CA 1326/07
and counter appeal
CA 572/08
CA 8776/08
CA 2600/09
CA 2896/09
CA 3856/09
CA 3828/10

Appellant in CA 1326/07 (Respondent in the counter appeal):	Lior Hammer
Appellant in CA 572/08:	The State of Israel
Appellant in CA 8776/08:	A (a minor)
Appellant in CA 2600/09 and Respondent in CA 2896/09:	Maccabi Healthcare Services
Appellants in CA 3856/09:	1. Eran Sidi 2. Tsipora Sidi 3. Yigal Sidi
Appellant in CA 3828/10	Clalit Health Services
	v.
Respondents in CA 1326/07 (Appellants in the counter appeal):	1. Professor Ami Amit 2. Mor Institute for Medical Information Ltd. 3. Clalit Health Services
Respondent in CA 572/08:	A (a minor)
Respondents in CA 8776/08:	1. Victoria Sharai 2. Alex Walpert 3. Maccabi Healthcare Services 4. Dr. Yivgenia Mazor 5. Kolmedic Ltd. 6. Dr. Yosef Bracha
Respondents in CA 2600/09 and Appellants in CA 2896/09	1. Noam Sabagian 2. Tsiona Sabagian 3. Hayim Sabagian

Respondents in CA 3856/09:	1. The Sick Fund of the Histadrut haClalit 2. Dr. David Kampf
Respondents in CA 3828/10:	1. Chen Na'ava 2. Chen Eli 3. The estate of Chen Ziv Or z"l

The Supreme Court sitting as a Civil Appeals Court

CA 1326/07 and counter appeal from the judgment of the Haifa District Court of 25 December 2006 in CC 745/02, given by the Honorable Judge B. Gillor

CA 572/08 from the judgment of the Haifa District Court of 2 December 2007 in CC 259/02, given by the Honorable Judge B. Gillor

CA 8776/08 from the judgment of the Be'er Sheva District Court of 31 August 2008 in CC 3344/04, given by the Honorable Judge S. Dovrat

CA 2600/09 and CA 2896/09 from the judgment of the Jerusalem District Court of 29 January 2009 in CC 8208/06, given by the Honorable Judge Y. Adiel

CA 3856/09 from the judgment of the Jerusalem District Court of 2 April 2009 in CC 1338/97, given by the Honorable Judge A. Habash

CA 3828/10 from the judgment of the Jerusalem District Court of 11 April 2010 in CC 8459/06, given by the Honorable Judge I. Inbar.

Before President D. Beinisch (emeritus), President A. Grunis, Deputy President E. Rivlin, Justice M. Naor, Justice E. Arbel, Justice E. Rubinstein & Justice S. Joubran

For Petitioner in CA 1326/07:	Carmi Bustanai, adv.; Shimrit Cohen-Daum, adv.
For Respondent 1 in CA 1326/07 and counter appellant:	Chaim Zelichov, adv.; Ofir Ben Moshe, adv.
For Respondents 2-3 in CA 1326/07 And counter appellants:	Ilan Uziel, adv.
For Appellant in CA 572/08:	Orit Sohn, adv.; Michal Sharvit, adv.
For Respondent in CA 572/08:	Meiron Cain, adv.; Akram Mehajne, adv.
For Appellant in CA 8776/08:	Eli Lotan, adv.; Dalia Lotan, adv.
For Respondents 3-6 in CA 8776/08, Appellant in CA 2600/09 and Respondent in CA 2896/09, Respondents in CA 3856/09 and Appellant in CA 3828/10:	Yaakov Avimor, adv.
For Respondents in CA 2600/09 and Appellants in CA 2896/09 and Appellants in CA 3856/09:	Amos Givon, adv.; Itai Givon, adv.
For Respondents in CA 3828/10:	Anna Rife-Liganza, adv.
For Amicus Curiae:	Eli Zohar, adv; Inbal Zohar, adv.; Meirav Sagi, adv.
For the Israel Bar Association:	Asaf Posner, adv; Eti Libman, adv.; Avishai Feldman, adv.

JUDGMENT

Deputy President E. Rivlin:

Background

1. The hearing of the appeals before us was consolidated for decision of the general questions regarding the issue known as a cause of action for "wrongful birth". The wrongful birth question typically arises where a person is born with some disability, and it is claimed that cautious conduct by the defendants – usually the medical personnel who had the pregnant mother as a patient – would have prevented his birth altogether. Two separate causes of action are might arise from the negligent conduct: the parents' cause of action, and the cause of action of the child himself. The

child's cause of action is customarily called "wrongful life", in order to differentiate it from the parents' cause of action, which is called "wrongful birth".

2. The question regarding the recognition of actions for "wrongful birth" and "wrongful life" was decided twenty five years ago in the judgment of the Supreme Court in CA 518/82 *Zeitsov v. Katz*, 40(2) IsrSC 85 (1986) (hereinafter: *Zeitsov*). In that judgment, which was handed down by a panel of five Justices, it was held, unanimously, that there is nothing preventing recognition of the parents' cause of action – the "wrongful birth" cause of action – in the framework of the tort of negligence, and in accordance with regular tort principles. The disagreement, even then, revolved around the question of the existence of the child's cause of action.

The Court, per the majority of Justices on the panel, recognized the cause of action of the child – the "wrongful life" cause of action. However, the four majority Justices disagreed regarding the theoretical reasoning for recognizing the "wrongful life" cause of action, and as a result, also regarding the question how the extent of the damage should be measured. That decisive question remained answerless in that case.

3. Deputy President M. Ben-Porat, Justice D. Levin concurring, held that the child's cause of action should be recognized only in the rare cases "in which it can be held that it would have been better for a certain person not to have been born. At times it will be a societal presumption, that it is a matter of consensus that it would have been better for a certain person not to have been born than to have been born with severe disability" (*id*, at p. 97). In those cases, according to her opinion, the very birth of the child is the damage that was caused to him. Assessment of that damage in monetary terms, it was held, is not easy; however, "he who is liable for his being alive should provide him monetary compensation through which the results of the defect can be lessened to the outermost boundary of the possible" (*Zeitsov*, at p. 100). *Ben-Porat, DP* clarified that her intention is not for a comparison to be made between a child born with disability and a child born completely healthy, "but rather, to exhaust the existing potential in order that he might function better, and suffer less, in his inferior condition". This solution, she emphasized, leads to "the taking into account of the fact that having been born (even if against his best interest), there is a child before us who is entitled to a life that is worth living, even if only within the framework of his disability" (*Zeitsov*, at p. 100).

4. President (then Justice) A. Barak, in whose opinion concurred Deputy President (then Justice) S. Levin, also determined that the cause of action for "wrongful life" should be recognized. However, the reasoning upon which his position is based is different, and can influence the scope of cases in which the cause of action for "wrongful life" arises and the way damage is assessed. At the foundations of this reasoning stands the view according to which "the notional duty of care of the doctor requires him to take reasonable cautionary measures so that the minor will not have a defect. It is thus also the minor's right that there not be negligence that will turn his life into a life of defect. The minor does not have any right to a lack of a life. The interest which the law protects is not the interest in not having a life, but rather the interest in life without defect. Thus, the damage which the negligent doctor is liable for is not the very causing of the life, or preventing the lack of a life. The damage which the doctor is liable for is the causing of defected life… the doctor is liable for the causing of defected life, and that damage is

formulated by comparing the defected life to life with no defect" (*Zeitsov*, at p. 117). According to that approach, the child's cause of action will be recognized also in cases in which the disability is not exceptionally severe, and does not necessarily lead to the conclusion that it would have been better for the child not to have been born. Estimation of the damage, according to this approach, is not calculated according to the difference between the disabled life and a lack of life (as per the approach of *Ben-Porat, DP*), but rather according to the difference between the disabled life and life without disability. Although had the tort not been committed the damaged party would not be alive, and certainly would not live a life with no disability, according to the position of President Barak, the uniqueness of the issue allows estimating the compensation in comparison to life without disability, in the framework of flexible interpretation that is adapted to the principle of *restitutio in integrum*.

5. Justice E. Goldberg, dissenting, determined that the existence of a cause of action for the child against the doctor, due to whose negligence the child was born disabled, cannot be recognized at all in circumstances where without the negligence the child would not have been born at all. Preferring the pre-creation nihil over life, even in rare cases – thus determined Justice Goldberg – is impossible.

6. Although the judgment in the *Zeitsov* case recognized the case of an infant due to "wrongful life", many questions deriving from it remained undecided. As a result, in the years that passed since the judgment was handed down, serious difficulties arose in implementing the rule regarding recognition of the child's cause of action for "wrongful life". Some of these difficulties stemmed from the existence of two different approaches regarding the scope of the cause of action and regarding the way compensation is calculated, and others stemmed from the very recognition of the cause of action itself. Thus, the trial courts had to determine, *inter alia*, what damage a person born with disabilities suffered; how the extent of that damage should be estimated; and whether slight disability (or only severe disability) can substantiate a cause of action for an infant. However, without *stare decisis*, the *Zeitsov* ruling was not implemented in a uniform fashion. Due to these difficulties, and due to the need to also decide additional related issues, we decided to consolidate the hearing of the cases before us, and to order their hearing before an expanded panel of seven justices. In the decision of President D. Beinisch of 29 December 2011, we discussed the questions of principle that require our decision:

A. *Does a cause of action exist* and what is its legal basis? In light of the time that has passed since the *Zeitsov* ruling was handed down and/or the continual difficulty in implementing it, should it be altered, or should one of the approaches expressed in the *Zeitsov* ruling be preferred over the other?

B. Assuming that a cause of action exists: should the parents' action (wrongful birth) or the child's action (wrongful life) be recognized, and in which cases will each of the causes of action arise?

C. The principles of *calculation of compensation* in both actions: *in the parents' action*: comparison between a healthy child and a child with defects, or another standard? *In the child's action*: comparison between no life and a life with defects? A comparison between a life with defects and a healthy life?

D. *Proving a causational link – in the parents' action* (proof that they would have terminated the pregnancy had they known of the expected defect). *In the child's action* – is his death better than his life?

E. Is violation of autonomy – as a cause of action in the parents' action – an additional cause of action, or an alternative to the cause of action for wrongful birth?

It was further held in that decision that the questions of principle shall be decided first in the framework of a partial judgment, after which the individual hearing in each of the cases would continue, to the extent that would still be necessary. Thus, we shall relate in this decision to the questions of principle only and to the arguments regarding those issues. The decisions in the various cases shall be heard separately and not before this panel, and we are not determining anything regarding the liability of any of the defendants in the cases before us.

The Parties' Arguments

7. The counsel of the claimants in the cases before us supported recognition of the child's cause of action for "wrongful life", according to the approach of President Barak in the *Zeitsov* case. It was claimed that the advantage of this approach is that it makes unnecessary the comparison between life and no life, and quantification of life itself. In addition, the various claimants argue that President Barak's approach advances certainty and uniformity in the caselaw, as it does not require making a differentiation, which is inherently vague, between a "severe" defect and a "slight" defect; and even compensation, which is assessed in comparison to a healthy person, is calculated by a method that is well recognized in tort cases for bodily harm, which is accepted by the courts. It is also claimed that the comparison between various disabilities, such that some of them entitle a person to compensation and others do not entitle a person to compensation, is not morally appropriate either, as it discriminates between various groups of disabled persons. Furthermore, considerations of corrective justice and efficient deterrence support ordering full compensation for the damages involved in the disability, even if it is a relatively mild disability. The claimants' counsel even note that according to their position, it is not possible to provide a full solution for the needs of the child in the framework of the parents' action, since the compensation of the parents is limited to the period during which the child is dependant upon his parents. It is argued that from the moral standpoint, it is appropriate to recognize the cause of action of the child when the doctor acted negligently, even if there is difficulty in locating the causational link between the negligence and the damage from the disability. The claimants add that non-recognition of the child's action would grant quasi-immunity across the board to doctors who acted negligently; and that there is something improper in the argument that life with defect is preferable to no life, when it is raised by a doctor who performs tests the specific purpose of which is to allow abortion in case of a defect.

8. The counsel of the defendants in the various cases, on the other hand, support annulment of the child's action for "wrongful life". According to their position, President Barak's approach in the *Zeitsov* case is at odds with fundamental principles of tort law, whereas the approach of Deputy President Ben-Porat is impractical, because the court has no real tools with which to compare between a situation of life

with disability and a situation of no life. In addition, the very decision that there are situations in which it would have been better for a person not to have been born since he has a defect contains a problematic societal-moral statement which contradicts fundamental values of society regarding human dignity and the sanctity of life. In any case, the defendants are of the opinion that if the cause of action for "wrongful life" is recognized, the approach of the Deputy President should be preferred, and differentiation should be made, between "severe" defects regarding which it can be said *prima facie* that it would be better for a person had he not been born and more "minor" defects which do not establish a cause of action, according to the extent of the person's independence of functioning and his ability to be of benefit to himself and others, to be integrated into society and to live a life that entails satisfaction, meaning, and enjoyment. It is argued that an additional possibility is to make such a differentiation on the basis of criteria used by the pregnancy termination committees when deciding upon authorization to perform an abortion at the viability stage. Moreover, it is argued that the parents' cause of action should not be recognized either, as the expenses they bear in caring for their child constitute mitigation of damage, and where the party who suffered the direct damage – the child – has no cause of action, nor do the parties who mitigate the damage have a cause of action. The conclusion, according to the defendants' approach, is that only the parents' action for violation of autonomy should be recognized.

9. The Israeli Medical Association and the Israel Bar Association also appeared in the proceedings, with the status of amicus curiae.

The medical association extensively discussed the existence of a trend which it calls the aspiration to give birth to "the perfect child." According to its stance, the statement that it would be better for a person not to have been born leads to an intolerant attitude toward disabled persons, and as such considers them as having an inferiority due to which their birth should be prevented in advance. Thus, the medical association is of the opinion that the approach of Deputy President Ben-Porat in the *Zeitsov* case should be adopted, whilst determining clear criteria which would limit the use of the cause of action for "wrongful birth" (or "wrongful life") to the most difficult and severe cases, as per its definition. These criteria, proposed the medical association, can be based upon Health Ministry instructions to the multi-district pregnancy termination committees. The medical association further points out the sentiment of doctors in the field of obstetrics and gynecology, as well as that of those serving in the pregnancy termination committees, according to which the concern regarding a law suit is likely to lead to an increase in medical tests and to "superfluous" medical procedures or abortions.

10. The Israel Bar Association is of the opinion that the causes of action for "wrongful birth" and "wrongful life" should be recognized. It is further of the opinion that the practical difference between the various stances that recognize actions for "wrongful life" in principle is smaller than it first appears. Thus, because even according to the position of President Barak the child-claimant must prove, in the framework of the element of causal link, that the defect is so severe that the pregnancy termination committee would have authorized an abortion due to it; and because, on the practical plane, there is no essential difference between the two approaches regarding compensation. The Israel Bar adds that to its understanding, the caselaw on the question of wrongful birth does not have an influence on the number

of abortions that will be performed or upon the scope of tests during pregnancy, as it is the parents' desire for a healthy child that leads to these results, not the question of provision of retrospective compensation. Furthermore, the Israel Bar Association argues that public policy regarding the question of performing abortion should be determined in the framework of the law applying to it, and not in the framework of tort law. On the merits, the Israel Bar Association supports the position expressed by President Barak in the *Zeitsov* case. Decision of the question whether it would be preferable for a person not to have been born, it is argued, is a difficult one, which should be avoided and which is likely to lead to caselaw that is not uniform. The Israel Bar Association further argues that refraining from recognition of the child's cause of action is likely to leave him with no compensation if his parents make unenlightened use of the compensation granted them, or if he is put up for adoption after birth.

11. Last, note that the Attorney General notified us that the Minister of Justice ordered the establishment of a public commission, at his request, headed by the Honorable Deputy President (emeritus) E. Mazza (hereinafter: the *Mazza Commission*), in order to formulate his stance regarding the existence of a cause of action due to wrongful birth and the question of the appropriate boundaries of such a cause of action. The findings of the *Mazza Commission* were submitted to the Court on 19 March 2012, in the framework of "the Report of the Public Commission on the Subject of 'Wrongful Birth'" (hereinafter: the *Commission Report*). However, the Attorney General did not express his stance regarding the questions put up for decision before us. Thus, we refrained from viewing the findings of the report themselves as part of the parties' arguments, as they lack the status in law of the stance of the Attorney General.

The operative findings of the commission did not serve as part of the pleadings before us; nonetheless, it is worth noting that the *Commission Report* is the fruit of circumspective, serious and thorough work; sitting in the commission were the best of experts, many witnesses were heard, position papers from various sources were submitted, a survey of all the relevant issues was presented, and all was examined thoroughly and meticulously. We read the report and found that in certain respects, the commission went in the direction of the findings we reached. In light of that, we shall refer below to the *Commission Report* to the extent that it is relevant to the cases at hand.

12. After considering the entirety of the aspects of the issue, we have reached the conclusion that in the legal reality of our time, twenty five years after the *Zeitsov* ruling was handed down, the child's cause of action – the cause of action for "wrongful life" – can no longer be recognized.

There are substantial legal difficulties, regarding both the element of damage and the element of causal link, which make difficult the recognition of this cause of action in the framework of the tort of negligence. But above and beyond these legal difficulties, there is moral, substantive difficulty in the view that the life of a person who was born with disability can be considered – in the eyes of the infant himself – as "damage". Recognizing this difficulty, we in effect continue according to the moral view outlined by President Barak in the *Zeitsov* ruling. Furthermore, as detailed below, we wish to realize the proper purpose at the foundations of the *Zeitsov* ruling –

granting compensation, as fully as possible, to fulfill the needs of the disabled child; however, to do so via the cause of action of the parents, which does not raise those difficulties.

The Difficulties in Recognizing the Cause of Action for "Wrongful Life"

13. As noted above, at the foundations of the *Zeitsov* ruling, which recognizes the cause of action for "wrongful life", are two different and separate theoretical reasonings. According to both approaches, a cause of action for "wrongful life" is based upon the tort of negligence. The element of negligence is manifest in "the negligent medical omission by not finding, in the framework of the tests performed on the mother prior to or during the pregnancy, the existence (or concern thereof) of a defect in the fetus which is going to be born, or omission by not providing the parents of the infant required information, in advance, whether regarding the existence of concern of a defect or regarding the need for, or possibility of, performing additional tests that can verify or rule out said existence of concern" (the *Commission Report,* at p. 38). Both approaches assume that this element has been established. However, each of the approaches raises logical or legal difficulties regarding the existence of one or more or the other elements of the tort of negligence: damage or causal link.

The Difficulties regarding the Element of Damage

14. The approach manifest in the opinion of Deputy President Ben-Porat raises substantive difficulty regarding *the element of damage.* According to this approach, the element of damage is defined in the cause of action, as aforementioned, as the difference between non-existence, or no life (the situation of the child had the negligence not occurred) and existence with disability (the situation of the child due to the negligence). The life of the child itself is the damage caused to him. This definition of damage requires judicial decision of the question whether there are situations in which it would have been preferable for a person not to have been born, and thus requires "confronting the metaphysical questions found in the areas of philosophy, morals and religion, regarding the significance of existence, as opposed to non-existence. Dealing with these questions is not an issue for judicial decision, both from the normative standpoint and the institutional standpoint" (the *Commission Report,* at p. 39). And indeed, President (then Justice) A. Barak pointed out this difficulty in his opinion in the *Zeitsov* ruling, as follows:

> This approach [of Deputy President Ben-Porat – E.R.]… once again raises the question whether the Court is able to determine that in certain conditions the lack of a life is preferable to a life of suffering. Do our worldview, our approach regarding life and our lack of understanding of non-existence, allow us, as judges, to determine that there are indeed situations, even if they be rare, in which it is preferable not to live than to live a life of suffering? What is the meaning of such "preference"? When the life expectancy of a person is shortened, we assess this suffering of his. This assessment is difficult, but it is possible, as we are able to assess the meaning of life; but how can we assess the meaning of the lack of life? … When we compensate for death or for shortening of life expectancy, we do not compare the state of life to the state of death, and we do not determine

> the preference of one over the other, as we do not have the tools to do so. All we do is recognize the right to continue living – even if in suffering, and even if with defect… thus, how can we assess lack of life? *According to which rational standards can a reasonable person determine that even in the most extreme case, lack of life is preferable to life with defect?* (*Zeitsov*, at p. 116; emphasis added).

15. Indeed, from the normative standpoint, it appears that it is not appropriate for the Court to determine that a person who suffers from a certain level of disability would be better off if he had not been born. Furthermore, the Court in no way has the tools needed to reach such a decision, as the Court lacks information regarding the nature of non-existence, and such knowledge, of course, is not to be found ("no one has yet returned from there" – said the American Court – "no one has yet returned from there in order to tell us what the lack of life is"; see also the article by Ronen Perry "L'hiyot o lo L'hiyot: haIm Zo haShe'elah? Tviot Nezikin begin 'Chaim b'Avla' keTa'ut Konseptualit", 33(3) MISHPATIM 507, 545-546 and the references in note 177 (2003)(hereinafter: *Perry*)." From the institutional standpoint as well, it is better that the issue under discussion not be decided by the courts. As aforementioned, according to the approach of Deputy President Ben-Porat, the entitlement to compensation arises only in rare cases, and regarding an infant who suffers most severe defects. This approach thus requires decision of the question what those severe defects are; however, lacking a normative basis for such judicial decision, the necessary conclusion is that "the court is not the social institution that can make rulings on those questions" (the *Commission Report*, at p. 39).

16. It should be emphasized that in such a case the problem is not merely quantifying the damage, but rather difficulty determining if any damage occurred at all. Indeed, generally the caselaw is flexible regarding the proving of the element of damage, especially where there are inherent probative difficulties which do not depend upon the damaged party. So it is regarding proving future earning losses (see, *e.g.*: CA 10064/02 *"Migdal" Chevra l'Bituach Ltd. V. Abu Hana*, 60(3) IsrSC 13, par. 7-9 (2005)(hereinafter: *Abu Hana*)). However, that flexibility should not be replaced with pure speculation. In the question before us, the difficulty is not only in determining the amount of the damage, but rather a preliminary question – whether there is, or is not, damage. Thus notes Perry in this context:

> I agree that difficulties of calculation and assessment… need not deter the courts from determining liability; however, a differentiation should be made between cases in which the existence of damage is obvious but it is difficult to assess its scope, and cases in which the question of the existence of damage cannot even be decided. Non-monetary damages are damages that most of us have experienced, directly or indirectly. Our acquaintance with various situations of non-monetary interests allows us to know when a change for the worse in the situation of such an interest takes place. The question of the existence of damage is not unsolvable. The only question, of course, is the question of quantification – but in light of the fact that from the conceptual standpoint this problem arises only after the question of liability has already been decided, it cannot justify (*a priori*) negation of that liability. The situation under present discussion is different. Non-existence is a situation with which nobody is familiar, and

> thus comparing it to a situation of existence is always impossible. Without a relational plane to which the present situation of the plaintiff can be compared, we cannot determine if damage has been caused or not. The problem is not merely a problem of quantification" (Perry, at p. 547).

17. The state courts in the United States have also discussed the difficulty of defining the nature of a situation of "no life":

> The argument that the child was in some meaningful sense harmed by being born and would have been better off not being born suggests that there is a perspective, apart from our life and world, from which one can stand and say that he finds nonexistence preferable to existence (*Goldberg v. Ruskin* (1986), 113 Ill. 2d 482).

It was further written that:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence (*Becker v. Schwartz* (1978), 46 N.Y.2d 401, 386 N.E.2d 807).

18. Lacking the human capability to decide the question if and when nonexistence is preferable to a disabled life, the sky is the limit regarding the number of possible approaches on the issue. *Nota bene:* it is not just a matter of many approaches; if it were, it would be possible to decide between them by a Supreme Court ruling. As all the approaches are equally speculative, it is difficult to locate any rational criterion for deciding between them, and it is to a great extent dependent upon gut feeling and worldview. Thus, for example, one can wonder what the things are that make life clearly preferable to non-existence: the extent of enjoyment and happiness that a person gets out of life; his ability to fill his life with value; his ability to create meaningful personal relationships; the quality of his awareness of his own existence and the world surrounding him; his subjective desire to stay alive; his ability to sense and be aware of the wonders of creation; and human intellectual ability. A different question is how those variables should be measured – from the viewpoint of the child, who does not know any reality different from the one into which he was born, or the viewpoint of a healthy person. These are questions to which a judicative answer cannot be provided. Justice T. Orr described this well (albeit in another context) in CApp 5587/97 *The Attorney General v. A*, 51(4) IsrSC 830, 858 (1997):

> … we must refrain from adjudicating regarding the quality of life of [the child] in comparison to a regular child his age. We must focus upon examination of the well being of [the child] from his own viewpoint. When dealing with a child who suffers from defects from birth – even severe defects, like in the case before us – his life, with its disability – is the "whole" which that child enjoys. From the standpoint of [the child], another way of life was never a matter of consideration. The quality of

> life is that quality which is possible in light of the severe defects he suffered. That, from his standpoint, is everything. Such a life is not worthy of less protection than the life of a child who was born and developed normally.

Even if it were possible to point out situations in which it is clearly preferable for a person not to have been born – and, as aforementioned, we lack that ability – there is real difficulty in defining and demarcating those situations in a way that would allow prediction.

19. Deputy President Ben-Porat proposed in *Zeitsov* to solve this difficulty through examination of the question if it would have been better for a person not to have been born through the lens of "the reasonable person"; in other words: whether the reasonable person would be of the opinion that the life of the damaged party isn't worth living. However, without any knowledge regarding the quality of the alternative to life with disability, nor is it possible to find assistance in a standard of reasonableness in order to find a proper answer. Furthermore, the ability to get enjoyment and value out of life despite disability is also subjective, and one can assume that it varies from person to person. Indeed, at times use is made of the term "not worth living" regarding life with severe disability; however, that is merely a phrase intended to indicate the existence of great difficulty, and in no way whatsoever can it be derived from it that the situation of nonexistence is truly preferable.

20. Nor does the proposal to rely upon criteria of the pregnancy termination committees in order to demarcate the type of cases in which the "wrongful life" cause of action would be recognized provide a real solution to the question whether and when nonexistence is preferable to existence. The considerations which guide the pregnancy termination committees are not limited to the question if being born or not being born serves the welfare of the fetus; the committees also consider, in the framework of the entire balance, the welfare of the parents and their desire to terminate the pregnancy. Authorizing an abortion in a given situation does not necessarily inform of a widespread societal view according to which in such a case it is better not to be born. The authorization is based, at least partially, upon the societal view regarding the pregnant woman's right to autonomy, her dignity and privacy, and the scope of the right to have an abortion. The scope of the right to terminate the pregnancy is not, therefore, comprised of the interests of the fetus alone. For that reason, and as I shall yet clarify, non-recognition of the child's action does not create legal disharmony in relation to the recognition of the right to have an abortion in certain situations.

21. An additional difficulty in Deputy President Ben-Porat's approach regards the existence of the doctor's *notional duty of care* toward the child, which is primarily to provide full and correct information to his parents as they decide whether to have an abortion. Indeed, there is no principle preventing recognizing a duty of care toward a person who has not yet been born (as is indeed done in "regular" cases of medical negligence). However, recognition of a duty of care in a "wrongful life" action requires recognition of a protected interest not to be born in certain situations. This interest cannot be based on the right to have an abortion, as that right entitles, as aforementioned (and within certain boundaries) the pregnant woman, and does not necessarily establish a duty toward the fetus. And indeed, the dissenting opinion of

Justice Goldberg in *Zeitsov* was based upon the view that a right not to be born does not exist.

In conclusion, the approach of Deputy President Ben-Porat requires determining, in certain cases, that there are situations in which it would have been preferable for a person not to have been born. That determination cannot be established from the legal standpoint, and it is not proper to establish it from the substantive-moral standpoint. Lacking such a determination, it is not possible to prove the element of damage in the wrongful life cause of action (and see also: Bilha Kahane "Pitsui begin Kitsur Tochelet Chayim 've'haShanim ha'Avudot' baTviot b'Ila shel Holada b'Avla" *Mishpatim al Atar* D 1, 4 (5772)).

The Difficulties Regarding the Element of Causal Link

22. The approach of President A. Barak in *Zeitsov* avoids the difficulties inherent in the very need to make a comparison between life with disability and non-existence. President Barak proposes a different basis for recognition of the "wrongful life" cause of action. According to his approach, the damage element should be defined as "defected life", in comparison with life without defect. Indeed, in this way a solution is provided for the difficulty in defining the damage element in the tort and avoids the need to enter into the complex ethical questions involved in it (that is: whether and when it can be said that it would be better for an infant not to have been brought into the world). However, this approach contains other difficulties, which are no less disturbing, regarding the element of causal link.

23. The difficulty in determining a causal link between the negligence and the damage of a life with disability stems from the uncontroversial fact that it is not the negligence of the doctor which caused the damage of "defected life" (as per the definition of President Barak). Indeed, it is not the doctor who caused the disability of the infant, as even without the negligence, the infant could not have entered the world any other way than with his disability. In other words: proper medical care could not have led to prevention of the disability, and the possibility of that particular child being born without disability does not even exist. Deputy President Ben-Porat discussed this in *Zeitsov*, stating that:

> There was no possibility that the minor would enter the world whole and healthy. Determination of damage, by the vary nature of damage, requires comparison between the situation of the claimant without the tort, and the situation after it. The only interpretation of this rule in our case is, to my best understanding, the comparison between nonexistence (without the negligence) and defected existence (as a result of the negligence). *Charging the harmer on the basis of a comparison with a healthy child means punishment on foundations of an imaginary reality…* The solution which my colleague supports seems to me to be impossible from the legal standpoint, and with all due respect – also unjust (*Zeitsov*, at p. 105; emphasis added).

The approach of President Barak thus deviates from the fundamental principle of the law of compensation regarding *restitutio in integrum* (and see the criticism by Perry in his aforementioned article, at pp. 559-560). Note that President Barak was

aware of these difficulties, but wished to find a solution which would allow appropriate compensation for the children and their parents.

24. The legal difficulties detailed above are not merely "technical" difficulties, to be "overcome". From the standpoint of substantive justice, the meaning of the lack of causal link between the negligence and the only damage which can be certainly identified (the difference between life with disability and life with no disability) is that the particular harmer did not cause damage to the damaged party; determining liability in such a case would itself be an injustice. From that standpoint, there is also no place for the argument that "one of the weighty reasons for making doctors or other tortfeasors liable in the case at hand, is the reason that there is a negligent tortfeasor, and across from him there is an infant with a defect – at times a most severe one – and in the balance that is called for between the two, the sentiment of justice always tends toward the victim, the infant, who must live with his disability… it can be said that the situation is similar to a negligent driver who drove in his car with criminal negligence and almost hit and killed an innocent pedestrian, who at the last moment escaped a fatal collision with a vehicle. Can it be said that the '*mens rea*' of a hasty and negligent driver who, only by chance, did not conclude his driving with a fatal result, is normatively different from the same driver for whom the same driving concluded in a tragic result?" (SHMUEL YELINEK, HOLADA B'AVLA: ZCHUYUT, TVIAH UPITSUIM 57-58 (1997)). This type of argument, although it may be valid from an ethical-moral standpoint (and in fact this is the philosophical issue of "moral luck"), is not valid from the tort law standpoint. Tort law does not determine liability due to *negligent conduct*, but rather due to *causing damage negligently*. So it is regarding considerations of corrective justice, and so it also is from the standpoint of efficient deterrence. Where it cannot be said that the results of the defendant's conduct (life with disability versus nonexistence) are damage; and where the only damage that can be shown (life with disability versus life with no disability) was not caused by the negligence – it is not right or just to cast liability upon the defendant.

Note also, that the path from recognition of the child's action for wrongful life directed against the doctor, to recognition of the child's action against the parents who begat him, is a short one; and no approach is interested in advancing that.

Annulling the "Wrongful Life" Cause of Action – The Moral Aspect

25. Recognition of the cause of action for "wrongful life" is faulty not only due to legal difficulties, but also due to difficulties regarding principles and values.

Definition of life itself – even if it is life with disability – as damage, and the determination that it would have been better for a certain person not to even have been born, contain an unacceptable violation of the view that life has inherent value, that does not diminish, and certainly does not disappear, due to the existence of a defect or the existence of a disability (see, *e.g.*: Roee Gilber "haTsorech baHachra'ot Kashot baTviot shel Chayim b'Avla veHolada b'Avla: He'arot v'Hearot b'Ikvot T.A. (Mechozi Haifa) 259/02 A v. The State of Israel" MOZNEI MISHPAT 7 441, 466-467 (2010)). This view is an important and necessary part of our belief and recognition of the sanctity of life, the value of the individual and his dignity, and the right of people with disabilities to dignity and equality.

26. Since the *Zeitsov* ruling was handed down twenty five years ago, these principles received constitutional and statutory entrenchment. Basic Law: Human Dignity and Liberty determines, in Article 1, the "fundamental principles", according to which the basic rights of the individual in Israel are based upon the recognition *of the value of the individual and the sanctity of his life*. The recognition of these values is based both on universal moral values and the values of the State of Israel as a Jewish state that sanctifies the value of life. The individual is born in God's image. Having been born, his dignity and the sanctity of his life are to be protected. His life is priceless, be the difficulties as they may. His life is priceless, be the disabilities as they may. Life is a supreme value – for all.

This moral-legal view is expressed well in the Equality of Rights for People with Disabilities Law, 5758-1998, which determines as a "basic principle" in section 1 that:

> The rights of people with disability and the commitment of society in Israel to those rights are based upon the recognition of the principle of equality, the recognition of the value of the individual who was created in [God's] image and on the principle of the dignity of every person.

Section 2 of the law determines that its objective is:

> …to protect the dignity and liberty of a person with disabilities, and to entrench his right to equal and active participation in society in all areas of life, as well as to provide an appropriate solution for his special needs in a way which will enable him to live his life with maximal independence, privacy and dignity, whilst realizing his full ability.

27. According to our societal view, in the framework of our moral belief, and pursuant to our legal principles, the definition of the life of a person with disabilities as "damage" is not appropriate, is not moral and is not possible. It substantively violates the principle of the sanctity of life. Quantification of the damage of a person with disability – in comparison to the possibility that he would not have been born at all or in comparison to a person with no disability – is itself a violation of the value of his life and of the presumption, which is not to be negated, that the value of the lives of people with disabilities is absolute, and not relative.

28. Indeed, the cost of recognition of the "wrongful life" cause of action is so severe, that in France, for example, in which the Cour de Cassation recognized the cause of action for wrongful life, it was actually organizations of disabled persons which harshly criticized that caselaw, and argued that it relates to their lives as inferior even to nonexistence (as a result of that criticism, *inter alia*, the law in France was amended. See: Gil Sigal "Ma'amar haMa'arechet – al Holada b'Avla b'Yisrael veKol Koreh le'Shinui" MISHPAT REFUI VE'BIO ETIKA (vol. 4) 10, 12 (2011)(hereinafter: *Sigal*); Perry, at pp. 524-525; A. M. Duguet, *Wrongful Life: The Recent French Cour de Cassation Decisions* 9 Eur. J. Health Law 139 (2002)).

This position of principle is also expressed in the caselaw of the courts in the various United States. Thus, for example, it was determined in the aforementioned *Bruggeman* case:

> It has long been a fundamental principle of our law that human life is precious. Whether the person is in perfect health, in ill health, or has or does not have impairments or disabilities, the person's life is valuable, precious, and worthy of protection. A legal right not to be born – to be dead, rather than to be alive with deformities – is a theory completely contradictory to our law (718 P.2d at 642).

So it is there, and so it is here in Israel as well.

In *Berman v. Allan,* 80 N.J. 421, 404 A. 2d 8 (N.J. 1979) it was written that:

> No man is perfect. Each of us suffers from some ailments or defects, whether major or minor, which make impossible participation in all the activities the world has to offer. But our lives are not thereby rendered less precious than those of others whose defects are less pervasive or less severe.

For the same reasons themselves, the Court in Canada refrained from recognizing the "wrongful life" cause of action, clarifying that this view is common to all of the Common Law systems, excepting a small number of states in the United States:

> It is Unlikely that Canadian courts will entertain wrongful life claims in the near future. There are many technical and policy objections to them and this has led to a rejection of these claims in all common law jurisdictions other than a few American states… There is a risk that the recognition of a wrongful life claim will devalue the sanctity of life in general and the plaintiff's life in particular. A finding of liability may be interpreted as a finding that the plaintiff's life is a legally recognized loss and that he would be better off dead (Osborne, *supra*, at 141).

29. It is thus no wonder that the result we have reached unanimously, regarding the need to annul the "wrongful life" cause of action, was reached also by the majority of the members of the *Mazza Commission,* who determined that "the recognition of the cause of action is at odds with the fundamental values of our law" (the *Commission Report*, at p. 38). This result is also in line with the current law in the great majority of the Common Law states, as clarified below.

Comparative Law

30. The difficulties I have discussed led the great majority of the various legal systems not to recognize a cause of action for "wrongful life". The great majority of courts in the states of the United States do not recognize the cause of action for "wrongful life" (see, *e.g.*: *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1980) (applying South Carolina law); *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978); *Walker ex rel. Pizano v. Mart*, 790 P.2d 735, 740 (Ariz. 1990); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1210 (Colo. 1988); *Garrison v. Medical Center of Delaware, Inc.*, 571 A.2d 786 (Del. 1989); *Kush v. Lloyd*, 616 So. 2d 415, 423 (Fla. 1992); *Spires v. Kim*, 416

S.E.2d 780, 781 - 82 (Ga. Ct. App. 1992); *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (Idaho 1984); *Clark v. Children's Memorial Hospital*, 955 N.E.2d 1065, 1084 (Ill. 2011); *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230, 251, 512 N.E.2d 691, 702 (Ill. 1987); *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 635 (Ind. 1991); *Bruggeman v. Schimke*, 718 P.2d 635 (Kan. 1986); *Kassama v. Magat*, 792 A.2d 1102, 1123 (Md. 2002); *Viccaro v. Milunsky*, 406 Mass. 777, 783, 551 N.E.2d 8, 12 (Mass. 1990); *Taylor v. Kurapati*, 236 Mich. App. 315, 336 - 37, 600 N.W.2d 670, 682 (Mich. 1999); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 366, 308 N.W.2d 209, 213 (Mich. 1981); *Miller v. Du Hart*, 637 S.W.2d 183, 187 (Mo. App. 1982); *Smith v. Cote*, 128 N.H. 231, 252, 513 A.2d 341, 355 (N.H. 1986); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (N.Y. 1978); *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (N.C. 1985); *Hester v. Dwivedi*, 733 N.E.2d 1161, 1165 (Ohio 2000); *Ellis v. Sherman*, 512 Pa. 14, 20, 515 A.2d 1327, 1339 - 30 (Pa. 1986); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *James G. v. Caserta*, 332 S.E.2d 872, 880 (W. Va. 1985); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (Wis. 1975); *Beardsley v. Wierdsma*, 650 P.2d 288, 290 (Wyo. 1982).

31. The reasoning used as a basis in this caselaw is similar to that detailed above. Thus, for example, it was determined that the court has no standard according to which it can determine that it would have been preferable for a person not to have been born, and that in any case a person does not have the right not to be born (see, *e.g.*: *Elliot v. Brown*, 361 So. 2d 546, 548 (Ala. 1978)). The lack of the right not to be born, it is emphasized, does not contradict the right of a woman to have an abortion:

> [A] legal right not to be born is alien to the public policy of this State to protect and preserve human life. The right of women in certain cases to have abortions does not alter the policy (*Elliot*, 361 So. 2d at 548).

An additional reason, that is also used by the courts in the various states, is that there is no real possibility of *quantifying* the compensation for "wrongful life", as that would require determining the relative value of the situation of nonexistence – a situation regarding which there is no information (see: *Siemieniec*, 512 N.E.2d at 697). The courts in the United States also discussed the difficulty in determining criteria for differentiation between cases where the severity of a person's disability leads to a situation in which it would have been preferable for him not to have been born, and cases where the disability is not that severe (see, *e.g.*: *Siemieniec*, 512 N.E.2d at 699).

32. Three states alone in the United States have judicially recognized the cause of action for "wrongful life": California (see: *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (Cal. 1982) ; *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 447 (Cal. 2d Dist. 1980)); Washington (*Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (Wash. 1983)); and New Jersey (*Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (N.J. 1984)). In this caselaw no answer is found for the difficulties in recognizing the "wrongful life" cause of action. In fact, most of the reasoning at the basis of the judgments that recognized the "wrongful life" cause of action regards the desire to assist, by way of charging compensation, people

who need it due to their disability, at least where it is possible to locate a person who acted negligently. Thus, for example, the court declared expressly in *Procanik*:

> Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction (478 A.2d at 763).

It is obvious that we cannot use such reasoning to recognize a cause of action in tort law. It might be taken into consideration, and should be taken into consideration, in determining the amount of compensation after the tort has been recognized.

33. A similar approach, which characterizes most of the courts in the United States, was taken by other Common Law states. In *McKay v. Essex Area Health Authority* [1982] 1 QB 1166, it was determined in England that lacking express legislation determining otherwise, Common Law does not recognize a cause of action for "wrongful life" (in England such a statute was enacted; the case revolved around a girl born before the statute entered effect). Influenced by this case, and for reasons similar to those detailed above, the cause of action for "wrongful life" was rejected in Canada as well (see *e.g.*: *Bovingdon v. Hergott*, 2008 ONCA 2, 290 D.L.R. (4th) 126; Phillip H. Osborne, *Essentials of Canadian Law: The Law of Torts* 140-141 (2000)) and in Australia (*Harriton v. Stephens* (2006) HCA 15). In the latter case, the Supreme Court of Australia rejected the action of a child for wrongful life, ruling that the damage cannot be assessed by comparing life with a defect to no life whatsoever (see also: *Waller v. James* (2006) HCA 16).

In Germany the Federal Constitutional Court ruled that the cause of action for "wrongful life" should not be recognized (BVerfGE 88, 203 (269)), as it contradicts the constitutional principle of human dignity, entrenched in Article 1 of the German basic law. Germany of today, having internalized the horrors of the past, has recognized in its constitution and the caselaw of its courts the duty to sanctify human life.

The Supreme Court of Australia also reached a similar conclusion (OGH (25.5.1999) JB1 1999, 593). In France as well, as a result of caselaw that recognized the cause of action of the child, the law was amended in 2002, determining that a person cannot claim that his very birth caused him damage. The law allows the child's action only if the doctor's conduct directly caused his disability or worsened it (for a circumspective survey of the comparative law and of caselaw of additional states, see: Perry, at pp. 518-525; the *Commission Report*, at pp. 32-38; Sigal, at p. 12).

34. The understanding that an independent cause of action for "wrongful life" should not be recognized is thus shared by many legal systems. There is, then, a sort of "global consensus", common to the various legal systems, regarding negation of the cause of action for "wrongful life" (at very least without legislation that determines otherwise). It seems that a judge, who

sees himself (*inter alia*) as part of this global legal system, and who takes part in his writing in the "global chain novel", to paraphrase the well known metaphor of Ronald Dworkin ((RONALD DWORKIN, LAW'S EMPIRE 228-29 (1998)), will place before his eyes the existence of the existing consensus regarding a certain legal issue:

> [Global judicial cooperation] can also serve as a restraint imposed upon domestic courts, preventing them from exceeding the borders of the general consensus about what the "novel" should tell... referral to foreign law is similar to Dworkin's metaphor of a chain novel. When a judge considers himself part of the system - for that matter the global legal system - he will tend to avoid a significant departure from the global consensus (Eliezer Rivlin, *Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty*, 21 Fla. J. Int'l L. 1, 15 (2009).

Indeed, a global consensus does not oblige a court in our legal system, and in fitting cases, there might be a good reason to deviate from it; however, there is no doubt that it should be given appropriate weight, while relating to the reasons and reasoning that led to its creation, and examining whether it should be adopted in the framework of the Israeli legal system as well. In the issue before us, we should not deviate from the global consensus. The Israeli legal system sanctifies human life, and blocks any detraction from the value of life. The life of a person, any person, is better than his death.

35. Thus, our conclusion is that the child's cause of action for "wrongful life" can no longer be recognized. However, from the practical standpoint, as clarified below, a significant expansion of the cause of action at the disposal of the parents of the infant due to "wrongful birth" – a cause of action the recognition of which is not controversial – will allow granting the parents compensation that will cover the costs of raising him and all of his needs even after he grows up, and for the entire period of his life expectancy.

The Parents' Cause of Action – an Action for "Wrongful Birth"

36. Recognition of the action for wrongful birth – the parents' action – does not raise the same problems of law and principle involved in recognition of the child's action. On that issue there was full agreement between all the Justices on the panel in *Zeitsov*. Thus wrote President (then Justice) Barak in that case (at p. 113):

> "Indeed, recognition of the liability of the doctor toward the parents is in line with the regular rules of negligence law… between the doctor and the parents (who belong to the type of people who are cared for by the doctor) there is proximity, and the doctor has a notional duty of care. On this issue, there is no importance to the differentiation between a situation in which a doctor was negligent and without the negligence the minor would have been born healthy, and a situation in which had it not been for the negligence the minor would not have been born at all. In both

> cases, we are dealing with the damage of parents and the deviation of doctors from the proper level of care. In the proper balancing between the interests of the various parties, the monetary burden of the medical negligence should be cast upon the creator of the risk and his insurer. It is to be hoped that in this way a proper level of health can be ensured. There is no justification for granting immunity to doctors who have caused damage by their negligence… parents have a right to plan their family, and in that framework it is appropriate for the attending doctor to take proper cautionary measures toward them and inform them of the risks involved in conception, pregnancy, abortion, and birth.
>
> A necessary element in formulating liability through the tort of negligence is the element of damage. The existence of this element does not, in and of itself, raise any special problem in the context of the parents' action…

We too are of the opinion that the parents' cause of action for wrongful birth is in line with the regular definition of the tort of negligence, and does not raise any real difficulty regarding the issue of *restitutio in integrum*. Indeed, in the context under discussion this cause of action raises difficulties regarding the element of causal link. In addition – and President Barak discussed this *Zeitsov* – "questions might arise regarding the heads of damages for which compensation is given (*i.e.*, whether compensation is given for the expenses and pain and suffering involved in the raising of a child), and regarding the calculation of the compensation (*i.e.*, should the benefit stemming from raising the child be set off from the loss)" (*id*, at p. 113). These difficulties cannot negate the recognition of the parents' cause of action, and in any case, they will be fully worked through below.

37. From the standpoint of morality and principle as well, the parents' claim does not raise the same difficulty that arises regarding the infant's action. In the parents' action, the life of the child itself is not defined as damage. The damage is manifest in the additional monetary implications and the psychological implications which the parents are forced to bear, due to the negligence. Accepting the parents' claim does not mean that the child's life has no worth, or that it would be better *for him himself* had he not been born; its meaning is that the parents were denied the possibility of choosing not to raise a child with disability, with all the difficulty that entails. There is a real difference between relating to a living and breathing child, with a personality, desires and feelings – as someone whose life is worthless, to the point that it would be better for him had he not been born, an attitude which we are not willing to accept; and relating to the right of the parents, as they were, prior to the negligent act, to choose whether to continue the pregnancy or to have a legal and permitted abortion, at the stage when their child was a fetus, devoid of independent life. Therefore, there is no contradiction between my approach regarding the inherent value of life and the recognition of the right of the parents to choose not to bring into the world a child with disability of a severity that legally allows having an abortion.

When examining the parents' aforementioned right to choose, the entirety of the considerations must be taken into account, including their right to build their lives as they choose (within the law) and the considerable difficulties on the psychological, practical and even economical planes involved in raising a child with disability. *Nota bene:* that is not decisive in the moral issues that are external to the tort issue, which deal mainly with the question when and to what extent the parents' choice to do everything in order to avoid raising a child with disability is legitimate, from the moral standpoint. It suffices to say that this choice is composed of many factors, which do not necessarily include a worldview according to which the life of a child with disability is not a life worth living; it is a legal choice, which is at the disposal of the parents and is denied them due to an act of negligence.

38. Indeed, naturally the point of view of the parents usually changes after the birth of their child. Naturally, once their child has been born, his parents love him. The disability only intensifies the love. Nonetheless, they are often capable – and the court too is capable – of separating their present love for their child from their sincere statement that if they would have been given the choice in advance, before their child was born and became a person, they would have chosen not to bring into the world a child with disability like his.

39. Finally, note that we found no basis in the argument raised before us, according to which the parents do not have a cause of action as sufferers of direct damage, but only as mitigators of the child's damage. In CA 754/05 *Levy v. Mercaz Refui Sha'arei Tsedek* (yet unpublished, 5 June 2007)(hereinafter: *Levy*) we discussed the nature of the differentiation between a sufferer of primary damage and a sufferer of secondary damage:

> "Classification of damage sufferers as primary or secondary is the result of the attempt to identify the character of the causal link between the damage caused them and the tortious conduct. The primary damage sufferer is the party whose injury – physical or property – is the direct result of the tort; the sufferer of secondary damage is the party injured as a result of the injury caused to *another* party" (*id,* at par. 22 of the judgment).

According to that standard, the parents' damage, which establishes a cause of action for them due to "wrongful birth", puts them in the position of primary damage sufferers. The injury to them, both on the monetary plane (derived from their duty to care for the special needs of the child) and on the non-monetary plane, is a direct injury, due to the very fact that their child was born due to the negligence. The tortious conduct led directly to the damage of the parents. Not only was the negligent act committed directly toward the parents; the injury to them was also a direct injury. The injury does not derive from the disability of the child – as that disability was not even caused by the negligence; the injury stems from the costs that they bear and from the pain and suffering that they experience. The birth of the child was accompanied with an economic and psychological injury to the parents. This injury is in fact the realization of the risk at the outset, which makes the

conduct of the damager tortious. If in the *Levy* case the mother was on the borderline between being a sufferer of primary damage and the sufferer of secondary damage, in the case under discussion the border is crossed, and it can be clearly said that there is a direct injury (and see, also: Asaf Posner "haIm Yoter hu Tamid Yoter? Hebetim Ma'asi'im laMachloket baSugiat haHolada b'Avla", at note 6 (to be published in the *S. Levin Volume*)).

40. The conclusion is that there is no or hurdle of law or principle preventing recognition of the parents' cause of action for wrongful birth, and regarding that issue we should not stray from the rule determined in *Zeitsov*. Twenty five years after the *Zeitsov* ruling was handed down, we are making more flexible the *worthy purpose* which stands at its base, and allowing a solution to the great majority of the medical, rehabilitation, and assistance needs of the child, but we do so in the framework of his parents' action for wrongful birth.

41. Alongside the theoretical recognition of the parents' cause of action due to wrongful birth, I see fit to discuss three issues that arise regarding the *implementation* of that cause of action. They were not discussed extensively in *Zeitsov*, and the time has come for a clear rule to be determined regarding them by this Court – these issues regard the question of proving the causal link, assessment of damage, and the head of damages of injury to autonomy.

Proving the Causal Link

42. A central difficulty inherent in the wrongful birth cause of action relates to the element of causal link between the tortious act (the doctor's negligence) and the alleged damage (that stems from the child's disability). Indeed, as any tort action, the parents' action also requires proof of a causal link, and it has already been ruled on that matter that "the task of deciding the question of the existence of a causal link between the breach of the disclosure duty of the doctor and the damage manifest in wrongful birth – is not at all easy. It requires the court to try to search the souls of the parents and to determine what their position would have been regarding the question of continuing the pregnancy had they been exposed to all of the information they needed (*Hendel, J.* in CA 9936/07 *Ben David v. Entebbi* (yet unpublished, 22 February 2011)).

In the cases under discussion, it is clear that the infant's disability is a birth defect that was *not* caused as a result of the doctor's act or as a result of his omission. In such circumstances it must be proven in the framework of proving the element of causal link, that had it not been for the negligence, the parents of the infant would have chosen to terminate the pregnancy by having an abortion, and thus would have refrained from bringing him into the world. Against that backdrop, a number of practical, moral and theoretical questions arise: how will the parents prove in such actions the element of causal link, in other words, that had it not been for the negligence they would have chosen to terminate the pregnancy? Is it appropriate, in light of the psychological and moral difficulties which examining the parents on the witness stand raises, to waive the requirement of proving causal link in cases for wrongful birth completely? Is the court permitted to rely upon group considerations

as a basis for deciding the question of causal link? These questions will be examined below.

43. In order to prove the causal link between the negligence and the various types of damage stemming from the child's defect, it must be shown, *in the first stage*, that if all of the relevant medical information (information which was not brought to the knowledge of the parents due to the negligence) would have been before the pregnancy termination committee, the committee would have permitted the parents to terminate the pregnancy. *In the second stage*, and only if the answer to the first question is positive (as otherwise, in any case the causal link is broken), the parents must show that if it weren't for the negligence, they indeed would have applied to the pregnancy termination committee for permission (Mr. Posner, in his aforementioned article, calls stages "hurdles": "the objective hurdle" requires proof that the pregnancy termination committee would have approved the termination of the pregnancy; and "the subjective hurdle" requires showing that if it weren't for the negligence, the woman would have decided to terminate the pregnancy).

44. Proof of the parents' entitlement to terminate the pregnancy pursuant to a decision of the pregnancy termination committee relies on clear criteria, entrenched in statute and in Health Ministry guidelines. Performing artificial abortions in Israel is arranged in sections 312-321 of the Penal Law, 5737-1977 (hereinafter: the *Penal Law*). Pursuant to the provisions of that law, performing an abortion ("termination of pregnancy") is conditional upon the informed consent of the woman and permission from the pregnancy termination committee. The makeup of the committee and the causes for granting permission are generally set out in sections 315-316 of the *Penal Law*. For our purposes the cause determined in section 316(a)(3) of the law, regarding an infant that is "liable to have a bodily or psychological defect," is important. To this general provision we must add the guidelines of the Health Ministry, which detail how the committee is to employ its discretion, according to the stage which the pregnancy has reached. On this issue, an important criterion is the question of the fetus' reaching the "viability stage", set at the age of 24 full weeks. Whereas the "regular" committee hears applications for termination at the beginning of a pregnancy, over this age of pregnancy, a "multi-district committee", as defined in Health Ministry circular 76/94 of 28 December 1994, hears the application for termination of pregnancy. Health Ministry circular 23/07 of 19 December 2007 is intended to arrange the issue of termination of pregnancy at the viability stage, and determines on that issue a detailed hierarchy of disabilities, ranked according to their influence on functioning (slight, medium, and severe disabilities). The circular determines a clear relationship between the type of disability, the risk that it will occur, and the stage of pregnancy.

45. The criteria that guide the committees serve, *de facto*, to demarcate the boundaries of the wrongful birth cause of action, as this cause of action does not arise – due to lack of causal link – where the disability is not of the type that would lead to the granting of permission to perform an abortion. Furthermore, there is a logical-statistical fit – which is an appropriate one – between the considerations that the committees take into account in their decisions, and the considerations that guide the parents when they wish to receive permission to terminate a pregnancy. In light of that, it is appropriate that the pregnancy termination committee decision serves also as

a sort of *refutable presumption* regarding the parents' stance about terminating the pregnancy.

That presumption may help in solving a part of the difficulties that arise from *the second stage* needed in order to prove the causal link. As stated above, the parents must prove that if it hadn't been for the negligence (that is to say, if the full relevant medical information had been before them), they would have chosen to terminate the pregnancy. It is uncontroversial that requiring the parents to prove that they would have terminated the pregnancy, by examining them on the witness stand after their child has come into the world, raises considerable difficulties.

46. The first difficulty stems from the very need to retrospectively prove a *hypothetical* factual causal chain: what would have happened if the parents would have known about the disability during the pregnancy? Would they indeed have applied to the authorized committee for permission to terminate the pregnancy? And if they would have applied – would the committee have approved their application? And if it would have approved the application – would the parents have terminated the pregnancy? This difficulty does not characterize only actions for wrongful birth; the need to retrospectively decide hypothetical questions arises every day in torts cases. Thus, for example, the *Kadosh* ruling discussed the difficulty in implementing the causal link tests in the framework of the informed consent cause of action, due to the need to retrospectively asses an assumed event (CA 1303/09 *Kadosh v. Beit haCholim Bikur Cholim*, par. 26 of my opinion (yet unpublished, 5 March 2012)(hereinafter: *Kadosh*)). "The accepted causation tests…" – thus was written in another case – "are not appropriate for cases in which the court must hypothetically assess how a given patient would have acted if the doctors had provided him in advance with the information regarding the risks and opportunities involved in a given medical treatment (CA 4384/90 *Vaturi v. Beit haCholim Laniado*, 51(2) IsrSC 171, 191 (1997)).

47. In *Kadosh* – in the context of informed consent – we discussed another difficulty, regarding the proper test for proving causal link (*id*, par. 26 of my opinion). I noted there that the *objective* test provides lesser protection to the interest regarding the patient's control over his body, as it "distances itself from the desire of the particular patient and relies upon the desire and considerations of the reasonable patient" (*Strasberg-Cohen, J.* in CA 2781/93 *Da'aka v. Beit haCholim 'Carmel', Haifa*, 53(4) IsrSC 526, 606 (1999)(hereinafter: *Da'aka*)). Yet, as detailed there, the choice of a *subjective* test also raises considerable difficulties, because at the stage when the damaged party knows of the tortious consequences, that affects his considerations. On that issue noted President (then Justice) D. Beinisch "there is no doubt that there is practical difficulty in discovering the stance of the patient at the relevant time, as he always deals with this question with a backward glance, at a time when he suffers from the results of the treatment. In many judgments the courts noted that it is not human to require a person in agony due to medical treatment that he was given, to testify and reliably present the answer to the question what he would have done at the time the decision to undergo the treatment was made, if he had known of all the possible results" (*Da'aka*, at p. 553).

These difficulties raised by the implementation of the subjective test for examining the existence of causal link are infinitely intensified when dealing with the

parents' claim for wrongful birth. The assumption that "it isn't human" to expect that a patient "testify and reliably present" how he would have acted had he known the facts necessary for decision as they really were, is reinforced in the context under discussion and emphasizes the *psychological difficulty* that parents are forced to deal with. Indeed, in addition to the regular difficulty inherent in such testimony, the parents are also forced to explain how their testimony on the witness stand, that they would have chosen to terminate the pregnancy in case of a defect like the one that occurred, is in line with their love for their child, once he has been born. In this context, the argument has been made that where the court accepts the parents' factual version, according to which they would have aborted the fetus, a *moral problem* is also created, and a rift is liable to be caused between the parent and the child. That, however, is not so.

48. Indeed, the moral dilemma involved in investigating the parents on the witness stand reflects, in full force, the complexity of the cause of action for wrongful birth. The question of causal link is examined *ex ante*, and examines what the parents would have decided at the time of the pregnancy had they been supplied with the full relevant data; however their testimony is given *ex post*, after their child has already been born (this dilemma also arises regarding the damage question, and shall be discussed in that context below). Mr. A. Posner answers this dilemma, in the framework of a dissenting opinion in the commission, as follows: "a completely correct answer is that when the question of termination of pregnancy (or the question whether to get pregnant) was under discussion, the infant did not exist, at all (in case the question was whether to get pregnant), or in his present form, the form of a living person. A parent is not required to tell his child 'I am sorry that you are alive' or 'I don't love you'; it is sufficient that he persuade that when the pregnancy was in its early stages, or the fetus not yet a known person, the mother would have terminated the pregnancy" (*Commission Report*, at p. 105). There is no better concretization of parental sentiment than the words which came from the heart in one testimony before the district court (in CC (Be'er Sheva District Court) 3344/04 *R. W. v. Maccabi Sherutei Briut* (unpublished, 21 August 2008)). The testimony – of a woman raising her handicapped son – was that she would not have hesitated to terminate the pregnancy had she known of the existence of any defect, on the basis of the difficulties she experiences in the daily confrontation with the difficulties of her previous child, who suffered from cerebral palsy. Despite her unwavering position regarding getting an abortion, the mother testified: "I love R. very much, he contributes an enormous amount to the family, he is our light, he is our sun… I do not say he constitutes damage to the family, but if I would have gotten an abortion, in another year the same R. would have been born, but with a hand, and then he would have contributed to the family in the same way but he would not suffer from all the problems that a handicapped child has… we now are crazy about him, he is everything for us, that is clear…" (*id*, par. 4 of the judgment).

49. An additional difficulty arises *on the practical level*. It is argued that proving the causal link element might be more difficult for certain groups of claimants than for other such groups. The courts have concluded, more than once, that certain parents would have chosen not to have an abortion, even if they would have had all the needed information. The courts so ruled, finding assistance in data on issues such as lifestyle and religious belief; existence of fertility problems and difficulty in conceiving in the past; as well as the age of the mother and her obstetric history.

According to this argument, for example, an ultra-orthodox mother, whose first pregnancy was achieved in excruciating fertility treatments at a relatively late age, is likely to have a more difficult time proving that she would have an abortion had she been aware of the existence of a risk that the child would be born with a defect, in comparison to a secular young mother with a number of children whose pregnancy was spontaneously achieved. Moreover, the use of such data led to the argument – which was sounded in the hearing before us as well – that the requirement of proving that had it not been for the negligence the parents would have chosen to terminate the pregnancy, harms parents who are willing to bear the difficulty of raising a child with disability and rewards the very parents who are not willing to bear that difficulty (a similar argument is also raised in the legal literature in the United States, and see: Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harv. C.R.-C.L. L. Rev. 141, 172 (2005); it is further claimed that parents who due to their religious beliefs would not have an abortion are thus discriminated against.

50. As a result of these difficulties, in a number of judgments of the first instance the opinion was expressed that the requirement of proof that the parents would have chosen to have an abortion can be completely waived, and replaced with a legal presumption. Thus, for example, Judge M. Drori ruled in CC (Jerusalem District Court) 3198/01 *A. v. The Jerusalem Municipality* (unpublished, 12 May 2008) that:

> *prima facie*, such an a-priori presumption stands in contradiction to one of the foundations of tort law, that the conduct of the defendant or defendants was the *sine qua non* of the damage… thus, for example, if it is positively proven that the damaged party would have been born with the defect even if there hadn't been any negligence, *prima facie*, it should not be said that the negligence is the reason for the damage, and the defendants should not be charged for it…
>
> However, in my opinion, there is great and important public benefit in adopting the approach of Judge Benyamini [regarding waiving the requirement of proof that the parents would have had an abortion – E.R.]. Not only do we prevent the need for the parents' testimony, with their retroactive vacillations, but Judge Benyamini's approach entails equality between all pregnant women, regardless of religion, race or belief.
>
> … is compensation for a secular Jewish woman certain, but all the other women must explain what the range of beliefs is in the religion to which each of them belongs, and whether or not they would have had an abortion?! Is there a need, in each particular case, to focus upon the details of that religion, on the approaches and nuances in it, and to determine whether according to that religion abortion would have been permitted in the circumstances of that defect, and after that, will there be a need to categorize the claimant mother in the relevant subgroup in that religion and to determine whether she would have had an abortion, according to what is customary in that subgroup of that religion?!" (*id*, par. 285-286 of the judgment).

And see the judgment of Judge A. Benyamini: CC (Tel-Aviv District Court) 1226/99 *A.L. v. Yaniv* (unpublished, 29 March 2005).

51. Despite the difficulties described above, the requirement of proving the existence of a causal link between the negligence and the damage cannot be waived (this conclusion was reached both by the majority and by the minority opinions in the *Mazza Commission* – see p. 47 and 98, respectively). A solution like that proposed above is not possible in the framework of existing tort law. It is, *de facto*, the forfeiting of proof of one of the elements of the tort of negligence, as without proving that if it had not been for the negligence the parents would have chosen to have an abortion, it is not possible to prove causal link between the negligence and the birth of the child. Waiving proof of the causal link element in actions of this type would lead to casting liability upon parties who may not have actually caused the damage, and to entitlement of plaintiffs with compensation for damage which was not caused them by a tort. Not only is such a result at odds with tort law and its objectives; in addition, it does not do justice, in that term's basic meaning, with the parties in the suit. In the American legal system as well the mother is required to prove that had it not been for the negligence, she would have had an abortion (see, *e.g.*: *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 776, 233 N.W.2d 372, 377 (Wis. 1975); Alan J. Belsky, *Injury as a Matter of Law: Is this the Answer to the Wrongful Life Dilemma?* 22 U. Balt. L. Rev. 185 (1993)), despite the potential that the parents' testimony on the issue may harm the welfare of the child (*Keel v. Banach*, 624 So. 2d 1022, 1026 (Ala. 1993)).

52. Thus, to the extent that the parents are interested in suing on the basis of the cause of action of "wrongful birth", they must prove the causal link element of that cause of action. The refutable presumption, based upon the decision of the authorized committee, will assist in overcoming these difficulties.

Despite the fact that the proof of the causal link element cannot be waived, there is difficulty in dealing with the details of the religious beliefs of the parents, as well as in dealing with other group-based considerations. In any event, attempting to retrospectively determine how the parents would have chosen to act inherently involves a great extent of uncertainty. The various indications in which courts find assistance – including data such as a religious lifestyle, age, obstetric history and performance of additional tests in the framework of private medicine, are merely general indications, which, practically, rely to a significant extent upon group data. Categorizing the parents in one of these groups or another is plagued with a significant extent of speculation. In cases in which the court must rely upon general, group data, there is no choice but to choose a certain level of abstraction, and courts often determine working assumptions which assist in dealing with the inherent uncertainty (and see, in the context of calculation of compensation: Eliezer Rivlin and Guy Shani "Tfisa Ashira shel Ikaron Hashavat haMatzav le'Kadmuto baTorat haPitsui'im haNeziki'im" *Mishpat v'Asakim* 10 499 (2009)). Furthermore, group data are not always evidence of the tendencies of the individual. Even in routine times – but especially in times of crisis – the individual is likely to stray from group dictates and conventions, especially when they are group conventions. In fact, the individual's original position might be more complex and multifaceted than can be assessed according to his belonging to one group or another. Thus, significant weight should be given to the first question that was presented regarding causal link – the question

whether the pregnancy termination committee would have approved an abortion in a given case.

As mentioned above, the decision of the pregnancy termination committee should serve as a sort of refutable presumption regarding the parents' stance about having an abortion. In general, where an abortion is permissible according to the societal convention, as expressed in the criteria which guide the pregnancy termination committee, as said, it can be assumed, as a factual assumption, that typically, the individuals in society would also plan their actions in a similar fashion. Nonetheless, it should be emphasized that this is a factual, not a normative, assumption; in no way can it determine that refraining from having an abortion, in circumstances in which the pregnancy termination committee would have allowed an abortion, is unreasonable or undesired conduct. Its meaning is merely that from the practical standpoint, it should be assumed that typically, the individuals in society usually act, at least proximately, in a way that fits the criteria that guide the pregnancy termination committees.

53. It should also be emphasized that the presumption according to which, in circumstances where the pregnancy termination committee would allow an abortion the parents would also have submitted an appropriate application to the relevant committee, can not be refuted exclusively through general data, *i.e.*. regarding membership in a certain religious sector. Such data is at times likely to be relevant, but since it represents a single aspect of all the individual data regarding the woman, great caution should be employed in making conclusions upon it. Thus, it should be remembered that the question to be decided is not what is *the stance of the religion* to which plaintiffs belong regarding having an abortion in the circumstances of the case, but rather how the *particular claimants* standing before the court would have acted. As mentioned above, the individual himself is likely to stray from group dictates or conventions, especially when the conventions are group conventions; and relating to him, factually and normatively, as an individual whose choice is not predestined, is inevitable. Thus, it is not sufficient that the parents' religion prohibits them from having an abortion to determine the result; in order for that datum to be relevant for decision, the court must be persuaded that the mother would have obeyed that prohibition *de facto*. Of course, it is not impossible that having an abortion in certain circumstances would be permitted within the various religious beliefs, and often there are various approaches in the different religions regarding the circumstances which justify having an abortion (on this issue see, *e.g.*: CC (Jerusalem District Court) 3130/09 *A.K.V. v. Sherutei Briut Klalit* (unpublished, 28 November 2011); CC (Jerusalem District Court) 9134/07 *Alsayad v. The State of Israel* (unpublished, 17 February 2011)).

In fact, even today the courts of first instance do not rely exclusively upon data such as religious affiliation, and more significant weight is given to the individual data of the case (see *e.g.*: CA 7852/10 *Tidona v. Kupat Cholim Leumit shel ha'Histadrut ha'Ovdim* (unpublished, 15 March 2012); CC (Haifa District Court) 1014/05 *Zidan v. The State of Israel* (unpublished, 24 December 2011); CC (Central District Court 5193-11/07 *S.M.S. v. Malach* par. 5(d)(99)(unpublished, 14 September 2010); CA (Haifa District Court) 10492/97 *Aftabi v. Sherutei Briut Clalit* (unpublished, 30 September 2001)).

54. Finally, it should be emphasized that where it has been proven that the pregnancy termination committee would have allowed an abortion, even if the parents could not prove that they themselves would have chosen to terminate the abortion, that does not derogate from their ability to sue for the damage caused to them due to the violation of their autonomy, and in other words: their right to make such a significant decision in their lives in an enlightened fashion. For that damage they are entitled to separate compensation, and I shall discuss that extensively below.

The Question of Damage and Calculating Compensation

55. Having passed the hurdle of the causal link, it must be further determined, in the framework of the parents' action, what damage entitles them to compensation. The question that needs to be considered is whether the parents are entitled to compensation only for the additional expenses they must bear for the medical care and assistance for their child – and at a certain point living expenses (hereinafter: the *Additional Expenses*), or should they also be compensated for the expenses involved in raising their child, including those which they would have borne had the child been born healthy. These expenses, which a healthy child requires in any case (hereinafter: the *Regular Expenses*), are considered the "base cost" (or "base layer", in the words of commission member Asaf Posner, adv), as opposed to the Additional Expenses which stem from the child's disability.

56. It is uncontroversial that in a regular tort action, compensation is given only for the "Additional Expenses" caused by the tort event, and compensation is not given for the expenses which would have been borne even if the damage would not have occurred. Thus, for example, when an infant is injured due to medical malpractice (and not wrongful birth), the parents are not given compensation for the entirety of the aid that they require. The court reduces, from the number of hours needed to take care of the injured child, the number of hours needed to care for a healthy child, and compensation is given only for the resulting differential, in other words: only for the additional assistance hours. Similarly, a person who is wounded in an accident and needs a commercial sized vehicle in order to get around, will receive only the addition that is derived from his situation, in other words: the differential between the price of the commercial vehicle and its maintenance expenses, and the price of a regular car and its maintenance expenses (and see the examples in the *Commission Report* – the Posner opinion, at p. 115).

It would have been possible to think that the implementation of the *restitutio in integrum* test in the parents' action for wrongful birth would determine that had the negligence not occurred, the child would never have been born, so the parents would not have had to bear any expenses whatsoever for raising the child. Making the parents' situation as it would have been had the negligence not occurred according to the regular rules requires, *prima facie*, compensating them both for the regular expenses involved in raising a child and for the special expenses caused to them due to the child's disability. The "Additional Expenses", according to those principles, also include the regular living expenses.

57. However, in practice, in the parents' action on the basis of the wrongful birth cause of action, the "Additional Expenses", until adult age, are those beyond the regular living expenses. Compensation should not be granted to the parents for the

regular expenses involved in raising a healthy child, during the period before he reaches adult age; they should be compensated only for the additional, special expenses, which they bear due to the birth defect. Indeed, had the negligence not have occurred, the child would never have been born; however, there are good reasons not to charge the negligent damager to pay all of the expenses of raising the child. These reasons reflect the complexity of the cause of action under discussion, and emphasize the theoretical and practical difficulties inherent in this cause of action, with which the courts of various instances have dealt over the years. What are these reasons?

Casting *liability* upon the defendant who caused the damage, as detailed above, is done from an *ex ante* point of view, and under the assumption that if the parents had been given a choice *in advance*, before their child was born, they would have preferred, under the particular circumstances, not to bring a child with that disability into the world; however, examination of the *damage* caused to the parents cannot be performed whilst ignoring the *change* which has occurred in the passage from liability to damage – the change manifest in the birth of the child. Examination of the *damage* must thus be done from an *ex post* point of view, which takes into consideration the fact of the child's existence, which is not considered, and must not be considered, in and of itself, to be damage. *In retrospect*, after the disabled child has been born, his very birth is not considered to be damage in his parents' eyes. The feeling of love which the parents feel toward their child also exists when the child is born with disability. Those feelings also exist if, had they been given a full choice at the outset, the parents would have chosen not to bring the child into the world. After he has entered the world, his parents want him and enjoy the intangible advantages stemming from his very birth and his upbringing. The *Mazza Commission* described this well in its report: "Indeed", it was noted, "the disabled life of the child itself does not constitute damage to the infant, and his parents as well, after he has entered the world, are not considered injured due to his very existence; however, as needs have been created which involve special expenses, the party without whose negligence these special costs would not have been created should bear them" (*id*, at p. 60).

The American Court described this in *Marciniak v. Lundborg*, albeit in a different context (of raising a healthy child whose parents did not want to be born), but from the viewpoint of the child, whose parents are suing for compensation for his birth. The following is applicable also to the need to compensate the parents for the Additional Expenses:

> Defendants next argue that "awarding damages to the parents may cause psychological harm to the child when, at a later date, it learns of its parents' action for its wrongful birth thereby creating an 'emotional bastard.'" Again, we do not agree. The parents' suit for recovery of child rearing costs is in no reasonable sense a signal to the child that the parents consider the child an unwanted burden. The suit is for costs of raising the child, not to rid themselves of an unwanted child. They obviously want to keep the child. The love, affection, and emotional support any child needs they are prepared to give. But the love, affection, and emotional support they are prepared to give do not bring with them the economic means that are also necessary to feed, clothe, educate and otherwise raise the child. That is what this suit is about and we trust the child in the future will be

> well able to distinguish the two. Relieving the family of the economic costs of raising the child may well add to the emotional well-being of the entire family, including this child, rather than bring damage to it (*Marciniak v. Lundborg*, 153 Wis. 2d 59, 67, 450 N.W.2d 243, 246 (Wis. 1990**)**).

58. Of course, that cannot detract from the severity of the difficulties which the parents of disabled children experience or the suffering which is the destiny of parents who themselves experience the suffering of the child; for these damages – to the extent they are proven – the parents will be compensated separately, in the framework of the head of damages for *pain and suffering*. At the same time, the point of departure for the assessment of the parents' damage is that the life of the child – after he has been born – is not, in any way whatsoever, damage for which compensation should be made, and that this is how the parents also see it. Thus, the regular expenses which the parents bear for raising the child – are not damage. The damage is thus manifest in the Additional Expenses – the additional costs stemming from the negligence of the damaging defendant, and it is only natural that the parents receive compensation for them.

59. Here the special and extraordinary force of the action for wrongful birth is revealed: the inherent dissonance between the negligence in providing the information necessary to make a decision whether to bring the child into the world and the character of the damage, which is caused after the child has already entered the world, when his very life is not considered damage.

Nota bene: the same conclusion, according to which the defendant is charged with the Additional Expenses, can also be reached from another perspective, which is actually the other side of the same coin: in principle, the positive results of the birth of the child must also be expressed, and as a practical issue, the way this is done in the framework of the doctrine of compensation is quantification of all of the intangible benefits stemming from the birth of the child and his upbringing, and discounting them from the compensation to which the parents are entitled. A general estimation of these benefits will approximately equal the regular expenses involved in raising a child. Discounting the regular expenses involved in raising the child from the total of all the expenses involved in raising him leads to those very Additional Expenses, which stem from the child's disability (to which the non-monetary damage must be added).

This concludes the discussion of compensation for the parents for the period before the child reaches adulthood.

60. [For the period] after the child reaches adulthood, his parents should be granted compensation for their support of their child, as unlike the usual case, his dependence upon them continues due to his disability during this period as well, and in fact, *for the entire period of his life expectancy*. In the framework of granting compensation for these damages, there is nothing preventing taking into account the length of the period of the child's practical dependency upon his parents, where, due to his disability the child continues to be dependent upon his parents as an adult, and especially so due to the fact that there is no doubt about the parents' duty in principle to care for the needs of their adult children who are dependent upon them; that duty is

even manifest in law, in sections 4-5 of the Family Law Amendment Law (Support), 5719-1959. It is uncontroversial that had there been no negligence, the parents would not have to bear the expenses of support for their child *after* he reaches adulthood.

During the period of his adulthood, had it not been for his disability, the child would be expected to earn his living. To the extent that the disability detracts from his earning ability, his parents have the duty to sustain him and to supplement what he lacks. In other words: during the child's adulthood, his parents bear both the special expenses due to his disability and his regular living expenses, which he himself would have borne, were it not for his disability.

61. Where the child is expected to earn money despite his disability, the amount of his expected earning – in other words, the relevant part of the average salary in the economy – must be subtracted from the compensation granted to his parents. We have already ruled that it should be assumed that a healthy minor, when reaching adulthood, would earn the average salary in the economy, and that this salary would be used for his sustenance, in other words: his living expenses and welfare. From the practical standpoint, the parents should be compensated for the period of the child's adulthood, for all the "Additional Expenses", which, in said period, are the regular living expenses and the special medical and assistance expenses. Only if the infant is expected to earn a certain percentage of the average salary is there a need to subtract this percentage from the compensation. *De facto*, in the usual case, in which the injured child continues to be in his parents' house or in the community, the compensation paid to his parents will not be different than the amount of compensation which would be paid to him himself if he had a cause of action, in the framework of which he would sue for earning losses.

62. This will be demonstrated numerically:

Let us assume that the average salary in the economy is 10,000. Due to his disability, the child's earning ability is reduced by 50%, in other words, a loss of 5,000 has been caused him, and this amount would be paid to him if he had a cause of action of his own. Let us assume, in addition, that he is also entitled to additional medical and assistance expenses (in comparison to a healthy child) of 15,000. In total, the compensation he would receive in his own suit would be 20,000. Seeing as the child does not have a cause of action, and the cause of action is that of the parents, they are entitled, in the usual case, to compensation for all the additional expenses, that is: 15,000 for medical and assistance expenses, and in addition, the child's regular living expenses, which they have to bear due to the detraction from the child's earning ability, in other words: an additional 5,000. In total, the amount that the parents will receive is identical to the amount that the child would receive if he had a cause of action.

It should however be remembered that the compensation is always individual; there thus might be situations in which the compensation changes; for example, when dealing with a child who is expected to live in an institution, which certainly might influence his living expenses.

63. For the sake of comparison: in most of the cases from states in the United States, the parents were granted compensation only for the *Additional Expenses* that

they must bear in order to care for their child which are due to his disability, and they were not compensated for the regular expenses involved in raising a child:

> Although the question of damages has presented a difficult and troublesome problem to those courts which have considered wrongful birth claims, we align ourselves with the majority of jurisdictions which have limited the parents' recovery of damages to the extraordinary expenses - medical, hospital, institutional, educational and otherwise - which are necessary to properly manage and treat the congenital or genetic disorder. *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 260, 512 N.E.2d 691, 706 (Ill. 1987).

Another case clarified (emphasis added):

> Indeed, the central policy of all tort law is to place a person in a position nearly equivalent to what would have existed had the defendants' conduct not breached a duty owed to plaintiffs, thereby causing injury. In the context of wrongful birth, this means the situation that would have existed had the child actually been born in the state of health parents were led to believe would occur. Damaged are not gauged against the state of affairs that would have existed had the child never been born, because parents always assume the costs of healthy children born to them, even if unplanned. This policy can be fulfilled here only by allowing recovery of all future *extraordinary* expanses [the child] will incur. *Kush v. Lloyd*, 616 So. 2d 415, 424 (Fla, 1992).

The decisions of the American courts were based upon various reasons, including those detailed above. Thus, for example, it was held that if, in principle, the parents were entitled to compensation for all of the expenses of raising their child, as had it not been for the negligence he would never have entered the world and his parents would not be required to bear any expenses for him, the intangible benefits involved in the birth and raising of a child, including a child with disabilities, must be set off from that compensation. It was held that those benefits equal, at very least, the regular expenses involved in raising a child (*Ramey v. Fassoulas*, 414 So. 2d 198, 200-01 (Fla. App. 3d Dist. 1982)). It was further determined that casting the regular expenses involved in raising a child upon a third party is not proportionate to the fault of the negligent party and is contradictory to the idea that the primary and predominant duty to care for the needs of the child, whether wanted or not, is that of the parents (see: *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 518-19, 219 N.W.2d 242, 244-45 (Wis. 1974); *Ramey*, at p. 200). Last, it has been emphasized that in their decision to bring a child into the world, the parents necessarily agree, of their own volition, to bear the regular expenses of his upbringing, and thus it cannot be said that these expenses were caused by negligence (*Clark v. Children's Mem. Hosp.*, 955 N.E.2d 1065, 1083 (Ill. 2011)). On the other hand, a minority of US state courts charged expenses for all of the expenses of raising a child born due to the defendant's negligence, as had it not been for the negligence, the child would not have been born at all (*Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981)).

64. In England as well the courts tend not to charge compensation for the full expenses of the child's upbringing, and the compensation is granted only for the

additional expenses. The English judgment in *Parkinson v. St. James and Seacroft University Hospital NHS Trust* explained:

> A disabled child needs extra care and extra expenditure. He is deemed, on this analysis, to bring as much pleasure and as many advantages as does a normal healthy child. Frankly, in many cases, of which this may be one, this is much less likely. The additional stresses and strains can have seriously adverse effects upon the whole family, and not infrequently lead, as here, to the break up the parents' relationship and detriment to the other children. But we all know of cases where the whole family has been enriched by the presence of a disabled member and would not have things any other way. This analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more. *(Parkinson v. St. James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530).

Similarly, the courts in Canada follow the English system, and the compensation is granted only for the additional expenses stemming from his upbringing (*Zhang v. Kan*, [2003] B.C.J. 164, 2003 BCSC 5 (Can); Dean Stretton, *The Birth Torts: Damages for Wrongful Birth and Wrongful Life*, 10 Deakin L.R. 319, 324 - 25, (2005)).

65. This result, according to which the infant's parents should be compensated only for their additional expenses – was also accepted by the majority of members of the *Mazza Commission*. It was determined in the *Commission Report* in this context that "the point of departure for the tort arrangement we have decided to recommend is that the party who negligently caused the birth of a child with disability expressed by real medical handicap and who would not have been born had it not been for this negligence, has the duty to bear the monetary cost involved *in providing the special needs of the infant which stem from his disability* (emphasis added – E.R.). As the people who are responsible for caring for the infant and taking care of his needs are his parents, and they bear the majority of this cost *de facto*, the entitlement of the parents to sue and receive compensation intended to cover the needs of the infant due to his disability from the party responsible for the negligence should be recognized" (*id*, at p. 60).

However, as noted, "the Additional Expenses" in the usual cases also increase during the child's period of adulthood, such that they include his regular living expenses, which his parents must bear. Whereas the child lacks earning capability, the "Additional Expenses" thus include, in the usual cases, the living expenses as well, which, lacking evidence showing otherwise, equal the average salary in the economy.

66. To sum up: a party who, by his negligence, caused the birth of a child with disability, who would not have come into the world had it not been for that negligence, has the duty to bear the additional expenses involved in raising the child, expenses which stem from his negligence, which reflect the child's special needs due to his disability, in accordance with the circumstances of each given case and for the entire period of the child's life expectancy. This compensation shall include all the additional expenses needed in the particular case, including: medical expenses, third

party assistance, rehabilitation expenses, education expenses including ancillary expenses, housing expenses and mobility expenses. During the child's adulthood, and for the entire period of his life expectancy, his parents shall be entitled to compensation for his regular living expenses as well, to the extent that he lacks earning ability and there are no special circumstances negating that entitlement.

67. Note, incidentally, that a different question arises where the cause of action is for "wrongful pregnancy" (or "wrongful conception"), where the parents wished to avoid bringing children into the world at all, even healthy children, and due to negligence in medical care that choice was denied them (see, *e.g.*, CC (Jerusalem District Court) 1315/97 *A. v. Kupat Cholim shel haHistadrut haKlalit shel haOvdim b'Yisrael*, IsrDC 5763(2) 309 (2004); CC (Haifa Magistrates Court) 4503/06 *A. v. the State of Israel* (unpublished, 4 March 2012)). Discussion of actions such as these and the scope of compensatable damage is not necessary for our purposes, and I shall leave it for when it arises. Note, however, that in other legal systems in cases in which a disabled child is born as a result of wrongful pregnancy as well, compensation has been granted only for the Additional Expenses (see *e.g.* in England, the aforementioned *Parkinson* case). This result is correct *a forteriori* in our case, in which the pregnancy in and of itself was wanted, but the parents wanted a healthy child. In any case, as mentioned above, there is no need in the circumstances of these cases to express an opinion on the question what the proper compensation is in the case of unwanted pregnancy in our legal system.

Non Pecuniary Damage

68. Customarily, psychological damage sued for in an action for wrongful birth is categorized as "pure" psychological damage, lacking physical damage to the claimants. This classification is not devoid of doubts (compare, *e.g.* the enlightening judgment of Baroness Hale in the *Parkinson* case). In any event, the psychological damage in the case before us is ancillary to pecuniary damage, so it in any case does not stand alone.

69. Even if the psychological damage caused to the claimants before us is categorized as pure damage, the entitlement to compensation for pure psychological damage which is not ancillary to relevant physical injury (see: Eliezer Rivlin "Pitsui'im begin Nezek lo Muchashi u'begin Nezek lo Mamoni – Megamot Harchava" *The Shamgar Volume – Part C* 32 (2003)), was already recognized in CA 243/83 *Jerusalem Municipality v. Gordon*, 39(1) IsrSC 113 (1985), where negligence liability was determined for pure psychological damage caused to the party directly damaged; later, the status of "quasi-directly" damaged parties was recognized as equal to that of directly damaged parties (the *Levy* ruling). In that case, compensation was granted to parents suffering psychological damage due to the death of fetuses due to negligence; similarly, the entitlement of partners to compensation for psychological damage caused them due to the woman's unnecessary abortion caused by medical negligence was recognized (CA 398/99 *Kupat haCholim shel haHistadrut haKlalit v. Dayan*, 55(1) 765 (1999)).

70. In cases of wrongful birth the psychological damage continues for the lifetimes of the parents (the claimants). It is not single-event damage. It is not damage that is caused over a short period. The parents must care for the child for the

rest of their lives. They are vulnerable to his suffering, and are entrusted with his welfare. They accompany his pain, his suffering day and night, and these become their pain and suffering. They direct their lifestyle in a way that will allow them to fulfill their responsibility for the child. Their life changes, at times completely. Activities that once seemed natural and easy to do become unbearably difficult. The need to care for the future of the child, with all their might, keeps them awake at night and drains their resources. This is continuous damage. It is different and separate from the violation of autonomy which is a single-event violation which takes place at the moment when the choice was denied them. The continuous and severe psychological damage thus requires large and significant compensation.

Violation of Autonomy

71. The final question which requires our decision is the question of the relationship between the cause of action for wrongful birth and the cause of action for violation of autonomy, in the framework of the parents' action.

In *Kadosh* we extensively discussed the importance of the right to autonomy and the individual's right to sue for compensation due to violation of that right. It was again clarified that the right to autonomy is "the right of every individual to decide about his acts and desires according to his choices, and to act according to those choices" (the *Da'aka* ruling, at p. 570); this is a persons right "to write his life story" (the *Abu Hana* ruling, at p. 48). It was emphasized in *Kadosh* that "the individual's autonomy stands at the heart of human dignity. It is a right that constitutes a fundamental value in the Israeli legal system, and 'constitutes one of the central manifestations of the constitutional right of every person in Israel to dignity, entrenched in Basic Law: Human Dignity and Liberty' (the *Da'aka* ruling, at p. 571; HCJ 4330/93 *Ganem v. Va'ad Mechoz Tel Aviv shel Lishkat Orchei haDin*, 50(4) IsrSC 221, 233-234 (1996))"(par. 31 of my opinion).

Demarcation of the boundaries of the entitlement to compensation for violation of autonomy is carried out through demarcation of the violation which leads to entitlement to compensation:

> "Only a violation in the *heart* of the right to choose, in "the '*inner penumbra*' of the human right sanctifying autonomy (as stated in the *Bruria Tsvi* ruling) *and on a substantial matter*, will entitle the claimant to significant compensation. An example of such a violation can be found, as noted above, in medical care, "located in the inner penumbra of this right of every person to control his life", as "it might have a direct influence, and at times an irreversible one, both on his lifestyle and on his quality of life" (the *Da'aka* ruling, at p. 532). An additional example is a violation of a person's ability to weave his life story (the *Abu Hana* ruling). A demarcated definition of the injury that leads to entitlement to compensation will help the courts entrench the status of the right to autonomy, but whilst charging compensation only in the fitting cases "(the *Kadosh* ruling, at par. 39 of my opinion).

72. Violation of Autonomy is a head of damages in the framework of the tort of negligence (*id*, par 38 of my opinion; see also par. 72 of the opinion of *Amit, J.*). Of

course, in an action for wrongful birth as well the violation of autonomy is likely to serve as compensatable damage. The question arises, what the relationship is between the head of damages of violation of autonomy and the other heads of damages in the parents' action.

In *Kadosh* I wrote that compensation for violation of autonomy is not granted to the damaged party "for the very violation of his constitutional right abstractly and in principle", but for "real result-based damage" caused him (in the words of the article of Yifat Biton "Ke'evim b'Eizor haKavod" *Mishpat u'Mimshal* 9 137, 145-146 (2005)(hereinafter: *Biton*)). These damages, which can be identified as "violation of feelings", include the feelings regarding "violation of dignity, psychological suffering, humiliation, shame, sorrow and insult, frustration, undermining of trust in others, undermining of one's view of oneself, and injury to the self assessment of the individual or his ability for self realization, both as an individual and as part of a group, and more (*Biton*, at p. 184). In order for damage for violation of autonomy to stand on its own –

> Compensation for violation of autonomy can be sued for, even lacking other damage; in other cases it is possible to sue for such compensation in addition to or aggregation with *bodily damage* that has been caused, including in addition and aggregation to other *non-pecuniary damage*, in a situation of two separate kinds of damage. This is not novel, as the tortfeasor must compensate for all the damage he caused, and if he caused more than one kind of damage, he shall compensate for that which he caused. In that sense it is a factual and not a legal question" (*Kadosh*, par. 45 of my opinion).

This view derives from the recognition of violation of autonomy (to the extent that it is in the penumbra of the right and regards a substantial issue) as reflecting real and true damage. Such damage might come separately and differentiated from other damages, both pecuniary and non-pecuniary, because refraining from charging compensation for it would deviate from the principle of *restitutio in integrum* (and see also the opinion of the commission – the *Commission Report*, at p. 62). Of course, not in every case is there separation between the damage from violation of autonomy and other damage (for a survey of various possible cases in this context see: the *Kadosh* ruling, at par. 45 of my opinion). There might be overlapping between them. However, where separation is possible, and the violation of autonomy is an additional substantial violation in the penumbra of the right, negating additional compensation for it is like revoking the injured party's entitlement to compensation for any other head of damages (and see also the *Commission Report*, in which it was emphasized (on p. 62) that "the proposed arrangement cannot violate the rights of the parents to sue for compensation for the violation of their autonomous right to chose to continue or terminate the pregnancy, or their right to sue for compensation *also* for any other direct damage caused them, or some of them"; emphasis added). On this issue, compare the ruling that determines that if there is an action by dependants and an action by the estate, side by side, compensation should not be made only according to the sum in the claim for a greater amount, as the caselaw determined in the past; it must be examined whether there is a zone of overlap between the two actions, regarding which compensation should be made only once. If there is damage beyond the zone of overlap, then refraining from compensation for each of those damages will

lead to under-compensation (see: CA 4641/06 *Menorah Chevra le'Bituach Ltd. V. Karkabi* (19 December 2007); CA 2739/06 *Dubitsky v Razkalla* (1 June 2008)).

73. Regarding the amount of compensation: like Justice E. Hayut, I too am of the opinion that compensation for the violation of autonomy should not be standard, but should rather be individual, taking into consideration the concrete violation and its circumstances (see: CA 10085/08 *Tnuva Merkaz Shitufi l'Shivuk Totseret Chakla'it b'Yisrael v. the estate of Rabi*, par. 40 of the judgment of Justice E. Hayut (yet unpublished, 4 December 2011)). Nonetheless, it has already been clarified that "since we are dealing with assessment of intangible damage, the courts will assess on the basis of the circumstances of the case and their life experience. In general it can be determined that to the extent that the information that was not relayed is more important, and to the extent that the harmed interest is closer to the penumbra of the right and affects it more significantly, so shall the compensation for the violation of autonomy increase (see on this issue the standards proposed by Justice Strasberg-Cohen in the *Da'aka* ruling for assessing the intangible damage that was caused to a person whose right to autonomy was violated during medical treatment, including: the type of information denied to the patient; the scope, quality and special importance of the information that was not relayed to the patient, as opposed to the information that was relayed to him; the patient's stance about and way of relating to the relaying of the medical information regarding him; and the result of the treatment that was carried out… (*id*, at pp. 619-621))" (the *Kadosh* ruling, par. 42 of my judgment).

In those cases in which the court is persuaded that a violation of the claimant's autonomy has occurred – one that touches upon the penumbra of the right, and on an important issue – it should grant fitting compensation that reflects the full severity of the violation (*id*, at par. 48 of my judgment. And see also CA 9187/02 *Weinstein v. Bergman* (yet unpublished, 16 June 2005); CA 9936/07 *Ben David v. Antebi* (yet unpublished, 22 February 2011)).

Practical Considerations

74. The recognition in the past of the cause of action for "wrongful life", it seems, was in no small part influenced by the motivation to provide a proper solution for the needs of a minor born with defects, as a result of negligence in treating his mother during her pregnancy. Significant weight was given to this consideration in the parties' pleadings, and it did not miss our attention either. Indeed, we are of the opinion that the cause of action for "wrongful life" cannot be recognized in the framework of the tort of negligence, due to our societal view and within our legal system, and due to the hurdle of proving the element of damage or the element of the causal link. However, we are of the opinion that a true solution for the large majority of the needs of the minor can be proposed in the framework of his parents' cause of action for "wrongful birth".

75. As explained extensively above, the parents are entitled to compensation for the additional expenses needed to fulfill the medical and assistance needs of their child, and to the extent that their child continues to be dependent upon them due to his disability when he reaches adulthood, they are also entitled to compensation for the expenses they bear in caring for him during that period and for the entire period of his life expectancy. This includes his regular living expenses, to the extent that he does

not cover them due to his disability, and lacking circumstances that negate said entitlement. *Inter alia*, a sufficient legal solution can also be found for the concern that the parents will pass away without ensuring that they make fitting arrangements for fulfillment of their disabled child's needs, in the framework of sections 56-57 of the Inheritance Law, 5725-1965, which regard maintenance payments from the estate. They determine as follows:

> 56. If the bestower of inheritance is survived by a partner, children or parents, and they need maintenance, they are entitled to maintenance from the estate pursuant to the provisions of this law, whether in inheritance by law or inheritance by will.
> 57. (a) The right to maintenance is –
> (1) …
> (2) For the children of the bestower of inheritance – until the age of 18, *for a disabled child – the entire period of his disability*, for a child who is mentally ill – as long as he is mentally ill, and for a child with mental retardation – as per the meaning in the Welfare Law (Care for the Retarded), 5729-1969 [emphasis added – E.R.].

Thus, a broad solution is provided for the needs of the child due to his disability. Naturally, like in other cases arranged by tort law, the question of the ensuring of proper use of the compensation money might arise. This question is not unique to wrongful birth cases. *De facto*, there are various situations in which the needs of the child will not be sufficiently fulfilled via the tort action that his parents submit, but this result is unavoidable. Difficulty in ensuring the proper use of compensation that a person receives, even if he is an independent adult, exists due to the very fact that usually compensation is granted in advance and in one amount. In compensation law every injured party is presumed to plan his conduct in such a way that the compensation will offer him a proper and continuous solution for mitigating his damage in the future.

The *Mazza Commission* proposed that the legislature "authorize the court to include in its judgment instructions regarding the use of the compensation money, to the extent that the court sees fit to do so, in order to ensure the fulfillment of the needs of the infant. It is also proposed to determine in statute that the compensation intended to ensure the fulfillment of the needs of the infant shall not be considered part of the parents' property in a situation of bankruptcy; shall not be part of their estate; and shall not be the subject of lien, mortgage or assignment of right in any way" (the *Commission Report*, at p. 62). These proposals are very wise, not only for this cause of action, but also in a more general scope. I hope that the legislature will indeed heed the call, and that until then, the courts will develop the fitting mechanisms with the tools at their disposal.

Conclusion

76. For the reasons detailed above, we have found that the cause for an independent action by the child for "wrongful life" should no longer be recognized. However, the recognition of the parents' cause of action for "wrongful birth" stands firm. In principle, the latter cause of action is not limited by the severity of the disability that the child was born with, similar to the child's cause of action as per

President Barak's stance in the *Zeitsov* ruling. Nonetheless, it should be remembered that in practice, the requirement of causal link leads to a certain demarcation of the cause of action, as in the framework of both actions it must be proven that the disability would have led to a termination of pregnancy permitted by law.

77. Ultimately, the recognition of the child's cause of action for "wrongful life" is not made possible by the rules of law, and it even stands in contradiction to fundamental principles of the system, including the principle of sanctity of life, protection of human dignity and recognition of the rights of people with disability to dignity and equality. Nonetheless, a significant solution can be offered for the great majority of the needs of the child due to his disability, in the framework of the parents' cause of action.

Our task is not complete: in the framework of this decision of principle, from the outset we did not deal with the question of the specific liability of any of the defendants in the cases before us. These questions shall be decided by other panels, separately in each case.

President (emeritus) D. Beinisch:

I concur with the comprehensive judgment of my colleague the Deputy President E. Rivlin. The issue before us is one of the most difficult and complex ones, from the standpoints of law and values, and the moral and societal standpoints. This Court confronted this issue in the important judgment in CA 518/82 *Zeitsov* v. *Katz*, 40(2) IsrSC 85 (1986)(hereinafter: *Zeitsov*), and my colleague discussed it extensively. In that judgment the Court recognized the existence of a cause of action for a child that was born with a disability that was not diagnosed due to negligence in discovering the defect before conception or birth. It is important to note that the positions of the Justices of the majority in *Zeitsov* were of course not intended to detract from the status or rights of persons with disabilities; and in their various stances, nor did they detract from the view that recognizes the value of human life, which has always been a sacred value in Israeli law. The judgment in that case is an attempt to find a practical legal solution that might allow granting compensation to children and their parents, who must confront disabilities that at times involve great suffering and considerable monetary expenses. However, the two approaches that were adopted by the majority in *Zeitsov* raise a number of difficulties, which my colleague the Deputy President discussed in his judgment. The approach of Deputy President M. Ben-Porat in the *Zeitsov* case raises difficulty regarding the way damage is defined, and the approach of Justice (former title) A. Barak raises difficulty regarding the definition of the causal link between the negligence and the damage. Thus, after more than 25 years since the judgment in the *Zetisov* case was given, it can be said that its creative attempt to develop the causes of tort action has not yet reached fruition, and conceivably caselaw development of tort law on this issue will be possible in the future. I have been persuaded that at this time, that judgment does not provide a fitting solution for the difficulty involved in recognizing the cause of action of a child claiming that his birth (or his birth with a defect) is the damage that was caused to him. And indeed, the cases before us – with the variety of questions that arise in them – demonstrate more than anything else the difficulty involved in recognizing the cause of action for "wrongful life".

According to our societal views and values, every person – be his disabilities as they may – was born in [God's] image, and his life has value in and of itself, which must be honored. According to our moral view, it cannot be said that it would have been better for a person had he not been born. In legal garb, the meaning of this view is that the argument that a person's very life is damage that was caused to him cannot be recognized. The following words from the *Mazza Commission Report* on this issue are fitting:

> The view that recognizes the value of the individual as a human being, and the sanctity of life as a value in and of itself, was assimilated into our law as part of an all inclusive moral view. The fundamental principles and values of our system constitute a source of inspiration for the interpretation of concepts that have "open and flexible membranes"; and "damage", as per its definition in the Civil Wrongs Ordinance, as detailed above, is one of the concepts that should be interpreted according to those principles and values. In other words: the question of recognition or non-recognition of the very birth of a disabled person as "damage" should be decided while taking into account legal policy considerations, according to which the competing values and interests are examined; and determining the balancing point between the private interests and the general public interest shall be influenced by the fundamental views of the legal system and in light of moral considerations. Our stance is that taking into account of those considerations leads to the conclusion that the position that sees "damage" in the very birth of a disabled person should not be recognized (see the report of the Public Commission on the subject of "Wrongful Birth", at p. 46).

Note further that I have been persuaded by the position of my colleague the Deputy President that recognition of the cause of action of the parents for "wrongful birth" will allow granting compensation that fulfills a significant part, and possibly most, of the child's needs; it may be appropriate to broaden the solutions by alternative arrangements as recommended by the public commission, but that issue must be examined outside the framework of this judgment.

Thus, I concur with the judgment of my colleague the Deputy President, which seems, at the present time, to provide a consistent answer, found with the framework of accepted tort law, to the questions that arose before us, and even presents practical solutions to difficulties that arise in actions of this type. Nonetheless, this judgment too does not constitute the end of the discussion, and it appears that even if additional creativity is called for in developing causes of action regarding lack of early discovery of defects in a fetus, the time is not yet ripe for that. Furthermore, the questions that will arise in the parents' actions for wrongful birth, part of which were hinted at by my colleague in his judgment, will certainly engage the courts again in the future.

President A. Grunis:

I concur in the judgment of my colleague, Deputy President E. Rivlin.

Justice M. Naor:

1. I concur in the comprehensive opinion of my colleague the Deputy President E. Rivlin.

2. Regarding the transitional provision and par. 16 of the opinion of my colleague Justice E. Rubinstein: in my opinion we should not decide, in the framework of the transitional provision in the case before us, the question what the fate should be of an action of an infant which has not yet been submitted, regarding which the limitations period has, *prima facie*, expired. The correct parties regarding that question are not before us. We shall cross the bridges when we reach them.

Justice E. Arbel

1. The judgment of Deputy President E. Rivlin is a cornerstone in the issue of the tort of wrongful birth, which contains within it two separate causes of action, the cause of action of the child, called "wrongful life", and the cause of action of the parents, called "wrongful birth". The judgment deals with questions of principle, the central, most difficult and sensitive of which concerns the difficulties that arise from the "wrongful life" cause of action, raising the issue of the significance of nonexistence versus a life of disability and suffering, a situation of life versus a situation of death. Here lies, in its full force, the question whether we as judges can determine whether there are situations, rare as they may be, in which it is better not to live than it is to live a life of suffering, or in the words of President Barak, a defected life. My colleague discussed, extensively, the legal considerations and values of public policy that do not support the "wrongful life" cause of action, and the situation in various countries. I concur in his opinion that in light of these considerations, the cause of action for "wrongful life" should not be recognized. Beyond the legal difficulties that arise in the framework of this cause of action, the determination that defining the life of the injured party itself, even if it is defected life, as a life which would preferably – for the infant – never have occurred is difficult, and violates the sanctity of life and human dignity.

2. I join my colleague's determination that the need to provide a solution to the medical, rehabilitation and assistance needs of the child can be found in the framework of his parents' action for "wrongful birth", which does not raise the difficulties of law and principle involved in recognizing the child's cause of action. The parents are the parties that are directly injured by the fact that their child was born due to negligence. His birth necessarily bears injury to the parents. I agree with my colleague's conclusion that in this case the parents have the right to choose not to bring into the world a child with disability, via legal abortion permissible by law. This determination can be made without entering into the moral questions involved in the parents' choice to refrain from raising a child with disability.

3. I was not sure how to decide the issue of proof of the causal link in a "wrongful birth" action. In order to prove the existence of a causal link in such a cause of action, it must first be shown that the pregnancy-termination committee would have permitted the parents to terminate the pregnancy had the facts regarding the defect of the fetus been known. This issue poses no difficulty. However, it must further be shown that had it not been for the negligence, the parents would have chosen to terminate the pregnancy. The question, as it has already arisen in the past, is whether the requirement of such proof should not be completely waived. My colleague also agrees that the parents' standing on the witness stand and testifying that they would have chosen to terminate the pregnancy, if they had the relevant medical information, raises significant difficulty. There is difficulty in proving retrospectively and reliably a hypothetical factual causal chain, where the parents consider the subject with retroactively, at a time when they already know the tortious result. Although this difficulty is not unique to wrongful birth actions, I am of the opinion that the emotional intensity that accompanies such actions intensifies their practical difficulty. Can a person truly answer, looking back, whether he would have aborted the fetus that is now the living and loved child that he is raising? Can a person surmise what he would have done had he found out, when the child was still a fetus, about the fetus's defect? Furthermore, in actions for "wrongful birth" the difficulty is intensified, as discussed by my colleague, for two additional reasons. First, the psychological and moral difficulty confronted by parents, who must testify that they would have chosen to abort their child that is now living and loved, is a difficulty that may harm even the child himself, if he is exposed to the parents' testimony at one point or another in his life. Second, difficulties in the area of public policy arise, both due to the concern that a requirement of such proof would burden certain sectors of the population, regarding which there is a presumption that they do not tend to have abortions; and due to the concern that this requirement would actually harm parents who are willing to raise a disabled child.

4. I examined whether it would not be correct to adopt the approach according to which proof of causal link should be waived (CC (Jerusalem District Court) 3198/01 *A. v. the Jerusalem Municipality* (unpublished, 12 May 2008), Judge Drori; CC (Tel Aviv District Court) 1226/99 *A.L. v. Yaniv* (unpublished, 29 March 2005), Judge Benyamini). Indeed, this approach constitutes a certain deviation from the regular path of tort law. Nonetheless, in my opinion this approach is likely to be legitimate and fitting for the subject matter at hand, due to considerations of public policy and in light of the uniqueness and complexity of this cause of action. Thus, for example, the complexity of the "wrongful birth" cause of action served the Deputy President in determining that the defendants should be charged to pay the disabled child's additional expenses only, and not all the expenses of raising him. In addition, I find it doubtful that such a requirement would advance the discovery of the truth, and whether it can advance justice in a specific case, due to the noted difficulty in proving what the parent would have done had he known of the defect his fetus suffers from, whereas it is doubtful if he himself knows clearly how he would have acted. However, I ultimately decided to concur in the opinion of my colleague, both due to the desire to walk along the path of tort law, and due to my colleague's softening of the requirement in two ways: first, in determining that by proving the position of the pregnancy-termination committee to allow an abortion in the certain case, a refutable presumption arises regarding the parents' stance about having an abortion; and second, in determining that refuting this presumption shall not be done merely

through general information such as sectorial or religious affiliation. I add that in my opinion, courts hearing "wrongful birth" cases must act on this issue in a very cautious and sensitive fashion, giving weight to the individual, who is not necessarily obligated by the general positions of the sector to which he belongs; the courts must also act with a certain flexibility, to the extent possible, in implementing this requirement in the framework of a proof of the causal link. We are dealing with negligence law, which should be adapted to the ever changing and difficult reality of life.

As aforementioned, I concur in the judgment of the Deputy President.

Justice S. Joubran:

I concur in the circumspective and enlightening judgment of my colleague, Deputy President E. Rivlin.

Justice E. Rubinstein

1. The issue before us touches upon philosophical questions regarding human existence, possibly similar to the house of Shamai and the house of Hillel, who disputed "for two and a half years" the question whether "it is better for a person not to have been created than to have been created" (Babylonian Talmud, *Eruvin* 13b); questions which are philosophically difficult, legally difficult, and difficult from a human standpoint. In the annals of the sages a decision was reached: "counted and decided: it is easier for a person not to have been created than to have been created; now that he has been created, he must examine his deeds. And there are those who say: he must reckon his deeds" (*id*; and see Rashi, *id*; *Mesilat Yesharim* (Rabbi Moshe Chaim Luzzato (Italy-Holland-Eretz Yisrael, the 18th century) chapter 3); the thrust of this is that having been created, he must search for good and expunge evil, with constant self examination. The subject underdiscussion is more limited than the existential question posed above, which relates to the life of *any person*, and it relates to a person who entered the world *with severe defects*; it is fundamentally a situation in which the parents declare that had they known *ex ante* what the condition of their infant would be they would have refrained from continuing the pregnancy, and society confirms (via the provisions of section 316 of the Penal Code, 5737-1977) that this is a legitimate choice. Nonetheless, questions from the world of values, philosophy, morals and religion arise, integrated with questions the results of which are financial – such that the legal decision makes (or might make) a moral choice as well; thus the agony in making it.

2. In this context, it is my opinion that a different description of human existence actually characterizes this judgment. The verse "and G-d made man" (Genesis 2:7) is interpreted in the Talmud as follows: "woe is me because of my creator, woe is me because of my evil inclination" (Babylonian Talmud, *Brachot* 61a): approving the "wrongful life" cause of action raises complex theoretical legal difficulties, which my colleague the Deputy President (following what is accepted in other countries) wishes to avoid, and thus his decision. This is also the approach of the majority of the "Public Commission on the Subject of Wrongful Birth" (hereinafter the *Mazza Commission*) in the important and enlightening report it wrote (the minority opinion is also

important), which in my opinion has a special role in our decision. On the other hand, annulment of the cause of action, as proposed by my colleague, even if that comes alongside an *expanded* cause of action for "wrongful birth", is not simple, primarily on the practical level. Expansion of the cause of action for wrongful birth in order to provide a solution for the practical difficulties, or some of them, as can be seen in the opinion of my colleague the Deputy President, is also liable to raise various legal difficulties, some of which I shall touch upon below.

3. Regarding the difficulties: for example, *on the legal plane*, in justifying the limitation of the compensation in the "wrongful birth" cause of action to the additional expenses only (the expenses the parents bear beyond the regular expenses that accompany the raising of a child), although the regular expenses may also be able to be causally linked to the tortious act (see par. 56-57), my colleague the Deputy President notes that "the positive results of the birth of the child must also be expressed" (par. 59); and we again find ourselves quantifying the value of human existence, something we wished to avoid doing. Furthermore, in order to reach a result which is, in the circumstances of the case, *just* (to the extent possible), my colleague is willing to compensate the parents of the infant for their expenses "*for the entire period of [the infant's] life expectancy*" (par. 60, emphasis original – E.R.), even though from the practical tort law standpoint, it seems that to the extent that it is the parents' action to compensate them for their support of the infant, it could have been limited to the period of their life expectancy (according to the majority opinion in the *Mazza Commission*, that decision can be based upon the presumption that the parents "will save every penny during their lives in order to ensure the fulfillment of the needs of the infant after their death"; p. 64).

4. That is also the case regarding identification of living expenses (the "regular expenses") of the infant when he has become an adult, as the *average salary in the economy* (in the case of complete loss of earning ability) – a standard which generally characterizes expected lost income of a person who himself was injured by a tortious act, but not the extent of the basic living expenses which a third party bears in order to support him (although the majority opinion in the *Mazza Commission* was also of this opinion, p. 61). In this context, it is doubtful in my eyes if the regular standard for determining support pursuant to section 4 of the Family Law Amendment Law (Support), 5719-1959 (to which my colleague the Deputy President refers in par. 60) or pursuant to section 57(a)(2) of the Inheritance Law, 5725-1965 (to which he refers in par. 75) is the average salary in the economy (for support rates compare CA 4480/93 *A. v. B.*, 48(3) IsrSC 461; S. SHILO, PERUSH L'CHOK HAYERUSHA (AN INTEPRETATION OF THE INHERITANCE LAW), 5725-1965 (part 2, 5755) 37-38). I emphasize that I am not, *heaven forbid*, saying that an approach limiting the compensation in these issues should be taken. The opposite is the case – the human principle and considerations of justice, which stand at the foundation of the opinion of my colleague the Deputy President (as well as the majority opinion in the *Mazza Commission*) are clear and I accept them as well; however, the theoretical difficulty arising from adaptation of the parents' cause of action for "wrongful birth" to the reality in which the infant's cause of action for "wrongful life" has been annulled, should not be ignored.

5. *On the practical plane*, my colleague discussed, *inter alia*, the question how it can be ensured that the *parents'* compensation according to the wrongful birth cause

of action will indeed ensure the future of the infant (see par. 75). These questions are difficult to solve, as what will be done, for example, when the parents are irresponsible, or big spenders, and leave the infant with nothing by spending all the money. I shall say at the outset, that in my opinion there is a sufficient legal basis for determining arrangements that will safeguard this interest; *in addition,* because if the parents' entitlement stems from various *duties* that the law casts upon them (see, *e.g.*, par. 60 of the opinion of the Deputy President) it is not unreasonable to connect the compensation and these duties (in this context as well the majority opinion in the *Mazza Commission* proposed unique arrangements, see p. 62). An additional significant difficulty, at least on the level of principle, relates to an infant who has no parents to sue on his behalf (an issue which the majority opinion in the *Mazza Commission* discussed on p. 60), or when the parents themselves go bankrupt, *etc*.

6. In other words, beyond the legal complexity, the opinion of the Deputy President, despite the desire behind it to ensure the future of the infant via his parents' action, might – despite the intention, of course – lead to cases in which the infant, who today would be entitled to compensation, will be left with nothing; yet the negligence is the same negligence, and the expenses resulting from it are the same expenses (even if we refrain from using the legal concept of "damage"). Let us admit that the Justices of the majority opinion in *Zeitsov* (CA 518/82 *Zeitsov v. Katz*, 40(2) IsrSC 85) were aware of the various difficulties involved in the positions they presented, yet they chose to adopt a position which, even if it has theoretical difficulties, ensures that the great expenses caused *as a result of the negligent care by the doctor*, as per the meaning of this phrase in tort law, will be covered; for the difficulties, see also par. 42 of the minority opinion in the *Mazza Commission*, by Mr. Posner.

7. In this context, the position of (then) Justice Barak in *Zeitsov* proposes a compensation mechanism which is clear and relatively simple to implement, which avoids entering into complex ethical dilemmas (see also A. AZAR & A. NURENBERG, RASHLANUT REFU'IT (MEDICAL MALPRACTICE)(2nd ed., 5760) 287); however, as noted above, it entails legal difficulties (see Deputy President Ben-Porat in *Zeitsov*, at p. 105; see also R. Perry "L'hiyot o lo L'hiyot: ha'Im Zo haShe'elah? Tviot Nezikin begin 'Chayim b'Avla' keTa'ut Konseptualit"(To Live or Not to Live – Is that the Question – Tort Actions by Reason of Wrongful Life as a Conceptual Mistake) 33 MISHPATIM (5763) 507, 559-560; A. Shapira, "haZchut lo leHivaled bePgam" (The Right to be Born with a Defect) in DILEMMOT B'ETIKA REFU'IT (DILEMMAS IN MEDICAL ETHICS) (R. Cohen-Almagor ed., 5762) 235, 248). I will not deny that I was taken by the thought of proposing that we continue down that paved path, as per Justice Barak, with certain amendments and despite its theoretical difficulties, until the subject is fully arranged [in legislation]. As long as the subject has not received a full arrangement, we replace a construct with theoretical difficulties but practical validity, with a construct which does not have such theoretical difficulties, but raises practical questions, as mentioned above. The Justices that heard *Zeitsov* a bit more than a quarter of a century ago knew that they face a difficult mission; but they wished to practically assist those whose fate was bitter, where negligence had occurred, even if the very creation of a fetus with defects was not at the hands of the doctor but by "the dealer of life to all living creatures" (in the words of the hymn for Rosh haShana and Yom Kippur).

8. Nonetheless, the situation created after the judgment in *Zeitsov*, including the lack of uniformity in the judgments of the district courts, *inter alia* regarding the "seam" between the opinions of Deputy President Ben-Porat and Justice Barak in *Zeitsov* – requires decision and arrangement, and it is not for no reason that we are dealing, in these proceedings, with a large number of cases that require decision. As early as 1993 this Court noted:

> "a district court judge hearing an action like this stands before a number of possibilities… in each of the cases he will not deviate from the provisions of sec. 20(b) of Basic Law: Adjudication, which determines that 'a ruling of the Supreme Court obligates every court, except the Supreme Court'" (CA 913/91 *Azoulai v. The State of Israel* (unpublished) par. 3 – Justice Maltz; see also CA 119/05 *Amin v. The State of Israel* (unpublished))."

A generation has passed since the *Zeitsov* ruling was handed down, and as the members of the *Mazza Commission* noted: "the lack of decision, as aforementioned, has left the legal arena wide open" (p. 17); this situation, in which the fate of an action depends upon the decision of the judge – it may not be superfluous to note, the *random* judge – before whom the case is heard "according to his opinions and worldview" (in the words of the commission on p. 17), is hard to accept. Complaints against it were also heard from attorneys who deal in the field during the hearing before us (on 31 January 2012); and I will not refrain from mentioning here that the opinions supporting confirmation of the stance of Judge Barak in *Zeitsov* were usually heard – before us and in the *Mazza Commission* – from lawyers who generally represent claimants. Indeed, the majority opinion in the *Mazza Commission* proposed "as a first and preferred possibility" (p. 60) to create, in legislation, a social arrangement that would ensure fulfillment of the needs of those born with defects that cause them functional disability, and of course there would be much blessing in such an arrangement; it further proposed, as an alternative, a legislative torts arrangement, and there is much positive about that as well. However, as a court that hears *tort* cases according to the existing law, I fear that there is no evading determination of a caselaw rule in tort law, despite the existing difficulties that accompany each of the alternatives, until legislation of one kind or another is passed. And I call upon a sensitive and conscientious Israeli legislature to reach it as soon as possible.

9. Ultimately, I saw fit to concur, in principle, in the well reasoned decision of my colleague the Deputy President, consisting, at this time, of the part regarding legal principles. I do so whilst pointing out the difficulties and calling upon the legislature to speak. It is an *open-eyed* decision, aware of the disadvantages and advantages of each of the alternatives, wishing – trying hard – to ensure that basing one's opinion on "the regular legal tort logic" (the purpose of which is also avoiding the type of difficulties in theory and in result found in the various opinions of *Zeitsov*) does not lead to a practical result which is not just. I go this way also because the stance of my colleague is in line with the opinion of the majority of the members of the *Mazza Commission* regarding annulment of the "wrongful life" cause of action, and with the caselaw of the courts of the Common Law states (as the commission surveyed in its report, and as my colleague surveyed in his opinion). The moral message that arises from my colleague's decision – both regarding the sanctity of life and regarding treatment of persons with disability – also supports adopting it. It is also in line (as presented briefly below) with what can possibly be defined as the position of Jewish

Law, our legal heritage. The position that arises from our decision is that we do not leave people with disability in the category of "it would be easier for him had he not been created"; we must honor their needs and attempt to fulfill them, without a label of societal rejection in the form of "it would be easier for him had he not been created", but rather while treating them as desirable human beings.

"Better than both is the one who has not yet been" (Ecclesiastes 4:3)

10. Recognizing the cause of action for "wrongful life" requires, as aforementioned, discussion of weighty moral questions, the answers to which might be able to be found "in the area of philosophy – morality – theology" (in an analogy to the words of Justice Goldberg in *Zeitsov*, p. 128). Indeed, in the literature of Jewish law we also find positions – based on a religious worldview – according to which for a very defected infant, whose life expectancy is most short, "it is better for him that he was born than had he not been born at all, as those who are born enter the next world" (see the IGROT MOSHE responsa (Rabbi Moshe Feinstein, Russia-USA, 20th century) Even HaEzer first part chapter 62); there is, however, among important religious authorities also broad and significant attention given (in the context of discussion of termination of pregnancy) to the life of suffering to which such an infant, and to a great extent those who closely surround him, are condemned:

> "Is there need, sorrow, and pain, greater than that under discussion, which will be caused to the mother to whom such a creation is born, one who is all suffering and pain, and whose death is certain within a number of years, and the eyes of the parents see but their hands cannot relieve him? (and it is clear that if this child is taken to a special institution and the parents will not be given access until his death it makes no difference and does not detract from the aforementioned). Added to this are the tortuous and painful contortions of the child with the defect. Thus, if termination of the pregnancy is to be allowed according to Jewish Law due to great need and due to pain and suffering, it seems that this is the most classic case that should be allowed" (TSITS ELIEZER responsa (Rabbi Eliezer Waldenberg, Israel, 20th century) part 13 chapter 102).

The reality of human existence also brings forth cases in which life is not short, but rather continues, without hope, for decades, with all the suffering involved, at times especially to the parents, as the child does not communicate. Indeed, many pens broke in Jewish law attempting to clarify these questions with a forward looking glance (particularly regarding abortions; see, *for example*, Rabbi E. Lichtenstein "Hapalot Malachutiot – Heibetei Halacha" (Artificial Abortion – Halakhic Aspects), 21 TCHUMIN (5761) 93). The majority opinion in the *Mazza Commission* included discussion of a number of known sources relating to the question whether life is worth living, for example the words of King Solomon "and I thought the dead, who have already died, more fortunate than the living, who are still alive" (Ecclesiastes 4:2), and the words of Jonah the prophet, who wished to die and said "it is better for me to die than to live" (Jonah 4:8), although, according to their opinion, "there is no doubt that these statements relate to moral and theological aspects only" (p. 65), and I already discussed above the differentiation between the philosophical question and the situations which are before us for decision. The question when "death shall be preferred to life" (Jeremiah 8:3), or when to "long for death but it does not come, and

dig for it more than for hidden treasures" (Job 3:21), is a question which has not been decided; however, life is "heritage from the Almighty on high" (*id*, 31:2; see M. Greenberg "Erech haChayim baMikra" (The Value of Life in the Bible) in KEDUSHAT HACHAYIM VACHERUF HANEFESH: KOVETS MA'AMARIM LEZICHRO SHEL SEGEN AMIR YEKUTIEL (THE SANCTITY OF LIFE AND MARTRYDOM – COLLECTION OF ARTICLES DEDICATED TO MEMORY OF LT. ARNON YEKUTIEL) (Y. Gafni & E. Ravitsky eds, 5753) 35). For example, there are those ill with debilitating disease whose life is not really a life, and who expect to be put out of their misery, and there are those who turn the depths of suffering into a lever for creative activity (see the enlightening and touching writings of Dr. Rachamim Melamed-Cohen, a person with ALS who creates like an ever swelling spring).

11. The stories of the Bible and additional stories appearing in later sources teach that life is not always preferable to nonexistence: thus, for example, the words of King Saul to his porter "draw your sword and thrust me through with it, so that these uncircumcised may not come and thrust me through, and abuse me" (1 Samuel 31:4); or the story of the woman who "grew very old" and said to one of the sages of the Mishna: "I have grown too old and from now on my life is that of disgrace, I do not taste food or drink and I wish to leave the world" (YALKUT SHIMONI Dvarim chap. 11 Remez 871). Note that these acts served halachic authorities in discussion of modern questions regarding lengthening and shortening life (see, respectively, Rabbi Y. Zilberstein "Matan Morphium le'Choleh Sofani haSovel miChenek"(Giving Morphium to a Terminal Payment Suffering from Asphyxia) ASIA 15 (5757) 52; Rabbi Y. Zilberstein, in TZOHAR: KOVETS TORANI MERKAZI C (5758) 218). Then, as now, in Jewish law as in Western law, the considerations are well known, and the dilemmas are difficult.

12. However, it is still appropriate to differentiate between comparing life filled with tribulations to a healthy and happy life, and comparing life, as difficult as it may be, with a situation of nonexistence. That is certainly the case when dealing with a comparison that is intended for calculation of "the extent of damage", the "bottom line" of which is supposed to be a monetary amount. In-depth treatment of the very possibility of *discussing* those questions can in my opinion be found in the words of the Babylonian Talmud (BRACHOT 10a) regarding King Hezekiah, who refrained from procreating because he foresaw that his children would be evil (the evil King Menashe). In answering Hezekiah's explanations, the prophet Isaiah tells him: "what business of yours are the hidden ways of the Lord?"; and regarding freedom of choice in such matters it was said that "a person's soul is not his property, but rather the property of the Lord, as it is written (Ezekiel 18:4) 'all lives are mine'" (the interpretation of the Radbaz (Rabbi David ben Zimra, Spain-Egypt-Tsfat, the 16th century) of the Rambam (Maimonides), HILCHOT SANHEDRIN 18, 6). Even if Jewish law is willing to assume that in certain cases it is preferable to avoid pregnancy that is likely, with high probability, to lead to the birth of defected children, the words of the prophet Isaiah present a clear stance regarding the possibility of discussing and comparing a situation of nonexistence to a situation of existence, as problematic as it is, and their conclusion that law cannot be decided on the issue. I add that those words – regarding the hidden ways of the creator of the world – are used in religious philosophy in a completely different context as well, regarding ungraspable historical phenomena like the holocaust.

13. The *legal* issue of "wrongful birth" or "wrongful life" has been discussed – on the legal-halachic plane, as opposed to the moral-religious plane – in Jewish law (see, *e.g.*, S. Yelenik "Holada b'Avla – Zchuyot Tviah u'Pitsuim" (Wrongful Birth – Rights of Action and Compensation) PARASHAT HASHAVUA 23 (5761); Rabbi Chayim Vidal, "Holada b'Avla – Pitsuiyei Nezikin begin Holadat Ubar Ba'al Mum" (Wrongful Birth – Compensation in Torts for Birth of Fetus with Defects), TCHUMIN 32 (5772) 222), and the problem of an action on the basis of the cause of action for "wrongful life" was raised: "according to the *halacha* there should be no action by the minor" – as opposed to his parents' action – "who was born due to a tort, neither against his parents nor against a doctor who gave his mother consultation or diagnosis when she was pregnant" (VIDAL, p. 231). However, the *halachic* sources referred to in these works may support the conclusion of Dr. Michael Wigoda:

> "The truth should be said, that the classic sources of Jewish law do not deal with this issue" (thus, in his memorandum submitted to the *Mazza Commission* with the title "Reflections upon 'Wrongful Birth' in light of the Sources of Jewish law").

It can also be understood why: the formulation of tort actions like those before us is the fruit of the modern medical and legal age, in which what was previously in the realm of heavenly secrets and fate, can now be predicted and decoded by tools of medicine and genetics. That does not exempt modern [Jewish law] authorities from dealing with it.

Epilogue and Practical Comments

14. The outline that my colleague the Deputy President detailed expansively goes a long way toward reasoned, coherent and just arrangement of the complex human and legal issue before us. However, in certain regards, the path which the courts must continue to pave according to the cases that will be brought before us is still long (and my colleague also notes that). The majority opinion in the *Mazza Commission* dealt with additional provisions which should be included in the tort scheme. At the foundation of some of them lies the understanding which lies at the foundations of my colleague's opinion: that a substantial part of the compensation for the infant's parents is strongly linked to the burdensome expenses of ensuring optimal care for him, and its objective is to allow them to pay them in a way that will ameliorate his condition, to the extent possible (and it may be able to be said, to allow them to fulfill their *duties* toward the infant). Regarding relations within the family, the commission discussed the need to ensure that the money is indeed used for fulfilling the needs of the infant; regarding relations between the family and others, the commission discussed the need to earmark the money against third parties such as creditors in bankruptcy (p. 62). Additional questions regard the situation in which the infant does not have parents who will sue in his name, and additional complexities which the members of the *Mazza Commission* discussed.

15. These questions involve more than the question of the annulling or existence of the wrongful life cause of action, which is the central question discussed in this (partial) judgment. Indeed, at this stage we are not deciding the concrete cases, or questions of amounts of compensation, and thus we are also not deciding questions regarding earmarking it for the purpose for which it is given. The courts can find the

answer to these questions – at least to part of them – in the *Mazza Commission* report, and that circumspective legal document should be before the eyes of those hearing such cases. In may be, that the solution to them will resemble relocating the theoretical difficulties from the discussion of the cause of action to a discussion on translating the expanded cause of action into practice. However, the question of the cause of action is the one which is before us, and it is presumed that its translation into practice will find an appropriate solution in the future. The majority opinion in the *Mazza Commission* noted:

> "The question is whether such an arrangement can be reached, to the extent that it is found appropriate, by judicial ruling as well, is a matter of the decision of the Supreme Court."

Although I am, as aforementioned, of the opinion that there should be a legislative arrangement of the entire issue, and I hope that the call to the legislature will fall on attentive ears, whether in a social scheme (which, in its entirety, would not be before us) or, at least, a legislative arrangement of a complete and detailed tort scheme; the courts have a *duty* to ensure that the annulment of the wrongful life cause of action prior to enactment of a circumspective scheme in legislation will not derogate from their primary duty – to do justice within the framework of the law. The path that has been determined passes through the parents; the courts have a duty to ensure, in every single case, that the benefit reaches the infant and is earmarked for the infant, and not for other purposes.

Transitional Provisions

16. Regarding the transitional provisions determined by my colleagues, I am afraid that unintentionally, a mishap is liable to occur in cases in which no action was submitted by the parents, under the assumption that in the future (possibly after the clarification of the medical condition) an action would be submitted by the infant, on the basis of the *Zeitsov* ruling according to one interpretation of it or another, and *relying* upon it. According to law, there remains a period of many years for that. The transitional provision determined by the majority opinion safeguards the pending cases in which actions were not submitted by the parents, but it does not safeguard actions which have not yet been submitted; and if the seven year limitations period regarding the *parents* has expired (as opposed to the infant's twenty five years), a claim that their action is barred due to limitation may be raised. That may have been an additional consideration in favor of my preliminary leaning toward leaving *Zeitsov* standing until circumspective arrangement. However, I would *at least* determine that the result of this judgment shall not apply, to the cases in which an action was not submitted by the parents, for one year from the date of the judgment. Unfortunately my colleagues are in the majority, and thus I can only hope that the courts will find a way to confront the situation which has been created, regarding claims of limitations (to the extent they will be raised), in the framework of justice.

Final Comments

17. This judgment is being given on the day of the retirement of the Deputy President, Justice Eliezer Rivlin. He is retiring after 36 years – twice the numerological value of the Hebrew word *Chai* [life] – on the bench of all instances,

starting with traffic court, and reaching where he has. His contribution covers all areas of the law, and there is no valley in which he did not stake a claim. The judgment he chose for his retirement day is characteristic of the central field of his judicial legacy, the field of torts, and within it medical negligence. For many future years the mark which Justice Rivlin has made on all branches of tort law, from traffic accident law, regarding which he also wrote a fundamental book, to the complex and sensitive issue decided today, will accompany Israeli adjudication. According to the sages, the existence of fair tort law – relations between man and his fellow (Babylonian Talmud *Baba Kama* 30a) – is among the foundations of just human society. In his judicial work, Justice Rivlin contributed to that. I wish him, now that he has reached retirement age, that "in old age they still produce fruit; they are always green and full of sap" (Psalms 92:14).

Decided according to the opinion of the Deputy President E. Rivlin.

The result of the judgment – to the extent that it regards the annulment of the cause of action of the infant – shall not apply to pending cases (including cases before us) in which an action was not submitted by the parents. Justice E. Rubinstein was of the opinion that the result of the judgment should not be applied for one year from today, and Justice M. Naor notes that the question of the law regarding a claim on the part of an infant which has not yet been submitted should not be decided in the framework of a transitional provision in the case before us.

Given today, 7 Sivan 5772 (28 May 2012).