dealing with probability-based compensation in the single-plaintiff case. However, while a concern for reducing the number of legal errors is necessarily based on an analysis of a group of judicial decisions, the aim of reducing the magnitude of a legal error is examined — and can be achieved — through each individual case on its merits.

The spreading of the risk of error can of course be accomplished in the framework of settlement agreements, reached either at the initiative of the court or through agreements made by the parties. Courts have always acted this way in settlement agreement proceedings, in which the risk of error is divided between the parties. Nevertheless, according to Justice Naor, in appropriate cases the risk of error can be divided even without the parties' consent. The probability-based compensation exception — allowing for a decision that is just under the circumstances of the case, in situations of ambiguity regarding the actual causation of damage — does not rely on the agreement of the parties but rather on substantive tort law policy considerations.

d. *Fourth justification: as a truth-finding incentive*. The assignment of proportional liability in this category of cases gives defendants an incentive to develop as much relevant probability-based information as is possible. This type of information, regarding damage causing processes, has substantial social value as a tool that can be used to provide more precise and just compensation in litigation proceedings. Similarly, it can indirectly lead to improvements in the fields of medicine, insurance, risk management and other fields of knowledge. The typical defendants in this type of case (negligence in the framework of bodily injury) are large institutional entities who are — in contrast to the typical plaintiffs — "repeat players" in the legal forum, at least in a series of individual cases. Regarding these defendants, therefore, special importance must be attributed to long-term considerations relating to the guidance of their behavior; such considerations are different from the considerations involved in the specific case. This consideration, too, is not necessarily limited to situations in which there are multiple injured plaintiffs.

Response to criticism — probability-based compensation does not require a legislative change. Probability-based compensation in situations of ambiguity regarding the actual causation of damage is not only the result of "greater sympathy" for the injured party. It is also derived from the principles of tort law themselves, and is justified by the principle of corrective justice, the "lesser evil" argument, and the need to reduce the magnitude of a legal error. According to Justice Naor, it also does not require legislation. A probability-based compensation doctrine, of any kind, can be adopted on the basis of case-by-case rulings. Of course, the legislature may ultimately express its view on this matter, and obviously any statutory criteria that may be prescribed will bind the courts. It should be noted that the concept of transferring the burden of persuasion, which has been invoked in the past in the case law, is not based on any express statute.

The appropriate legal doctrine — proportional liability. Justice Naor made it clear that the doctrine that she is proposing is an exception to the proportional liability rule and not a new conceptual framework that is intended to replace the proportional liability rule. It is not a general risk-based liability doctrine. According to Justice Naor, the proportional liability doctrine in situations of ambiguity regarding the actual causation of damage provides the court with useful tools for providing appropriate protection to the various interests involved in a case, and for balancing those interests. It gives the court the discretion to award *partial compensation*, to be determined on the basis of statistical evidence or by way of an estimation.

Inspiration from European law. In her opinion, Justice Naor referred extensively the proposed PETL, as support for the absorption of the proportional liability exception into Israeli law. The PETL recognize the

proportional liability exception for cases of ambiguity in relation to the actual causation of damage. The exception is the product of the combination of two principles in the proposed PETL. Article 3:103(1) provides as follows:

> 'In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage.'

Article 3:106 expands the reach of Article 3:103(1) and provides as follows:

> 'The victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere'.

Article 3:106 supplements Article 3:103, and the two are based on the proportional liability exception (see: European Group of Tort Law, *Principles of European Tort Law: Text and Commentary* (2005) (hereinafter: "Commentary to the PETL"), at p. 56). This article deals with a situation in which there are multiple potential risk factors for the actual causation of the damage suffered by the plaintiff, including "natural" risk factors or risk factors related to the plaintiff himself. The European Principles provide that "natural" risk factors or those related to the plaintiff himself are encompassed within the injured party's sphere, and he may not receive compensation with respect to these factors. Article 3:103 (2), combined with Article 3:106 which expands it, leads to a proportional liability outcome. The term "activities" means any action or behavior (see Article 3:101) which is liable to constitute a risk factor regarding the actual causation of damage to the plaintiff, including risk factors within the range of the injured party's liability, such that this definition applies with regard to the two articles, and leads to the proportional liability result in the single-plaintiff case, with liability being divided between the plaintiff and the defendant.

The PETL do not require proof of a recurring distortion: the proportional liability exception applies even if the case is one that does not repeat itself, and it is not necessary to prove that the preponderance of the evidence standard will lead to a systematic distortion in favor of one of the parties. The commentary to Article 3:106 of the PETL offers an individual case of medical negligence as an example of the application of the concept (see Commentary to the European Principles, at p. 58).

The drafters of the PETL were aware of the innovation that the proportional liability exception introduced into English Common law, and they nevertheless recommended its adoption:

> ‘As already mentioned, *supra* Article 3:103, the Group realizes that the approach of Article 3:106 might be quite a step for the common law… Seen from a European angle, there is hardly a common core to support the balance of probabilities doctrine. Besides, there seems to be some dispute about it in the common law-world as well’ (Commentary to the European Principles, at pp. 57-58).

According to Justice Naor, the proportional liability exception is consistent with the proposed PETL. It is particularly close to the Austrian law, the “fingerprints” of which are recognizable in the text of the PETL. A similar approach to proportional liability can be found in Estonia, and to a certain extent in the Netherlands as well (see H. Koziol, *Digest of European Tort Law*, Volume 1: *Essential Cases on Natural Causation* (2007) at p. 437). A decision of the Estonian Supreme Court, sitting as a Court for Civil Matters, reflects a relaxation of the factual causal connection requirement (see the decision in Case No. 3-2-1-78-06 [12], as cited in Lahe Janno, “Fault in the Three-Stage Structure of the General Elements of Tort,” *Juridica International* (Vol. 1, 2007), at pp. 152-160). It should be noted that French decisions have also included expressions of a relaxation of the factual causal connection requirement (see the decision in Appeal No. 06-109767 [13]). The European Principles have not yet become law in the European countries, but they are very consistent with Justice Naor’s perspective regarding proportional liability in single-plaintiff cases.

Summary of the Proportional Liability Exception: Specification of the Standard for Probability-Based Compensation:

First, the plaintiff must prove the two other elements of the tort of negligence — negligence and damage — on the basis of the regular preponderance of the evidence standard. The plaintiff must also prove that there is a *legal* causal connection between the negligence and the damage, in accordance with the regular preponderance of the evidence standard. These requirements reduce the ambiguity issue to the matter of the *factual* causal connection only. As stated, the plaintiff must prove the damage element as well. Justice Naor’s proposal is that at the current time, the proportional liability exception should be applied only to cases of negligence in connection with bodily injury.

Second, the plaintiff must prove that there is inherent ambiguity in terms of the *factual* causal connection with regard to the *actual causation of*

damage. If *inherent* ambiguity with regard to the actual causation of damage has not been established, the case will not be litigated on the basis of the proportional liability exception, but on the basis of the normal preponderance of the evidence standard. On the other hand, if ambiguous causation is proved with regard to the actual causation of damage, the regular preponderance of the evidence standard will not apply.

Third, the assignment of proportional liability is conditioned on proving bodily injury. Justice Naor's proposal is that the proportional liability exception be applied only in relation to litigation in torts, and only with respect to cases involving bodily injury. The proportional compensation is therefore linked to the existence of the main bodily harm that was caused to a plaintiff, and it is derived from such harm. Justice Naor is aware of the concern that the exception constitutes a "breaching of boundaries" or a "slippery slope". She therefore believes that it is necessary to establish the bodily injury qualification, even if only *at this stage of the development of the rule*. Uncompensated bodily injury is the firmest ground for the implementation of the corrective justice consideration in a manner that favors recognition of probability-based compensation. Justice Naor believes that at this stage of the rule's development, the question of whether the exception should also apply to negligence cases that do not involve proven bodily injury should be left for further review, as this subject did not arise in the *Malul* case. Justice Naor is also aware of the fact that her approach can be criticized on the ground that a consistent solution would mandate its application to all areas of tort law, and there are those who would say that it should be applied to all areas of law in general; others could argue the opposite — that consistency would require that the proposed solution be rejected, or that no solution be chosen at all. According to Justice Naor, it is necessary to move one step at a time with respect to this complicated issue, drawing conclusions along the way. She does not see a need to restrict the concept of probability-based compensation for bodily injury to medical negligence cases. Nevertheless, as a practical matter, a claim of inherent ambiguity regarding the actual causation of bodily injury will arise in many claims involving medical negligence. This is due to the difficulty in making an absolute determination regarding the reasons for an illness or a defect. Medical negligence is therefore a *common* case for recognizing the proposed exception (see Porat & Stein, "Indeterminate Causation," *supra*, at p. 668). Although the policy considerations that underlie the proportional liability exception are characteristic of all of tort law in general, there is a dispute as to whether the award of probability-based damages should be limited to medical negligence cases only, and various opinions have been expressed in the legal literature. Justice Naor believes that the exception should not be limited to cases of medical negligence only. The proportional liability exception could also apply, for example, to environmental contamination

cases. The need to provide a solution to the problem of ambiguity with regard to the actual causation of damage is usually related to ambiguity that is the result of *scientific limitations* pertaining to the ability to identify the risk factors that can cause bodily injuries. A typical case involving inherent ambiguity regarding the actual causation of bodily injury is when there is no scientific possibility of proving or denying the existence of specific causation using the preponderance of the evidence test. This will be the situation even when there is no statistical evidence, because no relevant scientific research has ever been done. Nevertheless, Justice Naor believes that at present, the proportional liability exception should be applied only to tort law cases based on bodily injury. This exception is frequently applicable in medical negligence cases, although, as stated, it is not exclusive to this area.

Fourth, the plaintiff must prove, by a preponderance of the evidence, that the proven negligence is a *significant* cause of the particular type of damage that was caused to the plaintiff and that the defendant should have anticipated such damage (hereinafter: "the *tortious risk factor*"). The proportional liability exception does not necessitate a numerical-mathematical probability criterion, and a *significant* probability requirement will be sufficient. Such probability will be neither minimal nor negligible. If the plaintiff cannot prove a significant level of probability, even if based on an estimation only, the plaintiff will not be able to rely on the proportional liability exception, and the regular "all or nothing" rule will apply. This requirement of significant probability can reduce the concern that the court will be flooded with lawsuits by excluding marginal cases and establishing a minimum threshold, below which no liability will be assigned to the defendant.

Fifth, the proportional liability exception is available only to injured parties. The proportional liability exception will be adopted only in cases in which the plaintiff has difficulty in meeting the preponderance of the evidence standard due to an inherent obstacle, and when the exception can save him from the trap of ambiguity with respect to the actual causation of damage and help him to obtain partial (proportional) compensation. According to Justice Naor, the exception is not available to defendants in cases in which the plaintiff has proven a factual causal connection based on a preponderance of the evidence. Therefore, injured parties who are able to prove their cases based on a preponderance of the evidence, in reliance on their own *specific* evidence, opinions and details, will receive full, rather than partial, compensation. The application of the proportional liability exception in favor of defendants as well could go too far in upsetting the traditional preponderance of the evidence approach. Since this is an exception to the main principle, it must be treated as such and interpreted narrowly, especially in light of the centrality of the rule to which it is an exception. The main point is that one of the key policy considerations supporting the proportional

liability exception is, as stated, the flaw that has tainted the behavior of the negligent defendant. The moral asymmetry between the plaintiff (the injured party) and the defendant (the wrongdoer) whose negligence has been proven is the starting point that justifies probability-based compensation for this category of cases. Accordingly, this starting point justifies a corrective asymmetry in the legal tools available to the parties in the proceeding. The harm — the damage — is suffered by the injured party. The legal weakness of a factual causal connection that cannot be proved due to ambiguity regarding the actual causation of the damage is also suffered by the injured party. The solution must, therefore, also be something that works in favor of the injured party and not of the wrongdoer. This aspect removes the concern that the doctrine proposed by Justice Naor in this case will worsen the situation of the injured parties.

Sixth, the boundary between the preponderance of the evidence rule and the proportional liability exception is clear. The judge must first establish whether the plaintiff has proved his claim by a preponderance of the evidence, based on the evidentiary material before him. The court has broad discretion in terms of assessing the facts and their relative weight. When the court is persuaded that it is able to determine, based on the preponderance of the evidence, whether a factual causal connection has been established or ruled out, there is no ambiguity regarding the fact of the causation of damage, which is a condition for recourse to the proportional liability exception, and the regular "all or nothing" rule will apply. Thus, when the court is convinced that it has been presented with sufficient evidence to enable it to decide the factual dispute on the basis of the preponderance of the evidence, it must act in accordance with the regular decision-making rule. Accordingly, if the regular preponderance of the evidence rule establishes that a factual causal connection has been proven, the plaintiff will receive full compensation. On the other hand, if it is proven by a preponderance of the evidence that the defendant did not cause any damage, the judgment will clear him of liability. This allays the concern that a defendant might be obligated to pay for damages that he has clearly not caused.

Judicial practice: The manner of calculating compensation

When the criteria for probability-based compensation in cases of ambiguity with respect to the actual causation of damage have been met (even in a single-plaintiff case), Justice Naor believes that the court has the discretion to award compensation *in accordance with the level of probability* that the tortious risk factor caused the proven bodily injury.

As stated, the use of statistical evidence cannot replace the regular evidentiary rules for proving facts. However, in cases of ambiguity with respect to the actual causation of damage, it is reasonable to assume that

neither of the parties will have *specific* statistical evidence regarding the injured party. In the absence of *specific* statistical evidence, the court may rely on evidence of a *general* statistical probability, for the purpose of awarding probability-based compensation. According to Justice Naor, reliance on evidence regarding a general statistical probability is permissible only if the criteria for applying the proportional liability exception are met. Once the test for the use of the proportional liability exception has been met, and only then — i.e., once the plaintiff has proven, *inter alia*, that in his case there is ambiguity with respect to the actual causation of damage — the court may rely on statistical evidence regarding *general* probability, for the purpose of assessing the amount of the probability-based compensation.

Proof based on statistical evidence

General statistical evidence involves an estimation of the general-potential probability, i.e., the probability that the negligence would have caused the damage of the type suffered by the plaintiff, in reliance on scientific proofs, epidemiological studies and statistical estimates. The legal literature has noted the difficulties involved in reliance on general statistical evidence and Justice Naor's response is that proportional liability should not be determined on the basis of general statistical evidence alone. Such evidence is not sufficient to allow for the application of the proportional liability exception. A necessary condition for its application is that there are specific data regarding the defendant's negligence vis-à-vis the specific plaintiff, based on proof established using the preponderance of the evidence standard. Once the existence of such data has been established — a condition which is included among the criteria for application of the exception —the trigger for the application of the proportional liability exception is activated. At that point, Justice Naor believes, the court can rely on general statistical evidence for the purpose of awarding proportional compensation. The court's decision will thus not rely on the general statistical evidence alone, but rather on a combination of such evidence and the specific data regarding the defendant's negligence towards the plaintiff. The use of general statistical evidence for this purpose adjusts the traditional statistical concepts of causation to the existing scientific reality.

The burden of proof regarding general probability is placed on the plaintiff, and it must be proved by him at the required level. The significance of the requirement is that the plaintiff must establish a *proper evidentiary basis* for the general degree of probability. If there are data, they need to be presented; the plaintiff must explain, through expert testimony, the significance of that data and how they should be properly evaluated. The judge must not refrain from having recourse to and delving into medical opinions based on scientific studies and statistical assessments. The plaintiff is not required to provide evidence at a particular statistical standard of

certainty or at a particular level of reliability; he must only comply with the legal standard of significant general probability. The standard is legal, rather than mathematical.

A legal decision regarding the existence of a *general and significant level* of probability must be based, as a main consideration, on the scientific evidence that has been presented, and on logic and understanding against the background of the entirety of the material presented to the court. The proportional liability exception gives new content to the concept of factual causation in the context of ambiguity regarding the actual causation of damage, and as a test that realizes the issue of causation it must be examined from a "broad perspective". The court must not shirk from implementing the proportional liability exception when the criteria for its implementation have been met. The main function of the court is to decide disputes between parties, taking into consideration the information before it and the information that can be brought before it. It must avoid reaching a decision that allows a defendant who was negligent to "benefit" from the factual ambiguity, leaving the plaintiff empty-handed. Therefore, even if the scientific research has not yet reached the level of unequivocal scientific proof, the court may determine a legal truth regarding the scientific reality, even if only on the basis of *partial* scientific evidence, while giving such evidence the proper weight, and in reliance on other findings as well. There is no reason why the degree of (general) probability cannot be proven, for example, through a *general estimation* made by an expert giving evidence with a reasonable level of medical certainty. A medical opinion should also specify the entire array of individual circumstances pertaining to the plaintiff's case (such as his medical history, the absence of any hereditary indications from his family history, etc.)

As a rule, the compensation to be awarded is determined by multiplying the proven level of significant probability by the proven monetary value of the bodily injury. Calculation of the amount of compensation to be awarded based on the proportional liability exception can be based on an estimation, as was done here in the original decision. The level of probability that will ultimately be adopted by the court for the purpose of determining the partial compensation need not reflect actual statistical or mathematical data; it can also reflect an estimation of the relevant probability, based on life experience and on expert testimony, weighed along with an un-measurable assessment of the weight of the evidence presented as support for each party's position regarding causation.

Response to criticism: The conditions that outline the parameters of the proportional liability exception provide the response to the concern that the exception will be exercised in a way that distorts the determination of the amount of compensation, and to the concern that the regular rule will be

swallowed up by the exception. The dividing line between the regular rule and the proportional liability exception is clear, and the latter is not an "alternative" or "shortcut" to the regular rule. Justice Naor also discussed the criticism that the rule established in the *Malul* decision is liable to undermine legal certainty, and she offered two responses to this. On a substantive level, the problem of an adverse impact on legal certainty is unavoidable in various areas of law, and all that can be done is to attempt to limit the scope of that impact, although it cannot be avoided completely. The proportional liability exception reduces the degree to which legal decisions deviate from the "factual truth", and its impact on certainty is low. On a practical level, Justice Naor believes that as time passes, the implementation of the proportional liability exception will reach some level of certainty.

The proportional liability exception is a value decision. In concluding her opinion, Justice Naor noted that the proportional liability exception is a value-based decision. Tort law is replete with value-based decisions. Judicial decisions follow this path, developing from case to case. The proportional liability exception provides a just response to the failure of the traditional "preponderance of the evidence" approach in cases of ambiguity regarding the actual causation of damage. As a flexible and balanced exception, it can prevent the injustice which may be the outcome of the flaw in the traditional approach. Thus, an entire system of a rule and an exception thereto is created — a system which, in Justice Naor's opinion, achieves the objectives of tort law in an optimal fashion. The proportional liability exception reflects an "intermediate model" as compared to the more extreme models of no compensation at all (according to the ordinary rule of "all or nothing") or of awarding full compensation (in accordance with the doctrine of transferring the burden of proof or similar approaches). When the injured party can prove, on the basis of a preponderance of the evidence, all the elements of liability other than a factual causal connection, and can also prove in accordance with that same standard the element of inherent ambiguity regarding the actual causation of damage, it is not just to require that the plaintiff also bear, alone, the risks of a judicial error that may result from such ambiguity. In such a situation, it is the negligent party, the party that should have foreseen the damage and who may even have actually caused it — should be the party that bears — even if only partially — the cost of making good the damage that has been caused.

Justice Naor explained that the proportional liability exception is a *substantive* tort law exception and not an *evidentiary* exception that applies to all legal fields in general. The proportional liability exception does not apply in the law of evidence, which deals with the question of how to determine whether or not factual causation exists. It relates to the substantive law of torts, which deals with the question of what is a causal connection,

while refining that very concept in accordance with the exceptional circumstances of ambiguity regarding the actual causation of damage. This exception "relaxes" the factual causation requirement in tort law, and when invoked it results in proportional compensation.

According to Justice Naor, a judge must find new solutions to new problems, within the bounds of judicial authority and the basic values of the existing law. The model proposed by Justice Naor, which explains the justifications, content and limitations of the proportional liability exception, reflects, in her view, a flexible and fitting solution to the ambiguous causation problem. This exception applies to both multiple-plaintiff and single-plaintiff cases.

For these reasons, Justice Naor took the position that the petition for a further hearing should be denied.

Justice S. Joubran

1. Justice Joubran agreed with the positions taken by his colleagues, Vice President E. Rivlin and Justice M. Naor, with respect to the possibility of deviating from the preponderance of the evidence standard, including the "all or nothing" result that it entails, in tort law cases involving ambiguous causation — and applying instead the doctrine of probability-based compensation. Regarding the areas in which this doctrine should apply, Justice Joubran took the position of his colleague Justice Naor, to the effect that there is no need to show that the relevant behavior is part of a phenomenon that creates a "recurring distortion" (in contrast to the view of the Vice President, who does require such a showing) and it can be applied in a single plaintiff case. Nevertheless, Justice Joubran's reasons for taking this position are slightly different from those of Justice Naor, although he agreed with her regarding its application to this case.

Application of the principles of corrective justice

2. Justice Joubran noted that the Vice President, who sought to approach the question before the Court from a broad perspective, based his approach, *inter alia*, on the need to apply the principle of corrective justice, and to avoid insufficient or excessive assignment of liability and prevent the disruption of the bipolar connection between the wrongdoer and the injured party — a connection which is the core of the concept of the corrective justice. However, it is not necessary to determine that the principle of corrective justice is violated only when there is a recurring distortion, or why the implementation of the principle of corrective justice mandates such a requirement. If one is to say that a recurring distortion inherently violates the principle of justice, the violation requires resolution at the single-plaintiff

level, and a multiplicity of cases is not in itself sufficient to substantively alter the injustice caused in the single-plaintiff case.

To the extent that the wrongdoer is not liable for the injured party's damages (and on a practical level, to the extent that such liability has not been proven), then no damage at all has been caused to the "injured party" from the perspective of corrective justice. The fault of the wrongdoer does not, *per se*, help us to determine his liability vis-à-vis the injured party, if the fault does not exist independently as a violation by the wrongdoer of the injured party's right, established through independent proof of a causal connection between the two parties. Indeed, Justice Joubran noted that Justice Naor did not view the wrongdoer's negligence as being the last word on the issue, capable of overcoming the absence of liability on his part for the "injured party's" injury: an inability to establish liability would be overcome only in those cases in which there is a real chance that the wrongdoer's acts did in fact cause the damage, and in which an inherent ambiguity prevents the plaintiff from proving liability on the basis of a preponderance of the evidence. However, in Justice Joubran's view, the conclusion to be drawn from this is broader — that as long as the factual connection between the defendant's negligence and the plaintiff's alleged damages has not been sufficiently proven from a legal perspective, the fact of negligence itself is not sufficient to lead to a change in the legal treatment of the defendant's liability, even when there is ambiguous causation. Thus, even though, as stated, Justice Joubran agreed with his colleague that circumstances of ambiguous causation will justify the plaintiff's compensation by the defendant, the justification is not based on the wrongdoer's "fault" or on a preference for an innocent injured party.

Scientific uncertainty

The essence of the issue before us relates to the complexity and uniqueness of the scientific knowledge involved in this and other similar issues that create ambiguity regarding a causal connection. In Justice Joubran's view, the difficulty involved in this situation — which must be considered by the Court — turns on the very nature of the ambiguity. This nature prevents the law from properly relating to the real world, thus impeding any operation of the principles of justice.

4. Scientific developments, and as concerns us here, developments in medical science, have led to many discoveries regarding the physical world and the functioning of the human body. These discoveries have shed light on causal connections that had previously been hidden, and they provide a foundation for connections that had previously been shrouded in mystery. The development of scientific knowledge regarding causation must be recognized in any finding regarding the need for the law to reflect an

unambiguous factual reality. Among other things, such developments regarding scientific knowledge must find expression through recognition of the type of ambiguous causation which is exclusive to such knowledge, as an exception to the rules of the legal system, in order to keep pace with the operation of the real world. In these cases of ambiguous scientific causation, there is no longer an unambiguous reality about which it may be possible, with sufficient diligence, to reach a legal conclusion through recourse to the standard legal tools, and to leave no structural doubt. The reality to which the law purports to relate is unambiguous, or at least it can be seen as such. However, within a narrow area of scientific ambiguity, in which reality itself cannot be understood and formulated through the use of the scientific tools that are currently available, it would seem that the law must adjust its approach and become more flexible in terms of its pretension to establish an unambiguous reality.

5. It is important to delineate, with precision, the boundaries of the field with which we are dealing, and to distinguish it from other areas in which there may also be ambiguity. The cases under discussion here are not only those in which the absence of relevant information creates ambiguity regarding a causal connection, leading to difficulty in making a determination; they are also those cases in which the scientific knowledge itself, by its very nature, does not allow for a clear determination, either inside or outside the courtroom. It is also important to distinguish between scientific ambiguity and scientific disputes. Only when the case involves no factual ambiguity and no scientific dispute — and when what thus remains is true scientific ambiguity in which the scientific information brought before the court is itself ambiguous — can it be said that the situation is one in which reality must be represented in court through a rule which is itself ambiguous, in the form of a proportionality-probability based proof of a causal connection between a wrong that has been done and an injury that has been suffered. Obviously, the very existence of scientific ambiguity (as opposed to its content) must be proven in court through the usual evidentiary rules, on the basis of a preponderance of the evidence.

The appropriate doctrine — a change in the standard of persuasion

6. Unlike his colleague Justice Naor, Justice Joubran believes that the geometrical location of the scientific ambiguity exception is primarily in the evidentiary realm, and relates to the question of the *manner* in which the fact of a causal connection is to be determined. Nevertheless, the exception does not involve content only; it involves matters of substance and form as well, going beyond the single-value mode through which the law usually relates to reality. As such, its impact also extends beyond the purely evidentiary realm and is reflected in the nature of the legal determination that is based on its acceptance. Thus, the determination of the evidentiary foundation is

established on a proportionality-probability basis and leads to the substantive determination regarding the existence of a proportionate causal connection. However, this proportionality results only from the nature of the evidentiary exception on which it relies. In this sense, both the causal connection and, accordingly, the wrongdoer's liability, are *absolute* with respect to the wrongdoer's *proportionate share* of the damages that have been proven through invocation of the evidentiary exception. Unlike his colleague Justice Naor, Justice Joubran does not view this conclusion as creating a substantive change in the law of tort, in the form of the creation of proportional liability, but rather as a relaxation of a procedural/evidentiary rule, the consequence of which is a partial proof of a causal connection, at the level of substantial probability. Consequently, the conclusion to be drawn from proving the causal connection at a level lower than the preponderance of the evidence is that the wrongdoer is liable for damages that are proportional to the degree of probability to which the wrongdoer's causation of the damage was proven.

7. It is important to reiterate that the factual determination is not that the wrongdoer may have caused the damage, but that absent the ability to determine otherwise, the wrongdoer will be viewed as the party who has been proven to have actually caused — as a factual matter — the part of the damage that is expressed by the degree of probability that he caused the full amount of the damage. In this sense, as stated, the wrongdoer's liability is not partial but absolute — in relation to his proven part of the damage.

Justice E. Rubinstein

1. Justice Rubinstein studied the comprehensive and illuminating opinions penned by the Vice President and Justice Naor carefully expressed the difficulty of the case. According to Justice Rubinstein, the recurring distortion cases described by the Vice President provide a good example of cases in which the probability-based compensation doctrine should be applied, but ultimately, he accepted the position taken by Justice Naor — i.e., that the doctrine should not be limited to these rare cases. For this reason, Justice Rubinstein concurred in her opinion, both with regard to the classification of cases in which the doctrine of proportional liability should be invoked and with regard to the other issues she discussed (particularly the manner of implementation of the doctrine in cases in which a general probability of more than 50% has been proven, and the continued application of the doctrine of compensation for the loss of chances of recovery). In the field of torts as well, the human and legal realities are often neither black nor white, but rather some shade of gray. Justice often requires a level of flexibility beyond an "all or nothing" approach, and although this is not a simple doctrine, it is, in Justice Rubinstein's view, a basic principle for other areas of law as well.

2. Justice Rubinstein conceded that even though from a theoretical perspective and, admittedly, from an intuitive perspective as well, Justice Naor's method with respect to ambiguous causation is legitimate, it does give rise to a concern that boundaries will be breached and regarding the creation of a "slippery slope", as the Vice President wrote. However, with respect to the data in the world of judicial proceedings, the judges deciding this further hearing are better situated than their predecessors who decided the appeal: since the Supreme Court issued the original decision in the appeal in this case in 2005, the trial courts have sought to apply of application of the rule laid down in the appeal decision in many cases, and it would appear that the rule has been implemented cautiously and in a measured manner. Furthermore, due to vast technological developments, especially those that have taken place during the twentieth century, reality has become especially complex and complicated; the amount of data that is available has increased and even though the tools of measurement have improved, the complexity has increased at a very rapid pace. The philosophy of the law of torts must, therefore, move along as well, and even if there is no such category as a "half-tort", there are nevertheless categories such as a "possible tort" and there are certainly categories such as "one eighth of the damages", which the Vice President ruled out. This is true, Justice Rubinstein believes, in our case, as well. Furthermore, the matter under discussion involves tort law. Perhaps, of all the areas of law, this field is most amenable to estimations. In Justice Rubinstein's view, in appropriate circumstances, the law must strive to reach a just and moral result by means of division of the whole into parts.

3. According to Justice Rubinstein, the Vice President was rightly concerned that "passion will upset the proper order" — that the sense of justice, even if it lacks a proper legal basis, may mislead us into what is actually unjust. This concern cannot be completely eradicated, but it can — as stated — be dealt with by means of judicial responsibility, and through the cautious development of the relevant rules in each particular cause. Justice Rubinstein believes that when examining the conditions for opening the "gates of the proportional liability exception" in each case, the key condition that a deciding judge must consider should be whether the case involves "inherent ambiguous causation". Here the courts will need to distinguish between ambiguity resulting from a defective evidentiary basis and inherent ambiguity.

Decision-making in doubtful cases in Jewish law

4. Although Justice Naor referred Jewish law in her opinion, Justice Rubinstein wished to expand this matter somewhat. The resolution of uncertainties is not only common in Jewish law; it is actually built into it. Questions of uncertainty have accompanied Jewish law from the earliest times, both with regard to causation or to indirect damage and the question of

liability for such, and with regard to the amount of the damage. Regarding causation, the Talmud teaches that there had originally been a debate as to which of two rules of decision-making should be used in cases of doubt. One scholar, Symmachus, of the fifth generation of *Tannaim* (in whose time the Mishnah was redacted) took the position that "money, the ownership of which cannot be decided, is divided." The Sages, however, say that "it is a fundamental principle in law that the burden of proof falls on the claimant." The rationale underlying the "distributive solution" is the one-sided character of the rule regarding the burden of proof, which creates a zero-sum game, although "justice is not necessarily only on one side." The rule that was adopted —that did not follow Symmachus' approach — was the binary one (which in this case would require a decision in favor of either one side or the other), is, in principle, the rule used in Israeli law as well (Maimonides, *Laws of Financial Damages*, 9:3; *Laws of Forbidden Relations* 15:26). Nevertheless, we find that regarding a number of issues, a decision was reached that imposed the outcome of the doubt on both sides. In the *Laws of Sales* (20:11), Maimonides stated as follows: "If one says 'I do not know' and the other says 'I do not know' and the [subject] is located in a domain which does not belong to either of them, it should be divided." Much ink has been spilt regarding the question of how Maimonides' determination can be reconciled with the general rules of decision-making in Jewish law, but the fact is that the arbiters of Jewish law believed that the two rules of decision-making are compatible. Jewish sages were willing to issue immediate rulings in cases of inherent ambiguity regarding the existence of a causal connection, by dividing liability — and it appears that such rulings are not considered to be within the normal confines of the law (although, as Justice Naor noted, a rabbinical court does have authority to impose a compromise settlement). However, in special situations there may be special rules of decision, and it is not unheard of in under special, predetermined circumstances, Jewish law will apply a special rule of decision-making. In Justice Rubinstein's view, on the broader plane Jewish law in this context focuses on the issues of justice and of ethical parameters; indeed, there may be cases in which justice comes down entirely on one side, but there are many cases in which justice lies in the middle, and it is appropriate to rule accordingly.

Regarding "judicial legislation" in this context

5. Justice Rubinstein also wished to add a few words regarding Justice Procaccia's opinion. He wished to explain why he believes that his position comports with the judicial function and in no way deviates from its bounds. First, on the theoretical level: this subject is no different, in its essence, from many other subjects in which the law has developed through judicial decision-making, and *the preponderance of the evidence rule is itself a product of case law development*. If the preponderance of the evidence rule is

the product of case law, must the well of creativity dry up in its wake? Furthermore, we should not forget that the legal system with the strongest impact on Israel has been the British system, and the common law system in general, which is entirely a matter of "internal growth", like the branches of a tree that spread out from the trunk, or cells that split off from a living organism. Moreover, in the Foundations of Law Statute, 5740-1980, the Israeli legislature itself clearly established the ways in which the law may be developed in Israel. In Justice Rubinstein's view, the development of the law in this case, by way of interpretation, does not deviate from the parameters of interpretative legitimacy. As stated, this material is the bread and butter of a court's daily work, and in any event it is within the realm of its professional expertise.

On judicial interpretation, activism, and passivism in Jewish law

6. In Jewish law as well, the creation of rules of interpretation ("the thirteen rules through which the Torah is expounded") has facilitated expansion. Even without considering all the details of these rules, it is clear that the interpretative standards are, by their nature, innovative. A related subject is that of judicial "activism" as opposed to "passivism"; here, too, similar questions have arisen in Jewish law. Maimonides' halakhic statement is well known: "[a] judge must adjudicate civil law cases according to that which he is inclined to regard as true and which he feels strongly in his heart to be correct, even though he does not have clear proof of the matter. Needless to say, if he knows with certainty that a matter is true, he must judge the case according to what he knows" (*Laws of the Sanhedrin*, 24:1). Maimonides continued: "These matters are given over solely to the heart of the judge to decide according to what he perceives as being a true judgment" (*ibid*.). This has been presented as creating a legal revolution which places the judge as the "main pillar, almost the only one, on which the entire structure of the laws between man and his fellow man lies" (H.S. Hefetz, *Circumstantial Evidence in Jewish Law* (1974), at p. 52). Justice Rubinstein would add to this that the Jewish law of torts has found ways to do justice which take into consideration a broad social picture.

Following Justice Grunis' opinion: and henceforth proportional liability (had there been a majority for such)

7. Justice Grunis has expressed his agreement with the view that modern law has distanced itself from binary "all or nothing" decisions. But he drew a distinction between those decisions and the "ambiguous causation" situation, since the doctrines informing those decisions do not deal with the question of whether or not a certain event has occurred ("facts"), but rather, with the ramifications of what has occurred; even if Justice Grunis' comments are factually correct, they still do not provide an answer to the

basic question before the Court in this Further Hearing, which is essentially no different from the dilemmas presented by the preponderance of evidence standard, and certainly no different from the various standards that are so common in the law of torts — a field which is full of uncertainties. What is instructive in Justice Grunis' comments is the methodical jurisprudential attempt to focus as much as possible on the circumstances of the particular case, in order to determine the relationship between the element of negligence and the "act of God" factor, but his argument does not totally invalidate the "proportional liability" doctrine. Justice Rubinstein reiterated: the preponderance of the evidence rule is indeed based — as Justice Grunis noted — on accumulated judicial experience, but it is nevertheless implemented through the exercise of judicial discretion.

8. Justice Grunis considered the question of the relationship between the doctrine of proportional liability and the area of compromise settlements, noting that if the results of the two are identical, the significance of invoking the proportional liability doctrine is that it allows the court to render a ruling based on compromise without obtaining the parties' consent to such. This comparison is attractive, but Justice Rubinstein disputed its fundamental validity, even if it does occur coincidentally. Furthermore, the difference between a decision based on proportional liability and a compromise decision is, *inter alia*, that such compromise settlements often establish, with the consent of the parties, both a ceiling and a floor for the amount to be awarded, and in general the court does not provide any — or only very little — reasoning for its decision; a decision based on proportional liability will, and should, include a fitting presentation of the court's reasoning, based on substantive legal considerations, even if the actual decision regarding the payment of damages is based on an estimation, as often happens in tort cases. Justice Rubinstein noted Justice Grunis' concern that increased judicial discretion will lead, *inter alia*, to less certainty and a heightened concern about "arbitrariness" in the sense that the judges' personal opinions and set of values will be promoted in their decisions. Justice Rubinstein himself believes that in the case of decisions reached by professional judges — rather than by, for example, a jury, as is the practice in England and in the United States — this concern is relatively limited: first, judges exercise professional caution, based on their experience, and second, even if the implementation of proportional liability involves the measures to which Justice Grunis referred, such as expert testimony regarding a statistical assessment of damage, acceptance of the doctrine is still a far cry from acceptance of estimations based on "the length of the chancellor's foot".

9. Last but not least: Justice Grunis fears the slippery slope of an approach of averages and proportionality. However, he certainly does not dispute that the function of the court is to decide disputes *justly*: "Hear you

the causes between your brethren, and judge between a man and his brother, and the stranger that is with him" (Deuteronomy 1:16); "Justice, justice shall you pursue" (Deuteronomy 16:20). The statutes and the case law are replete with expressions of justice. It is the essence of adjudication. No judge is identical to any other judge, and there may therefore be differences in rulings (even when the preponderance of the evidence rule is followed). Justice Rubinstein argued that there is no need to fear the "multiplicity of voices" of judges and decisions in the sense that the "law was placed in the hands of each person" (Mishnah, *Shevi'it* 2:1). Ultimately, collective understanding and the appeals hierarchy have their cumulative value, and common sense will have its place. Justice Rubinstein's view is that without detracting from the aspiration of all his colleagues to do justice, justice would be best served if the view of the four judges supporting the doctrine of proportional liability were to be accepted.

President D. Beinisch

President Beinisch stressed that the starting point for the discussion is the consensus that the general rule remains that of proof on the basis of the "preponderance of the evidence". It is also agreed that in certain cases of ambiguous causation, there may be exceptions to this rule that will apply when the normal rule does not provide an adequate solution; in those cases, the probability-based compensation exception should be invoked. The dispute under discussion relates to the type of cases in which the exception can be applied when causation of damage cannot be proven using the regular rules of evidence.

2. The scope of the application of the exception that allows a court to award probability-based damages requires additional determinations, the most important of which is the distinction between ambiguity relating to the fact that damage has been caused, and ambiguity relating to the amount of the damage. In this context, President Beinisch noted that the difficulty involved in the implementation of partial compensation solutions when the ambiguity relates to the fact of causation of the damage is much greater than in situations in which it has been proven that the claimed negligence caused damage to the plaintiff, and the factual ambiguity relates only to the amount of the damage.

3. President Beinisch noted that the Vice President and Justice Naor had different approaches to the issue of ambiguity with respect to the actual causation of damage, and each of their proposals appears to her to be extreme. The President's view is that a middle way is called for, one which is dictated by the need to proceed carefully when travelling along this judicial path.

4. President Beinisch believes that the solution proposed by the Vice President for "recurring distortion" situations, should be for cases involving the said type of ambiguous causation. Nevertheless, President Beinisch noted that the Vice President's approach may lead to an excessive reduction of tort liability. Thus, for example, she believes that there is no justification for rejecting the case law that has recognized an independent head of damage for "loss of chance of recovery", since this doctrine has already become established in our system and the case law has noted its advantages. In this connection, the President expressed her agreement with the distinction made by Justice Naor between the head of damage of loss of chance of recovery, and the "increased risk" head of damage. The President added that Justice Naor's approach is based on a desire to reach a just result in a particular case, with the court favoring the innocent injured plaintiff over a defendant whose negligence has been proven; however, it is doubtful that probability-based compensation, in the format proposed by Justice Naor or one similar to it (such as that proposed by Justice Joubran), would indeed lead to just results in the long run. President Beinisch added in this context that in the absence of clearer boundaries, there is a real concern that this approach will create a slippery slope, and she has therefore refrained from accepting such a determination as of the current time.

5. President Beinisch expressed her hope that in the years to come, a solution may be developed for some of the problems engendered by ambiguous causation that result from the limitations of scientific knowledge. There have been scientific developments in certain areas that were formerly ambiguous or unclear, and these developments have made it possible to prove the causes of various types of damages as a factual matter. Once the ambiguity or lack of clarity regarding these matters was removed, solutions for the problem of compensation were provided, after the fact, by way of legislation.

6. Another issue that must be considered is whether the proportionate damages approach requires, *inter alia*, an examination of the possibility of also applying the apportionment solution to the defendant, who bears the burden of compensation. It is necessary, in this context, to consider the fact that in the final analysis, the cost of the expansion of tort liability may be borne by the public and not only by the wrongdoer. For these reasons, President Beinisch's opinion is that, although the expansion of tort liability is a worthy aspiration, any such expansion must be accomplished methodically and in a balanced fashion. The desire to reach a just result in a particular case is the basis of any judicial proceeding; it is necessary, however, to exercise the greatest possible care in introducing comprehensive changes in the substantive law, so as to avoid the modification of existing norms only because of the need to resolve a particular case. In appropriate cases,

therefore, an effort should be made to reach, in a practical manner, the most just result in the particular circumstances. It may be that the suitable means to accomplish this, in those circumstances which appear to the judge to be appropriate, would be, *inter alia*, to encourage the parties to agree to a consensual compromise ruling. Another possible solution, to be used in exceptional circumstances, would be to transfer the burden of persuasion.

President Beinisch noted that in her view, the main point should be to avoid an ultimate result in which the public as a whole bears the cost of providing compensation for tort damages. It may be that the just solution involves a different economic, social or insurance-related distribution of the costs, but such a solution can be developed only after there has been a public discussion of the matter and an examination of the possibility of appropriate legislation. It therefore appears that the time for a comprehensive solution to the issue of proving causal connection other than through traditional measures has not yet arrived.

President Beinisch therefore found that she could not concur in Justice Naor's opinion.

Justice E. Arbel

Justice Arbel agreed with Justice Naor that probability-based compensation should be allowed in cases of ambiguous causation even in single-plaintiff cases, and that the application of this rule should not be limited to "recurring distortion" cases alone. In her view, when the ambiguity in an ambiguous causation case concerns the actual causation of damage, the legal truth, as established through the use of the standard preponderance of the evidence rule, is very far from the factual truth. It is therefore necessary to choose another rule that will bring the two truths closer together by means of probability-based compensation that reduces the magnitude of legal errors. It should be recalled that it will have been proven in these cases that the wrongdoer was negligent and that he created an unreasonable danger. There is a possibility that such a wrongdoer will stand to benefit if he is ordered to pay only probability-based compensation, if the result is that he is not required to pay for all the damages that he actually caused, but it also may be the case that he will be required to pay a part of the damage which he did not cause. However, this situation is preferable to one in which the injured and innocent party is not compensated at all. This juxtaposition reflects the concept of corrective justice mentioned by Justice Naor. Justice Arbel found that this situation is also preferable in terms of deterrence: if probability-based compensation is not allowed in a single-plaintiff case, the result will lead to insufficient deterrence, but if partial probability-based compensation is allowed, the deterrence will be optimal under the circumstances, as it is proportionate to the probability that damage will be caused as a result of the

risk created by the wrongdoer. With respect to deterrence, the law recognizes the need to deter wrongful behavior, even in cases in which neither a causal connection nor actual damage has been proven.

According to Justice Arbel, the courts must recognize that the limitations of human knowledge create a challenge that cannot always be met through the traditional rules that have been applied by the courts for many years in the framework of tort law. It is therefore necessary to continue to develop the law of torts such that it offers an optimal solution, in terms of all its objectives, for cases of this type as well. The balance in cases of this type must change, and the emphasis must be placed on the wrongdoer's negligence. In cases in which both the wrongdoer's negligence and the damages suffered by the innocent injured party have been proven, the proportional liability exception is the best means for achieving the objectives of the law of torts, as well as the most just solution in the specific case.

Justice Arbel believes that doctrines that were previously developed in the case law and which do not provide a comprehensive and systematic solution in cases of ambiguity regarding the actual causation of damage are not sufficient. Similarly, solutions such as the idea of bringing the parties to a compromise, or a transfer of the burden of proof, or waiting for science to advance, do not provide a true and comprehensive jurisprudential solution for the substantive question that has arisen and which must now be decided. As for the loss of chance of recovery doctrine, it provides only a partial solution to the problem of ambiguity regarding the actual causation of damage. It is therefore appropriate to add to that doctrine another more comprehensive and inclusive doctrine, as is presented in Justice Naor's opinion.

Justice Arbel believes that the concerns created by this innovative rule can be allayed. First, the case law has already taken the first steps towards resolving the ambiguous causation issue through the use of partial compensation, in a manner that in fact deviates from the preponderance of the evidence standard; second, the new rule established in the *Malul* case was already set out in the decision on appeal, and since its issuance, the rule has been implemented by the trial courts without breaching any boundaries; and third, in the future it will continue to be possible and necessary to monitor the case law on this issue, to examine it, to preserve the existing boundaries and, when necessary, to establish additional boundaries or provide additional direction in order to preserve the appropriate limitations of this rule. An essential part of this Court's function is to develop the law, and it must not flinch from doing so when necessary and appropriate.

Justice A. Procaccia

1. In the law at present, the rule is that the plaintiff is required to prove all the elements of a civil cause of action on the basis of the preponderance of the evidence. A plaintiff wins his case if he can prove all the elements of his cause of action at that level or higher. If he is unable to do so, he loses his claim in its entirety. The preponderance of the evidence standard is based on an averaging of the risks and chances between the plaintiff and the defendant, using probability values. "Corrective justice" according to the principles of the preponderance of the evidence standard rests on a conception that there is a symmetry between the plaintiff and the defendant, with the equilibrium point between them being at the middle of a scale of proof that is comprised of various stages.

2. The concept of a "liability ranking" for the defendant, derived from the level of proof that has been provided by the plaintiff, even if that proof is less than 50%, is foreign to the principle of the preponderance of the evidence standard, and deviates substantially from the rationale underlying the required level of proof in civil cases. The possibility that a lower level of proof will produce a proportional liability outcome derived from that lower level of proof is foreign to the standard evidentiary principle, and fundamentally changes the existing equilibrium point for proving a civil law cause of action. An evidentiary rule that enables partial proof of a substantive element of the cause of action, while establishing the defendant's partial liability, involves not only a material change in the rules of evidence but also a profound change in the substantive law rules relating to civil liability.

3. The possibility of recognizing a level of proof which is lower than the preponderance of the evidence standard, and of graduated liability derived therefrom, constitutes a profound revolution in the conception of liability and the alignment of rights and obligations in tort law. This revolution is liable to impact on all areas of civil law and to bring about substantial changes in the concept of liability and the level of proof required in all areas of civil law. Such changes reflect a movement of the equilibrium point of the alignment of the plaintiff's and the defendant's alignment of risks and chances, and they have far-reaching implications in general areas of policy — social, economic, and moral. They affect the level of legal certainty and the ability to assess, in advance, the legal results of a given dispute.

4. Justice Procaccia noted that the proposals suggested by her fellow judges, important and interesting as they are, can be categorized as broad and wide-impacting judicial. They lead to a substantive change in the law of torts and to a revolution in the rules of evidence. They shift the existing

equilibrium point in the legal relationships between the wrongdoer and the injured party. And they involve far-reaching changes in current legal practice.

5. The concept of probability-based compensation attempts to bridge the gap between the law and the dictates of reality under difficult circumstances, in which the existing legal tools do not provide suitable answers for an injured party who faces systemic difficulties in proving the connection between the damage caused to him and the defendant's fault. In order to bridge the gaps it is first necessary to identify the categories of cases that require special judicial tools and the types of damages for which special tools are to be used, as stated; it is also necessary to find the tools that can be used to bridge the existing gap. It may also be possible to find solutions for bridging the gap that are external to the existing system, such as compensation without proof of fault, through a statutory mechanism to be devised for that purpose. The said changes may well have a decisive effect on the perception of civil liability under the substantive law, on the remedies to be provided in the framework thereof, and on the proper point of equilibrium between the plaintiff and the defendant. General aspects of legal policy in the areas of society, economics and morality accompany this effort. Such a change is likely to affect the entire civil law and the legal system as a whole.

6. This is not a natural and integrative development of the existing law, but a substantive change of existing laws, which impacts on the entire system. Such a change requires that the following questions, *inter alia*, be considered:

Is there a justification for recognizing factual ambiguity and graduated liability with respect to the causal connection element in particular, rather than in relation to the elements of fault and causation of damage? Should the recognition of graduated liability be limited to bodily injury, medical negligence and mass torts, without expanding it to cover additional situations — including other areas of law — which may involve structural evidentiary difficulties? Is it possible to recognize a defendant's graduated liability without a symmetric adjustment of the amount of the wrongdoer's liability, in accordance with the level at which his actual liability was proven over and above the preponderance of the evidence standard? What are the evidentiary requirements that a plaintiff must meet in situations of compensation on the basis of graduated liability: should any level of proof be sufficient in order to establish such liability or should a minimum threshold be set which will entail the rejection of claims that do not reach the said level? How can the transfer of the burden of proof in the event of ambiguity involving the tort of negligence (for example, in cases in which the *res ipsa loquitor* rule applies and in those involving hazardous materials) be reconciled with a situation of ambiguity regarding a causal connection, which according to the various

proposals that have been raised will not serve to transfer the burden, but will allow for the establishment of graduated liability?

What are the financial costs for the parties and for the general public as a result of the proposed changes; what will their impact be on the scope of insurance coverage that will be required and on the size of the premiums that will be charged? How will these changes affect the professional status of defendants in the fields of medicine or science, whose liability will be expanded; will there be excessive deterrence of doctors, which will increase the risk of medicine being practiced defensively?

What is the response to ethical questions arising in the context of the proposed changes, which seek to impose proportional liability on the wrongdoer at a level of proof that does not ensure any substantive or concrete degree of probability that the wrongdoer is actually responsible for the damage caused to the plaintiff, and what is the effect of the "fault" that is assigned to the defendant under such circumstances from the perspective of morality and legal justice? What is the impact of the proposed changes on private defendants who do not have deep pockets, as compared to defendants that are large entities protected by insurance? How will these changes in the concept of tort liability impact on the concepts of civil liability in other areas of law? *Can a conceptual reform be carried out in the narrow field of tort law without affecting the harmony that must prevail throughout the entire system, and will the changes in tort law not mandate corresponding changes in other areas of law, in situations of inherent evidentiary difficulties?*

7. These questions, which do not exhaust all the aspects of this subject, cannot be examined in a comprehensive, universal manner in the framework of judicial legislation. They require broad and in-depth discussion in a comprehensive legislative process. The issue of ambiguous causation, in all its aspects, is therefore a matter that must be handled by the legislature.

Justice A. Grunis

1. Justice Grunis agreed with the position taken by President Beinisch, Deputy President Rivlin, and Justices Procaccia and Levy — holding that the rule adopted in the appeal which is the subject of this further hearing should be revoked. Justice Grunis' position is that tort law should not recognize proportional liability in cases of ambiguity regarding causation.

2. First, Justice Grunis noted that it is highly doubtful that the case under discussion raises an "ambiguous causation" issue — the issue which is the basis of the further hearing. This is because it was not proven in this case that there was an inherent difficulty regarding the determination of the cause of the damage suffered by respondent 1 (hereinafter: "the respondent").

Justice Grunis emphasized, regarding this matter, that when a trial court is presented with evidence that indicates that a particular possible cause cannot be ruled out as the cause of damages, alongside evidence establishing that there is a known and proven factor that causes the damage, a ruling whereby the damage was caused by the known and recognized cause is unavoidable. In our case, the evidence presented to the District Court indicates that premature birth is a certain and recognized cause of the difficult outcome, while lengthy bleeding is a possible cause of damage. It would therefore have been justified to rule that the respondent suffered damage because she was born prematurely and not because of the delay in her being delivered by a Caesarian section.

3. Despite this conclusion, Justice Grunis felt it necessary to discuss the issue raised in the further hearing. His starting assumption, for this purpose, was that the trial court was faced with a situation in which it was not possible to decide, on the basis of the evidence, whether the damage was caused by the hospital's negligence or by the premature birth itself.

4. As stated, it is Justice Grunis' position that proportional liability should not be recognized in a manner that would allow a negligent party to compensate the plaintiff not for the full amount of the damages, but rather in accordance with the level of that party's proportional liability. It is also unacceptable to require a party to compensate an injured party only because the first party negligently created a risk for other people, if it is not possible to prove that the negligence caused the second party's injury. Such a conclusion is contrary to the tort law principles of corrective justice, according to which a person who, in violation of a duty, has caused harm to another party, must compensate the injured party for the amount of that harm. Judge Grunis also stressed that a rule that allows for such a conclusion would not necessarily prevent the creation of the particular risk, and that there may be more effective legal tools that can be employed to prevent the risk. Justice Grunis did recognize that in certain areas of law, the courts have begun to move away from binary decisions in which one of the litigants is fully successful while the other litigant fails completely. However, according to Judge Grunis, the answer to the question of whether there was a factual causal connection must be either yes or no: was it the negligence that caused the damage in the particular case, or was the damage caused by an act of God?

5. Justice Grunis also discussed the well known case of *Summers v. Tice* [7]. In that case, two hunters fired their guns and a third hunter was injured as a result of the shooting. The court there ruled that both hunters were liable, jointly and severally, for the damages of the third hunter. Justice Grunis noted that in the case of the hunters there was a fifty percent chance that one of the hunters was the one who had caused the injury, and exactly the same

chance that the other was the wrongdoer. In such a situation, the award of damages against both hunters could not be avoided. However, in the present case, no argument was made, and none proven, to the effect that there was an equal — i.e., 50% — chance that the cause of the damage was the negligence and not an act of God.

6. Regarding the "recurring distortion" test proposed by Deputy President Rivlin, Justice Grunis noted that even if this test is not fully consistent with the principle of corrective justice, it may be that when there is a group of injured parties and a consistent distortion, a limited and narrow deviation from the said corrective justice principle is justified. In any event, Justice Grunis saw no need to express a final position regarding this matter.

7. Justice Grunis also felt that the decision rendered in the original appeal should be overturned, because recognition of proportional liability is not compatible with the accepted law with respect to the preponderance of the evidence standard. According to Justice Grunis, there is no justification for a revolutionary change in the accepted law regarding the preponderance of the evidence standard, which is based on hundreds of years of judicial experience.

8. Finally, Justice Grunis emphasized that recognition of proportional liability in this case would have very far-reaching consequences for the development of civil law and regarding the perception of the function of the higher court in civil proceedings. He noted that the circumstances of this case are difficult, particularly in light of the fact that it involves a girl who had been born with severe disabilities, and because any decision that is rendered will have significant financial consequences. From the perspective of the highest judicial instance (and particularly with regard to a further hearing), the difficulty arises from the tension between the sense of justice concerning the specific details in the case before the court, and a recognition that the court's decision will have consequences for the future. The development of proportional liability in this case, Justice Grunis believes, is a creative and innovative path, which is not appropriate when the court is faced with such difficulties. Thus, for example, a difficulty arises regarding the possibility that the final result would be the same whether the decision was rendered on the basis of the law, or whether it was a ruling based on a compromise. This difficulty is primarily due to the fact that by law, a compromise decision can be made only if the parties have agreed to it.[1] The adoption of the

[1] Justice Grunis emphasized that according to various statutory provisions, a court is authorized to issue a ruling based on a compromise only if the litigants have agreed to this option (s. 79A of the Courts Law (Consolidated Version), 5744-1984; s. 4(c) of the Compensation for Victims of Road Accidents Law, 5735-1975).

"ambiguous causation" doctrine can thus expand and enhance judicial discretion; such an outcome is undesirable, because it reduces legal certainty, encourages litigation in baseless cases, and increases the danger presented by arbitrary judicial decisions. Proof that the adoption of this doctrine will increase uncertainty can be found in the case before us now: the trial court fixed the compensation at forty percent. The appeals court reduced this amount by half and set it at twenty percent. The position taken by the judges supporting the application of a special "ambiguous causation" doctrine does not explain why one percentage is preferable to the other in this case.

9. Furthermore, Justice Grunis noted that the acceptance of the proportional liability doctrine, i.e., a decision or a solution based on proportionality, is one step down a slippery slope and we cannot anticipate where it will lead. In practice, various attempts have been made in this Court to base decisions or solutions on proportionality outside the area of tort law causation as well. This approach is liable, in the end, to bring about a substantive change in the role of the courts, and in particular in the function of the Supreme Court as a developer and creator of law. The emphasis will be moved, completely and decisively, from the theoretical to the more concrete aspect. The problem may be more serious in the trial courts, in which hundreds of different judges serve. In hard cases, the practice of reaching decisions pursuant to the applicable law will be replaced by decisions that are essentially compromises, without the litigants having consented to the use of this approach.

10. To sum up, Judge Grunis found that the present case is difficult from various perspectives. The Court must therefore forge its path heeding Justice Oliver W. Holmes' immortal warning: "Hard cases make bad law." Justice Grunis' position is that if the doctrine of proportional liability were recognized, the result would have been exactly that against which the great American judge cautioned.

Decided, by a majority vote, not to recognize a proportional liability exception in cases of ambiguous causation, and to overturn the decision in CA 5375/02. No order was made to return compensation that had been paid to the respondents, and no order was made for additional compensation to be paid.

19 Elul, 5770.

29 August, 2010.