In the Supreme Court, sitting as the Court of Civil Appeals

CA 10064/02
and counter-appeal

Before: The honourable Justice E. Rivlin
The honourable Justice A. Grunis
The honourable Justice S. Joubran

The appellants (the respondents in the counter-appeal):

1. Migdal Insurance Company Ltd
2. Avner Road Accident Victims Insurance Association Ltd

v.

The respondents (the appellants in the counter-appeal):

1. Rim Abu-Hana
2. Nadia Abu-Hana

Appeal and counter-appeal of the judgment of the Haifa District Court of 17 October 2002 in CC 621/98, which was given by the honourable Justice H. Pizam.

Date of the hearing: 21 Sivan 5765 (28 June 2005)

For the appellants (the respondents in the counter-appeal): Adv. Bezalel Sagi.
For the respondents (the appellants in the counter-appeal): Adv. Shai'r Metanis.

Facts: The respondent was injured in a road accident when she was five months old. The district court, in assessing her damages for loss of earning capacity, took into account the respondent's ethnic origin and her socio-economic background. The proper method of calculating this head of damage is the focus of the dispute between the parties.

Held: Damages for an injured minor's loss of earning capacity should be computed according to the presumption that the minor would have earned the equivalent of the national average wage, regardless of sex, religion, ethnicity, etc.. This presumption can be rebutted only when there is evidence of considerable weight, showing that there is a high probability that the minor would have entered a certain profession in the future.

Legislation cited:
Equal Employment Opportunities Law, 5748-1988.

Equal Remuneration for Female and Male Employees Law, 5756-1996.
National Health Insurance Law, 5754-1994.
Road Accident Victims Compensation Law, 5735-1975, s. 4.
Special Education Law, 5748-1988.

Israeli Supreme Court cases cited:

[1] CA 685/79 *Atrash v. Maalof* [1982] IsrSC 36(1) 626.
[2] CA 2061/90 *Marcelli v. State of Israel, Ministry of Education and Culture* [1993] IsrSC 47(1) 802.
[3] CA 140/00 *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [2004] IsrSC 58(4) 486; **[2004] IsrLR 101**.
[4] CA 357/80 *Naim v. Barda* [1982] IsrSC 36(3) 762.
[5] CA 235/78 *Hornstein v. Ohavi* [1979] IsrSC 33(1) 346.
[6] CA 2801/96 *El-Al Israel Airlines Ltd v. Yifrach* [2001] IsrSC 55(1) 817.
[7] CA 79/65 *Israel Steel Enterprises Ltd v. Malca* [1965] IsrSC 19(2) 266.
[8] CA 237/80 *Barsheshet v. Hashash* [1982] 36(1) 281.
[9] CA 4932/97 *Asraf v. HaMagen Insurance Co. Ltd* [1999] IsrSC 53(5) 129.
[10] CA 311/85 *Efraimov v. Gabbai* [1988] IsrSC 42(3) 191.
[11] CA 634/88 *Attiya v. Zaguri* [1991] IsrSC 45(1) 99.
[12] CA 571/78 *Abu-Karat v. Wiener and Tiko* [1980] IsrSC 34(4) 639.
[13] CA 722/86 *Youness v. Israel Car Insurance Pool* [1989] IsrSC 43(3) 875.
[14] CA 335/59 *Reichani v. Tzidki* [1961] IsrSC 15 159.
[15] CA 209/53 *Weizman v. Zucker* [1954] IsrSC 8(2) 1412.
[16] CA 169/77 *Schwartz v. Lieberman* [1978] IsrSC 32(3) 561.
[17] CA 746/81 *Nahalat Yehuda Local Council v. Zada* [1985] IsrSC 39(1) 19.
[18] CA 326/88 *Zimmerman v. Gavrielov* [1992] IsrSC 46(1) 353.
[19] CA 849/80 *Burka v. Burka* [1982] IsrSC 36(3) 739.
[20] CA 30/80 *State of Israel v. Asher* [1981] IsrSC 35(4) 788.
[21] CA 801/89 *Cohen v. Shabam* [1992] IsrSC 46(2) 136.
[22] CA 61/89 *State of Israel v. Eiger* [1991] IsrSC 45(1) 580.
[23] CA 142/89 *Gamliel v. Oshiot Insurance Co. Ltd* [1990] (3) TakSC 683.
[24] CA 5118/90 *Basha v. State of Israel* [1993] (3) TakSC 438.
[25] LCA 2531/98 *Goldschmidt v. Fogel* [1998] (2) TakSC 1317.
[26] CA 612/84 *Margalit v. Margalit* [1987] IsrSC 41(3) 514.
[27] CA 3375/99 *Axelrod v. Tzur-Shamir Insurance Company* [2000] IsrSC 54(4) 450.
[28] CA 778/83 *Estate of Sarah Saidi v. Poor* [1986] IsrSC 40(4) 628.
[29] CA 2978/90 *Israeli Car Insurance Pool v. Ben-Yeda* [1993] (1) TakSC 599.
[30] CA 1134/98 *Mugrabi v. Maimon* [2001] IsrSC 55(1) 729.
[31] CA 228/91 *Malca v. Sanwar* [1994] (2) TakSC 2055.
[32] CA 5052/92 *Schick v. Matalon* [1994] (3) TakSC 2119.
[33] CA 1027/90 *Clal Insurance Co. Ltd v. Batya* [1993] (4) TakSC 619.
[34] CA 92/87 *Danan v. Hodeda* [1991] IsrSC 45(2) 604.
[35] CA 7358/95 *HaSneh Israel Insurance Co. Ltd v. Zuckerman* [1996] (3) TakSC 23.
[36] CA 5118/92 *Altripi Lelahahoudat Alaama Ltd v. Salaima* [1996] IsrSC 50(5) 407.
[37] CA 2781/93 *Daaka v. Carmel Hospital* [1999] IsrSC 53(4) 526; **[1998-9] IsrLR 409**.
[38] CA 5794/94 *Ararat Insurance Co. Ltd v. Ben-Shevach* [1997] IsrSC 51(3) 489).
[39] CA 8216/99 *Estate of Friedman v. Rapaport* [2001] (2) TakSC 15.

[40] CA 572/67 *Perser v. Ezra* [1968] IsrSC 22(1) 397.
[41] HCJ 6126/94 *Szenes v. Broadcasting Authority* [1999] IsrSC 53(3) 817; **[1998-9] IsrLR 339**.
[42] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.
[43] CA 44/76 *Atta Textile Company. Ltd v. Schwartz* [1976] IsrSC 30(3) 785.
[44] CA 5604/94 *Hemed v. State of Israel* [2004] IsrSC 58(2) 498.
[45] CA 1433/98 *Hemed v. Ahlam* [1999] (3) TakSC 1754.
[46] CA 802/03 *Bashir v. Israeli Phoenix Assurance Company Ltd* (unreported).
[47] HCJ 6845/00 *Niv v. National Labour Court* [2002] IsrSC 56(3) 663.
[48] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**.
[49] CA 750/79 *Klausner v. Berkovitz* [1983] IsrSC 37(4) 449.
[50] CA 702/87 *State of Israel v. Cohen* [1994] IsrSC 48(2) 705.
[51] CA 718/91 *Suliman v. Wafa*, DinSC 27 481.
[52] CA 9117/03 *Zohar v. Bardweil* [2004] (3) TakSC 3060.
[53] CA 4597/91 *Afikim Kibbutz v. Cohen* [1996] IsrSC 50(2) 111.
[54] CA 6431/96 *Bar-Zeev v. Mohammed* [1998] IsrSC 52(3) 557.

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[55] CC (Jer) 385/94 *Binder v. Sun* (unreported).
[56] CC (Hf) 1844/00 *Ali v. Daud* (unreported).
[57] CC (Jer) 1533/98 *Turman v. Israel Car Insurance Pool* (unreported).
[58] CC (Jer) 653/90 *Aylin v. Cohen* (unreported).
[59] CC (Jer) 2074/00 *S. v. Knesset Yehuda School* (unreported).
[60] CC (Jer) 3341/01 *Dumer v. Avital* (unreported).
[61] CC (BS) 351/89 *Difalla v. Azbarga* [1995] (2) IsrDC 500.
[62] CC (TA) 2024/01 *Batran v. Tryg-Baltica* [2004] (3) TakDC 2319.
[63] CC (Hf) 1274/98 *Nujidat v. Estate of Nujidat* [2005] (1) TakDC 1805.
[64] CC (Hf) 1969/87 *Yaakobi v. Mimni* [2000] (2) TakDC 8544.

American cases cited:

[65] *United States v. Bedonie*, 317 F. Supp. 2d 1285 (D. Utah, 2004).
[66] *Hughes v. Pender*, 391 A. 2d 259 (D.C. 1978).
[67] *Athridge v. Iglesias*, 950 F. Supp. 1187 (D.D.C. 1996).
[68] *Croley v. Republican Nat'l Comm.*, 759 A. 2d 682 (D.C., 2000).
[69] *Clavier v. Roberts*, 783 So. 2d 599 (La. Ct. App. 2001).
[70] *Washington Metro. Area Transit Authority v. Davis*, 606 A.2d 165 (D.C. 1992).
[71] *Fontenot v. Laperouse*, 774 So. 2d 278 (La. Ct. App. 2000).
[72] *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850 (D. Pa. 1974).
[73] *Bulala v. Boyd*, 239 Va. 218 (Va. 1990).
[74] *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352 (6th Cir. 1978).
[75] *Reilly v. United States*, F. Supp. 976 (1987).
[76] *Reilly v. United States*, 863 F. 2d 149 (1st Cir. 1988).
[77] *Caron v. United States*, 548 F.2d 366 (1st Cir. 1976).
[78] *Vincent v. Johnson*, 833 S.W. 2d 859 (Mo. 1992).
[79] *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427 (1991).

[80] *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269 (2000).
[81] *Classic Coach, Inc. v. Johnson*, 823 So. 2d 517 (Miss. 2002).

Australian cases cited:
[82] *Rigby v. Shellharbour City Council* [2005] NSWSC 86.
[83] *Grimsey v. Southern Regional Health Board* [1997] TASSC 103.
[84] *Diamond v. Simpson* (No.1) [2003] NSWCA 67.
[85] *Rotumah v. New South Wales Insurance Ministerial Corporation* [1998] NSW Lexis 1714.
[86] *Relly v. Fletcher*, unreported, 22 October 1997.

Canadian cases cited:
[87] *Walker v. Ritchie* [2003] O.J. No. 18 (S.C.J.) (QL).
[88] *Parker v. Richards* [1990] B.C.J. No. 1824.
[89] *Webster v. Chapman* [1996] 6 W.W.R. 652.
[90] *Rewcastle Estate v. Sieben* (2001) 296 A.R. 61.
[91] *Crawford (Guardian ad litem of) v. Penny* [2003] O.J. No. 89.
[92] *Arnold v. Teno* [1978] 2 R.C.S. 287.
[93] *D (Guardian ad litem) v. F* [1995] B.C.J. No. 2693.
[94] *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital* [1994] 1 S.C.R. 114.
[95] *Cherry (Guardian ad litem of) v. Borsman* (1992) 70 B.C.L.R. (2d) 273.
[96] *Mulholland (Guardian ad Litem of) v. Riley Estate* (1995) 12 B.C.L.R. (3d) 248.
[97] *Gray v. Macklin*, 2000 A.C.W.S.J. 513443.
[98] *Audet (Guardian ad litem of) v. Bates* (1998) B.C.J. No. 678 (S.C.) (QL).
[99] *Tucker (Public Trustee) v. Asleson* (1991) 86 D.L.R. (4th) 73.
[100] *Terracciano (Guardian ad litem of) v. Etheridge* (1977) 33 B.C.L.R. (3d) 328.
[101] *MacCabe v. Westlock Roman Catholic Separate School District* (1999) 226 A.R. 1.
[102] *Tucker v. Asleson* (1993) 24 B.C.A.C. 253.
[103] *Chu (Guardian ad litem of) v. Jacobs* [1996] B.C.J. No. 674.
[104] *Shaw (Guardian ad litem of) v. Arnold* [1998] B.C.J. No. 2834.
[105] *Cho v. Cho* [2003] 36 R.F.L (5th) 79 (Ont. Sup. Ct. J.).
[106] *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229.

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[107] *Taylor v. Bristol Omnibus Co.* [1975] WLR 1054 (CA).
[108] *Joyce v. Yeomans* [1981] 1 WLR 594.
[109] *Jones v. Lawrence* [1969] 3 All ER 276.
[110] *Croke v. Wiseman* [1981] 3 All ER 852.

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[111] Babylonian Talmud, *Nedarim* 81a.

Judgment

Justice E. Rivlin:

1. The respondent, who is the appellant in the counter-appeal, was injured in a road accident when she was only five months old. The District Court assessed her damage, including her expected loss of earnings in the future. With regard to this head of damage, a fundamental dispute arose between the parties. It concerns the right of minors who have been injured as a result of a tort to receive damages for the loss of their future earning capacity irrespective of their ethnic origin, family or gender.

BACKGROUND

2. Rim Abu Hana, the first respondent in the appeal and the appellant in the counter-appeal (hereafter: 'the respondent' or 'Rim Abu Hana'), was injured as aforesaid in a road accident when she was five months old. The claim for damages was filed through the second respondent, the respondent's mother and natural guardian (hereafter: 'the mother'), in accordance with the Road Accident Victims Compensation Law, 5735-1975. The hearing before us — like the hearing before the trial court — focused solely on the question of the sum of damages.

The Haifa District court (the honourable Vice-President H. Pizam) determined the respondent's total permanent medical disability to be 44%. Since the respondent had a disability of 5% that did not result from the accident, the court saw fit to calculate her medical disability on a 95% basis, and it therefore found that the disability caused by the accident amounted to 43.7%. The court awarded the respondent a sum of NIS 91,160 for pain and suffering, a global sum of NIS 100,000 for past and future medical expenses, and a sum of NIS 35,000 for the expenses of travelling to receive medical treatments. For the serious neurological injury that the respondent suffered, as a result of which — in the court's estimation — she 'would need help in her studies and in acquiring life skills, as well as general help for her disability,' the court awarded her further global damages in a sum of NIS 400,000.

3. For the head of loss of earning capacity, after it heard the arguments of the parties on this issue, the trial court awarded the respondent a global amount, explained its decision in the following manner:

> 'In my opinion, we should not go to extremes in reducing the damages due to the plaintiff on account of her being a resident of the village of Reineh, or because most of the women in the village do not earn money outside their homes, since living conditions may change, and the accepted trend around the world is to make the living conditions and livelihood of men and women as equal as possible (CA 685/79 *Atrash v. Maalof* [1], at p. 630).
>
> Yet, since there is almost no data on which it is possible to assess the plaintiff's earning opportunities, it is preferable that I should award global damages for this head of damage as well, in view of the fact that there are, as of yet, no indications of the plaintiff's fields of interest, of what will be her education, her path in life and her training (*ibid*. [1], at p. 630).
>
> There is no alternative to determining the estimated loss of her earnings on a global basis, in which I am taking into account the national average wage, the average wage in the village of Reineh, the plaintiff's socio-economic background and the tension between the retirement age, which is 65, and the possibility of employees of various kinds to continue to earn a salary until the age of 70, and the capitalization of the aforesaid.'

The trial court included all of these factors in its assessment and determined the damages for the loss of the respondent's earning capacity to be NIS 500,000. It also awarded her NIS 85,000 for loss of pension and social benefits. The court deducted the disabled child benefit paid to the respondent by Social Security, in the sum of NIS 41,721, from the total amount of damages. Notwithstanding, the court was of the opinion that in view of the respondent's medical disability, it appeared that she would not be entitled to additional benefits from the National Insurance Institute, and therefore it refused to deduct any further amount or to freeze a part of the damages.

This judgment is the subject of the appeal and the counter-appeal.

4. The appellants claim that part of the respondent's disability is the result of neglectful treatment, which may severe the causal link between that part of the disability and the accident. Consequently, and in view of the evidence concerning the respondent's condition, the appellants are of the opinion that the rate of her medical disability should be reduced. The appellants dispute the amount of damages awarded to the respondent due to the loss of earning capacity in the future. They claim that the amount awarded for this head of damage *de facto*, albeit not expressly, reflects an actuarial computation on the basis of the national average wage. The use of the national average wage as a criterion for estimating the respondent's earning potential is, in the appellants' opinion, inappropriate; according to them, where there is objective evidence and real indications on the basis of which it is possible to determine the real earning potential of the injured person, these are preferable, since they reflect the true damage that was caused and realize the principle of restitution. The appellants believe that the trial court erred when it ignored the proven information regarding respondent, including 'the personal and familial background, the employment patterns in the sector to which the respondent belongs and, above all, the average wage figures of the village of Reineh, where the respondent lives.'

The appellants further claim that the damages awarded to the respondent for 'loss of pension and social benefits' should be cancelled, since there is no certainty that she would indeed have entered the labour market. The damages for 'assistance with her school work and general assistance' is, in their opinion, too high as well, since the respondent does not require assistance in her day-to-day functioning beyond that which she is entitled to from public authorities under the Special Education Law, 5748-1988. In addition, the appellants believe that the respondent can obtain the medical treatment she needs, if indeed she needs any, via public healthcare, under the National Health Insurance Law, 5754-1994, and therefore there was no justification to award her damages for this head of damage. According to the appellants, the trial court also erred when it denied their plea to deduct or to temporarily withhold from the damages awarded to respondent the capitalized value

of the benefits to which the respondent is likely to be entitled to from Social Security when she becomes an adult on account of her disability.

5. The respondent (the appellant in the counter-appeal) is of the opinion that the damages she was awarded for loss of earnings are less than she would have been awarded had the court relied on an actuarial computation based on the national average wage. According to her, one of the considerations that were taken into account by the court — the average wage in the village where she lives — is an irrelevant consideration, inconsistent with the principle of equality. The respondent further claims that the magnitude of her functional disability is greater than the degree of her medical disability, and that the court should have calculated her loss of earnings until the age of 70. The respondent argues against of the low amount of damages, in her opinion, of NIS 400,000 which she was awarded for third party assistance. She argues that this amount does not reflect the assistance that she has needed since the accident and until today and the increase in her need for assistance and supervision. The respondent further argues against the amount of damages that she was awarded for her increased mobility expenses. As to the deduction of the Social Security benefits, the respondent is of the opinion that 'only if the court had computed her full loss of earnings in the future on the basis of the national average wage, or at least on the basis of 75% of the national average wage, would there be a basis for considering a deduction of the value of the general disability benefit,' and that 'only if the plaintiff's claims regarding the computation are accepted should the defendants' claims regarding the deduction be accepted as well.'

6. As aforementioned, at the heart of the dispute between the parties lays the issue of how to compute the damages for loss of future earnings. This involves a further question of fundamental importance which must be addressed. In this matter I am of the opinion that the counter-appeal is to be allowed. I have also found that we should order part of the damages to be temporarily withheld on account of the anticipated disability benefit, as agreed by the parties in light of the change made in the computation of the loss of earnings. As to the other issues, I do not believe there is any ground for intervention. The district court reached its conclusions on the basis

of the evidence laid before it. I have not found that its conclusions, especially those that are based on a global estimate, and except for those related to the loss of future earnings, require intervention.

LOSS OF EARNINGS: GENERAL PRINCIPLES

7. The head of damage related to the loss of earnings is often a substantial component of the damages awarded for personal injury. When computing the compensation for this head of damage, the court is called upon to estimate the earning capacity of the plaintiff before the accident, examine the severity of his injury and its effect on his earning capacity, and award an amount that reflects the disparity, created by the accident, between the earning capacity before the accident and the earning capacity that the plaintiff has left after the accident and as a result thereof. Determining the amount of damages for this head of damage requires the court to take into account facts as well as predictions: facts with regard to the abilities, circumstances and occupations of the plaintiff before the accident and before the judgment, and predictions with regard to the damage that he or she is expected to suffer in the future. These predictions may also regard the past, for example: what would the plaintiff's level of earnings have been during the period between the accident and the judgment, had it not been for the accident? And with regard to the future, the court should examine what the salary the injured person could be expected to earn during the period between the date of the judgment and the plaintiff's retirement age. These predictions, including the prediction regarding the actual retirement age, are what led the Court to say that —

> 'When calculating compensation for loss of earning capacity in the future, we seem to ourselves to be walking with Alice in Wonderland, a land where guesses and suppositions are facts, and hopes and wishes are reality. We are required to discover the secrets of the future — a future that will occur and a future that will not occur — even though we are not prophets nor even the sons of prophets' (*per* Justice M. Cheshin in CA 2061/90 *Marcelli v. State of Israel, Ministry of Education and Culture* [2]).

Assessing the damage for the head of loss of earning capacity is therefore not simple. Often it is quite speculative. "Human capital" does not have a market value. The court is required, here as in other heads of damage, to consider two balance scales — an external balance scale and an internal balance scale. On one pan of the external balance scale lies a weight marked 'had not,' which examines the position that the plaintiff would be in had the accident not occurred. On the other pan of the external balance scale lies a weight marked 'as a result of,' which examines the position of the plaintiff as a result of the accident. The purpose of compensation is to balance the scales. To this end, one must also take into account the position of the internal balance scale, which is an offshoot of the external 'as a result of' pan. On one pan of the internal balance scale lays a weight marked 'loss.' One must examine the losses of the plaintiff as a result of the accident. On the other pan lays a weight marked 'gain.' One must examine the benefits and the 'gains' that the plaintiff has received — if any — as a result of the accident. Although it realizes the principle of restitution, this "balancing" process may seem problematic, since it would be difficult to accept that the victim "benefits" from the accident. But the limits of compensation — in money — for injuries that cannot always be compensated in money, require us to consider the losses and the 'gains.' Weighing the loss and the 'gain' that were caused to the plaintiff as a result of the accident provides a complete picture of the plaintiff's position after the accident, which can be weighed against the position he would have been in, had the accident not occurred. Only then is it possible to award the plaintiff an amount of damages that will correct the imbalance caused by the accident (CA 140/00 *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [3], at pp. 510-511 {118}).

8. The balance scale imagery merely serves to illustrate one important purpose of compensation in the law of torts, namely, *Restitutio In Integrum*. Admittedly, *Restitutio In Integrum* in its literal sense – restoring to wholeness - is impossible, but the goal of achieving this purpose expresses the aspiration of restoring the position of the plaintiff, in so far as this can be done by monetary means, to the position he would have been in had it not been for the tortious act (see A. Barak, 'Assessing Compensation for Personal Injury: The Law of Torts As It Is, and As It Should Be,' 9

Tel-Aviv University Law Review (Iyyunei Mishpat) 243 (1983), at pp. 249-251). This view is based, *inter alia*, on the approach of corrective justice, according to which the law of torts is intended to compensate for a wrong-doing of one individual to another, while emphasising the personal liability of the tortfeasor to compensate the plaintiff for the conduct that caused the injury (for a discussion of the corrective justice approach, see J.L. Coleman, 'The Practice of Corrective Justice,' in *Philosophical Foundations of Tort Law* (David G. Owen (ed.), 1995) 53; E.J. Weinrib, *The Idea of Private Law* (1995); G.P. Fletcher, 'Fairness and Utility in Tort Theory,' 85 *Harv. L. Rev.* 537 (1972)). The idea is that the plaintiff's damage — rather than the conduct or the financial means of the tortfeasor — is decisive in determining the amount of damages. 'The damages are determined in accordance with the damage, for which liability is imposed. At the heart of the compensation lies the damage, which should be estimated and quantified. The needs of the injured party — and not the financial means of the tortfeasor — are what lie at the heart of assessing damage in tort' (CA 357/80 *Naim v. Barda* [4]). Compensation is a 'remedial' relief, not a punitive one. It is intended to remedy or compensate for damage (Barak, 'Assessing Compensation for Personal Injury,' *supra*, at p. 246). These fundamental principles guide should also guide us when awarding compensation for the head of loss of earning capacity.

9. Compensation in the law of torts is based on an individualistic approach.

'The assessment of damage and the award of compensation in tort law are based on an individualistic approach. The law concerning the assessment of damage in torts is not based on a statutory ceiling or on a bottom limit for the amount of damages… the law focuses on the individual damage that occurred to the injured person, for which the tortfeasor is responsible, and the need to return the injured person to his original position' (*Naim v. Barda* [4]).

Therefore, the plaintiff's loss of earnings is determined according to his individual earnings. In special statutory arrangements, such as the Road Accident Victims Compensation Law, a 'tariff' system accompanies the imposition of strict liability; this tariff system sets a ceiling for the individualistic assessment. It should be noted that below this ceiling the individualistic approach continues to apply, in so far as

compensation for loss of earnings is concerned (see s. 4 of the Road Accident Victims Compensation Law, and compare with the determination of non-pecuniary damages, which depends wholly on objective-technical standards — CA 235/78 *Hornstein v. Ohavi* [5]; CA 2801/96 *El-Al Israel Airlines Ltd v. Yifrach* [6]).

We should preface our remarks by saying that the individualistic approach does not diminish the legitimacy of relying on 'working assumptions' in the appropriate cases, as those are merely presumptions of fact that have been formulated, *inter alia*, on the basis of experience, statistical data, legal realities and economic realities. Among these presumptions are the presumption of continuity with regard to the injured person's type of occupation and place of employment, the presumption of dependency of children and spouses — both male and female —on another for subsistence and livelihood, the presumption of the age for entering the labour market and the presumption of retirement age, the presumptions concerning ordinary life expectancy and the factual presumptions concerning the 'standard' level of earnings. This last presumption brings us closer to the matter at hand.

THE LOSS OF A CHILD'S EARNINGS

10. When a person is injured in an accident while he is still a minor, or before entering the labour market, he is entitled to compensation for the expected reduction in his earning capacity – as a working adult would be. The compensation for this head of damage, both for the adult-plaintiff and for the child-plaintiff, is determined according to the difference between what the plaintiff would have earned had it not been for the accident, and what he can earn with his injury (CA 79/65 *Israel Steel Enterprises Ltd v. Malca* [7]). Indeed, the compensation for this head of damage is given for the loss of *earning capacity* and not for the loss of earnings. This approach leads to the conclusion that even a plaintiff who has not yet begun working (a child) or a plaintiff who has stopped working before the accident (a housewife) is entitled to compensation, despite the fact that at the time of the injury he or she did not have any actual earnings. Notwithstanding, the determination — in the present — of the value of the earnings that the plaintiff would have produced from his earning capacity, had it not been for the accident, depends on the tangible

earnings that the injured person would have received by using his capacity in practice (*per* President Barak in CA 237/80 *Barsheshet v. Hashash* [8]). According to this approach, the loss of earning potential is a type of damage that merits compensation, provided that there is a possibility, which is not negligible or completely speculative, that this potential would have been realized. Earning capacity is regarded as an asset that belongs to its owner and reflects his 'economic horizon' (see *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [3], at pp. 518-519 {129}). Harm to this asset entitles the injured person to damages. This is true for an adult who has established himself in his work and had been uprooted from it by an accident, and it is equally true for a child who has been deprived of the possibility of establishing himself or herself in the labour market.

11. The problem is that the theoretical position with regard to the entitlement of a child to compensation for expected loss of earning— a position that is not under debate— encounters difficulties when it comes to assessing the damages. The usual difficulty inherent in the need to resort to predictions and estimates is magnified, first and foremost, because in the case of a child the court cannot rely on any 'work history' or on proven facts with regard to the plaintiff's position in the labour market. Lord Denning addressed this difficulty in *Taylor v. Bristol Omnibus Co.* [107]:

> 'At this very young age these [calculations – E. R.] are speculative in the extreme. Who can say what a baby boy will do with his life? He may be in charge of a business and make much money. He may get into a mediocre groove and just pay his way. Or he may be an utter failure.'

Lord Denning went on to say that:

> 'It is even more speculative with a baby girl. She may marry and bring up a large family, but earn nothing herself. Or she may be a career woman, earning high wages.'

We will return later to the question of differences between a baby boy and a baby girl.

It is therefore unsurprising that it has been held that, in so far as a minor is concerned, 'the assessment of the expected damage in the future and the

determination of the proper compensation, naturally involve a lack of certainty, since it is difficult to estimate whether and how the damage will develop and what effect it will have on the plaintiff's life' (CA 4932/97 *Asraf v. HaMagen Insurance Co. Ltd* [9], at pp. 136-137). 'Indeed, in the case of a child, a difficulty may arise in measuring the extent of the loss of earnings, since details about the earning potential of the plaintiff are often lacking, and the court finds itself trying to find its way in the dark' (*Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [3], at p. 543 {157}). The younger a minor is, the greater the court's difficulties are in assessing the loss of a his or hers future earnings (*per* Justice Y. Malz in CA 311/85 *Efraimov v. Gabbai* [10], at p. 194), as the minor has not yet chosen the course of his or her professional training, and since his professional future is shrouded in darkness (see also CA 634/88 *Attiya v. Zaguri* [11], at p. 101).

In General, that when the court seeks to compute the loss of a minor's earning capacity, it seeks to realize the goal of restoring the status quo, but it needs to contend with the fact that the nature of that "status quo" is largely unknown. The court must reconcile the tension between the principle of corrective justice and the evidential ambiguity as to what actually requires correcting.

GLOBAL OR ACTUARIAL CALCULATION?

12. Israeli case law has found several ways of dealing with the evidential ambiguity concerning the future earnings of minors on the one hand, and the need to realize the purpose of *Resitutio ad Integrum* on the other. In this the case of minors is not unique; the competing approaches are no different from those adopted in the general law of compensation, namely the conventional (actuarial) calculation approach and the global estimate approach (for a general discussion, see CA 571/78 *Abu-Karat v. Wiener and Tiko* [12]; CA 722/86 *Youness v. Israel Car Insurance Pool* [13], at pp. 877-878).

Initially, the court tended to resolve the problem of evidential ambiguity by awarding a global sum. Thus, in CA 335/59 *Reichani v. Tzidki* [14], it was held that:

> 'Naturally, the difference between the earning capacity of the appellant before the accident and his earning capacity after the accident cannot be

> proved, since the appellant was not yet able to earn any money before the accident because of his age. It follows that all that can be proved is the fact that as a result of the accident, the plaintiff's earning capacity was reduced to a certain degree, as compared with the average earning capacity of a healthy person; and in view of the evidence that is brought to prove this general matter the court must assess the damage to the best of its judgment… The learned judge was entitled, in my opinion, to do what he did and to determine the amount of damage as he did: it is nothing more than an estimate, and we are unable to say whether this estimate is better or worse than any other possible estimate' (*ibid*. [14], at p. 166).

The Court has reiterated this position — which supports the awarding of damages for the loss of a minor's earning capacity on the basis of a global estimate — many times (see, e.g., CA 209/53 *Weizman v. Zucker* [15]; CA 169/77 *Schwartz v. Lieberman* [16], at pp. 570-571; *Atrash v. Maalof* [1]; see also CA 746/81 *Nahalat Yehuda Local Council v. Zada* [17], at pp. 24-25; CA 326/88 *Zimmerman v. Gavrielov* [18]; and in England see *Joyce v. Yeomans* [108]; *Jones v. Lawrence* [109]). In another case, in the early 1980s, the Court wrote:

> 'As aforementioned, the calculation of the loss of future earnings was based on the salary of a housekeeper. The trial court was evidently influenced by the fact that several of the appellant's friends did indeed work in housekeeping. There is merit in the appellant's council's claim that this fact does not necessarily indicate that his client would pursue the same occupation, and therefore he proposes that the computation be based on the national average wage. Indeed, it is sometimes customary to make such a calculation, especially in the absence of specific precise information. But even then a proper basis of fact is required, whereas in our case there are no facts at all with regard to the social background, the disposition, the ability, etc., and any attempt to rely on calculations will be even less than a guess, and in practice it will be nothing more than an arithmetic exercise without any foundation. In the absence of any facts, and in light of the objective difficulties in predicting what the future holds

> for a girl over a period of decades, during which she may leave the labour market as a result of marriage, motherhood, etc., it would appear that the circumstances in this case justify awarding her a global sum for this head' (CA 849/80 *Burka v. Burka* [19], at p. 749).

Thus we see that the plaintiff's gender has also led the court, in the past, to award damages in the way of a global estimate, since it regarded this element as a factor that creates uncertainty with regard to earning capacity.

13. Yet, over the years we have seen, in various contexts, an ever-increasing use of actuarial computations. Detailed and reasoned computation was preferred to the vague path of global calculation. In one case it was said that if —

> '… it is possible, according to the facts proven during the trial, to arrive at a detailed, reliable and sensible computation, it is preferable to compute the damages in the conventional manner, since such a calculation has the advantage of being convincing, transparent and clear to everyone. On the other hand, when the proven facts are insufficient, any computation will be artificial and will involve guesswork and a degree of gambling, and therefore the global calculation should be preferred' (CA 30/80 *State of Israel v. Asher* [20], at pp. 792-793).

It can be observed that Justice T. Or recognized, in as early as the middle of the 1980s, that 'in recent years, there can perhaps be seen a trend to recommend the conventional method of computation in those cases where there is sufficient information needed for computing the loss in this way' (*Youness v. Israel Car Insurance Pool* [13]; cf. CA 801/89 *Cohen v. Shabam* [21], at p. 148; see also, the opinion of Justice M. Cheshin in *Marcelli v. State of Israel, Ministry of Education and Culture* [2], at p. 822). It is self-evident that the actuarial method of computation provides the parties with the tools to understand the basis for the assessment. It is also consistent with the need for the existence of effective appellate scrutiny.

This trend did not skip the computation of damages for the loss of earnings of injured minors. On the face of it, the evidential ambiguity and the vague reality that characterize the employment future of a minor tip the scales in favour of the global calculation method, which in the past was used in many cases where facts were

lacking. Indeed, this method has not been completely abandoned. However, the court has preferred, in a host of judgments, to follow the path of the actuarial computation whenever possible, despite the lack of a probative foundation. The factual uncertainty with regard to the future level of earnings of a minor who has not yet entered the labour market, and the lack of relevant facts from the past that may cast light on the future have been replaced by the factual presumption that relies on the figure of the national average wage (D. Katzir, *Compensation for Personal Injury* (fifth edition, 2003), at p. 579). This was discussed by Justice E. Goldberg in one case:

> 'The principle that has been determined in case law is that in computing the loss of a child's earning capacity, the national average wage constitutes the basis for the computation…
>
> Choosing this basis is the result of the uncertainty as to which occupation the minor would have chosen had it not been for the accident, and how much he would then have earned. Determining the loss of a minor's earnings is an area full of guesswork and suppositions, one in which we are required to practically foresee a future that will now never be realized. Therefore a uniform, stable and solid criterion was chosen, namely the national average wage table, which makes the consideration of the case simpler and prevents speculations… according to which we are required to clear the fog and predict specifically which path the minor would have taken had it not been for the accident' (CA 61/89 *State of Israel v. Eiger* [22], at p. 591).

Similar remarks were made by Justice T. Or:

> 'Indeed, there are cases in which the courts resort to assumptions or presumptions even with regard to the earning capacity of a plaintiff in an action for personal injury. This is done, for example, in the case of a child who is injured in an accident, when it cannot be known which occupation he would have chosen upon reaching adulthood, and what would have been his earning capacity in the occupation that he chose for himself. In such a case, there is in practice no possibility of proving the child's earning capacity had it not been for the accident, and without clear and convincing indications of a different earning capacity, the policy of relying

> on the rate of the national average wage as a measurement of the child's earning capacity is a necessary, albeit not optimal, one' (CA 142/89 *Gamliel v. Oshiot Insurance Co. Ltd* [23]).

Justice D. Dorner summarized the matter as follows:

> 'Indeed, in those cases where the court has no facts for determining the earning capacity of a minor, and when there are no reasons to depart from the general rule, the national average wage should be used as a proper measurement for determining the earning capacity' (CA 5118/90 *Basha v. State of Israel* [24]).

The national average wage table— 'as known on the date of the judgment from the publications of the Central Bureau of Statistics' (LCA 2531/98 *Goldschmidt v. Fogel* [25]) — has therefore become the central pillar in computing the loss of a minor's earnings (see also CA 612/84 *Margalit v. Margalit* [26], at pp. 518-519; CA 3375/99 *Axelrod v. Tzur-Shamir Insurance Company* [27]; CA 778/83 *Estate of Sarah Saidi v. Poor* [28]; CA 2978/90 *Israeli Car Insurance Pool v. Ben-Yeda* [29]; see also *Croke v. Wiseman* [110]). Thus the court only resorts to awarding global damages in exceptional cases. This rule has also been applied to young people, who are just starting out their way in life, and are injured before they chose a defined career path (CA 1134/98 *Mugrabi v. Maimon* [30], at pp. 736-737; CA 228/91 *Malca v. Sanwar* [31]; see also CA 5052/92 *Schick v. Matalon* [32]). This is a factual presumption that is based, as aforesaid, on experience, but also on normative considerations.

14. The premise, therefore, is that damages for the loss of a minors' earning capacity are based on the assumption that the minor would have earned the national average wage, had it not been for the accident. The question before us today concerns the nature of the circumstances that allow the court to *depart* from the factual assumption that the level of earnings would have been the national average wage. In particular, the question is whether it is possible to do so by means of alternative statistical data that relates to a particular group or sector of the population, or whether it may only be done on the basis of specific facts relating to the specific minor who was injured?

There is no doubt that where the information regarding the injured person is sufficient to allow an individual actuarial computation, the court will tend to prefer such a computation to relying on the presumption of the national average wage. It should be noted that various approaches have been heard in this Court with regard to the nature and quantity of the evidence required to justify a departure from the presumption. Justice Goldberg was of the opinion that what is needed is information that can indicate *to a near certainty* the occupational future of the minor had it not been for the accident (CA 1027/90 *Clal Insurance Co. Ltd v. Batya* [33]). Justice D. Levin was of the opinion that the existence of an 'additional specific fact' regarding a 'remarkable intellectual ability or a clear tendency towards a field of employment or art…' might lead to a correction of the computation by way of a global assessment (*Estate of Sarah Saidi v. Poor* [28], at pp. 633-634). Justice T. Or expressed an even more far-reaching approach. According to him, 'special facts concerning the injured person before him, which are capable of assisting, even in a general way, in estimating the expected earning capacity to be different from the national average wage' are sufficient in order to justify a departure from the national average wage table (CA 92/87 *Danan v. Hodeda* [34], at pp. 606-607). And in another case he explained that 'when estimating the damages in torts for a period in the future, we also take into account events that may occur in the future, even if their probability is insufficient for determining them as facts according to the standard of proof required in a civil trial' (CA 7358/95 *HaSneh Israel Insurance Co. Ltd v. Zuckerman* [35]). We shall state our opinion on this matter below, but now let us examine the question of whether group-based statistics — such as those relating to the sector, the ethnic group or the gender of the injured minor — or other data concerning the minor's social status, such as his parents' education or the socio-economic background from which he comes, are capable of justifying a departure from the criterion of the national average wage.

This is the question that we are considering today. The Israeli legal system is not the only system that has been called upon to consider it. A review of comparative law shows that the solution that has been found in different legal systems is not uniform.

THE LAW IN THE UNITED STATES

15. In the United States it is accepted that the loss of earning capacity is computed on the basis of statistical evidence given by expert economists and statisticians (see 2002 A.L.R. 5th 25, 2b; Illinois Jurisprudence, Personal Injury and Torts § 5:37; L.M. O'Connor & R.E. Miller, 'The Economist-Statistician: A Source of Expert Guidance in Determining Damages,' 48 *Notre Dame L. Rev.* 354 (1972)). In some states it is even a requirement to present such statistical evidence (22 Am. Jur. 2d Damages § 765). According to the prevailing approach, the damage is calculated according to statistical data brought forth by experts, who rely on various characteristics of the plaintiff, including age, gender, race, socio-economic status and education (2002 A.L.R. 5th 25, 9; O'Connor & Miller, 'The Economist-Statistician: A Source of Expert Guidance in Determining Damages,' *supra*, at p. 356). Where the matter at hand is the loss of the earning capacity of a minor who has not yet begun to pave his professional path, the experts rely even more on these characteristics, as well as on the level of education of the injured minor's parents and siblings (for a recent survey, see M. Chamallas, 'Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss,' 38 *Loy. L.A. L. Rev.* 1435 (2005); *United States v. Bedonie* [65], at pp. 1315-1320). For example, in one case it was held that —

> '…[A] case such as this, involving a person who had not yet made his choice of livelihood, future lost earnings must be determined on the basis of potential rather than demonstrated earning capacity. That potential must be extrapolated from individual characteristics, such as age, sex, socio-economic status, educational attainment, intelligence and dexterity' (*Hughes v. Pender* [66], at p. 263).

And in another case it was said:

> 'Plaintiff presented evidence from an economics expert, Robert N. Fenili, Ph.D, as to the demonstrated earning capacity of someone of plaintiff's race, sex, age, and educational level' (*Athridge v. Iglesias* [67], at p. 1192).

These remarks were cited favourably in the matter of *Croley*, given by the District of Columbia court in 2000 (*Croley v. Republican Nat'l Comm*. [68], at p. 693).

16. In so far as the plaintiff had demonstrated, before he or she was injured, his or her aspirations, and had succeeded in proving his ability to realize them to a sufficient degree of certainty, this will be taken into account when computing the damages. The courts emphasize, in this regard, the importance of the plaintiff's educational level and achievements in various fields, such as academics, sports, etc. (for a detailed review, see 2002 A.L.R. 5th 25). For example, it was held in one case that:

> 'In addition, prior to the accident, plaintiff had expressed an interest in becoming a lawyer. In light of all of the evidence, the Court finds that, but for the accident, plaintiff most likely would have obtained at least a college degree and there is a significant probability that he would have obtained a professional degree' (*Athridge v. Iglesias* [67], at p. 1193).

Cf. *Clavier v. Roberts* [69], at p. 610.

Even in these cases, where evidence was presented with regard to the course in life that the injured minor had wanted to follow, the courts have taken into account in their decision statistical information, including facts regarding the minor's sex, race, family and environment, in order to calculate the probability that he would indeed have realized his aspirations (2002 A.L.R. 5th 25, 2a). For instance, the court of Appeals in the District of Columbia rejected an expert opinion according to which the deceased, who was nine years old at the time of the accident, would have acquired an academic profession, because the expert did not take into account her grades and the reports from the school in which she studied, her parents' and siblings' educational level and professions and other demographic facts. The court accepted the statistics showing that one of every two hundred women pursues professional academic studies, and held that the expert did not prove that the deceased 'would have been the one among 200 women to graduate from graduate school' (see *Washington Metro. Area Transit Authority v. Davis* [70], at p. 178; see also, *Fontenot v. Laperouse* [71], at p. 285, where the lost earnings of the plaintiff were calculated on the basis of the average wage of women with the same educational level).

It should be pointed out that even when the plaintiff is an adult, courts may take into account his or her aspirations to develop and advance in life:

> ‘[T]he test is not the age, pre-injury occupation, nor the nature of the proposed profession, but rather the sufficiency of the plaintiff's evidence in showing his skill, likelihood of becoming a member of the profession and availability of work in that area’ (*Hoffman v. Sterling Drug, Inc*. [72], at p. 861).

Yet, sometimes it has been held that mere statistical evidence that does not relate at all to the personal and specific circumstances of plaintiff is insufficient to discharge the burden of proving the damage. For example, information regarding the plaintiff's social class will not necessarily suffice (see *Bulala v. Boyd* [73], at p. 233, and, for examples of evidence that was insufficient to discharge the burden of proof, see 2002 A.L.R. 5th 25, 10b-23b).

17. Alongside the prevailing approach in American case law according to which it is possible — and even desirable — to use gender- and race-based statistics in computing the lost earning capacity, it is also possible to see other approaches in American case law. A certain approach, which was adopted by the Federal Court of the Sixth Circuit in one case, does not depart from the general framework of allowing gender- and race-based statistics, but it is more sensitive. The Court allowed a defendant to show that from a statistical viewpoint the plaintiff, a black woman, is not expected to enjoy the average American standard of living, but it also took into consideration the prediction that this situation will change and that the gap between different groups will diminish:

> ‘While we also acknowledge defendant’s statistical evidence showing that blacks and females generally do not presently fully enjoy the benefits of the American standard of living, we recognize the likelihood that these disadvantages will have considerably less impact in the future on the ability of a black female such as Terri to obtain gainful employment comparable to that available to white males’ (*Drayton v. Jiffee Chemical Corp.* [74], at p. 368).

18. Moreover, contrary to the prevailing trend in American case law, which allows the use of statistics based on race and gender, it was also possible to find an opposite

approach in American case law, even if it is less common. For instance, in so far as gender is concerned, the court of Rhode Island held in *Reilly v. United States* [75], that the assumption that women work less years than men is not to be accepted:

> 'I cannot accept… [the] reduction of Heather's estimated working life by 40%. The reduction relies solely on the survey of women's work histories between 1978 and 1980… as a factual matter, I seriously doubt the probative value of such a statistic with respect to twenty first century women's employment patterns, particularly in light of current, ongoing changes in women's labor force participation rates' (*ibid.* [75], at p. 997).

This decision of the court was approved by the First Circuit (*Reilly v. United States* [76]; see also, the judgment of the First Circuit in *Caron v. United States* [77], at p. 371, in which it was held: '… we see no reason to distinguish between the sexes'). Moreover, it was held that the assumption that even in the future the women's average wage will be two thirds of that of men must not be accepted:

> 'This Court will not consider it error for a jury to refuse to minimize an award of lost minimum wages for an infant female on the assumption that the average wage for women in the future will still be only two-thirds of the average wage for men' (*Vincent v. Johnson* [78]).

The question of making a distinction between men and women in this context also arose with regard to persons injured by the terrible terrorist attack that befell the United States on September 11, 2001. Initially, the manager of the statutory fund that was established to compensate the victims of the disaster, decided to rely on gender-based statistical information in order to calculate the compensation for each victim. However, public criticism led him to reverse his decision and to award equal compensation to men and women, according to the average wage earned by men (as distinct from the average wage in the United States; see Chamallas, 'Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss,' *supra*, at pp. 1444-1445; M. Chamallas, 'The September 11th Victim Compensation Fund: Rethinking The Damages Element In Injury Law,' 71 *Tenn. L. Rev*. 51, at pp. 69-73 (2003)).

19. Similarly, the question of the legitimacy of relying on race based tables in the assessment of the lost earnings was considered in *Wheeler Tarpeh-Doe v. United States* [79], at p. 455. In that case, a question arose as to how to determine the earning potential of a child whose father came from Liberia and whose mother was white. The court in that case rejected the use of statistics based on race or gender, and held that:

> '[I]t would be inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races or the potential for any future such discrimination into a calculation for damages resulting from lost wages. The parties did not cite any precedent on this question. Accordingly, upon request by the Court… [defendant's expert – E. R.] submitted a calculation of the average earnings of all college graduates in the United States without regard to sex or race.'

The Supreme Court of the State of Mississippi also expressed the opinion that statistics relating to the earnings of the injured child's parents or the average earnings in his community should not be relied upon (*Greyhound Lines, Inc. v. Sutton* [80]). Relying on such statistics, according to the court, would be 'both unfair and prejudicial.' The court expressed the difficulties of relying on this type of statistics:

> 'Who is to say that a child from the most impoverished part of the state or with extremely poor parents has less of a future earnings potential than a child from the wealthiest part of the state or with wealthy parents? Today's society is much more mobile than in the past. Additionally, there are many more educational and job-training opportunities available for children as a whole today. We must not assume that individuals forever remain shackled by the bounds of community or class.'

Therefore the court held, in that case, that the average wage in the United States should be the basis for computing the loss of earnings for children (see also, *Classic Coach, Inc. v. Johnson* [81], at p. 528).

20. An additional milestone worthy of mentioning is the comprehensive judgment of the federal court in the State of Utah in *United States v. Bedonie* [65]. The court held that damages for the loss of earning capacity under the Mandatory Victims Restitution Act should be awarded on the basis of the national average wage, irrespective of race, gender and place of residence.

The conflict between the two approaches — the one that supports taking gender- and race-based statistical information into account, and the opposing one — is also reflected in legal writing. Scholars debated, among other questions, the application of the United States Constitution in private law. A central element in this debate concerns the rules of evidence, namely, the question of the admissibility of expert testimony that is based on statistics regarding gender and race (see M. Chamallas, 'Questioning The Use Of Race-Specific And Gender-Specific Economic Data In Tort Litigation: A Constitutional Argument,' 63 *Fordham L. Rev.* 73 (1994); A. McCarthy, 'The Lost Futures of Lead-Poisoned Children,' 14 *Geo. Mason U. Civ. Rts. L.J.* 75 (2004); S.R. Lamb, 'Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective,' 72 *Chi.-Kent L. Rev.* 299 (1996)).

21. It can be seen, then, that the courts in the United States tend, as a rule, to award damages for loss of earning capacity in accordance with statistical information based on the sex, race and socio-economic status of the injured child, as well as on his parents' education. But alongside the prevailing approach, another approach has developed in recent years, according to which damages should be awarded according to the national average wage, and group-based statistics should be ignored. The federal court in *United States v. Bedonie* [65] gave expression to the courts' somewhat surprising tendcy to, to ignore this issue altogether:

> 'Dr. Randle, who has performed thousands of lost income analyses, testified that no one had ever asked him to provide race- and sex-neutral calculations in wrongful death cases…' (*ibid*. [65], at p. 1315).

Chamallas explains this trend by saying that its inherent inequality is hidden behind the experts' 'expertise':

> '[W]hen experts rely on race or gender-based statistics to calculate tort damages, we tend not to notice the discrimination and to accept it as

natural and unproblematic' (Chamallas, 'Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss,' *supra*, at p. 1442).

However, this issue is not longer unnoticed.

THE LAW IN CANADA

22. The Canadian courts frequently made – and continue to make – use of statistical data in order to determine the extent of the damage to earning potential. When the statistics before the court took into account gender or ethnicity, the result was that disparities were created in the damages awarded to children of different groups. For example, the use of gender-based statistics led to awarding lower damages to girls than to boys (J. Cassels, *Remedies: The Law of Damages* (2000), at pp. 138-149). The courts in Canada have greatly emphasised the social characteristics of the minor — his socio-economic background and his family's educational level, as well as his skills and achievements (see, for example, *Walker v. Ritchie* [87]). The assessment of the damage has also been based on the gender and ethnic identity of the plaintiffs (see *Parker v. Richards* [88]; *Webster v. Chapman* [89]), and on several occasions the damages were even reduced because of the 'marriage contingency,' i.e., the expected circumstances of marriage, parenthood and childbirth (see *Rewcastle Estate v. Sieben* [90]; *Crawford (Guardian ad litem of) v. Penny* [91]; for a critical discussion, see E. Adjin-Tettey, 'Contemporary Approaches to Compensating Female Tort Victims for Incapacity to Work,' 38 *Alberta L. Rev*. 504 (2000)). In one case (*Arnold v. Teno* [92]), a four and a half year old girl was seriously injured in an accident. The court assessed the damages for loss of earning capacity on the assumption that her future earnings would be close to the poverty line but for the accident. The court explained its decision in the following manner: 'There can be no evidence whatsoever which will assist us in determining whether she ever would have become a member of the work force or whether she would have grown up in her own home and then married.' This reasoning gives rise to a considerable difficulty, to say the least. As the learned Prof. Adjin-Tettey wrote in her aforesaid article, the court was not even prepared to give the injured girl the benefit of the

doubt that she would have followed in her mother's footsteps, and become a schoolteacher.

23. Despite the fact that group-based statistics are still customarily used (see *D (Guardian ad litem) v. F* [93]), in recent years a more equal approach can be observed. This trend is consistent with the writings of scholars who have pointed to the need to adopt more equal standards in awarding damages for the head of loss of earnings, and to avoid relying on data based on gender, race or social status (see, for example, J. Cassels, 'Damages for Lost Earning Capacity: Women and Children Last!', 71 *Can. Bar Rev.* 447 (1992); E. Adjin-Tettey, 'Replicating and Perpetuating Inequalities in Personal Injury Claims through Female-Specific Contingencies,' 49 *Macgill L. J.* 309 (2004); C.J. Bruce, '*MacCabe v. Westlock*: The Use of Male Earnings Data to Forecast Female Earning Capacity,' 37 *Alberta L. Rev.* 748 (1999); E. Gibson, 'The Gendered Wage Dilemma in Personal Injury Damages,' in *Tort Theory* (K. Cooper-Stephenson & E. Gibson (eds.), 1993) 185). There is an understanding that statistics based on gender, ethnicity or race, and which are used to assess the loss of earning capacity, are rooted in history and reflect long-abandoned discriminations and social rules of the past, whereas in present-day life the gaps are becoming increasingly narrow. It is claimed that reliance on such statistics legitimizes social injustice (Cassels, *Remedies: The Law of Damages*, *supra*, at pp. 142-143) and may also be inconsistent with the constitutional right to equality (see Gibson, 'The Gendered Wage Dilemma in Personal Injury Damages,' *supra*, and Adjin-Tettey, 'Replicating and Perpetuating Inequalities in Personal Injury Claims through Female-Specific Contingencies,' *supra*).

24. It is therefore possible to find in Canadian case law a more recent tendency to recognize the improvement that is expected to take place in the status of women in the labour market; indeed, in certain cases, despite the fact that the court based its decision on statistics regarding the earnings of women only, these were used as a mere starting point, and a certain amount was added to the damages to reflect the expected future increase in women's salaries (see *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital* [94]; cf. *Cherry (Guardian ad litem of) v. Borsman* [95];

Mulholland (Guardian ad litem of) v. Riley Estate [96]). An additional attempt to express the expected improvement in women's earnings was made by Canadian courts through using men's standard earnings as a starting point, and then deducting a certain amount, which reflects the time devoted to children, shorter work hours and other such 'shortcomings' (see *Gray v. Macklin* [97]; *Audet (Guardian ad litem of) v. Bates* [98]; *Tucker (Public Trustee) v. Asleson* [99]; *Terracciano (Guardian ad litem of) v. Etheridge* [100]; see also, *MacCabe v. Westlock Roman Catholic Separate School District* [101], and the discussion of this issue in C.J. Bruce, '*MacCabe v. Westlock*: *The Use of Male Earnings Data to Forecast Female Earning Capacity*,' 37 *Alberta L. Rev.* 748 (1999), at p. 760). Justice McEachern, who wrote a dissenting opinion in *Tucker*, expressed discomfort in light of the use of 'male statistics' as a starting point for assessing the earning capacity of an injured girl:

> 'This is not to say that female statistics should be used strictly, for they have rightly been found to reflect bias, but it is necessary, so far as may be possible, to use statistics which comport most closely with the essential facts of the case under consideration**...**
>
> While we may strive for social justice, as it is perceived from time to time, the courts must deal with the parties who are before them, plaintiffs and defendants, on the basis of realistic predictions about the future, and not just in accordance with understandable wishes that society, in some of its aspects, were different from what it really is' (*Tucker v. Asleson* [102]).

25. This approach, as we have said, was not universal. In certain judgments 'male statistics' were used regarding injured female plaintiff's who brought evidence to show that they were expected to enter into professions of a 'male' character (see, for example, *Chu (Guardian ad litem of) v. Jacobs* [103]). In other judgments the Canadian court saw fit to rely on neutral (not gender-based) data in order to determine future average earnings, while taking into account the plaintiff's expected level of education (see *Shaw (Guardian ad litem of) v. Arnold* [104]; *Cho v. Cho* [105]; see also, *Walker v. Ritchie* [87]). In one case, the Canadian Court expressed criticism of the very use of gender-based statistics:

> 'Indeed, it may be as inappropriately discriminatory to discount an award solely on statistics framed on gender as it would be to discount an award on considerations of race or ethnic origin. I am doubtful of the propriety, today, of this Court basing an award of damages on a class characteristic such as gender, instead of individual characteristics or considerations related to behaviour…' (*Terracciano (Guardian ad litem of) v. Etheridge* [100]).

In *MacCabe v. Westlock Roman Catholic Separate School District* [101], in which Justice Johnstone rejected the possibility of basing the compensation calculation on sex-based figures, the court considered the question of the constitutionality of making a determination based on the sex of the injured person:

> 'It is entirely inappropriate that any assessment I make continues to reflect historic wage inequities. I cannot agree more with Chief Justice McEachern of the British Columbia Court of Appeal in *Tucker*… that the Courts must ensure as much as possible that the appropriate weight be given to societal trends in the labour market in order that the future loss of income properly reflects future circumstances. Where we differ is that I will not sanction the "reality" of pay inequity. The societal trend is and must embrace pay equity given our fundamental right to equality which is entrenched in the Constitution. The courts have judicially recognized in tort law the historical discriminatory wage practices between males and females. The courts have endeavoured to alleviate this discrimination with the use of male or female wage tables modified by either negative or positive contingencies. However, I am of the view that these approaches merely mask the problem: how can the Court embrace pay inequity between males and females? I cannot apply a flawed process which perpetuates a discriminatory practice. The application of the contingencies, although in several cases reduce the wage gap, still sanction a disparity.
>
> A growing understanding of the extent of discriminatory wage practices and the effect of this societal inequity must lead the Court to retire an antiquated or limited judicial yardstick and embrace a more realistic,

> expansive measurement legally grounded in equality… The Court cannot sanction future forecasting if it perpetuates the historic wage disparity between men and women. Accordingly, if there is a disparity between the male and female statistics in the employment category I have determined for the Plaintiff, the male statistics shall be used, subject to the relevant contingencies. Once again if the contingencies are gender specific, then the contingencies applicable to males shall be used except in the case of life expectancy, for obvious reasons.'

THE LAW IN AUSTRALIA

26. In Australia, the tendency of the courts is not to award an injured minor high amounts for the head of loss of earning capacity, mainly in view of the degree of arbitrariness inherent in deciding what the future would have held for a child. Australian judgments have emphasized that the older the plaintiff is, the greater the possibility of reasonably assessing the loss that he has suffered (F. Trindade & P. Cane, *The Law of Torts in Australia* (2001), at p. 518). In awarding damages to injured minors, the courts have taken into account the average wage and additional data such as employment and earning patterns among the members of the injured minor's family.

With regard to injured girls, the courts have occasionally relied on women's income-tables in Australia, while assuming that statistically, the injured girl would have children and not work, at least as long as the children are young (see *Rigby v. Shellharbour City Council* [82]). In other cases courts in Australia have seen fit to base the computation of lost earnings on "mixed" figures, relating to the earnings of both women and men, as they assumed that disparities in earnings will decrease in the future, when the injured girl will be old enough to join the labour market (see *Grimsey v. Southern Regional Health Board* [83]). The court held that:

> 'Considerable strides have already been made in eliminating what most people see as an unfair and unjustifiable discrimination between the value of a man's work and that of a woman. Furthermore, as society develops, one sees a considerable blurring of the boundaries which

> previously distinguished male and female workers. These days men become cake decorators, and women become underground miners.'

In another case, the court of appeals held that a girl's personal characteristics, as well as those of her parents, indicated that she would have grown up to be a "business woman", and it therefore based her loss of future earnings on the national average earnings tables (*Diamond v. Simpson* (No.1) [84]).

27. The question has also arisen with regard to Aborigine plaintiffs. One case considered the matter of an infant who was severely injured in an accident (*Rotumah v. New South Wales Insurance Ministerial Corporation* [85]). The defendants claimed, in reliance on statistical data, that the infant's being part of the Aborigine community had significant implications on his life expectancy and on his expected earning capacity, had it not been for the accident. The Supreme Court of New South Wales rejected their argument, even though the only judgment that it found given by a court in Western Australia which considered this question, approved the use of statistical data relating to this community, together with data relating to the injured person's family (*Relly v. Fletcher* [86]). In explaining its position, the court of New South Wales said the following in *Rotumah v. New South Wales Insurance Ministerial Corporation* [85] (*per* Justice Donovan):

> 'I have some doubt about whether other evidence could include statistics about sub-groups within Australia. The plaintiff's racial group in this case has already been included in the overall statistics of average weekly earnings. This reflects the equality of opportunity in this country and I do not think that the general statistics which may reflect economic opportunity should be rebutted by specific statistics of sub-groups.
>
> …
>
> If I took into account the general statistics of the Aboriginal race it seems to me that I would then have to take into account the general statistics of, for example, the Chinese race, the Italian race, the Irish race, the Anglo-Saxon race. I can understand the practical basis for this submission but I cannot, with due respect to their Honours in the Full court of Western

> Australia, accept that statistics applicable to a race can be taken into account in a matter such as this. If there were specific factors associated with the plaintiff's family which could be said to "drag down" his future income I would certainly take that into account but that, in my view, is not the evidence in this case...'.

The conclusion of the court was, as aforesaid, that general statistics, rather than group-specific statistics are the proper data to rely on.

BACK TO DOMESTIC LAW - THE LAW IN ISRAEL

28. Our review of comparative law shows, on the one hand, that statistical gaps in the earnings of different population groups do sometimes affect the amount of the compensation for the head of loss of earning capacity. The social and ethnic background and the sex of an injured child sometimes are used in other countries as a legitimate index for assessing future earnings. On the other hand, there is also a growing recognition of the need to reduce the use of statistical evidence that relies on ethnic background, sex or social status. In many senses, Israeli case law is leading the way. Now the time has come to take another step forward.

THE NORMATIVE CONSIDERATIONS

GENERAL

29. As mentioned above, Israeli case law usually bases the damages awarded for compensation for a child's loss of earning capacity on the national average wage. This policy relies on the need for *Restitutio In Integrum*. Admittedly, this standardization of the compensation contradicts, *prima facie*, with the individualist approach that underlies the principle of restitution. However, if there is evidential ambiguity, such as in the case of a child, where the reality itself is unclear, a calculation based on statistical data of the national average wage seeks to realize the principle of restitution in the closest way possible. The factual assumption underlying the choice of statistical data is that in the absence of any other adequate evidence, it should be

assumed that the injured child probably would have earned the equivalent of the national average wage.

However, if we are talking of statistical assumptions, a question arises as to which statistic ought to be used: Should we use a uniform statistic, or should we use group-based statistics? Should the court examine, with regards to each injured person (or perhaps only with regards to certain injured persons), the sector of the population to which one belongs - whether his or her gender, ethnicity, religion, and perhaps also one's place of residence, parents' education, socio-economic background and other similar criteria that supposedly identify the individual with a particular group, but in practice bind one to it?

30. It should be stated right away, that as implied beforehand according to the prevailing law in our legal system, this question is of a relatively limited scope. Thus, for example, generally there is no disagreement that the relevant statistic for the earnings of men and women should be the same. The courts frequently use the level of the national average wage, which provides a uniform single set of figures for men and women alike (see, for example, CA 5118/90 *Basha v. State of Israel* [24]). Thus, on a matter that has been the subject of much debate in other legal systems, and still is the subject of debate in some of them — namely the question of the use of different statistics for the different genders — the law in Israel is very clear: Israeli law does not recognize any difference between men and women when awarding compensation for loss of earning capacity (see also D. Katzir, *Compensation for Personal Injury* (1998), at p. 412). So is the case today, and so it will continue to be. Even in other contexts, where it could have been possible to argue for the need to rely on group-based statistics, such arguments have not been heard, and if they were heard, they were often not accepted. Thus, we must examine the distinction that is being proposed today, and similar ones, with great caution; and if the conclusion of our deliberations is, as the appellants have requested of us, that a separate calculation should be made for the respondent before us, because she is a child from a particular sector of the population, the significance of this is much wider than their request, both in the context of the anticipated earnings of children and in other contexts. The perception argued by the appellants is likely, if the spirit of their

argument is to be adopted, to lead us to think that every person should have his own 'statistical chart.' Yet this will not be our conclusion.

31. We find it necessary, at the beginning of the discussion, to return to the various previous judicial opinions on the proper way of calculating the value of earnings. As mentioned, in Israel the accepted approach is that the loss of earning capacity (as opposed to the loss of earnings) is compensable damage (see *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [3]; *Naim v. Barda* [4]; the same is true in other legal systems — see, for example, in Canada: *Andrews v. Grand & Toy Alberta Ltd.* [106]). The proponents of the concrete approach held that 'it should be shown that there is a chance, which is not merely hypothetical, that the injured person would have earned money had it not been for the accident, and that the accident harmed these earnings' (the position of Justices Barak and Landau in *Barsheshet v. Hashash* [8]). Others held that a more abstract position should be adopted, according to which the value of the earnings is determined in accordance with what the injured person could theoretically earn in the future, had it not been for the accident (the position of Justice Y. Shilo in *Barsheshet v. Hashash* [8]). But in so far as a child is concerned, Chief Justice A. Barak emphasized that he did not see any difference between the two approaches:

'In the vast majority of cases, it is possible to reach the same result whether one adopts the concrete approach or one adopts the abstract approach… Take the case of a child who is injured in a way that causes him functional damage. The child has not yet worked, and it is impossible to know how things would have developed in the future. According to both approaches, he is entitled to compensation for loss of earnings. According to the concrete approach, the child is entitled to compensation, since there is a chance that the functional injury will impair his earning capacity. According to the abstract approach, the child is entitled to compensation, since the capacity to work has been impaired. Even the amount of the compensation is identical in both approaches' (*ibid.* [8], at p. 301).

Indeed, in general, there is no difference between the two approaches in so far as a child is concerned. This is true both with regards to the entitlement to compensation, and with regards to its calculation. It would appear that especially in

the case of a child, there is an advantage to considering his earning potential (as opposed to the concrete inquiry). The choice of earning potential provides a basis for the assumption that every child — whatever his gender, race or his family's economic status — has the potential to earn the equivalent of the national average wage. Focusing on the earning *potential* of the child is consistent with the principle of *Restitutio In Integrum* and with the individualistic approach to the law of torts. Indeed, it is precisely the individualistic approach — which focuses on the concept of the autonomy of the individual — that requires us not to shackle the injured person with the bonds of the social environment into which he was born, or in which he has grown up. It demands that we do not constrain him to an historical reality, and determine his fate on the basis of the economic or social disadvantage of persons of his gender or race, according to the statistics that might disempower him. The notion that damages are awarded for a loss of capacity — a loss of potential — is therefore inconsistent with compensation that relies on group-based statistics.

32. Nevertheless, as we have seen in other legal systems, sometimes the group affiliation has been taken into account when calculating compensation for loss of earning capacity. In Israel too, alongside judgments that adopted an equal approach, which we will discuss later, there are judgments which have taken into account statistics based on the plaintiff's sectorial affiliation when calculating the compensation. For instance, in CA 5118/92 *Altripi Lelahahoudat Alaama Ltd v. Salaima* [36], this court approved the amount of compensation awarded by the district court to an injured child, and stated:

> 'The judge's conclusion that the plaintiff could be expected to do manual work is entirely consistent with the tendency of his family members who are all manual workers, and the limited success of the plaintiff in his studies. The judge examined the average wage that the plaintiff could have earned as a manual worker in Israel and in the territories [the area of Judaea and Samaria, E.R.], and determined that his earning potential laid between these two averages. This cannot be criticized. There is no basis to the appellant's claim that the judge should have determined the earning capacity of the injured person solely on the basis of the average

> wage in Judaea and Samaria, since we are speaking of an Israeli citizen, who is fully entitled to work inside the Green Line.'

What is the reason underlying this result? It would appear that the main reason is as follows: the disparities of income in society are a wide-ranging social problem, and it is unjust to impose the price of equality on a random defendant who injured, for example, a plaintiff who is a girl or a member of a minority. It is also unjust — so the argument continues — to award random plaintiffs damages that exceed the earnings they could have expected in a labour market that reflects a discriminatory reality. The purpose of compensation in the law of torts, according to the argument, is restitution — real restitution, not utopian restitution — and this is what the court should do on the basis of reality, even if the reality is unpleasant.

In my opinion, this justification for inequitable compensation cannot stand.

THE STORY OF LIFE, THE RIGHT TO AUTONOMY - AND CORRECTIVE JUSTICE

33. Every person has the right to write the narrative of his own life. It is the individual's autonomy, which is a part of a person's human dignity and freedom. As Prof. Josef Raz noted:

> 'The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives... A person whose every decision is extracted from him by coercion is not an autonomous person. Nor is a person autonomous if he is paralysed and therefore cannot take advantage of the options which are offered to him' (J. Raz, 'Autonomy, Toleration, and the Harm Principle,' in *Justifying Toleration* (S. Mendus, ed., 1988), at pp. 155-156).

The right to autonomy was discussed by Vice-President T. Or in CA 2781/93 *Daaka v. Carmel Hospital* [37], where he considered a different question in the field of tort:

> 'The premise for our discussion lies in the recognition that every person has a basic right to autonomy. This right has been defined as the right of each individual to make his own choices, and to act according to these choices… This right of one person to determine his life and fate encompasses all the central aspects of his life: where he will live; what will be his occupation; with whom he will live; in what will he believe. This right is central to the existence of each individual in society. It expresses the recognition of the value of each individual as a world of his own. It is essential to each person's own definition, in the sense that all of the individual's choices define his personality and his life.'

Admittedly, often a person acts or refrains from acting unwillingly. Fate often rocks the ship of life. When a tortuous act deprives a person of the ability to choose his own path in life, the law of torts seeks to restore the status quo, and as far as it can, restore the right that he has lost, i.e., the right to outline the narrative of his own life, a narrative of hope, a narrative of aspiration to realize that hope. This also the case when a person's earning ability is diminished due to a tortious act. This diminution lessens the possible life-paths available for each person's choices. It restricts the horizon of possibilities that are open to him. It chains him in the bonds of disability. It restricts his ability to control the course of his life with regards to a most central aspect of human life - participation in the labour market — and realization of the freedom of vocation, which is recognized in Israeli law as a basic human right. Restoration of the status quo comes to correct the situation created as a result of the injury. It comes to negate, to the extent it can, the result of breach of equality between plaintiff and defendant according to Aristotle's conception. In our case, it comes to restore the restricted horizon of vocational possibilities seen from the eyes of the injured person (on the conception of corrective justice in tort law, see also E.J. Weinrib, 'Understanding Tort Law,' 23 *Val. U. L. Rev.* 485 (1989)). Corrective justice, as an important goal of the law of torts, is merely one branch on a large tree that reflects the conception of universal justice — the justice that requires equality, that requires recognition of the right to autonomy, and that nourishes hope.

34. How, then, will the law of torts restore the status quo for a person whose ability to work has been reduced or destroyed? The law must forecast the future and estimate what his income would have been had he not been injured in the accident. In effect, the court has to sketch the map of life of the person without the injury, and compare it to the map of his life after the injury. Sometimes the injured person reveals — by word, deed, conduct or way of life — how he intended to direct his path and what could be forecast for him in the area of employment. Thus, for example, his earnings before the accident (which is often seen from tax returns filed with the tax authorities — see CA 5794/94 *Ararat Insurance Co. Ltd v. Ben-Shevach* [38]), the pattern of life, the horizon for promotion in his place of employment, academic studies, realizable aspiration, all these and other facts allow one to forecast what his real income would have been had the accident not occurred. In such a case, the court is able to assess the damages on the basis of the expected income but for the accident (as compared with the income after the injury) and express, by means of the compensation, the need for restoring the status quo, as the plaintiff was denied the professional career which he sought (and would have been able) to realize. Such is the actuarial calculation that relies on individual characteristics relating to the injured person, and it is usually used by the court when it awards an injured adult compensation for loss of earning capacity (see, for example, CA 8216/99 *Estate of Friedman v. Rapaport* [39]). However, unfortunately sometimes the injured person does not tell us anything. The path he would have trod in the future has not yet begun. The case of an infant is a conspicuous example of this. Usually, he does not manage to compose even the first chapters of his vocational life. And since he has not yet taken the first step, it is difficult for the court to predict the following ones.

When we are dealing with an infant, we look around, then, for a basis that will allow us to compensate despite the shroud of uncertainty. In practice, we seek to locate a basis that will reflect the range of possibilities that was open to the injured infant. This basis has to express not only the possibility that the infant on maturity would be found on the lowest stratum of employment, but also the possibility that in due course he would have achieved professional greatness. This basis has to encompass the range of narratives that are open to a child in Israel — every child, of

whatever sex, origin, race or religion. The national average earnings is the best basis for realizing this goal. The choice of any other basis on the exclusive ground that the injured infant belongs to a certain group signifies adherence to the assumption that the vocational opportunities that exist in Israel are not open – and never will be open in the future - to a child of that group. This denial has no factual or normative ground. It might itself create a discriminatory reality. It might turn out to be a self-fulfilling prophecy. But the 'glass ceiling' can be broken — many have proved this to be true — and even if for some members of society this prospect is more difficult to fulfil, as it requires more diligence, dedication, ambition and a great effort — the right to chose that path still exists and cannot be taken away.

35. Indeed, Israeli case law, from its earliest days, has held that assuming a child's low economic position is permanent simply because of his origin, the socio-economic state of his family or his sex – is unacceptable. The Court always emphasized that the opportunity of professional success is not restricted to certain groups of society, and that we should not assume that children of poor origin are doomed to poverty. The 'cornerstone' of this approach was laid by Justice Berinson, in the following illuminating remarks:

> 'As we remember, the court took into account the fact that the respondent is from a poor family, and for this reason he was unable to acquire for himself a profession that guarantees a high income. With all due respect, I am of the opinion that this conclusion has gone one step too far. There have always been children of poor families who attained outstanding spiritual and material achievements, in accordance with the saying in the Talmud: "*be heedful [not to neglect] the children of the poor, for from them Torah goeth forth*" (Babylonian Talmud, *Nedarim* 81a [111]). In our time and in our country many possibilities and opportunities are open to the children of the poor, so they may fulfil their aspirations to advance in society and to increase their level of education and professional training' (CA 572/67 *Perser v. Ezra* [40], at p. 400).

Such was the case then, and such is certainly the case today. It was Justice Bejski who expressed his resistance o using statistics relating to ethnic origin or gender in calculating the loss of earnings:

> 'The appellant was approximately seventeen years old when the judgment [of the lower court] was given, and she is still a student. We cannot say that she will not continue her studies in order to acquire a profession, and even if according to general statistics the number of women from this sector who leave the home to work is still low in comparison to the Jewish sector, this is not a static number, especially not for the younger generation. General statistics do not even indicate what this group of women who work is made up of in terms of social status, area of residence, etc.. And since various factors may influence the appellant's life-path, it does not seem reasonable at this time to say that she certainly will not join the work force in production or services' (*Atrash v. Maalof* [1], at pp. 630-631).

Similarly, the court in Australia emphasized that the family history of an injured child should be considered with great caution when determining the loss of earning capacity of that child. Its remarks are also relevant to our case:

> 'Many young people break out of their family background and achieve high job status and income. There are many captains of industry, chiefs of commerce, Parliamentarians, Ministers and indeed even Prime Ministers who illustrate the danger that arises if one automatically imposes family background income as a limitation' (*Rotumah v. New South Wales Insurance Ministerial Corporation* [85]).

In the absence of specific circumstances to prove the contrary, every boy and girl in Israel — whether from a rich or a poor home, and regardless of origin — has an opportunity of finding their way into the various economic circles. Everyone has the right to enjoy this opportunity. Giving less compensation for identical injuries, merely because of the gender, socio-economic status or ethnic origin of the injured person, if fails to restore the damage caused by the tortuous act. It perpetuates a historical reality. It prevents the realization of the new reality. It does not recognize an important aspect of the head of 'loss of earning capacity,' namely the loss of the right

to aspire to self-realization in the professional sphere, and the accompanying benefits.

36. It should be noted that the position of the adult is frequently different from that of the child. The path in life that he has already trodden upon has provided him with various possibilities, and the choices that he has already made along that path often make it possible to see what awaits him in the future. An adult's job before the accident, and the salary that accompanies it, his achievements and his promotion prospects, are all a result of those choices, and therefore they constitute the relevant facts needed for restoring the status quo. These facts will replace the national wage statistics, thus validating the adult's choices. But the situation of a minor is different; he has not yet, in most cases, had time to choose his professional path. For him, the future is a mere hope, but no less than a hope that may be realized. The national average reflects the spectrum of opportunities that was available to him but for the accident.

The choice of a uniform statistical basis, when we are dealing with plaintiffs with no proven earnings pattern, does not mean that we are departing from the individual approach that prevails in the law of compensation in torts. The use of general statistics is reserved solely for those cases in which it is not possible to resort to an individual assessment. This ensures that the rule of *Restitutio In Integrum* and the principle of corrective justice are not undermined (see Chamallas, 'Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss,' *supra*, at pp. 1460-1461, where she expresses support, 'at least in the short term,' for this distinction between the adult and the child). However, even for an injured child the national average wage is merely a presumption that can be rebutted. When the specific child can tell us about the road he already took, or expected to follow — as an individual human being— the individual criterion may certainly affect the statistical result. I will return to this later.

37. Moreover, the hope is not merely a hope. It may, and should be, assumed that the position of women, minorities and weaker sectors of society will improve in the future and better times are ahead. The world is not in regression. The future will be

brighter than the past. Stereotypes are dissipating, and discriminatory assumptions are being shattered by reality (see also S.R. Lamb, 'Toward Gender Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective,' 72 *Chic.-Kent L Rev.* 299 (1996); Chamallas, 'Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument,' *supra*; Martha Chamallas, 'Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss,' *supra*). A person has more opportunities today than she did in the past to acquire education or professional training, and it should not be assumed that people will remain forever shackled to the same status into which they were born (*Greyhound Lines, Inc. v. Sutton* [80]). In any case, we should not assume that an existing form of discrimination and the balance of powers of the present will always prevail in our country. The distribution of resources between different social groups may change. The opportunities available to the various groups could become more equal, and as a result, it may be assumed, that the gaps in income will decrease or vanish (see also, in the field of legislation, the Equal Remuneration for Female and Male Employees Law, 5756-1996; the Equal Employment Opportunities Law, 5748-1988). These are realistic assumptions, especially with regards to the distant future of the children of today. The table of the national average wages encompasses this possibility of change. Therefore it is only right, from a factual viewpoint, not to shackle the injured child with the bonds of the discriminatory reality that prevails at the time the judgment is handed down. This belief was discussed by Justice Mills in the Supreme Court of the State of Mississippi:

> 'We must not assume that individuals forever remain shackled by the bounds of community or class. The law loves certainty and economy of effort, but the law also respects individual aptitudes and differences' (*Greyhound Lines, Inc. v. Sutton* [80], at pp. 1276-1277).

The use of statistical data based on the sector, race or ethnic group of the injured person gives effect to the prevailing division of resources in society. It weights the past but does not reflect the reality of the future. It is not normatively appropriate. Restoring the status quo under the heading of loss of earning power means bringing the injured person to the place destined for him in the future, not returning him to the position of his forefathers (and foremothers) were in the past. This perception

leads to the conclusion that finding the tortfeasor liable for compensation in accordance with the national average wage table, as opposed to using group statistics, does not impose on the tortfeasor an excessive liability or make him responsible for the wrongs of the past. Finding the tortfeasor liable for compensation on the basis of the national average wage merely assumes that every child stands on his own, with his future before him. It assumes that the world does not stand still, and that present realities should not be frozen for the purpose of awarding damages for future loss. From the standpoint of corrective justice it is not right to say that our approach turns the injurer into an instrument for perusing social goals and for remedying an injustice built into society. The injurer is obliged to provide compensation that reflects what the injured person lost (cf. Cassels, *Remedies: The Law of Damages*, *supra*, at p. 144; see also A. Porat, 'Negligence and Interests,' 24(2) *Tel-Aviv University Law Review (Iyyunei Mishpat)* 275 (2001)).

DISTRIBUTIVE CONSIDERATIONS

38. Corrective justice is, as aforesaid, merely one expression of universal justice. Some believe that the law of torts has a wider role. Therefore, there are some that take into account the distributive ramifications when deliberating questions in the law of torts. There are some who believe that the law of torts should seek to realize the principle of equality in society, and particularly seek to adopt compensatory rules that strengthen the weaker sectors of society, and reduce gaps between the rich and the poor (see, for example, R.L. Abel, 'A Critique of Torts,' 37 *UCLA L. Rev.* 785 (1990), at pp. 798-803; T. Keren-Paz, '"It Costs Me More": Rejecting the Arguments of Illegitimacy and Excessive Cost Brought against the Promotion of Equality in Private Law,' 7(2) *Mishpat uMimshal (Law and Government)* 541 (2005), and the references cited there; cf. H. Dagan, *Property at the Crossroads* (2005), especially at pp. 55-65). The principle of *Restitutio In Integrum*, so it is alleged, 'blocks the possibility of change in the distribution of wealth and power in society by means of the law of torts'. It serves, so it is argued, 'as one of many instruments for justifying the existing distribution of resources in society, for regarding it as a natural and neutral situation and for resisting change thereto' (T. Keren-Paz, 'How Does Compensation Law Render

the Poor Even Poorer?', 28(1) *Tel-Aviv University Law Review (Iyyunei Mishpat)* 299 (2004). No doubt, distributive justice is also an important branch of the tree of justice.

Obviously, an approach that grasps the law of torts as a means of achieving distributive goals, will support the notion proposed by us in this judgment(see, for example, T. Keren-Paz, 'An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness,' 16 *Can. J. L. & Juris.* 91 (2003), at pp. 121-126). This article, as other articles, claims that awarding women smaller compensation as compared to men, which intends to restore the status quo, actually has a regressive effect. It does not reflect the full contribution of the woman — lost due to the tortuous act — at home and in the labour market; it does not take into account the possibility that disparities will diminish, and that the current resources distribution will shift. This is also true, *mutatis mutandis*, regarding children who belong to various sectors of the population (see also Chamallas, 'Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss,' *supra*, at pp. 1456-1459).

39. Differential compensation based on gender, race or ethnicity may also result in imposing the costs of the tortuous events on underprivileged plaintiffs. This is a problematic outcome, both from the distributive perspective, and from the economic perspective. The difficulty is illustrated by the insurance system. For instance, when underprivileged people pay the exact same insurance premium for third-party insurance as the more affluent people do (in their capacity of potential tortfeasors), the later receive higher compensation if they are themselves injured. Such a 'regressive cross-subsidization' occurs, according to this analysis, where individuals with a lower income pay the same insurance fees as those with a higher income, but receive lower compensation. This issue was discussed by Prof. Priest:

> 'The third-party premium is set with reference to *average* expected loss. Thus, the high correlation of total awards with income means that premiums reflect the average income of the population of consumers. The implication of charging each consumer a premium related to average income is that consumers with high incomes are charged a premium lower than their expected loss, and consumers with low incomes are

> charged a premium higher than their expected loss. Third-party insurance thus requires low-income consumers to subsidize high-income consumers' (G.L. Priest, 'The Current Insurance Crisis and Modern Tort Law,' 96 *Yale L. J.* (1987) 1521).

See also Keren-Paz, '"It Costs Me More": Rejecting the Arguments of Illegitimacy and Excessive Cost Brought against the Promotion of Equality in Private Law,' *supra*, at pp. 589-591. Awarding damages on the basis of group affiliation, race, gender or ethnicity may also create, according to this approach, a regressive distribution of wealth between the poor and the rich. By contrast, compensation based on neutral criteria will minimize the effect of these regressive consequences.

40. It should be noted, however, that not everyone agrees that the law of torts was intended, in principle, to attain values of equality and distributive justice (for a discussion of distributive justice in the law of torts, see also G.C. Keating, 'Distributive and Corrective Justice in the Tort Law,' 74 *S. Cal. Rev.* (2000) 193; K.D. Cooper-Stephenson, 'Economic Analysis, Substantive Equality and Tort Law,' *Tort Theory* (K.D. Cooper-Stephenson and E. Gibson (eds.), 1993) 48; Weinrib, *The Idea of Private Law,* supra; Weinrib, 'Understanding Tort Law,' *supra*; for the claim that tax laws are in general more effective than private law for distributing wealth in society, see L. Kaplow & S. Shavell, 'Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income,' 23 *J. Legal Stud.* (1994) 667). Even the more general question of applying the principle of equality in private law, and the relationship between its place in public law and its place in private law, has not yet been determined (see, for example, HCJ 6126/94 *Szenes v. Broadcasting Authority* [41]; CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [42]; on the question of whether the assessment of damage on the basis of the injured person's sex is consistent with the constitutional right to equality, see, *inter alia*, E. Gibson, 'The Gendered Wage Dilemma in Personal Injury Damages,' in *Tort Theory* (K.D. Cooper-Stephenson & E. Gibson (eds.), 1993) 185; on the debate in the United States on this issue, see also, A. McCarthy, 'The Lost Futures of Lead-Poisoned Children,' 14 *Geo. Mason U. Civ. Rts. L. J.* 75 (2004)). At present, we are not required to discuss these complex issues in length, nor do we need to resolve this matter. There is no doubt that using the law of

torts as means for reducing gaps between the prosperous and the less-fortunate individuals, brings forwards complicated questions, and much has been written about this issue. All that we wish to say is that the approach proposed by us here is rooted in perceptions of justice that go beyond the approach of corrective justice and the principle of *Restitutio In Integrum* and seek to realize values of equality, *as well as in other perceptions*.

FURTHER REMARKS FROM AN ECONOMIC PERSPECTIVE

41. The difficulty inherent in awarding compensation on the basis of group statistics can be illustrated by considering the question from the viewpoint of an economic analysis of the law of torts, and the efficient deterrence approach (for a general discussion, see: I. Gilead, 'On the Limits of the Efficient Deterrence in the Law of Torts,' 22 *Hebrew Univ. L. Rev. (Mishpatim)* 421 (1993)). Imposing tort liability changes the cost of the risk creating activity. The notion of deterrence in the law of torts is commonly identified with the sanction imposed on the tortfeasor— the amount of compensation that he is found liable to pay. This notion is based on the assumption that the sanction imposed affects the level of precaution that he will take into order to prevent the foreseen damage. If the tortfeasor can expect to pay compensation that does not fully reflect the damage that he caused, he will be 'under-deterred,' and for this reason he may continue his undesirable activity, or refrain from adopting precautions that cost less than the expected damage (see *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [3], at p. 516 {124}; A. Porat, 'Collective Responsibility in the Law of Torts,' 23 *Hebrew Univ. L. Rev. (Mishpatim)* 311 (1994), at pp. 349-350). The assumption of the economic analysis is that the law aims to achieve optimal deterrence, and that a rational tortfeasor will undertake precautions that cost less than the expected damage.

Compensation that relies on data concerning the ethnicity, social status or race of the plaintiff may lead to an absurd result, where the expected damage to injured individuals with a low expected income is less than the expected damage to those with a higher one; consequently, the precautions that a tortfeasor will take – will be

different according to the potential victims (a man or a woman; people of different religious affiliations; a resident of a high-class neighbourhood or a resident of a poor city). In so far as the tortfeasor has control of the situation, and sometimes he does have such control, the risks he takes will be directed towards the weaker sectors of society (see, for example, Abel, 'A Critique of Torts,' *supra*). This difficulty is, admittedly, shared by the various ways of computing loss of earning (A. Porat, 'The Lost Years, Loss of Earnings and the Price of Manslaughter,' *Prof. Menashe Shava Memorial Book* (D. Friedmann (ed.), not yet published), but it is emphasized and enhanced in the context of the special circumstances under discussion. From the economic point of view, relying on group-based statistics means that despite the evidential ambiguity enfolding the future of children, the law supposedly assumes that children belonging to certain groups are not even expected to have reached the national average wage. This provides tortfeasors with an incentive to take less strict precautions with regard to those children. The price of injuring some children will be different than the price of injuring others, even if the circumstances of the injury and the physical damage caused are completely identical, and even if all of them have not yet even considered what they will do 'when they grow up.' This result is clearly intolerable, whether one looks at the matter the through the idea of equal distribution, or the notion of the efficient deterrence.

The standardization of compensation, according to the national average wage data, not only realizes the principle of *Restitutio In Integrum*, as aforesaid, but it also minimizes the problem of unequal incentives.

42. Indeed, one may wonder whether the result that we are reaching today is the most 'efficient' result in a 'narrow' economic sense. Arguments may be presented both for and against. On the one hand, it may be argued that the average wage in a certain sector of the population reflects the social price involved in injuring an individual from that sector. It therefore follows, according to this argument, that awarding equal compensation will lead to a result of 'over-deterrence' or 'under-deterrence,' i.e., to adopting precautions that are not consistent with the cost involved in the conduct. On the other hand, it may be argued, as we explained above, that the social price of harming a child is unknown. The road not (yet) taken could

have been a road to greatness. The particular child could have become greatly successful, had it not been for the accident. It is considerably difficult to calculate the expected damage in the future, based on the current group statistics. Moreover, we should not ignore other factors that affect the equation, including the reduction in information-costs due to the rule of uniform compensation. The cost of a group determination is in itself expensive. This was discussed by Prof. Calabresi, who explained:

> '... since subcategorization is expensive, it will at some point be cheaper to have some externalization to a broader category than to subcategorize indefinitely… If these costs are substantial, we might not be willing to spend the money to define some actuarially significant subcategories, even though their definition is possible…' (S.G. Calabresi, *The Cost of Accidents* (1970), at p. 146).

One way or another, our approach differs from the narrow economic one (see, for example, CA 44/76 *Atta Textile Company. Ltd v. Schwartz* [43]). It incorporates various considerations based on the different aspects of justice and achieving an efficient outcome in a broader sense. The cost-benefit analysis is not necessarily a monetary equation. In one context, we discussed this notion of the broad perspective embodied in the well know formula of Judge Learned Hand:

> 'The formula, in my opinion, does not need to limit itself merely to considerations of economic efficiency. Indeed, it is not a "formula" in the accepted mathematical sense of the term. It is a conceptual framework, which is used by the court as a tool of logic. It is the court that gives it content. The likelihood of the occurrence of the damage, the extent of the damage and the cost of preventing it are not all mathematical values that the court inserts in order to reach, at the end of the inquiry, a numerical result. These variables of formula can reflect social values, and the court is required to give them significance. In doing so, the court may enter into the formula any value that it thinks proper; it may make different balances between different risks that are caused to different persons — the tortfeasor, the injured party, a third party and the public (A. Porat, 'The Many Faces of Negligence,' 4 *Theoretical Inquiries in Law*

> (2003), at p. 105), and it may also take into account considerations such as just, fair and moral conduct. An injustice is a cost; corrective justice is a benefit. The concepts of cost and benefit may relate to different considerations in the sphere of "justice," such as the considerations of "distributive justice"' (CA 5604/94 *Hamed v. State of Israel* [44]).

This notion is applicable in our case as well. The economic analysis is not used here to define an efficient result in the mathematical sense. Moreover, an efficient result cannot necessarily be fully realized in the matter that we are discussing here. But the economic analysis illustrates the illogic and the injustice inherent in the discriminatory approach. Indeed, following the remarks of President Barak in *Hamed v. State of Israel* [44], according to which 'the reasonable person is not only the efficient person. He is also the just, fair and moral person,' we would say that the full compensation is not just a matter of efficiency. It is also just, fair and moral. I accept the remarks of Prof. Porat, in 'The Lost Years, Loss of Earnings and the Price of Manslaughter,' *supra*, with regard to the case of a Bedouin child who was injured in an accident and suffered a reduction in his earning ability:

> '… This result [awarding low compensation to a Bedouin child, according to the average wage of an Israeli Bedouin citizen and not according to the national average wage] is unacceptable; it is one thing to award low damages to someone who has low earnings and therefore his loss of earnings is small, but it is a completely different thing to determine that, because we are dealing with a Bedouin child, his compensation will be lower than a Jewish child, because statistically the former will earn less than the latter.'

Thus we see that all of the aforesaid — the demands of justice in its various aspects, the economic analysis and the concept of restoring the status quo — all lead to the same result, namely the rejection of group-based statistics and preferring the 'blind' statistic in so far as compensation for injured children is concerned.

PREVIOUS DECISIONS OF THE ISRAELI COURTS REGARDING THE QUESTION BEFORE US

43. Our conclusion, which as mentioned above is based on the fundamental concepts to the law of torts, is supported also by the case law, even though not all of them have followed this path (see, for example, in this court: *Altripi Lelahahoudat Alaama Ltd v. Salaima* [36]). We have discussed the criticism expressed by this Court, as early as the 1960s and the 1970s, on the position that implied: 'Once a pauper, always a pauper' (*Perser v. Ezra* [40] and *Atrash v. Maalof* [1]). In those judgments, compensation was awarded on the basis of an overall assessment. A similar opinion was adopted in CA 1433/98 *Hamed v. Ahlam* [45], where the computation was based on the national average wage table. That case examined the question of the loss of earnings of a two year old girl. It was argued that the loss of earnings should be based on a general assessment or on the average wage in the village where she lived, which amounted to half of the national average wage, since her familial circumstances showed that 'she would have left the work place at an early stage of her life.' The Court rejected this position and held that the amount awarded by the district court, which based the loss of earnings on the national average wage, should remain unchanged. It was held in that case:

> 'True, the plaintiff lives in a village where the average wage, as determined by the Central Statistics Bureau, amounts to less than half of the national average wage. Yet these figures may change in the future, and the district court also took into account the possibility that the plaintiff might have found a work place away from her place of residence. It did not find a sufficient evidential basis that should justify deviating from the assumption regarding the wages on which the compensation is calculated. Indeed, it seems that in this particular case the figures to which the defendants refer are insufficient to justify a deviation from the aforesaid assumption. Under the circumstances of this case it would appear that there is no basis for intervening in the assessment that was made by the trial court for this head of damage.'

(See a similar decision, with regards to a thirty year old who was injured, in CA 802/03 *Bashir v. Israeli Phoenix Assurance Company Ltd* [46]). This idea was applied at that time to the specific circumstances of that case. Today we are stating it as a rule.

44. A similar position with regards to a distinction based on gender, ethnicity or family has also been adopted in the case law of the Israeli district courts. Thus, for example, Justice Y. Adiel rejected the claim that because a girl came from a family of Satmar Hassidim, she could be presumed to have earned less than the national average wage:

> 'In the present context, I am of the opinion that we should not accept the argument that denies a child, who has not yet matured, or independently decided how he wishes to live or work, of compensation for the injury to his earning ability based solely on what is customary in the his community. Therefore, I am of the opinion that the injury to the earning capacity of the plaintiff should be based on the national average wage. Even the fact that the plaintiff's mother earns a far lower wage does not undermine this conclusion' (CC (Jer) 385/94 *Binder v. Sun* [55]).

And Justice S. Berliner in another district court case stated the following:

> 'We are speaking of a girl who was injured when she was approximately eleven years old; her characteristics are average. There is no special characteristic in her background or past that will convince us she could not earn a living like any other average person when she would enter the labour market. The rule in this matter is that we should follow the national average wage table. It makes no difference, in my opinion, that we are speaking of a woman rather than a man; it is insignificant that she comes from the Arab sector; the fact that she lives in a (relatively) small village, Kfar Yassif, is of no importance, and the same is true for an outlying place of residence, or one that has a high unemployment level or that does not have well-developed schools and professional training institutions. The assumption should be that a child who is a resident of Israel, who is injured in a road accident, and has average characteristics, would have earned in the future the equivalent the national average wage' (CC (Hf) 1844/00 *Ali v. Daud* [56]).

See also, additional judgments that rejected the claim that the compensation should be reduced due to factors such as race, religion and ethnicity: CC (Jer) 1533/98 *Turman v. Israel Car Insurance Pool* [57]; CC (Jer) 653/90 *Aylin v. Cohen* [58]; CC (Jer) 2074/00 *S. v. Knesset Yehuda School* [59]. However, as we have said, this is not the only existing approach in the Israeli law of compensation. Data regarding specific wage rates in certain towns, certain ethnic groups and the socio-economic position of the injured person's family are frequently brought before the trial courts, and in some cases they are used in the judicial decision (see for example, CC (Jer) 3341/01 *Dumer v. Avital* [60]). As mentioned, in some contexts — for example gender based distinction — there is usually no question in Israeli law that the national average wage applies to everyone. We use the word 'usually,' because when data regarding socio-economic and ethnic affiliation are taken into account in assessing compensation, gender-based discrimination is sometimes implicitly involved. To illustrate this, consider the example of a court that takes into account the particulars of a certain village, including the fact that most of its women have not worked outside the home in the past.

45. In my opinion, the attempt to determine that the children of a certain population groups will *a priori* be unemployed or low earners is doomed to fail. We should not condemn the child to a certain fate merely because of the environment in which she grew up, the education and occupation of her parents, nor his or her gender or the racial or ethnic origin from which she comes. It makes no difference if the plaintiff is a boy or a girl, whether she comes from an established or underprivileged family, whether she is an immigrant or was born in Israel, whether she lives in a rich or poor neighbourhood or whether she is a member of a minority group. The computation of compensation according to group affiliation creates, in fact, discrimination on the basis of religion, race, nationality or gender. This discrimination was defined in our legal system as the 'worst kind of discrimination' (*per* Justice M. Cheshin in HCJ 6845/00 *Niv v. National Labour Court* [47], at pages 683-684; see also the remarks of Justice Dorner in HCJ 4541/94 Miller v. Minister of Defence [48], at p. 134 {227}). The principle of the personal autonomy requires us to assume that in the absence of individual and specific circumstances that indicate

otherwise, every child has the possibility of advancing, developing and joining the Israeli labour force at least on the level of the national average wage. A regime that that seeks to link the child's earning ability to that of his family members, gender or people from the social background in which he grew up, rules out the possibility that he would have freed himself from the chains that the group-based statistics seek to impose on him. It leads to a regressive result —perpetuating and strengthening the existing social classes, and undermining the deterrence of potential tortfeasors.

THE BASIC APPROACH AND THE EXCEPTIONS THERETO

46. It follows from all of the above, that we must assume that for children who have not yet reached adulthood on the date of the accident, and whose career and means of earning have not yet crystallized, their loss of earning ability should be calculated based on the national average wage. This premise for computing the child's loss of earnings, which creates uniformity in compensation, is consistent with the principle of *Restitutio In Integrum*, alongside the aspiration of realizing the right to equality and the need to create optimal deterrence. This assumption applies to every girl and boy, man and woman, black and white, members of all religions, and people of all ethnic origins. This is the initial assumption, but it may be rebutted. The question that we still have to consider concerns the nature of the evidence that will allow a deviation from this assumption.

One important factor in deciding when to deviate from the average wage assumption could be the child's age. 'We have already mentioned more than once that determining the loss of future income for a child who has not yet actually entered the labour force is always a guess, and the younger the child is, the greater the guess' (*per* Justice Y. Malz in *Efraimov v. Gabbai* [10], at p. 194). The older a person is, the more information is available regarding his studies, his hobbies, his talents, his persistency etc.. Due to such additional information, the uncertainty regarding the child's potential future earnings can be reduced. In any case, the possibility of deviating from the assumption becomes more reasonable as the child approaches maturity and is closer to entering the labour market; but even then, as a rule, the possibility of deviating from the assumption is limited.

47. The child's age is therefore an important factor, and it may be accompanied by additional evidence that, in special cases, courts have already recognized as capable to allow a deviation from the national average wage table. For example, it was held in CA 750/79 *Klausner v. Berkovitz* [49], that when there is a real chance that the injured person would work in another country, where the wage level was different than in Israel, this fact should be considered when calculating his damages (see also CA 702/87 *State of Israel v. Cohen* [50], at pp. 731-732). A similar position was also adopted with regards to children, that the centre of their lives was in the Gaza Strip or Judaea and Samaria (CA 718/91 *Suliman v. Wafa* [51]; CA 9117/03 *Zohar v. Bardweil* [52]; see also CC (BS) 351/89 *Difalla v. Azbarga* [61]; CC (TA) 2024/01 *Batran v. Tryg-Baltica* [62]). The logic underlying these rulings is that the children who live in other foreign countries will not be a part of the Israeli economy in the future. Therefore, and from this viewpoint alone, the Israeli national average wage carries no real significance in calculating their loss of earnings. However the situation with regards to children who live, and intend to continue living in Israel, is different.

48. Sometimes various concrete characteristics of the injured child — his qualifications and capabilities, education and aspirations as expressed before the date on which the damage occurred — are significant. These in turn may justify deviation from the national average wage. Especially, when the deviation leads to awarding the plaintiff with higher compensation., For example, it has been held that the proof of an obvious talent for sports prior to the accident, justifies awarding damages that are higher than the national average wage (CA 4597/91 *Afikim Kibbutz v. Cohen* [53], at pp. 128-129; *HaSneh Israel Insurance Co. Ltd v. Zuckerman* [35]). A similar position was adopted with regards to intellectual skills, academic tendencies and academic achievements (*State of Israel v. Cohen* [50]; CC (Hf) 1274/98 *Nujidat v. Estate of Nujidat* [63]; CC (Hf) 1969/87 *Yaakobi v. Mimni* [64]), although it was emphasized that 'for professional success and, for increasing earning ability, additional factors are required, such as diligence, persistence, good interpersonal relationships, organizational skills and other similar qualities' (*Axelrod v. Tzur-Shamir Insurance Company* [27]). As stated above, this Court has expressed different

approaches regarding the nature and extent of such evidence, and the probability that they can indicate the child's professional future had it not been for the accident. For instance, there has been, in one case, a requirement of ‘near certainty’ (CA 1027/90 *Clal Insurance Co. Ltd v. Batya* [33]); in another case there has been a requirement for an ‘additional specific characteristic’ with regards to an ‘obvious intellectual ability or obvious tendency towards a field of employment or art…’ (*Estate of Sarah Saidi v. Poor* [28], at pp. 633-634); and according to Justice Or, a requirement for ‘special facts concerning the injured person, which are capable of assisting, even in a general way, in differentiating the expected earning ability from the national average wage’ (*Danan v. Hodeda* [34], at pp. 606-607), where ‘in assessing the compensation for damage for a certain period in the future, we also take into account events that may occur in the future, even if the chance that they will indeed occur is lower than the level of proof required in a civil trial’ (*HaSneh Israel Insurance Co. Ltd v. Zuckerman* [35]).

49. In my opinion, specific evidence and indications concerning the injured child will allow us to deviate from the assumption of the national average wage — in either direction — only where they are extremely significant and they show a high probability that the child would indeed have developed a certain career in the future (or, alternatively, that he would have difficulties in finding profitable employment). Indeed, inclinations, skills and ambitions alone are not necessarily sufficient (see, for example, CA 6431/96 *Bar-Zeev v. Mohammed* [54]); experience shows us that it is usually hard to predict what will happen in the future and whether the inclination, ambition or skill of a child will be realized in acquiring a profession; on the other hand, there are children who are 'late bloomers' and are very successful, despite the prediction of experts that they will not amount to much. Therefore there must be particular information about the specific child in order to exclude him, with a high level of probability, from the scope of the general assumption. It should be noted, however, that usually, ‘… in assessing the chance, the court does not require the level of certainty that is normally required in a civil trial. It does not demand a balance of probabilities. The court is merely assessing chances. Therefore the court will take into

account a chance that is less than fifty percent, where the likelihood of the chance is reflected in the amount of the compensation' (*Naim v. Barda* [4]).

We are not seeking to change this rule, but in this context, considering the assumption submitted in our judgment on the one hand, and the inherent lack of certainty in predicting a child's future on the other, the court should generally follow the national average wage table. Deviating from this standard will be harder, as we have said, in the case of younger children, since usually it is very difficult to prove an intention and ability regarding the future career of a young child.

50. In summary, there is no doubt that assessing the damages for the loss of earning capacity in the future is not a simple task, especially where minors are concerned. The court always seeks to make such an assessment that would reflect reality, in as far as this is possible; in the absence of specific information which allows for an individual-actuarial computation, the court frequently makes use of the national average wage statistic. This figure embodies the average earning patterns of people in Israel. Since this is a uniform compensation, computed according to a figure that reflects the average, it necessarily benefits some people, and under-compensates others. But the question of who benefits and who loses – will always remain unanswered. This, however, we do know: The law must not determine, *ab initio*, different starting-points for different children in Israel merely because they belong to different population groups. The damages, as we have seen, are awarded for the loss of *potential*, and in the absence of individual evidence to the contrary, every child in Israel has an equal potential. It is the right to decide so from a factual point of view. It is correct also from the normative and moral point of view. It has to be so decided according to any point of view. It is so decided.

RIM'S CLAIM

51. Rim Abu Hana was injured in a road accident when she was only five months old. The district court deliberated in its judgment as to whether it should consider, when computing the loss of her earnings, the fact that she was born in a poor Arab village. Ultimately, while the district court pointed out the changing conditions of life

and the trend towards equality in the earnings of men and women, it nevertheless awarded a global sum for this head of damage, stating:

> 'In my opinion, we should not go to extremes in reducing the damages due to the plaintiff on account of her being a resident of the village of Reineh, or because most of the women in the village do not earn money outside their homes, since living conditions may change, and the accepted trend around the world is to make the living conditions and livelihood of men and women as equal as possible (CA 685/79 *Atrash v. Maalof* [1], at p. 630).
>
> Yet, since there is almost no data on which it is possible to assess the plaintiff's earning opportunities, it is preferable that I should award global damages for this head of damage as well, in view of the fact that there are, as of yet, no indications of the plaintiff's fields of interest, of what will be her education, her path in life and her training (*ibid*. [1], at p. 630).
>
> There is no alternative to determining the estimated loss of her earnings on a global basis, in which I am taking into account the national average wage, the average wage in the village of Reineh, the plaintiff's socio-economic background and the tension between the retirement age, which is 65, and the possibility of employees of various kinds to continue to earn a salary until the age of 70, and the capitalization of the aforesaid.

The appellants claim that *de facto*, the court based the global damages for loss of earnings on the national average wage data, and thereby, in their opinion, it erred. According to them, the respondent's mother does not work, and her grandmother — a teacher by profession — stopped working after her marriage. The appellants also claim that most of the women in the sector to which the respondent belongs do not work or they earn a living only until they marry. The appellants also rely on figures regarding the specific average wage in the village of Reineh, which is where the respondent lives. They claim that according to these figures the average wage of women in the village of Reineh does not exceed the sum of NIS 3,000 per month. All of these figures show, according to the appellants, that the court should not have made an actuarial computation on the basis of average figures that are, in their words, 'far removed from the figures that are relevant to the respondent'.

The respondent, in contrast, is of the opinion that the court erred when it based its computations, *inter alia*, on the average wage in her place of residence. As the trial court noted: '…I am taking into account the national average wage, the average wage in the village of Reineh, the plaintiff's socio-economic background...'. The respondent is of the opinion that the fact that she belongs to the Christian community indicates a high earning potential and a good chance of joining the labour market. In addition, the respondent argues that '… a claim that a child from a minority group will earn less than the national average wage is, to say the least, an outrageous and shocking claim' and that she is entitled 'to grow up like any other girl in Israel and to receive a proper education, professional training and a suitable place of work that are no less than what any other girl in Israel will receive…'. The respondent emphasizes in this context the trial court's remarks as to the scarcity of evidence presented before it prior to determining her future earning potential; she claims that this evidential ambiguity should have led the court to rely on the national average wage.

52. Rim Abu Hana was injured in a road accident when she was a very young infant. When the accident happened, her entire future lay ahead of her. No assumptions should be made, at such an early stage in a person's life, with regard to her future, the direction in which she may develop or what her occupation may be. Certainly no assumptions should be made as to her detriment on the basis of her supposed 'socio-economic background.' It should not be thought that since the respondent is a member of the Christian community, she would not have been able, had it not been for the accident, to reach the level of the national average wage. The figures presented by the appellants as reason to depart from the presumption of the national average wage — the fact that the respondent is a baby-girl and not a baby-boy, the fact that she belongs to the Arab sector, the fact that in her family the women tend not to work after they are married, as well as her being born in a place that is characterized by a low average wage — are irrelevant for the purpose of computing the damages for loss of earning capacity in the future.

Therefore the basis for the computation should be corrected, and Rim Abu Hana should be granted damages based on the national average wage. Her 'socio-

economic background,' including the figures regarding the average wage in her village, should not be taken into account. The case is thus returned to the district court, so that it may reassess the computation of the head of loss of earning capacity. As for the question of freezing part of the awarded damages until the respondent's rights vis-à-vis Social Security are clarified, she agrees that should her position regarding the computation of lost earnings be accepted, there would also be room to order such a freeze. The legal fees will be revised in accordance with the outcome that is reached.

The appeal and the counter-appeal are therefore allowed in the aforesaid sense. The appellants shall bear the cost of the respondent's legal fees in the sum of NIS 20,000.

Justice A. Grunis:

I agree.

Justice S. Joubran:

I agree.

Given today, 23 Elul 5765 (27 September 2005).