CA 5258/98

A

v

1. B

2. Attorney-General

The Supreme Court sitting as the Court of Civil Appeal

[14 July 2004]

Before President A. Barak and Justices E. Rivlin, A. Procaccia

Appeal by leave of the judgment of the Tel-Aviv–Jaffa District Court (Justices Y. Gross, Y. Ben-Shlomo, M. Rubinstein) on 7 December 1997 in CA 166/96, in which an appeal of the judgment of the Tel-Aviv–Jaffa Magistrates Court (Judge H. Ahituv) on 19 December 1995 in CC 37166/89 was allowed.

Facts: The respondent had a long-term relation with the appellant, while both parties were married to others. During this relationship, the respondent encouraged the appellant to obtain a divorce from her husband, and promised to divorce his wife and marry the appellant. The appellant did obtain a divorce from her husband, but the respondent did not divorce his wife.

The appellant sued for damages for breach of a promise of marriage. The respondent argued, *inter alia*, that a promise of marriage given by a married man is void for being contrary to public policy. The Magistrates Court awarded a lump-sum compensation to the appellant for non-pecuniary damages, but this decision was overturned by the District Court, which held, by a majority, that the promise was contrary to public policy and therefore void. The Supreme Court gave leave to appeal solely on the question of whether a promise of marriage made by a married man was void for being contrary to public policy.

Held: (Majority opinion — President Barak, Justice Procaccia) A promise of marriage made by a married man is not void for being contrary to public policy, merely because the promissor was married at the time he made the promise.

(Minority opinion — Justice Rivlin) No distinction should be made between a promise of marriage made by a married man and one made by a single man. However, in an action for breach of a promise of marriage, only pecuniary loss should be awarded, and for this reason (rather than for the reason given by the

District Court), since the appellant had not claimed any pecuniary loss, the result in the District Court should stand.

Appeal allowed, by majority opinion (Justice E. Rivlin dissenting).

Legislation cited:

Contracts (General Part) Law, 5733-1973, ss. 1, 2, 5, 6, 12, 14, 14(d), 25, 27, 28, 30, 31, 63.

Contracts (Remedies for Breach of Contract) Law, 5731-1970, ss. 3(2), 3(4), 13, 18.

Palestine Order in Council, 1922, art. 46.

Procedure (Attendance of the Attorney-General) Ordinance [New Version], s. 1.

Torts Ordinance [New Version], ss. 35, 36, 56.

Israeli Supreme Court cases cited:

[1] CA 337/62 *Riezenfeld v. Jacobson* [1963] IsrSC 17(2) 1009; **IsrSJ 5 96**.

[2] CA 4/66 *Peretz v. Helmut* [1966] IsrSC 20(4) 337.

[3] CA 609/68 *Natan v. Abdallah (Ilan)* [1970] IsrSC 24(1) 455.

[4] HCJ 1635/90 *Jerzhevski v. Prime Minister* [1991] IsrSC 45(1) 749.

[5] CA 460/67 *A v. B* [1968] IsrSC 22(1) 157.

[6] CA 647/89 *Shifberg v. Avtalion* [1992] IsrSC 46(2) 169.

[7] CA 545/77 *A v. B* [1978] IsrSC 32(2) 393.

[8] LCA 8256/99 *A v. B* [2004] IsrSC 58(2) 213.

[9] CA 5587/93 *Nahmani v. Nahmani* [1993] IsrSC 49(1) 485; **[1995-6] IsrLR 1**.

[10] CA 563/65 *Yeger (Plink) v. Flavitz* [1966] IsrSC 20(3) 244.

[11] CA 116/75 *Haik v. Sefya* [1977] IsrSC 31(1) 90.

[12] HCJ 693/91 *Efrat v. Director of Population Register, Ministry of Interior* [1993] IsrSC 47(1) 749.

[13] HCJFH 4191/97 *Recanat v. National Labour Court* [2000] IsrSC 54(5) 330.

[14] CA 614/76 *A v. B* [1977] IsrSC 31(3) 85.

[15] CA 6601/96 *AES Systems Inc. v. Saar* [2000] IsrSC 54(3) 850.

[16] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.

[17] CFH 2401/95 *Nahmani v. Nahmani* [1996] IsrSC 50(4) 661; **[1995-6] IsrLR 320**.

[18] CA 3833/93 *Levin v. Levin* [1994] IsrSC 48(2) 862.

[19] CA 416/91 *Maman v. Triki* [1993] IsrSC 47(2) 652.

[20] HCJ 6231/92 *Zagouri v. National Labour Court* [1995] IsrSC 49(4) 749.

[21] CA 461/64 *Tamsit v. Fahima* [1965] IsrSC 19(4) 129.
[22] CA 401/66 *Marom v. Marom* [1967] IsrSC 21(1) 673.
[23] CA 264/77 *Dror v. Dror* [1978] IsrSC 32(1) 829.
[24] CA 805/82 *Versano v. Cohen* [1983] IsrSC 37(1) 529.
[25] CA 174/65 *Badash v. Sadeh* [1966] IsrSC 20(1) 617.
[26] CA 58/73 *Shaked v. Silberfarb* [1985] IsrSC 39(1) 151.
[27] CA 473/75 *Ron v. Hazan* [1977] IsrSC 31(1) 40.

Israeli District Court cases cited:
[28] CC (TA) 1279/54 *Berghoiz v. Silber* IsrDC 10 380.

Palestine cases cited:
[29] CA 129/42 *Jarrous v. Adas* (1942) 9 P.L.R. 707.

American cases cited:
[30] *Gilbert v. Barkes*, 987 S.W. 2d 772 (1999).
[31] *Jackson v. Brown*, 904 P. 2d 685 (1995).

English cases cited:
[32] *Spiers v. Hunt* [1908] 1 K.B. 720.
[33] *Wilson v. Carnley* [1908] 1 K.B. 729 (C.A.).
[34] *Layton v. Martin* [1986] 2 F.L.R. 227 (Ch.).

French cases cited:
[35] Cour de Cassation, 4 Octobre 1965, no. 507.
[36] Cour de Cassation, Civ., 30 Mai 1838, B.C.C.
[37] Cour de Cassation, Civ. 1, 31 Janvier 1961.
[38] Cour de Cassation, Civ. 2, 7 Juin 1967, no. 210.
[39] Cour de Cassation, Civ. 1, 22 Juillet 1964, no. 412.
[40] Cour de Cassation, Civ. 1, 19 Juillet 1966, no. 443.
[41] 92-21767 Cour de Cassation, Civ. 1, 4 Janvier 1995.
[42] 71-13001 Cour de Cassation, Civ. 2, 18 Janvier 1973, no. 25.
[43] Cour de Cassation, Civ. 1, 9 Octobre 1961, no. 440.

For the appellant — A. Sarig.
For the first respondent — B. Don-Yihya.

For the second respondent — M. Cheshin, Senior Assistant to the State Attorney, Director of Civil Department at the State Attorney's Office.

JUDGMENT

President A. Barak

We have before us an appeal, after leave was given, against the judgment of the Tel-Aviv–Jaffa District Court, which ruled by majority opinion that a breach of a promise of marriage that was made by the first respondent (hereafter — 'the respondent') to the appellant, when he was married to another woman, does not entitle the appellant to damages, since the promise was contrary to public policy.

Background

1. The appellant became acquainted with the respondent in the course of her employment at a cigarette factory in Lod, where she worked as a secretary. The respondent worked as the manager of the packing department. When they first became acquainted, the appellant was a young spinster and the respondent was a married man and the father of children. A close relationship developed between the two, which was at first merely a friendship but progressed to intimate relations that continued for several years. The appellant was married (in 1977) and after several years her first child, a son, was born. For most of the marriage, the appellant was separated from her husband. The relationship between the appellant and the respondent was close. The respondent provided for the appellant, he bought her a car and he showered her son with gifts. He had a key to the appellant's apartment and went there every day. The respondent encouraged the appellant to obtain a divorce from her husband, and even financed legal representation for the appellant in the divorce proceedings. The respondent even suggested to the appellant that she forego maintenance for her son, promising that he would take care of all his needs. He promised her that after she was divorced, he would divorce his wife, and the two of them would start a family together. Although the appellant obtained a divorce from her husband, the respondent's divorce remained an unfulfilled promise. Notwithstanding, the relationship between the appellant and the respondent continued, and the respondent was possessive towards the appellant and thwarted any attempt on her part to end the relationship. After her divorce,

the appellant conceived the respondent's child, for the fifth time, but unlike the previous four times when she underwent an abortion, this time the appellant wanted to continue the pregnancy. Against this background, the respondent reneged on his agreement to marry her. At the end of 1988, the appellant gave birth to a daughter, who was declared the daughter of the respondent. At this stage, the relationship between the respondent and the appellant was finally severed.

The Magistrates Court

2. The appellant filed a claim in the Tel-Aviv–Jaffa Magistrates Court, in which she alleged a breach of a promise of marriage, loss of marriage expectations, mental anguish and loss of spiritual and emotional support. The appellant applied to have the respondent found liable to pay her a monthly sum of 1,000 new sheqels until she married or, alternatively, to have him found liable to make a lump-sum payment of a total of 35,000 new sheqels. The Magistrates Court accepted the claim and awarded the appellant the full amount of the alternative compensation that she sought. The Magistrates Court believed the appellant's witnesses and accepted the appellant's testimony that the respondent explicitly and implicitly promised her, over a long period of time, that he was about to divorce his wife and marry her, a promise that he eventually breached. With respect to the amount of the compensation, the respondent did not address the sum claimed in his defence, nor did he deny the heads of damage. The court held that the amount claimed was reasonable and consistent with accepted case law, and as aforesaid it found the respondent liable accordingly.

The District Court

3. The appeal of the respondent in the District Court was allowed by a majority. Justice Y. Gross, with whom Justice Y. Ben-Shlomo agreed, accepted the respondent's argument that a contract that is made by two married persons, for the purpose of terminating their respective marriages in order to marry one another, is a contract that is contrary to public policy. Relying on a series of judgments from the 1960s (CA 337/62 *Riezenfeld v. Jacobson* [1]; CA 4/66 *Peretz v. Helmut* [2]; CA 609/68 *Natan v. Abdallah (Ilan)* [3]), the court held that 'the rule, as it was formulated, is that a promise of a married man to marry a woman will be valid, as long as the marriage had fundamentally broken down at the time of the promise. However, in a situation where the plaintiff does not succeed in proving that the marriage had broken down, the court will not uphold such a promise and it will void it for being immoral and contrary to public policy.' The court said

that even today the institution of marriage is one of the few institutions whose sanctity is almost unquestioned by all parts of Israeli society. This leads to the desire to protect the status of this institution. The voidance of marriage agreements by married men allows the married man to try to rehabilitate his marriage. If the married man is bound by his promise to divorce his wife, he would never have such a possibility. In this case, the appellant neither claimed nor brought any evidence to the effect that, when the promise was made, the marriage of the respondent had broken down. Consequently the majority judges held that the promise was void for being contrary to public policy.

4. Justice M. Rubinstein gave the minority opinion, that there is no basis for distinguishing between a promise of a married man and a promise of a single man with regard to the existence of a cause of action for breach of a promise of marriage. She was of the opinion that such a distinction discriminates against women. A married man should not be given a protected and special status. The judge emphasized that the cause of action does not enforce performance of the promise, but merely awards financial compensation to the injured party, who believed the promise and was injured by the breach thereof. This does not create a risk of harming existing marriages, but only of having to compensate the injured party. The minority judge also addressed the difficulties in evidence that confront a woman who is required to bring proof of the nature of the marital relationship between the man and his lawful wife. With respect to public policy, the judge added the following:

> 'Moreover, a promise of marriage made by a married man that is not kept may cause the same damage as a promise by a single man, and I do not think that public policy will be saved by the fact that there will be married men who can with their promises harm women whom they have made miserable, without incurring any risk of being held liable for damages. From the viewpoint of the nature of the promise, it does not matter whether the person who made the promise is married or not;
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> …
>
> As to the risk to existing marriages, I will add that the quality of the marital relationship is measured, *inter alia*, also by the way the man, who has a relationship with another woman while he is married, conducts himself. Anyone who ignores the significance of this is establishing a norm that, in effect, creates a privileged

> status of persons who are entitled to hurt others without suffering any damage themselves.
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> The case before us shows that public policy and justice demand that we do not discriminate between a man and a woman, and certainly we should not grant an exemption from liability under the law of contracts to a married man (as opposed to a single man) who made a promise that he had apparently [not] intended to keep from the beginning, and found a victim who believed him for ten years.
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> In summary, giving an exemption from legal risk to a married man will harm public policy more than the theoretical risk that a married man will divorce his wife merely in order to avoid paying damages to a woman whom he promised to marry.'

5. An application for leave to appeal the judgment was filed in this court. The appellant was given leave to appeal 'on the question of the legal validity of a promise of marriage given to a woman by a married man.' Subsequently, the Attorney-General gave notice of his attendance in the proceeding (under s. 1 of the Procedure (Attendance of the Attorney-General) Ordinance [New Version]).

The arguments of the parties

6. The appellant is asking in her appeal that we adopt the position of the minority judge in the District Court. She adds that the argument that the promise is contrary to public policy is a defence argument of the kind where the respondent has the burden of proof. According to her, in view of the moral flaws in the respondent's conduct, he is precluded from raising any moral arguments against the appellant. The appellant is further of the opinion that the 'sanctity' that the court attributed to the institution of marriage is out of place in view of the extensive recognition of the institution of 'cohabitation.'

7. The respondent, for his part, supports the majority opinion in the District Court. He emphasizes the centrality and importance of the institution of marriage in society, which public policy ought to protect. He argues that allowing the claim will seriously harm the institution of marriage, particularly in view of the fact that the appellant also was married during the period when she had a relationship with the respondent. According to him, the appellant's claim is tainted by a lack of good faith, since she caused the respondent to break the marriage contract and the trust between him and his

wife. The respondent warns that should he be held liable for damages, the money will come from the joint family kitty, which may destroy the family unit. Likewise, allowing the claim will harm the freedom of marriage and the dignity of his wife. Alternatively, the respondent asks that we set the damages at a minimal (symbolic) amount. He argues that the appellant did not suffer any real damage, and the compensation that the respondent was found liable to pay was merely for suffering and mental anguish. Moreover, the respondent supported the appellant generously during the years of the relationship.

The position of the Attorney-General

8. The Attorney-General, who decided to attend the proceeding, explained his position on the general issue of the cause of action of breach of a promise of marriage and on the specific issue being litigated before us: the legal validity of a promise of marriage made by a married man. The position of the Attorney-General is that the contractual cause of action of a breach of a promise of marriage should continue to exist, though in a limited format. In his opinion, within the framework of the limited cause of action, compensation should be awarded only for special, pecuniary loss that is suffered by the injured party as a result of reliance upon the agreement. Non-pecuniary damages, such as emotional damage and mental anguish, should not usually be recognized within the framework of the contractual claim. Restricting the compensation reduces the fear of claims motivated by extortion and revenge, and the fear of harming the freedom of marriage. On the specific issue, the position of the Attorney-General is that we should change the existing rule that an agreement of marriage between parties, where one of them is married, is a contract that is contrary to public policy, unless the injured party proves that the marriage of the party in breach had broken down. The Attorney-General is of the opinion that the relief of damages (in a limited form) should not be denied even in cases where the party that breached the promise was married to another person, and even if his marriage had not broken down when he made the promise, since the distinction between a married man and a single man in this context leads to undesirable outcomes.

9. I shall begin the consideration of the issue before us with the *first* question — whether an agreement to marry between two single persons is legally valid. A positive answer to this question will lead me to the *second* and main question in this appeal — whether a breach of an agreement to marry, where one of the parties was married at the time it was made, gives

the other party a right to compensation (ss. 30 and 31 of the Contracts (General Part) Law, 5733-1973).

Agreement to marry between single people

10. A man and a woman agree to marry. Does this consent form the basis of an agreement between the parties to marry? The answer to this question may be found in the law of contracts. If the two parties wish to create a legal-contractual relationship between them, there is nothing in principle to prevent the promises of marriage that they have made to one another from being part of a contract between them (see G. Shalev, 'Gentlemen's Agreements,' 32 *Hebrew Univ. L. Rev. (Mishpatim)* 3 (2002)). Of course, as in any other case, it is necessary to prove the content of the mutual promises (see HCJ 1635/90 *Jerzhevski v. Prime Minister* [4]). We must examine 'circumstantial evidence of the making of the promise, since usually the change of "status" that comes with a promise of marriage does not remain a secret between him and her, but also manifests itself outwardly in signs as to which other evidence can be brought' (*per* Justice Landau in CA 460/67 *A v. B* [5], at p. 160). In this respect, 'it is sufficient to prove facts that can lead to the conclusion that the parties reached the "basic agreement," i.e., "to make a life contract with the woman you love"' (*per* Justice Shamgar in CA 647/89 *Shifberg v. Avtalion* [6], at p. 174, citing the remarks of Justice H.H Cohn in CA 545/77 *A v. B* [7], at p. 399). If the facts required to establish the mutual promises of the parties are properly proved, the court will recognize the existence of a contract between the parties.

11. The recognition of the contractual validity of a promise of marriage is not free of doubt. It is possible to argue that the agreement to marry is of an intimate nature and falls within the realm of emotion, and therefore it is right to recognize the freedom of each party to be released from his promise, without thereby breaching the right of the other party. According to this approach, while a promise of marriage has a place in the legal system, it is not found in the sphere where the law recognizes a contractual undertaking to honour promises, but it is found in the sphere where the law recognizes the freedom of the individual to honour his promise or not to honour it. The reason for this is based on the fear of harming the freedom of marriage (see P. Shifman, *Israeli Family Law* (second edition, vol. 1, 1998), at p. 202) and the abuse of the right to marry, reasons that have been extensively addressed by my colleague, Justice Rivlin. Indeed, in several countries it has been established (in legislation or in case law) that a promise of marriage is not binding (see in England — the Law Reform (Miscellaneous Provisions) Act

1970, s. 1; in Ontario, Canada — the Marriage Act, R.S.O. 1990, c. M.3, s. 32; in British Columbia — the Family Relations Act, R.S.B.C. 1996, s. 128; for details of legislation in the United States, see *Gilbert v. Barkes* [30], at p. 775).

12. Notwithstanding these arguments, I believe that the law cannot be indifferent to a consent to marry and this consent cannot be left in the sphere that grants freedom of decision to each of the parties. There are two reasons for this. First, a breach of a promise of marriage may cause damage to the other party. There is no objective justification for not allowing damages to be awarded for this damage. Freedom of marriage does not give rise to a freedom to cause damage to others. The promise of marriage sometimes leads to reliance and various plans for realizing it. The plan to marry may also have ramifications on other plans of the couple and lead to an adverse change in their position in various respects. Ignoring this reality of life is wrong and unjustifiable. Often a promise of marriage involves substantial financial expenditure. Why should the party who changes his mind be released from paying those expenses? Friedman and Cohen rightly point out that 'unlike a mere agreement of friendship, a promise of marriage involves property aspects, and it constitutes a preparation for a patently legal relationship, the relationship of marriage' (D. Friedman and N. Cohen, *Contracts* (vol. 1, 1991), at p. 370). An infringement of the property aspect of the promise of marriage should lead to 'property' consequences, in the form of compensation for the damage suffered.

13. Second, the law of contracts in Israel does not stop on the threshold of the family home. The law does not deny the legal validity of contracts (even implicit contracts) that are based upon emotional foundations and are created in intimate, inter-personal circumstances. Thus, the law recognizes contracts that determine property rights between parties; it recognizes a contract of joint ownership of assets between spouses; it recognizes a contract to have a civil wedding outside Israel and the liability for maintenance that this contract may create (LCA 8256/99, *A v. B* [8]). G. Shalev has rightly pointed out that the 'distinction between the family sphere and the business sphere as a criterion for proving the absence or existence of an intention to create a legal-contractual relationship is tendentious, since it assumes *ab initio* the existence of the intention in those spheres which the law seeks to govern, and its absence in spheres which the law seeks to leave alone… there is no clear reason for exempting a person from his family and social obligations on the ground that he did not intend to create a legal relationship, and at the

same time for enforcing business obligations that he undertook outside his family and social environment' (Shalev, 'Gentlemen's Agreements,' *supra*, at pp. 22-23). Recognition of the validity of contracts of this type, including an agreement to marry, guarantees proper legal protection even for injured parties in the intimate family circle. A breach of undertakings in the family and marital sphere also leads to expenses and damages. There is no justification for exposing either spouse to damage arising from a breach of the undertaking without the law coming to their aid. The expenses and damages should not be borne randomly by one of the parties (usually the weaker party), but this should be determined by the rules of contractual liability.

14. Israeli law therefore holds that a 'promise of marriage is… in our legal system, a binding contract' (*per* Justice Strasberg-Cohen in CA 5587/93 *Nahmani v. Nahmani* [9], at p. 508 {27}). In principle, there is nothing in agreements to marry, *per se*, that prevents the application of the law of contracts to relationships between couples, but the contract is created if the parties intended to create a binding legal relationship between them. The question whether the couple regard themselves as legally bound, or whether the undertaking between them is only in the social or moral sphere, is a question that must be examined on the basis of the circumstances of each case. It is necessary to examine, *inter alia*, the conduct of the parties, the nature of the relationship and the content of the promises. Of course, reliance on the part of the recipient of a promise and an adverse change of status may be an indication that we are in the contractual sphere (see: Friedman and Cohen, *Contracts*, *supra*, at p. 373; Shifman, *Israeli Family Law*, *supra*, at p. 206). We must also remember that the contract to marry is a unique type of contract (see Friedman and Cohen, *ibid.*, at p. 368). Thus, for example, the natural remedy for a breach of contract is specific performance. This remedy is not available to the recipient of the promise when it has been breached (whether because of s. 3(2) of the Contracts (Remedies for Breach of Contract) Law, 5731-1970, or whether because of s. 3(4) of that law). The injured party will have to settle for compensation (for pecuniary loss and non-pecuniary damage).

A marriage agreement with a married man

15. A man and a woman agree to marry. If both are single, the agreement creates contractual rights and obligations between the parties. Are these rights and obligations not created merely because one of the parties to the contract is married to someone else? The 'geometric place' where an answer

to this question may be found is in ss. 30 and 31 of the Contracts (General Part) Law. Section 30 provides:

> 'A contract whose creation, content or purpose is illegal, immoral or contrary to public policy, is void.'

Section 31 provides:

> '… in voidance under s. 30, the court may, if it thinks it just to do so and on such conditions as it sees fit, exempt a party from the duty under s. 21 [i.e., the duty of restitution after cancellation], in whole or in part, and to the extent that another party has carried out his obligation under the contract, it may find the other party liable to carry out the corresponding obligation, in whole or in part.'

Does an agreement to marry, when one of the parties to the agreement is married to a third person, give the recipient of the promise a right to compensation?

16. This question arose in case law in the 1960s (see *Riezenfeld v. Jacobson* [1]; CA 563/65 *Yeger (Plink) v. Flavitz* [10], at p. 249; *Natan v. Abdallah (Ilan)* [3]). It was held that the validity of the agreement is contingent on the question whether, at the time it was made, the marriage with the other spouse had broken down or not. If the relationship between the married spouses had 'broken down, and they no longer had the same relationship of mutual affection and loyalty that could be harmed by the agreement,' then the agreement cannot be regarded as immoral (*Riezenfeld v. Jacobson* [1], at p. 1029 {117}). It was said that 'when it has been proved to the court that the relationship between a husband and wife has broken down, and the marriage exists on paper only, why should the law protect the fiction of a relationship of trust and affection that characterizes a healthy marital relationship, when that relationship has in practice ended and exists no more?' (*per* President Sussman in CA 116/75 *Haik v. Sefya* [11], at p. 92). On the other hand, if the marital relationship has not reached a crisis, the contract of marriage should be regarded as immoral. The contract is void, and the damage rests where it falls.

17. Forty years have passed since this ruling. The concepts of morality and public policy — this ground was added in s. 30 of the Contracts (General Part) Law — have changed. 'Public policy' means the main and essential values, interests and principles that a given society at a given time wishes to uphold, preserve and develop' (HCJ 693/91 *Efrat v. Director of Population*

Register, Ministry of Interior [12], at p. 778). With the help of 'public policy,' the legal system ensures proper conduct in inter-personal relationships. This proper conduct changes with the times (HCJFH 4191/97 *Recanat v. National Labour Court* [13], at p. 363). 'Public policy' is influenced by the social climate. Its content varies from society to society; it changes in a given society from time to time (CA 614/76 *A v. B* [14], at p. 94). In determining the scope of 'public policy,' an internal balance is required between conflicting values and interests (CA 6601/96 *AES System Inc. v. Saar* [15], at p. 861; CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [16], at p. 534; *Recanat v. National Labour Court* [13], at p. 364).

18. What are the conflicting values and principles that shape public policy in the matter before us? *On the one hand*, we have the institution of marriage and the social centrality of the family unit. By virtue of this consideration, the obligation given by a married man to marry should not be recognized as valid. *On the other hand*, we have the social outlook that promises should be kept, and whoever breaches his promise and causes damage can expect to be found liable for this. In my opinion, an internal balance between these values leads to the conclusion that the agreement to marry, even if one of the parties is married when it is made, is not contrary to public policy and is not void as such. There are several reasons for this.

19. *First*, since the 1960s a significant change has occurred in the public perception of morality and public policy. Significant changes have occurred in the social attitude towards the dissolution of the bonds of matrimony and the phenomenon of divorce. The rule that promises of marriage by a married person are contrary to public policy was formulated in English law at the beginning of the twentieth century (*Spiers v. Hunt* [32]; *Wilson v. Carnley* [33]). This rule was based on the perception that a termination of the relationship with the lawful spouse for a different partnership that involves a promise to divorce and to marry someone else is completely wrong. The courts feared that recognizing the validity of the promise would encourage immoral conduct (adultery) and even criminal conduct (bigamy). The rule was adopted in Israeli law in a limited form, by focusing on the public interest in upholding the institution of marriage as a basic social unit. An agreement that is intended to harm this, to destroy family life or to 'promote' divorce was rejected on the grounds of public policy (*Riezenfeld v. Jacobson* [1], at p. 1027 {114-115}). In *Riezenfeld v. Jacobson* [1], Justice Silberg

wrote that 'accepted concepts of morality… regard extra-marital relations between a man and a woman as improper and vile' (*ibid.*, at p. 1021 {107}).

20. There is no doubt that preserving the family unit is a part of public policy in Israel even in the present. It is in the interest of society to support stable marriages. The institution of marriage is central to our society. Against this background, I said in one case that 'within the framework of the family unit, the preservation of the institution of marriage is a central social value, which constitutes a part of public policy in Israel' (*Efrat v. Director of Population Register, Ministry of Interior* [12], at p. 783). Notwithstanding, over the years social perceptions have changed with regard to the dissolution of the bonds of marriage and the phenomenon of divorce. There is a recognition of the fact that divorce has become part of the reality of life (CFH 2401/95 *Nahmani v. Nahmani* [17], at p. 792 {487}). Property agreements made before marriage, which deal with the possibility of divorce, are not considered today to be contrary to public policy. Explicit divorce agreements are also given validity (CA 3833/93 *Levin v. Levin* [18]). Even the abhorrence of extra-marital relationships does not reflect the attitude of Israeli society today, and the laws applying to cohabitees — which were developed jointly by the legislature and the court — prove this. The old rule, which makes the validity of the contract conditional upon the question whether the relationship between the parties has broken down or not seems to me inconsistent with the attitudes of Israeli society today.

21. *Second*, the institution of marriage will not be protected by sacrificing the rights of a victim of a breach of a promise of marriage. The injured party should not be made to pay the price of socio-legal support of the institution of marriage. Moreover, when a married person promises to obtain a divorce and to marry another, it may be assumed that the marital relationship is a weak one. It certainly does not have the mutual loyalty and affection that characterize this relationship. It is difficult to justify strong protection of the law for this weak relationship (see *Haik v. Sefya* [11]). It should be remembered in this context that making enquiries as to the 'stability' of the marriage requires an invasive examination of the family life of the married couple. This invasive enquiry into intimate information is likely to cause considerable and unnecessary suffering to all the parties concerned, and it appears to be preferable to adopt the presumption that when a married person undertakes to obtain a divorce and to marry a third party, his marriage at that time is not 'stable.'

22. *Third*, it is not the recognition of the validity of the contract that harms the marital relationship, but it is the fragile marital relationship that leads to making the contract. It is difficult to see how immunity for the married man, who establishes interpersonal relationships outside the framework of marriage and bandies about promises, contributes to the strengthening and stabilization of the institution of marriage. The married person who chooses an interpersonal relationship outside of marriage does so of his own free will, and this should in no way affect the legal status or the rights of any of the litigants (cf. CA 416/91 *Maman v. Triki* [19], at p. 659). The destruction of the marriage, like any other harm to the lawful spouse, derives from the conduct of the married person. This conduct, and not the award of damages, is what undermines the institution of marriage. This conduct causes a double wrong: granting an exemption from (contractual) liability with respect to this conduct merely reinforces the wrong that has been caused, without serving a real social purpose. In a certain sense, the exemption even gives approval to such conduct, in so far as it imposes the losses and the risks upon the other party, in their entirety.

23. *Fourth*, the duty of keeping one's word and keeping promises is also a part of public policy (G. Shalev, *The Law of Contracts* (second edition, 1998), at p. 367, and the references cited there). We must exercise caution when denying the validity of an agreement and exempting a party from an undertaking that he has taken upon himself (*Levin v. Levin* [18], at p. 875). Judge Witkon rightly said in *Riezenfeld v. Jacobson* [1] that 'the party that relies upon the invalid aspect of his promise and seeks to escape it does not do so out of unselfish motives, and usually the wrongdoer ends up benefiting' (*ibid*., at p. 1027 {114-115}). The possible harm to the institution of marriage is countered by the legitimate interests of the parties themselves and the public interest in the honouring of undertakings.

24. My conclusion is therefore that an agreement to marry, where one of the parties thereto is a married person, is not void for being contrary to public policy. Of course, there may be special cases where an agreement that is based upon a promise of marriage may be contrary to public policy, when, for example, there is intentional harm to a third party. Thus an arrangement that includes a fraudulent transfer of assets from the legal spouse to the future spouse, for the purpose of harming the property rights arising from the divorce, may be found to be invalid for this reason. This is not the normal position, in which an unstable relationship between a married couple leads to making the contract with the unmarried person, and it is not the recognition

of the validity of the contract that will lead to the breakdown of the relationship; it is merely its outcome. Indeed, a solution of the problem is not simple. Justice Witkon rightly pointed out that 'we have before us a question that is really a sociological, not a legal, question' (*Riezenfeld v. Jacobson* [1], at p. 1026 {113}). It would be best if the legislature were to consider this matter.

25. In *obiter*, I will add that even had I thought that the agreement to marry was void under s. 30 of the Contracts (General Part) Law, there still would be no justification for denying it all legal significance. The results of a contract being void were changed unrecognizably by the addition of a new provision (s. 31). According to the new law of contracts, the damage does not rest where it falls. According to the approach of the District Court, the fact that the agreement to marry is contrary to public policy automatically leads to the denial of any legal remedy to the appellant. I cannot agree with this determination. The approach of the District Court is inconsistent with the new law of contracts, which provides a new legal arrangement with respect to improper contracts. In view of the new arrangement, the determination that an agreement is contrary to public policy does not exempt the court from examining the remedies that are available to the plaintiff within the framework of s. 31 of the law. According to the new rule, the court may, 'if it thinks it just to do so,' hold the maker of the promise liable to carry out his undertaking, if the other party has performed his obligations under the contract (HCJ 6231/92 *Zagouri v. National Labour Court* [20], at p. 784). If the contract is unenforceable, the court may award damages by virtue of its authority to give validity to an obligation, validity that entails a liability for damages for the breach involved in its non-implementation (see O. Grosskopf, 'An Improper Contract,' in Friedman and Cohen, *Contracts* (vol 3, 2004), at p. 624). It follows that with respect to a promise of marriage, the court may find a party that does not honour his undertaking liable to pay damages, if the other party did everything in order to uphold his part of the contract.

From the general to the specific

26. It was agreed between the appellant and the respondent that they would each end their legal marriage, and that they would marry each other. The circumstances of the case all indicate that the couple intended to create a legal-contractual relationship between them. The marriage plan was not a secret shared only by the couple. Their colleagues at work and those around them knew of it. The respondent gave expression to his undertaking to the

appellant on various occasions. Thus, for example, the attorney who represented the appellant in the divorce proceedings (who was retained by the respondent) testified that he found himself involved in one of the quarrels between the couple that occurred because of the respondent's failure to keep his promise to divorce. The respondent begged the attorney to persuade the appellant not to leave him and made an undertaking in his presence that within six months, at most, he would divorce his wife and marry the appellant. The marriage plan was the basis for the appellant's divorce, which was obtained with the encouragement and funding of the respondent. The appellant relied upon the marriage plan, she gave up her status and her rights as a married woman. All the circumstances clearly indicate that the joint plan of marriage was not confined merely to the social sphere. The plan also moved into the legal sphere, and a binding contract was made between the respondent and the appellant.

27. This contract is not contrary to public policy. The mere fact that the respondent was a married man when he undertook to divorce his wife and marry the appellant does not lead to the voidance of the contract on the grounds of public policy. The respondent did not argue that the marriage plan included an intention of harming a third party, or that there were other special circumstances that are contrary to public policy. In fact the respondent did not even show that the promise of marriage resulted in a deterioration in his relationship with his lawful spouse. It may be assumed that before the promise there had already been a deterioration in the relationship of fidelity and mutual affection that characterizes a married couple. In any case, the appellant should not be blamed for the harm to the respondent's wife or family, in so far as there was any such harm. Certainly the appellant should not pay the price for protecting the respondent's family unit. Since the respondent did not keep his promise to the appellant, there is no justification for exempting him from legal liability. The appellant is therefore entitled to compensation for the pecuniary and non-pecuniary damages that she suffered as a result of the breach of the contract. With regard to the scope of the compensation, it was not brought before us (since it is not included in the application for leave to appeal), and there is no basis for considering it.

28. It should be noted that the relief of damages would be available to the appellant even if I thought that the agreement to marry was void under s. 30 of the Contracts (General Part) Law. Section 31 of the law is entirely relevant to this case. The appellant fulfilled her obligations under the

agreement. She obtained a divorce from her husband, with assistance provided to her by the respondent, and as a single woman she was willing at any time to marry the respondent and sacrificed the best years of her life to that end. She had a lengthy relationship with the respondent. Justice demands — and it is hard to imagine a case more extreme than the case before us — that the appellant should be compensated for her damage.

The result is that the appeal is allowed; the judgment of the District Court is set aside, and the judgment of the Magistrates Court is reinstated. The first respondent shall be liable for the appellant's costs in a total amount of 10,000 new sheqels.

Justice E. Rivlin

1. This appeal focuses on the nature of the cause of action that is usually referred to as 'breach of a promise of marriage.' The discussion of this cause of action necessarily involves social and cultural outlooks, and *prima facie* it requires the court to examine emotional relationships in a contractual context.

The appeal raises two fundamental questions with respect to this complex legal cause of action. The first and the more central and general question concerns the scope of the cause of action for a breach of a promise of marriage in Israeli law and the nature of the reliefs that it can make available to the litigant. The other question, which is more limited in its scope of application, concerns the possibility of a claim based on a promise of marriage that was made by a man when he was still married to another woman.

2. I will begin with the second question, because, unlike with the first question, I agree with the remarks of my colleague, President Barak, and therefore I do not need to say anything further on it. My colleague, President Barak, explains well why there is no basis for continuing to hold that a promise of marriage is void for being contrary to public policy, if it was made by a married man whose marriage has not completely broken down. I agree with my colleague's opinion on this point, and also with the reasons that led him to adopt it.

3. With respect to the other issue, concerning the general validity of the cause of action of a breach of a promise of marriage, my opinion is different.

The contractual cause of action that is based on a breach of a promise of marriage was adopted by Israeli law from English common law. Following traditional English case law, once a plaintiff has proven the basic elements of the cause of action, the plaintiff is entitled to compensation both for 'special' pecuniary loss that was suffered as a result of the breached promise, and also for the 'general' damage that was suffered. The general damage is comprised of the emotional damage that *prima facie* was suffered as a result of the breach of the promise. This is the law that was adopted in Israel. My colleague, President Barak, described the distaste that this cause of action, which is based upon a breach of a promise of marriage, creates in modern law. This distaste is clearly stated in CA 461/64 *Tamsit v. Fahima* [21], at p. 131. Acting President Silberg maintained in that case that an action for the breach of a promise of marriage is —

> '… one of the kinds of action that are not especially popular… such an action almost always contains something distasteful, because it is based on the premise that the fiancé or fiancée should have married the other partner, merely because of the promise that was made, even though there are no feelings of love between them. Even the ancient Romans regarded such an action as contrary to public morality… but what can we do when the common law regards these actions as valid contractual actions, and our courts have also adopted this approach.'

Justice Berinson also agreed with this position in *Natan v. Abdallah (Ilan)* [3], at p. 464:

> 'It is well known… that the courts do not regard actions for a breach of a promise of marriage in a favourable light.'

4. Several reasons have been advanced against the very existence of a cause of action for a breach of a promise of marriage. The first and main reason was mentioned in the aforesaid remarks of Vice-President Silberg. This reason concerns the freedom of marriage. It is undisputed that the decision to marry must be a free and voluntary decision. No one believes that a man who wanted to marry a woman, or a woman who wanted to marry a man, and then underwent a change of mind, should be compelled to keep his or her word. Quite the reverse; I think that society has an interest that such a marriage — which appears doomed to failure from the outset — should not take place. There is therefore a difficulty in the existence of the possibility that a man or a woman may be sued because he or she decided not to marry. Admittedly, it may be assumed that the liability to pay compensation as a

result of such a claim is not in itself a deterrent, and it will not induce someone to marry against his will. But the very liability to pay compensation is an expression of a socio-legal outlook that a person who goes back on his word in such matters is acting wrongly, whereas in practice, as we have said, the accepted outlook in society and in the court is that someone who changed her mind, and no longer wishes to build a future together with the person who was just recently her chosen partner, is entitled, and maybe even obliged, to follow her heart. This contradiction is regarded as undesirable. Indeed, there are many who recommend that we develop legal tools that are different from the cause of action of breach of a promise of marriage, in order to protect the interest of the recipient of the promise.

The scholar P. Shifman gives two additional reasons that strengthen the conclusion that the contractual cause of action of breach of a promise of marriage should be cancelled (Shifman, *Israeli Family Law*, *supra*, at pp. 200-205). The first of these is the fear of abusing the action for blackmailing the other party. The second is the sex-bias that has historically been involved in this cause of action, which is almost exclusive to women (in the 180 years that preceded the cancellation of the cause of action in England, no action is known to have been filed by a man: *ibid*., at p. 201; a study of case law shows that the number of actions of this type is also negligible in Israel, the United States (in this regard, see also *Gilbert v. Barkes* [30], at pp. 774-775) and France (in the last forty-five years, only one action filed by a man for breach of a promise of marriage has been heard by the Cour de Cassation (Cour de Cassation, 4 Octobre 1965, no. 507 [35]); his claim was dismissed)). Therefore it appears that the cause of action is often abused in order to perpetuate the outlook that women, unlike men, need marriage in order to fulfil themselves.

5. Ultimately, it appears that the main difficulty with the cause of action of breach of a promise of marriage lies in the attempt to impose the law of contracts on a situation in which it is of questionable suitability. This difficulty raises doubt as to the very nature of a promise of marriage as a contract.

This was discussed by Justice Kister in CA 401/66 *Marom v. Marom* [22], at p. 679:

> ‘It is questionable whether [an agreement to marry is] a contract for which damages can be awarded at all. Surely it is hardly logical that a marriage agreement between a man and a woman

> is treated the same as an agreement for the supply of agricultural produce.'

It is easy to demonstrate the difficulty involved in analyzing the institution of a promise of marriage with contractual tools. Consider the case of a woman who made a promise of marriage and then discovered that, contrary to her previous belief, she has no feelings of love for the man to whom she gave the promise. Should it be said that she made a fundamental mistake that allows the rescission of the contract under s. 14 of the Contracts (General Part) Law, or is this perhaps 'a mistake as to the whether the transaction is worthwhile,' which does not grant a right of rescission (s. 14(d))? Can the woman who gave the promise argue that the performance of the contract has been frustrated under s. 18 of the Contracts (Remedies for Breach of Contract) Law or, alternatively, is it possible, in view of the understanding of the parties (s. 25 of the Contracts (General Part) Law) to interpret the contract — the promise of marriage — as a conditional contract (s. 27) where the condition is the existence of feelings of love? If so, can the woman who gave the promise and then stopped loving the recipient of the promise build a case based on the condition, when she herself was 'responsible' for its frustration (s. 28 of the Contracts (General Part) Law)? (For a discussion of the defects in the making of a contract of a promise of marriage and the possibility of making it conditional, see *Maman v. Triki* [19]).

And what of a case where the man who gave a promise discovers that, contrary to his previous belief, the woman to whom he gave the promise does not have any feeling of love to him? Is he the victim of a misrepresentation? Or perhaps we can say that by concealing information from the man who gave the promise, the recipient of the promise acted in bad faith in negotiations (s. 12 of the Contracts (General Part) Law)? Whoever hears this will laugh and shy away from the law of contracts.

It can simply be said that 'it is difficult to apply contractual criteria based on the existence of commercial standards to the emotional sphere.' These remarks do indeed lead the scholars D. Friedman and N. Cohen to the conclusion that 'a promise of marriage is a problematic contract that lies on the very edge of justiciability' (Friedman and Cohen, *Contracts*, *supra*, at pp. 368, 369).

6. In most western jurisdictions, the cause of action of breach of a promise of marriage has been cancelled or restricted. One authority describes this cause of action as follows:

> 'It is a barbarous remedy, outgrown by advancing civilization and, like other outgrown relics of a barbarous age, it must go' (H.F. Wright, 'The Action for Breach of the Marriage Promise,' 10 *Va. L. Rev.* (1923-1924) 361, at p. 382).

Even in England, from which we derived this special cause of action, it was determined in s. 1 of the Law Reform (Miscellaneous Provisions) Act 1970 that an agreement to marry is not deemed a legally enforceable contract, and that a breach of such an agreement does not give rise to a cause of action. The act regulates conflicts concerning property aspects of a promise of marriage, by applying, in s. 2(1), some of the provisions governing the assets of married couples to certain assets of the couple, and by providing, in s. 3(1), a mechanism for the restitution of gifts. It should be emphasized that this restitution does not depend at all on the identity of the person who 'broke' the promise — even the person who broke the promise of marriage is entitled to benefit from the restitution (see further N.V. Lowe, G. Douglas, *Bromley's Family Law* (ninth edition, 1998), at pp. 24-28; S.M. Cretney, J.M. Masson, *Principles of Family Law* (sixth edition, 1997), at pp. 184-185; Halsbury, *The Laws of England*, (fourth edition (reissue), 2001), vol. 29(3), at pp. 37-38).

7. Like the legislature in England, the legislature in Australia has also repealed the possibility of filing an action for damages for a breach of a promise of marriage, while retaining the possibility of an action for the restitution of gifts (s. 111A of the Marriage Act 1961). Similar legislation has been adopted in several Canadian provinces: in Ontario (s. 32 of the Marriage Act, R.S.O. 1990; under s. 33, gifts shall be returned irrespective of fault); and also in British Columbia (s. 123 of the Family Relations Act, R.S.B.C. c. 128). In Manitoba both the contractual cause of action for a breach of the promise and the cause of action for fraud with regard to a promise of marriage were repealed (s. 4 of the Equality of Status Act, C.C.S.M., c. E130). In Alberta, the cause of action of breach of a promise of marriage was not repealed, but the statute provides that the breach can give rise to compensation only for property damage (s. 101 of the Family Law Act, S.A. 2003, c. F-4.5); under s. 102 of that statute, gifts shall be returned irrespective of fault.

8. In the United States, most states have repealed the cause of action of breach of a promise of marriage in legislation (these statutes, which were enacted from 1935 onwards, are called 'Heart Balm' statutes). This legislation has frequently been interpreted as also preventing the filing of an

action on grounds that are not contractual in nature — such as fraud and negligent misrepresentation — based on a promise of marriage (see: 12 *Am. Jur. 2d* (Breach of Promise), §§13-14; 'Note: Heartbalm Statutes and Deceit Actions,' 83 *Mich. L. Rev.* (1984-1985) 1770). In two states, the cause of action was cancelled in decisions of the court (in Utah — *Jackson v. Brown* [31], and in Kentucky — *Gilbert v. Barkes* [30]), while retaining the other civil causes of action. The courts in both states explained that the property damage of the recipient of the promise can find relief in contractual theories, whereas the emotional damage can be addressed by the tortious causes of action of fraud or negligent misrepresentation, in appropriate cases.

9. In France, the cause of action of breach of a promise of marriage existed for hundreds of years. Its origins were in German customs that in time entered Canon law (P. Weidenbaum, 'Breach of Promise in Private International Law,' 14 *N. Y. U. L. Q. Rev.* (1936-1937) 451, at pp. 451-452). After the revolution, which led to the removal of religious traditions from the statute books, the cause of action did not appear in the Civil Code. The courts interpreted this failure to mention the action as its cancellation, because it harmed the freedom of marriage. Notwithstanding, it was held that this did not prevent the existence of a cause of action in torts, based upon the breach of promise (see, for example, Cour de Cassation, Civ., 30 Mai 1838, B. c. C. [36]). In order to show a cause of action in torts under ss. 1382 and 1383 of the Civil Code (which are the sections that govern the law of torts in France), a plaintiff is required to prove that there was fault in the way in which the promise was breached; in other words, the breach itself is insufficient in order to find the party in breach liable for damages: the breach must be accompanied by a *faute delictuelle* or *quasi-delictuelle* (see, for example, Cour de Cassation, Civ. 1, 31 Janvier 1961 [37]; Cour de Cassation, Civ. 2, 7 Juin 1967, no. 210 [38]; Cour de Cassation, Civ. 1, 22 Juillet 1964, no. 412 [39]). In these cases, the court therefore focused on the question whether the conduct of the party in breach was unreasonable — whether it was a *rupture abusive de promesse de mariage* (for examples of cases where it was held that the breach of marriage was without fault, see: Cour de Cassation, Civ. 1, 19 Juillet 1966, no. 443 [40]; 92-21767 Cour de Cassation, Civ. 1, 4 Janvier 1995 [41]; by contrast, for examples of cases where the party in breach was held liable to pay tortious damages, see: 71-13001 Cour de Cassation, Civ. 2, 18 Janvier 1973, no. 25 [42], at p. 19; Cour de Cassation, Civ. 1, 9 Octobre 1961, no. 440 [43]). The issue of gifts that were given in connection with an intended marriage is regulated in s. 1088 of the

Civil Code, which provides that such gifts shall be cancelled if the marriage plans are not realized.

10. In Germany, a breach of a promise of marriage is not a cause of action (s. 1297(1) of the BGB), unless no reason was given for the breach (s. 1298). In the latter case, it is only possible to sue for compensation for the damage that was suffered as a result of reasonable expenses that were incurred and reasonable undertakings that were made in anticipation of the marriage. Gifts that were given shall be returned, irrespective of this action, based upon the laws of unjust enrichment (s. 1301 of the BGB). Compensation for emotional damage was recognized in the past, only in a case where, as a result of the promise, a 'pure' (unbescholtene) woman was seduced into having sexual relations (s. 1300). This section was recently cancelled.

In Spain, an unjustified breach of the promise gives rise only to the right to restitution for the expenses that were incurred and the undertakings that were made for the purpose of the promised marriage (ss. 42 and 43 of the Código Civil). In Switzerland, whereas in the past the Civil Code allowed an action for emotional damage in special cases of a breach of a promise of marriage, the Civil Code now provides that an action is only possible for a contribution to expenses and losses of income that were caused by the intended marriage (s. 92), as well as an action for the restitution of gifts (s. 91). Such actions are not affected by the identity of the party in breach.

11. This survey of comparative law, although not comprehensive, shows that even in other legal systems, like in Israel, dissatisfaction has been expressed as to the existence of the cause of action for breach of a promise of marriage. This approach has led to the cancellation of the cause of action, or at least to a significant restriction thereof, throughout the western world. Even in Arab countries, where personal law is based on Islamic law, a breach of a promise of marriage itself gives rise, at most, to a right to the restitution of gifts (see the survey included in J.J. Nasir, *The Islamic Law of Personal Status* (third edition, 2002), at pp. 46-48.)

As for me, I am of the opinion that the time has indeed come to cancel this contractual cause of action, as it is recognized in Israel today, while ensuring a possibility of a no-fault action for property damages that are suffered as a result of a breach of a promise of marriage. These damages are likely to include damages for reliance or expenses that were incurred in preparation for the marriage, as well as wedding gifts that were given before the marriage (with respect to gifts, see D. Frimer, 'The Restitution of Engagement Gifts for a Breach of a Promise of Marriage, in view of the New

Civil Legislation,' 10 *Hebrew Univ. L. Rev. (Mishpatim)* (1980) 329). It is also possible that we should consider the possibility of adopting the system accepted in France, and now also in other countries, whereby the compensation for a breach of a promise of marriage is awarded, if at all, in the sphere of torts. Today in Israel, tortious damages for breach of a promise of marriage are awarded only in cases where the tort of fraud is proved (see, for example, *Natan v. Abdallah (Ilan)* [3]). Given the basic elements of the tort, which are set out in s. 56 of the Torts Ordinance [New Version], the plaintiff is required, in order to succeed in his action, to prove that already when he gave the promise, the promissor intended not to keep it.

In this respect, perhaps we ought to extend the possibility of filing an action also to cases where the promise of marriage does not amount to fraud, but it does involve false representation (ss. 35 and 36 of the Torts Ordinance [New Version]), i.e., cases where the promissor acted unreasonably, and there are conditions that give rise to a duty of care for false representation. This is the position of the scholar G. Shalev, who calls for abandoning the contractual cause of action and replacing it with a tortious cause of action, in order to protect the principle of freedom of contracts and the freedom of the parties to enter into a relationship that is outside the law (Shalev, 'Gentlemen's Agreements,' *supra*, at pp. 29-30).

12. The problem is, as this court has said on more than one occasion, that such a cancellation of the contractual cause of action, in view of its established position in case law, must be made in legislation (*Shifberg v. Avtalion* [6], at p. 176; *Maman v. Triki* [19], at p. 657). But does this mean that we are unable to do anything in order to alleviate the force of the case law rule that no longer appears reasonable to us? Not necessarily.

In my opinion, a proper interim solution would be to determine that the damages awarded for breach of a promise of marriage are restricted to pecuniary loss (this was proposed by Justice Mazza in *Shifberg v. Avtalion* [6], at p. 176, which followed remarks made by Prof. Shifman in *Israeli Family Law*, *supra*, at p. 204. Even before this, a similar position was expressed by Prof. G. Tedeschi in 'Notes on the draft Individual and Family Law,' in G. Tedeschi, *Studies in our Private Law* (1959) 264, at pp. 282-283). Counsel for the State also agrees with these remarks in her summations.

13. The main difficulty with a remedy involved in the cause of action for breach of a promise of marriage lies in the compensation that is awarded for non-pecuniary damage. Therefore, it is no wonder that in most countries

where the cause of action has been preserved, it has been restricted to pecuniary loss.

While no one denies that the law cannot remain indifferent to the property aspects of the breach of a promise of marriage (Friedman and Cohen, *Contracts*, *supra*, at p. 370), it is very questionable whether ordinary legal tools are capable of dealing with the emotional damage that is created in and as a result of emotional-personal relationships:

> 'The natural sphere of the law of contracts is the sphere of commerce. The spiritual or emotional province falls outside the traditional sphere of the law of contracts. Emotions are not a commodity. One cannot trade in them… in principle, emotions are not a proper subject for a contract' (N. Cohen, 'Status, Contracts and Inducing a Breach of Contract,' 39 *HaPraklit* 304 (1989-1991), at p. 317).

(For the opposite position, cf. H. Keren, *The Law of Contracts from a Feminist Perspective* [64], at pp. 97-134, 397-403).

14. For the sake of illustration, as we know, the law does not provide a cause of action for emotional damage involved in divorce proceedings (see and cf. CA 264/77 *Dror v. Dror* [23], at p. 832), even though in many cases the dissolution of a long-term marriage involves emotional damage that is far greater than the emotional damage that is caused as a result of a breach of a promise of marriage (and therefore there are those who go so far as to explain the conclusion that compensation should not be awarded for the emotional damage from a breach of a promise on the grounds that the breach prevented the realization of greater emotional damage, had the promise been kept (N.G. Williams, 'What to Do When There's No "I Do:" A Model for Awarding Damages Under Promissory Estoppel,' 70 *Wash. L. Rev.* (1995) 1019, at pp. 1055-1056). Similarly, there is no remedy in our legal system for someone who has suffered emotional damage from an adultery committed by that person's spouse (see G. Tedeschi, 'A Crisis in the Family and the Proponents of Tradition,' *Legal Studies in Memory of Abraham Rosenthal* (G. Tedeschi ed., 1964) at pp. 291-295). As a rule, the separation of persons who had a romantic relationship, which is a common event that undoubtedly involves strong feelings, does not in itself give rise to any legal remedy (even though it is perhaps possible for damages to be awarded in the event of a sudden eviction from the home: CA 805/82 *Versano v. Cohen* [24]). How is a breach of a promise of marriage worse than these cases? And why is it precisely the dissolution of a personal relationship in which such a promise

has been made that entitles a person to damages? It appears that here we have a distinction without a difference.

15. Admittedly, the law, as my colleague President Barak says, does not stop on the threshold of the family home, but the law refrains from trying to regulate emotional relationships. The law has difficulty providing a remedy for injured feelings and an aching heart. The spouse who is unfaithful, adulterous, breaks up a relationship without justification is deserving of moral, religious or social condemnation, but the injured party will have difficulty finding a remedy in law.

For these reasons, it seems to me that in a contractual claim for a breach of promise of marriage the court should exercise the discretion given to it under s. 13 of the Contracts (Remedies for Breach of Contract) Law (and see Shalev, *Contracts*, *supra*, at p. 586), and refrain from awarding compensation for non-pecuniary damage.

16. In my opinion, the essence of the matter is that where a breach of a promise of marriage has been proved, compensation should be awarded only for pecuniary loss that was suffered as a result of the breach. With respect to such an action, it makes no difference, in my opinion, whether the promise was made between an unmarried couple or it was made between a couple where one of them was married. Therefore I believe that no argument should be heard against an action that is filed in the latter instance to the effect that the promise is contrary to public policy. With respect to the non-pecuniary damages, the remedy for this can be found solely within the framework of a claim in tort, if and in so far as the basic elements required for this exist in the case under consideration.

Let us turn from these principles to the case before us. Indeed, the claim of the appellant should have been denied, but not for the reasons given by the District Court. The appellant based her claim on a contractual cause of action, and the compensation that she sought was entirely intended to repair the general, emotional damage that she suffered. The appellant did not argue the existence of a tortious cause of action, and since the hearing in the Magistrates Court focused only on the question whether the promise was given by the respondent, nothing was proved with respect to the circumstances that surrounded the giving of the promise and its breach, and in any event no tortious cause of action was considered. Indeed, the leave to appeal that the appellant received was limited solely to the question of the ‘legal validity of a promise of marriage that was made to a woman by a married man,’ but this restriction that was imposed on the appellant actually

caused procedural harm to the respondent, because of the difficulty in considering other questions that have an impact on the liability. In any event, even on the merits the conclusion that I have reached — that a promise of marriage has contractual validity with limited consequences — falls within the scope of the legal dispute, as it was defined when leave to appeal was granted. Consequently, in my opinion there is no alternative but to deny the appeal.

Justice A. Procaccia

I agree with the opinion of the President and all his reasons. I wish to add the following remarks:

Breach of a promise of marriage as a contractual cause of action

1. From its very inception, Israeli law regarded a promise of marriage as a binding contract that gives rise to a cause of action for its breach. This was done by virtue of the rules of English common law, which were absorbed by virtue of art. 46 of the Palestine Order in Council, 1922 (CA 129/42 *Jarrous v. Adas* (1942) [29]; CC (TA) 1279/54 *Berghoiz v. Silber* [28]; CA 174/65 *Badash v. Sadeh* [25]). Since then, this cause of action has been repealed in England by legislation, in the Law Reform (Miscellaneous Provisions) Act 1970. At the same time, the Contracts (General Part) Law was enacted in Israel, and in s. 63, the dependence of Israeli law on English common law was terminated. Notwithstanding, even after the enactment of the Contracts (General Part) Law, Israeli law recognized the cause of action of breach of a promise of marriage (see, for example, CA 545/77 *A v. B* [7]; *Shifberg v. Avtalion* [6]). This is a contractual action, as distinct from an action in torts that is based upon the cause of fraud or false representation. Consequently, the injured party has the right to receive compensation, even without proof of fraudulent intent or false representation on the part of the promissor. There are some who have criticized the existence of a contractual cause of action for breach of a promise of marriage, and have argued that an action for a breach of promise as aforesaid should be based on a tortious cause of action only (Shifman, *Israeli Family Law*, *supra*, at p. 198; Shalev, *Contracts*, *supra*, at p. 29). Notwithstanding, recognition of the contractual cause of action for breach of a promise of marriage has remained in force and, in any event, the approach in case law is that uprooting it is a matter for the legislature, rather than judicial legislation (*Shifberg v. Avtalion* [6], at p. 176). Recognition of the contractual cause of action for breach of a promise

of marriage was therefore firmly established in case law even before the founding of the State. It reflects an awareness of the social, moral and legal need to give effect to binding promises between two people who are conducting an intimate personal relationship, where the giver of a promise makes a representation as to his intention to be bound by it and keep it, and the recipient of the promise relies upon this, and sometimes even acts and changes his position on the basis thereof. There is no moral, social or legal reason for excluding the promise of marriage from the scope of the law, and for thereby allowing the existence of marriage agreements that bind the parties thereto in a relationship of mutual commitment, without that commitment having any legal consequences when the breach of the commitment by one of the parties causes damage, and sometimes serious damage, to the other party. The pecuniary loss and the non-pecuniary damage that accompany the breach of a promise of marriage may sometimes be even more serious than damage that is caused as a result of the breach of contracts that govern ordinary market transactions, and the law must provide means and remedies that can compensate for damage that is caused in this context. The contractual cause of action for breach of a promise of marriage is therefore an appropriate one and one that is required as a response to situations in which a person has been injured by a breach of promise, even where he is unable to establish a cause of action in torts for fraud or false representation that accompany such a breach. I agree with all of the objective reasons given in the opinion of the President with respect to the importance of recognizing the contractual cause of action for breach of a promise of marriage as an institution that is controlled by the law. This approach is not consistent with the approach of my colleague, Justice Rivlin, who believes, for the reasons given in his opinion, that recognition of the contractual cause of action for breach of a promise of marriage should be cancelled, or, at the very least, the compensation for this should be restricted to pecuniary loss only, whereas the remedy for non-pecuniary should be found in an action in torts, if and in so far as its basic elements exist in our case.

When is a promise of marriage considered a binding contract?

2. A condition for establishing a cause of action for breach of a promise of marriage is the existence of a binding promise from the viewpoint of the law of contracts. This condition requires a promise that is specific and testifies to the resolve of the offeror, thereby making it possible to accept the offer, which may be effected either in words or by conduct (ss. 1, 2, 5 and 6 of the Contracts (General Part) Law). In an intricate and complex

relationship between a couple that is conducting an intimate relationship, not every statement or expression of prospective hope or intent amounts to a promise of marriage, nor does all conduct that indicates a desire for the continuity of the relationship and an expectation as to its future permanence amount to a commitment to marriage. Alongside the social value that seeks to compensate someone who has been injured as a result of reliance upon a promise of marriage that was breached, there is the value of personal freedom and autonomy of a person to chose his partner and to conduct interpersonal and cohabitational relationships in a social world that is characterized by openness, freedom, the absence of coercion and no intervention by the law. Intervention by the law occurs only when the circumstances clearly indicate the existence of a real commitment to a permanent cohabitational relationship which goes beyond mere expectation or expression of wishes or intent. The real difficulty that characterizes the topic under discussion that we are dealing with is finding the dividing line between an expression of intent, wishes or expectation and a legally binding promise. This dividing line may be very fine indeed.

The difficulty of proving the existence of a binding promise of marriage is a salient characteristic of this topic. Where a promise of marriage is made formally and explicitly, it is easy to deduce from this an intention to create a legal relationship. By contrast, when the agreement is not a formal one, caution must be shown in reaching conclusions as to the existence of such an intention, since otherwise,

> '… we expose every courtship of a woman by a man, or *vice versa*, to the danger that the conduct of the parties will be interpreted, at some stage, as an implied expression of a promise of marriage, without the two of them, or at least one of them, being aware of the full significance thereof' (Shifman, *Israeli Family Law*, *supra*, at pp. 205-206).

The evidential requirements for proving a binding promise vary from one legal system to another. Thus, for example, in the State of Kentucky in the United States, a relatively low threshold of evidence has been established:

> 'The offer, however, need not be formal. "Any expression… of readiness to be married is sufficient" ' (*Gilbert v. Barkes* [30], at p. 774).

On the other hand, the English courts have taken a more prudent approach, raising the level of the requirements of the rules of evidence with respect to interpersonal agreements between a couple:

> '… in family or quasi-family situations there is always the question whether the parties intended to create a legally binding contract between them. The more general and less precise the language of the so-called contract, the more difficult it will be to infer that intention' (*Layton v. Martin* [34]).

In most cases, a promise of marriage is not explicit at all, but can be deduced from the conduct of the parties, and therefore the court should examine all of the circumstances surrounding the relationship between the couple, in order to establish whether a binding contract was made between the parties (CA 460/67 *A v. B* [5], at p. 160; and in United States law: H.H. Clark, *The Law of Domestic Relations in the United States* (second edition, 1988), at pp. 4-5). Indeed, most agreements for the purpose of marriage are made informally, without witnesses and without any written documentation, and in many cases even without exchanging any explicit promises. The intention of the couple to establish a viable relationship with one another usually occurs almost imperceptibly, as a result of frequent meetings, an intimate relationship and the development of reciprocal wishes and hopes. It cannot always be seen to occur at a given point in time. Therefore, the courts have always recognized the need to deduce the existence of a contract to marry from the circumstances. This solved one problem, but at the same time it created another — a tangible danger of frivolous actions that lack credibility. This area does indeed raises difficulties in evidence that are inherent in the very unique and special nature of an agreement involving a promise of marriage.

There are those who believe, in this context, that deducing the existence of an intention to create a legal relationship should be limited to cases in which the agreement between the couple also has economic significance and not merely an emotional element (Shifman, *Israeli Family Law*, *supra*, at p. 206). Case law has not followed this path, and it has examined the intentions of the parties against the background of all the circumstances of the case, without attributing special importance to any particular aspect of the relationship between the couple. Indeed, the economic aspect of the relationship between the couple should not be given decisive weight. A couple may decide to live as 'cohabitees' and run a joint household by pooling their resources, without any intention of marriage, whereas a couple

may decide to marry without the commitment between them having any economic basis, such as if they have registered for marriage at the Rabbinate, but have not yet entered into any financial relationship (CA 58/73 *Shaked v. Silberfarb* [26]; CA 473/75 *Ron v. Hazan* [27]; *Maman v. Triki* [19]). We must therefore examine all of the circumstances surrounding the relationship between the couple in order to deduce from it whether a binding promise of marriage was given and then breached. In view of the need to deduce the existence of a binding promise from all the circumstances, and in view of the innate fear of unsubstantiated actions in the sphere of human sensibilities and intimacy, which is naturally replete with strong emotions, it follows that a heavy burden of persuasion rests with the plaintiff to prove the existence of a promise of marriage that was breached, as required by the nature and complexity of the matter. The line that separates a close relationship without any real commitment from conduct that creates a binding promise of marriage is sometimes blurred, and special caution is therefore needed before we recognize a contractual cause of action for breach of a promise of marriage. This caution compels us to set a high threshold of proof, with special weight, to prove a binding promise, as required by the nature of the matter.

Remedies for breach of a promise of marriage

3. When it has been established that a promise of marriage was made and breached, the question of damages arises for the party injured by the breach. Due to the special nature of the contract, it is certain that an order of specific performance cannot be granted within the framework of the Contracts (Remedies for Breach of Contract) Law. I also agree with the opinion that expectation damages cannot be claimed for the breach (Cohen, 'Status, Contracts and Inducing a Breach of Contract,' *supra*, at p. 311, note 34). The injured party is not entitled to damages that reflect the expectation interest that is measured on the basis of the assumption that the couple actually married. Notwithstanding, the injured party will be entitled to damages for harm to the reliance interest (i.e., expenses that were incurred and other economic damage that was suffered as a result of the promise), for pecuniary loss (*Berghoiz v. Silber* [28], at p. 386; *Shifberg v. Avtalion* [6], at p. 176), and also for non-pecuniary damage that was suffered (*Ron v. Hazan* [27]).

In the dispute among legal and judicial authorities as to whether reliance damages should be limited to compensation for pecuniary loss only, or extended also to general damages, I agree with the broader approach. Once a breach of a promise of marriage has been proved, there is no moral or legal

reason not to award the injured party general compensation where it has been proved that the injured party experienced suffering, anguish and pain, which are recognized by the law as heads of damage in the law of remedies for breach of contract. Precisely in a case of breach of a contract in the sphere of human emotion and intimacy, the emotional damage caused by the breaking of the relationship between the couple may, in most cases, be the main damage and the one most worthy of compensation. Limiting the contractual remedy in such a case to pecuniary loss only does not usually reflect the real damage in its entirety, and it is liable to defeat the main purpose of compensation, according to accepted legal concepts. The provisions of s. 13 of the Contracts (Remedies for Breach of Contract) Law should therefore be applied to a breach of a promise of marriage, in such amount as the court thinks fit in the circumstances of the case.

A promise of marriage made by a married man

4. I agree with all of the President's reasoning, that the rule applying the principles of public policy to a promise of marriage made by a married man, which in certain conditions nullifies the promise, can no longer stand. Lifestyles and social perceptions have changed unrecognizably since this rule was originally formulated, and the changes that have taken place in the values of modern society with respect to human intimacy justify the cancellation of the historical distinction between a promise of marriage made by a single man and one made by a married man. The fundamental changes that took place in the second half of the twentieth century in the perceptions of morality, and the processes of emancipation from thought patterns, concepts and lifestyles that were accepted in the past, have had an impact on the content of the concept of 'public policy,' which is a dynamic concept that reflects the most important values, interests and principles that society seeks to protect and develop. This concept naturally also reflects the changes in social outlooks that occur from time to time (*Efrat v. Director of Population Register, Ministry of Interior* [12], at p. 778). The Western world, including Israel, has in recent decades undergone radical changes to basic value systems that are characterized by conceptual and moral pluralism, with increasing recognition of the value of freedom of the individual to determine his lifestyle in every respect. These changes significantly affect lifestyles and legal outlooks (A. Rubinstein, *The Enforcement of Morality in a Liberal Society* (1975), at p. 140). These changes affect the question of the relationship between the value of protecting the institution of marriage — which was and still is a value of paramount importance in human life — and

the obligation of the law to someone who has been injured by a breach of a promise of marriage — whether the injury is a pecuniary one or not. In the balance between the need to provide a remedy that will compensate for the injury suffered by someone who relied on a promise of marriage that was breached and who, on the basis of the promise, developed hopes and expectations of a joint future with a partner, and the danger that finding the party in breach liable for damages will hurt his marriage, the first value prevails. This is certainly the case in the absence of a direct correlation between the liability of the person who breached the promise of marriage to compensate the injured party, and the existence of direct harm to the marriage of the party in breach as a result of such a liability. There is therefore no basis for distinguishing between a promise of marriage made by a married man and one made by a single man; the same law and the same remedies apply to them and to the remedies for breaching them.

From the general to the specific

5. The circumstances of this case, as described in the opinion of the President, leave no doubt that the respondent breached a promise of marriage that he made to the appellant. His promise can be seen clearly from the relationship that they had for many years, which had a very significant effect on the life of the appellant and left its mark on her lifestyle and her fate for many years. The respondent's promise, his breach thereof, and the injury to the appellant as a result of her reliance on the respondent's undertaking to marry her cannot be allowed to pass without a proper legal response. They lie at the heart of the law, and are not marginal to it. The fact that the respondent was married should not affect the legal consequences of his undertaking that was breached, and we must enforce his liability to pay the appellant compensation for the damage and the injury that he caused her. This outcome is consistent with criteria of justice and fairness, and it satisfies the requirements of public policy, according to the concepts of the time, the place and the hour. I therefore agree with the conclusions of the President in full.

Appeal allowed, by majority opinion (Justice E. Rivlin dissenting).

25 Tammuz 5754.
14 July 2004.