CA 11152/04

A

v.

1. **Migdal Insurance Company Ltd**
2. **Avner Car Accident Victims Insurance Association Ltd**
3. **Attorney-General**

CA 11313/04

1. **Migdal Insurance Company Ltd**
2. **Avner Car Accident Victims Insurance Association Ltd**

v.

1. **A**
2. **Hotline for Migrant Workers**
3. **Hebrew University Legal Aid Clinic for Combating Trafficking in Women**

The Supreme Court sitting as the Court of Civil Appeals

[16 October 2006]

Before President Emeritus A. Barak, President D. Beinisch and Vice-President E. Rivlin

Appeals of the judgment of the Tel-Aviv-Jaffa District Court (Justice Dr D. Pilpel) on 26 October 2004 in CC 1553/99.

Facts: The appellant in CA 11152/04 ('the appellant') was injured in a road accident. As a result of the accident, his sexual functioning was impaired. The main issue addressed by the court regarded the compensation awarded to the appellant for the use of escort services.

Held: The appellant did not succeed in proving, from a factual viewpoint, a need for resorting to escort services. In addition, the law of compensation does not recognize the possibility of pecuniary damages for the expenses of using escort services. Compensation for impairment of sexual functioning can be awarded for pecuniary loss, i.e. expenses for medications and recognized therapies. It can also be awarded for non-pecuniary loss that is expressed in the pain and suffering of the injured person that arises from the impairment. Pecuniary compensation should also not be awarded for the use of escort services for reasons of public policy, in view of the

many problems of criminality that are associated with the ‘prostitution industry’ in Israel, and especially trafficking in women for the purposes of prostitution, which have significantly increased in the last decade.

Appeal CA 11313/04 allowed in part.

Legislation cited:

Contracts (General Part) Law, 5733-1973, ss. 30, 61(b).

Inheritance Law, 5725-1965, s. 143.

Names Law, 5716-1956, s. 16.

National Health Insurance Law, 5754-1994, third schedule.

Penal Law, 5737-1977, ss. 199, 201-203, 203A, 203B, 205A-205C, 215(c).

Rehabilitation of Psychologically Disabled Persons in the Community Law, 5760-2000.

Road Accident Victims Compensation Law, 5735-1975, s. 4(a)(3).

Road Accident Victims Compensation (Calculation of Compensation for Non-Pecuniary Loss) Regulations, 5736-1976.

Torts Ordinance [New Version], s. 2.

Israeli Supreme Court cases cited:

[1] CA 243/83 *Jerusalem Municipality v. Gordon* [1985] IsrSC 39(1) 113.

[2] CA 518/82 *Zaitsov v. Katz* [1986] IsrSC 40(2) 85.

[3] CA 22/49 *Levy v. Mosaf* [1950] IsrSC 4 558.

[4] CA 557/80 *Naim v. Barda* [1982] IsrSC 36(3) 762.

[5] 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**.

[6] CA 10064/02 *Migdal Insurance Co. Ltd v. Abu-Hana* [2005] (3) TakSC 3932.

[7] CA 773/81 *Estate of Robert Freilich v. State of Israel* [1982] IsrSC 36(4) 816.

[8] CA 541/63 *Reches v. Hertzberg* [1964] IsrSC 18(2) 120.

[9] CA 209/53 *Weizman v. Zucker* [1954] IsrSC 8(2) 1412.

[10] CA 12/55 *Kleiman v. Glabgisser* [1956] IsrSC 10(2) 1030.

[11] HCJ 114/86 *Weil v. State of Israel* [1987] IsrSC 41(3) 477.

[12] LHCJA 5614/04 *Amir v. Israel Prison Service* [2004] (3) TakSC 3446.

[13] CA 52/54 *Golob v. A.B.* [1955] IsrSC 9(2) 841.

[14] CA 541/63 *Reches v. Hertzberg* [1964] IsrSC 18(2) 120.

[15] CA 3417/00 *Yaniv v. Hadar Insurance Co. Ltd* [2001] (2) TakSC 714.

[16] CrimA 3520/91 *Turgeman v. State of Israel* [1993] IsrSC 47(1) 441.

[17] CrimA 2885/93 *Tomer v. State of Israel* [1994] IsrSC 48(1) 635.

[18] CrimA 94/65 *Turgeman v. Attorney-General* [1965] IsrSC 19(3) 57.

[19] CrimA 1609/03 *Borisov v. State of Israel* [2003] (3) TakSC 1919.

[20] CrimA 6568/93 *Krugoltz v. State of Israel* [1995] IsrSC 49(1) 397.

[21] CrimA 765/78 *Yanko v. State of Israel* [1979] IsrSC 33(3) 219.

[22] CrimA 648/77 *Kariv v. State of Israel* [1978] IsrSC 32(2) 729.

[23] CrimApp 7542/00 *Hanukov v. State of Israel* [2003] (3) TakSC 1992.

[24] CrimApp 9274/01 *State of Israel v. Yishai* [2001] (4) TakSC 57.

[25] CrimApp 7544/03 *Rahimov v. State of Israel* [2003] (3) TakSC 1501.

[26] CrimA 419/05 *Vodovichenko v. State of Israel* [2005] (2) TakSC 3903.

[27] LCA 8925/04 *Solel Boneh Building and Infrastructure Ltd v. Estate of Alhamid* [2006] (1) TakSC 2609; **[2006] (1) IsrLR 201**.

[28] HCJ 58/68 *Shalit v. Minister of Interior* [1969] IsrSC 23(2) 477; **IsrSJ SV 35**.

[29] HCJ 6893/05 *Levy v. Government of Israel* [2005] IsrSC 59(2) 876.

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

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

[32] CA 552/66 *Levital v. General Federation Medical Fund Centre* [1968] IsrSC 22(2) 480.

[33] HCJ 143/62 *Funk-Schlesinger v. Minister of Interior* [1963] IsrSC 17 225.

[34] CA 200/63 *Tzuf v. Ushpiz* [1963] IsrSC 17 2400.

[35] CA 5794/94 *Ararat Insurance Co. Ltd v. Ben-Shevach* [1997] IsrSC 51(3) 489.

[36] CA 589/89 *Rakovitsky v. Yaakobov* [1993] IsrSC 47(1) 726.

[37] CA 235/78 *Hornstein v. Ohavi* [1979] IsrSC 33(1) 346.

[38] CA 146/87 *Katz v. Rosenberg* [1989] IsrSC 43(3) 421.

[39] CA 2801/96 *El-Al Israel Airlines Ltd v. Yifrach* [2001] IsrSC 55(1) 817.

Israeli District Court cases cited:

[40] CC (TA) 11/97 *Sebag v. Israeli Car Insurance Pool* (unreported).

[41] CC (TA) 754/93 *Kan-Dror v. Clal Insurance Company Ltd* (unreported).

[42] CC (Hf) 1269/93 *Sharon v. Mizrahi* (unreported).

[43] CC (Jer) 1433/96 *Maimuni v. Jerusalem Municipality* (unreported).

[44] CC (TA) 569/96 *Dahari v. Nevaro* (unreported).

[45] CC (BS) 2817/98 *Asor v. Levidei Ashkelon Ltd* (unreported).

[46] CC (Hf) 709/03 *Mizrahi v. Aryeh Insurance Co. Ltd* (unreported).

[47] CC (Hf) 10312/97 *Reitman v. Israeli Phoenix Insurance Co. Ltd* (unreported).

[48] CC (Hf) 1102/94 *Dayan v. Karnit Road Accident Victims Compensation Fund* (unreported).

[49] CC (Jer) 82/94 *Panon v. State of Israel*, TakDC 96(3) 748.

[50] CC (Hf) 820/98 *Hattib v. Fox*, TakDC 2004(1) 110.

[51] CC (TA) 2191/02 *K.A. v. Igor*, TakDC 2006(1) 7885.

Israeli National Labour Court cases cited:

[52] NLC 56/3-180 *Eli Ben-Ami Classa Institute v. Galitzensky*, TakNLC 96(3) 245.

Israeli Regional Labour Court cases cited:

[53] LabC (BS) 4634/03 *V.M. v. Salasrabsky*, TakLC 2005(3) 97.

American cases cited:

[54] *Felice v. Valleylab, Inc.*, 520 So. 2d 920 (La. App. 3d Cir. 1987).

[55] *Isgett v. Seabord Coast Line R. Co*., 332 F. Supp. 1127 (D.S.C., 1971).

[56] *Quade v. Hartfield Enterprises Incorporated*, 120 Mich. App. 704 (1982).

Australian cases cited:

[57] *Lawrence v. Mathison* (1982) 11 NTR 1.

[58] *Hills v. Transport Commission*, Tas SR 154.

Canadian cases cited:

[59] *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229.

English cases cited:

[60] *Wise v. Kaye* [1962] 1 Q.B. 638.

[61] *Cook v. J.L. Kier & Co.* [1970] 1 WLR 774.

[62] *Hodges v. Harland & Wolff* [1965] 1 WLR 523.

[63] *Burns v. Edman* [1970] 2 Q.B. 541; [1970] 1 All ER 886.

Italian cases cited:

[64] *Piccioli c. Meie Assicurazioni*, Court of Cassation, n. 4927, 1986.

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JUDGMENT

Vice-President E. Rivlin

The appeals before us raise several issues, including the question whether an injured party suffering from sexual dysfunction should be awarded compensation for requiring escort services.

Background

1. The appellant in CA 11152/04 (the respondent in CA 11313/04; hereafter — the appellant), who was born in 1975, was injured in 1998 in a road accident. The medical experts who were appointed by the court determined that he suffered from various disabilities, which the trial court

enumerated as follows: 20% for an injury to his left thigh, 10% for scarring, 10% for difficulty in focusing his eyesight, 5% for damage to his hearing, 10% for tinnitus, 5% for dizziness, 10% for urological problems, 10% for sexual dysfunction caused by psychological problems and 70% for psychological disability. The combined medical disability was held to amount to 83%. The question of the actual liability of the respondents in CA 11152/04 (the appellants in CA 11313/04; hereafter — the respondents) to compensate the appellant for his injuries is not in dispute. Both the trial in the District Court and the present hearing therefore focused on the question of the quantum of damages.

After the District Court held, as a finding of fact that was based *inter alia* on the opinion of the medical expert, that the appellant's disability, and especially his psychological disability, was not malingering and was a result of the accident, the court addressed the degree of the appellant's functional disability. On the basis of all the facts and testimonies, the appellant's functional disability was set at 100%. The court went on to hold, in view of the appellant's personal characteristics, his qualifications and his abilities, that the appellant's earning capacity, had it not been for the accident, would have amounted to NIS 10,780 per month (before deducting tax), and that his future loss should be calculated until age 70. For the past loss of earnings, the court made a calculation for a certain period, in view of the appellant's plans prior to the accident, on the basis of the national average wage in the economy.

The trial court found that the appellant required psychiatric treatment, and that he needed to be treated privately, mainly in view of the trust that the appellant had in his doctors. According to the details that were submitted, it was held that a calculation should be made on the basis of two treatments per week, at a cost of NIS 500 each. He was also awarded a global amount of NIS 30,000 for the purpose of purchasing medications. The court did not find sufficient grounds for awarding additional medical expenses, apart from the purchase of a masking machine for treating the tinnitus in an amount of NIS 36,721. The court thought that in the circumstances of the case the proper treatment of the appellant's sexual dysfunction should be by means of 'medication therapy and/or visits to an escort agency' and not by means of sex surrogate therapy. The appellant was therefore awarded a sum of NIS 150,000, which included the costs of 'medications (such as Viagra) and other injections that are not covered by national health insurance, which was calculated on a once-weekly basis, as well as an additional visit to an escort agency once a week.' Among the additional heads of damage that the court

awarded were telephone expenses and mobility expenses. For telephone expenses the court awarded sums of NIS 25,416 for the past and NIS 108,674 for the future, and for mobility it awarded a sum of NIS 55,000. With regard to these two heads of damage, the court addressed *inter alia* the fact that as a result of the accident the appellant was hyperactive and was 'compelled' to talk on the telephone (including on a mobile telephone when he was away from home) and to drive ('a driving obsession'). An additional amount of NIS 250,000 was awarded for the head of assistance and supervision, and a further NIS 150,000 was awarded for help in housekeeping; the court awarded a sum of $78,000 for housing expenses. An amount of NIS 20,000 was awarded for expenses involved in sports activity; the court ordered that the calculation of compensation for pain and suffering should be made for 83 days of hospitalization (without taking into account visits to 'day clinics' made by the appellant). The court ordered that immediate payments should be deducted from the amount of compensation, and that benefits from the National Insurance Institute given to the appellant according to the temporary disability that was recognized should be frozen until his claim was decided.

It should be noted that the District Court did not, in its judgment, make a calculation for each head of damage, and with regard to some of these it only outlined criteria for the compensation. In my opinion, there is an advantage in making such a calculation, both in order to prevent potential disputes with regard to the interpretation of what the court says, and also in order to give a complete and tangible picture of the separate and total amounts of the compensation. In any case, according to the respondents the total amount of compensation is approximately NIS 5,500,000.

3. This judgment is being challenged by the parties on both sides. The dispute concerns every aspect of the case. We ought to emphasize once again that the discretion of the trial court, in a case such as this, has great weight, from the viewpoint of determining the findings of fact, from the viewpoint of analyzing the expert testimonies and reaching its conclusions therefrom, and from the viewpoint of the evaluations and assessments in determining the compensation. Notwithstanding, in this case we have found that with regard to some of the heads of damage the District Court went too far in the amounts that it awarded, and in particular we have found that the total compensation is in excess of what is proper and reasonable. We should first say that the high damages that were awarded were determined on the basis of a picture of an injured person who does not work for his livelihood, can only be treated by private medical services, burns up many miles in driving, speaks at length on a mobile telephone and requires escort services once a week.

Notwithstanding the proven injuries of the appellant, we do not find that the amount awarded has a factual or a normative basis. We shall therefore focus first on those heads of damage that we think require addressing; thereafter we shall discuss in detail the main question arising in the appeals before us, namely the compensation for escort services.

Deliberations

4. The respondents devoted a large part of their closing arguments to an attempt to undermine the findings with regard to the appellant's psychological disability. Their objections concern both the actual determination that he has such a disability and the determination that the disability, in so far as it exists, was caused by the accident. These arguments were considered by the trial court, but it did not find that there was any reason, in the circumstances of the case, to reject the conclusion of the medical expert, who was of the opinion that the disability was genuine and not feigned, that the amount of the disability was 70% and that it derived from the accident. We do not find any sufficient reason to intervene in this conclusion of the District Court, which was based on the expert's opinion. We will merely emphasize the following: the appellant's head was injured in the accident. The medical documents indicate ups and downs in the psychological sphere. Psychological symptoms in the appellant were observed by various doctors. He was hospitalized in psychiatric wards and was treated, time after time, with medications (he did not always persist with the treatment). The court-appointed expert said that these ups and downs — deteriorations and remissions — are characteristic of this type of case. This expert gave details of his impressions and his findings with regard to the appellant's psychological condition, and he ruled out the possibility that the current psychological condition is a result of problems and illnesses that are unrelated to the accident. The District Court, which also had the opportunity to form a direct impression of the appellant, adopted the expert's conclusions. In this regard it has broad discretion, and although the respondents succeeded in raising certain questions, there is insufficient cause for intervention in the conclusion of the District Court concerning the psychological disability. We should also point out that even the questions raised by the respondents with regard to the opinion of Dr Lazri in the field of rehabilitation cannot lead to the conclusions of the trial court being overturned. We are of the opinion that the trial court relied on this opinion, in those matters where it did so rely, after considering all of the evidence that came before it, and in a manner that does not justify intervention.

5. With regard to the degree of the disability and the loss of earnings: there is no doubt that the appellant's psychological disability has a very significant effect on his functioning and his ability to earn a livelihood. Notwithstanding, it should be noted that there is no dispute as to the fact that the trial court listed two disabilities that are really one: 10% for urological problems and 10% 'for erection impairment caused by psychological problems with a possibility of enjoying limited sexual relations with penetration.' It should also be said that not all of the respondent's disabilities have a functional significance. Moreover, it appears to me that even when one takes into account the reasoning of the trial court with regard to the appellant's difficulty with regard to his regular taking of the medications that his doctors have prescribed him, a certain weight should still be given to the fact that the appellant does not minimize his damage in this way and does not fully cooperate with the professionals who are treating him. It should also be recalled that the respondent studied, after the accident, at the Academic College of Engineering, engaged in social relationships, including with girlfriends, drove his car and also travelled abroad.

We should also consider the salary basis that the trial court used to calculate the loss of earnings. The court addressed the relevant factors in this regard: the appellant had a qualification as an electronics technician. At the time of the accident he was 22 years old and served with distinction in the armed forces as an electronic warfare technician in the Israel Air Force. He earned at that time a salary of NIS 3,500 a month and was considering whether to study engineering or to continue his military service. The court went on to say that the appellant's friend, whose qualifications are similar, earns NIS 15,600, and the appellant's commanding officer earns NIS 11,000. The court adopted the calculation submitted to it by the appellant — a salary of NIS 10,780 before deducting tax — for the reason that 'it also constitutes a possible average of his commander's salary and his friend's salary.' Indeed, the appellant's qualification and abilities — at least in the field of electronics — gave him the potential to obtain a good salary, but at the same time, as we have said, the appellant had not yet chosen his career path and was at the beginning of his professional career.

In view of all of the facts, we have decided to reduce by a relatively moderate amount the compensation for the head of loss of earnings, and to determine the monthly loss in an amount of NIS 8,000. This figure is before the deduction of tax.

6. The appellant requires psychiatric treatment and help. Notwithstanding, we have found that the amount of compensation awarded to

him to cover these expenses — approximately one and a quarter million new sheqels — requires our intervention. In determining the compensation, the court assumed that the appellant needed and will continue to need to be treated privately, because of the relationship of trust he had developed with certain doctors before he filed the claim, a relationship which is of great importance in cases of this kind. The court emphasized that the appellant asked his Health Fund for psychiatric treatment and was refused, and that the Rehabilitation of Psychologically Disabled Persons in the Community Law, 5760-2000, which offers a 'rehabilitation basket' at no expense to persons who suffer from psychological disability, was enacted after the relationship of trust between the appellant and his private doctors was created. The court also held that the calculation should be made on the basis of two sessions a week. As I have said, I am of the opinion that the result obtained from the method of calculation that the trial court outlined is excessive, and it does not take into account the need to minimize the damage while properly taking into account the interests of the defendant. As the trial court said, the need for psychiatric treatment and supervision may change from time to time, according to changes in the appellant's psychological condition. It would appear that under the provisions of the law the appellant is entitled to receive various psychiatric services from his health fund (see especially the third schedule to the National Health Insurance Law, 5754-1994). It also transpires that the appellant himself changed his psychiatrists in the past. On the other hand, I do not see any basis for intervention in the actual finding that the appellant requires and is likely to require private treatment. In the overall balance and after examining the various figures that were presented, I am of the opinion that the amount should be determined by way of a global assessment and should be set at NIS 600,000 as of the date of the District Court's judgment.

7. I did not find any basis for awarding the appellant compensation in an amount of $78,000 for housing expenses. The District Court said that the appellant lives in rented accommodation, together with a friend, and the rent is $530. The court emphasized that there is no reason why it should order that the appellant should be placed in protective housing or a 'hostel,' and it added that 'we should take into account the fact that the plaintiff will be interested in living in rented accommodation with another person. The total rent that the plaintiff pays for a three-room apartment is $530, and the total overall capitalized amount (rounded) is $78,000.' The court ordered the respondents to pay this amount to the appellant. The problem is that not only does the appellant himself dispute the factual basis that underlies the court's

conclusion in this matter — namely, the renting of an apartment together with a friend — but it should also be remembered that even had the accident not occurred the appellant would, it may be supposed, have needed to live in an apartment, and no explanation was given as to whether, and to what extent, his housing expenses increased as a result of the accident. It is clear that compensation should only be paid for additional expenses resulting from the accident, and in this case no such additional expenses were proved in the field of housing. Consequently, the compensation for this head of damage should be cancelled. Similarly, the compensation for telephone expenses — in an amount of NIS 25,416 for the past and NIS 108,674 for the future — seems too high in view of the aforementioned duty of minimizing the damage and the need to award only additional expenses. I would set the compensation for this head of damage in a global sum — for the past and the future — of NIS 50,000. In so far as the head of damage of assistance required from others and help in housekeeping is concerned, I should say that after examining the claims of the parties in this regard, I have not found any reason to intervene in the discretion of the District Court, which awarded a global sum that takes into account all of the facts that were brought before it and its findings and conclusions with regard to the appellant's condition. I have reached a similar conclusion with regard to the other heads of damage that have not been mentioned in our deliberations up to this point.

We can now turn to examine the main issue that requires consideration and a determination of law, which is the issue of compensation for escort services.

Compensation for escort services

8. The District Court awarded the appellant a sum of NIS 150,000 for medications to improve his sexual functioning and also for the use of escort services once a week. On this issue the parties explained their positions, and we also heard the positions of the Hotline for Migrant Workers and the Hebrew University Legal Aid Clinic for Combating Trafficking in Women, both of which were recognized as *amici curiae*, and of the Attorney-General. After we have considered all of the arguments, we have decided to allow the appeal on this point and to cancel the compensation for escort services (while leaving the compensation for medication therapies unchanged).

It appears that this is not the first time that the courts in Israel have awarded compensation to pay for escort services. Thus, in CC (TA) 11/97 *Sebag v. Israeli Car Insurance Pool* [40] the court considered the case of a victim of a road accident who suffered from urological disabilities, including impotence. The court awarded him compensation for treatments and

medications that were intended to treat the problem of impotence, in a global amount of NIS 150,000. The court also awarded him compensation in an amount of NIS 50,000, when it was proved that the injured person resorted, from time to time, to escort services. Similarly in CC (TA) 754/93 *Kan-Dror v. Clal Insurance Company Ltd* [41], the District Court awarded the injured party compensation in an amount of NIS 200,000 for 'sex services.' The court emphasized that it did not intend to 'give approval to such conduct which was not considered proper' but 'all that the court was doing was to recognize a reality in which sex services are available.' Also in CC (Hf) 1269/93 *Sharon v. Mizrahi* [42] and in CC (Jer) 1433/96 *Maimuni v. Jerusalem Municipality* [43] amounts of NIS 20,000 and NIS 35,000 respectively were awarded for 'social needs' or the 'loss of social services.'

9. Other courts have taken a different approach. In several cases compensation claims for escort services have been denied on the grounds that no such need had been proved from a factual point of view. This, for example, was the case in CC (TA) 569/96 *Dahari v. Nevaro* [44], CC (BS) 2817/98 *Asor v. Levidei Ashkelon Ltd* [45] and CC (Hf) 709/03 *Mizrahi v. Aryeh Insurance Co. Ltd* [46]. In one case the court refused to award compensation in excess of the amount that it awarded for non-pecuniary loss (CC (Hf) 10312/97 *Reitman v. Israeli Phoenix Insurance Co. Ltd* [47]. A fundamental position on this matter was expressed by the District Court in CC (Hf) 1102/94 *Dayan v. Karnit Road Accident Victims Compensation Fund* [48]. The court, *per* Justice S. Berliner, said:

> 'I reject the plaintiff's arguments regarding a need for escort girls because of the impotence which he suffers as a result of the accident. My position is that a distinction should be made between the cost of medical treatment or of medications for sexual problems, which the injured party may require as a result of the damage he sustained in the accident (such as Viagra, treatment at 'On Clinic' or sex surrogate therapy at a recognized medical institution) and the prostitution fee that he pays, if he indeed does, to escort girls. Such a payment does not fall within the scope of medical treatment or medical expenses, it does not constitute "rehabilitation," and for reasons of public policy it should not be recognized as a head of damage; moreover this issue was not properly proved in the present case.'

These remarks are a concise statement of the issue: the whole matter in one sentence. We too are of the opinion that in the case before us sufficient evidence was not brought to show that the sexual needs of the appellant can

only be satisfied by means of resorting to escort services. But even if such a need were proven, I still do not think that this is a need that justifies compensation in accordance with our accepted principles — the principles of the law of torts and the principles of Israeli law.

The specific case

10. We should begin by saying that the District Court found that in this case, according to its circumstances, there was no basis for awarding the appellant compensation for the cost of sex surrogate therapy. The appellant withdrew his appeal on this issue in his closing arguments, and therefore we do not need to consider the fundamental aspects of the question of compensation for sex surrogate therapy. We should therefore focus on the compensation that was awarded by the District Court for the cost of resorting to escort services.

In the appellant's case, an opinion was given by Prof. Matzkin in the field of urology. For obvious reasons we will not discuss the details of the opinion, but we will point out that according to the opinion the appellant suffers from a 10% disability because of 'impotence arising from psychological issues, with objective and subjective symptoms of erectile dysfunction, but there is a possibility of enjoying limited sexual relations (with penetration).' The expert emphasized that there is no evidence of any organic injury, but at the same time the appellant suffers from sexual dysfunctions, both when he is being treated with medications that suppress sexual urges and when he is not being treated with such medications. The expert found that what is required in this context is 'both supportive psychological therapy and local medication therapy to improve the erectile dysfunctions.'

11. And so, in so far as the medications and psychological treatment that the expert recommended in his opinion are concerned, the appellant is entitled to compensation. The court also said that this treatment produces results: 'from the evidence it appears that the plaintiff succeeds in enjoying sexual relations with the aid of medications such as Viagra and injections.' In view of all of the arguments of the parties in this regard, I would set the compensation for this head of damage at a sum of NIS 100,000.

In addition, the court awarded the appellant, as we have said, compensation for payments to escort agencies. In this context, the court accepted the argument made by counsel for the appellant that the appellant succeeded in enjoying sexual relations only with escort girls. My impression is that this claim was not properly proved or explained. It is not clear what is the cause of the appellant's alleged inability to enjoy sexual relations with

girlfriends — there is no dispute that he had relationships with girlfriends — and why he allegedly succeeds only with escort girls. Opinions that were filed in the court do admittedly speak of the appellant's difficulty in creating long-term relationships with girlfriends, but, as we have said, the appellant did enjoy sexual relationships, and he himself, in his closing arguments before the trial court, explained his demand for compensation on other grounds, namely that he goes to escort girls because 'with them he is successful because no emotion is involved.' Indeed, it would appear that the trial court awarded the compensation on the basis of this argument. But in my opinion the matter was not properly established in a medical opinion or in other evidence, and there is no clear answer to the question why the appropriate treatment, such as psychological and medication treatment as recommended by the expert urologist, cannot deal with this problem, in so far as it exists, for the benefit of all the parties concerns and especially the appellant himself.

There is consequently a difficulty, from a factual point of view, in the compensation that was awarded for escort services. Notwithstanding, it is not for this reason alone that we think it right to cancel the compensation for this head of damage. There may be circumstances in which there will be a factual basis to a claim for escort services. Thus, for example, an injured person may succeed in proving a claim that, because of his external appearance or psychological problems that are the result of the accident, he has difficulty in creating relationships with partners (even though from a physical viewpoint there is nothing that prevents him from enjoying sexual relations). The question is whether in such a case we ought to recognize the expenses of escort services as a head of damage for which compensation should be awarded.

Sexual dysfunctions: pecuniary loss and non-pecuniary loss

12. Compensation in the law of torts is given for damage, namely 'loss of life, property, convenience, physical welfare or reputation, or a reduction therein, and any similar loss or reduction' (s. 2 of the Torts Ordinance). The definition of damage is broad:

> 'It includes all types of damage, whether physical or non-physical, whether pecuniary or non-pecuniary. The definition is based upon a tangible reality. It covers both physical injury and pecuniary loss, both personal injuries and discomfort that have a physical expression and also personal injuries and discomfort that have no physical expression' (CA 243/83 *Jerusalem Municipality v. Gordon* [1]).

As a rule, damage is identified by comparing the injured person's position before the tortious act to his position after and as a result of the act. The difference between one and the other reflects the reduction or the loss that is a result of the tortious act, and it is this reduction or loss that the compensation seeks to make good, in so far as this is possible with money. '… in order to determine the damage, the [plaintiff's] position before the incident for which he is suing should be compared… with his position as a result of the respondents' negligence…' (CA 518/82 *Zaitzov v. Katz* [2]). This is the principle of restitution, which lies at the heart of the law of compensation. Indeed, awarding compensation in the law of torts seeks, as its primary goal, to restore the injured person to the position he would have been in had it not been for the tortious act, in so far as it is possible to do this with money (CA 22/49 *Levy v. Mosaf* [3], at p. 564; CA 557/80 *Naim v. Barda* [4], at p. 772; A. Barak, 'Assessing Compensation for Personal Injury: The Law of Torts As it Is and As it Should Be,' 9(2) *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1983) 243; CA 140/00 *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [5]; CA 10064/02 *Migdal Insurance Co. Ltd v. Abu-Hana* [6]).

One of the distinctions made by case law with regard to the concept of 'damage' is the distinction between pecuniary loss and non-pecuniary loss. 'Pecuniary loss' — as s. 2 of the Ordinance states — is 'a real loss or expense that can be assessed in money and of which details can be given.' And what is non-pecuniary loss? This damage has been defined as 'intangible losses, which cannot be represented by a mathematical figure' (see T.M. Tabacchi, 'Hedonic Damages: A New Trend in Compensation?' 52 *Ohio St. L. J.* 331 (1991), at p. 337). But in truth this distinction is not clear and simple. It should be recalled that even non-pecuniary loss is ultimately assessed in money; moreover, pecuniary loss, which is characterized by the possibility of assessing it in money, often involves uncertainty, estimates and even guesswork. Notwithstanding, the dichotomy between pecuniary loss and non-pecuniary loss is well-established, and it can be regarded as follows: *pecuniary loss* reflects specific expenses and losses, which case law has chosen to reimburse by means of compensation that is calculated specifically and usually actuarially. This is *purpose-oriented* compensation, which is intended to ensure that the injured person has means for his support, medical care, nursing and rehabilitation. Thus, for example, compensation for nursing is intended to provide payment for the caregiver; compensation for medical expenses is intended to pay for medications; all compensation seeks to

achieve restitution when there is a specific need and a specific way of dealing with that need.

Non-pecuniary loss reflects an additional potential aspect of the injury to the victim's body and mind. Indeed, in addition to pecuniary expenses and a loss of income the injured person may claim, and prove, that he has suffered, as a result of the accident, pain and suffering, distress and anguish, frustration, disappointment, loss of his ability to realize himself and loss of the pleasures of life. Indeed, a hand is not only a means of obtaining a livelihood, and its loss is not merely a loss of income. This additional aspect is reflected in the non-pecuniary heads of damage — pain and suffering, loss of life expectancy, and, according to some authorities, also the loss of the pleasures of life (see Tabacchi, 'Hedonic Damages: A New Trend in Compensation?' *supra*; CA 773/81 *Estate of Robert Freilich v. State of Israel* [7]). Admittedly, 'no money in the world can compensate for physical and emotional suffering, for the loss of the chance to have a family, or for the loss of the normal pleasures of life' (CA 541/63 *Reches v. Hertzberg* [8], at p. 126). But difficulties in assessing damages do not lead the court to abandon its efforts. Indeed, compensation for non-pecuniary loss is not usually compensation that is paid upon production of receipts. It also does not necessarily seek a *specific method* of benefiting the injured person nor does it purport to define such a method. To a large extent, compensation for non-pecuniary loss gives the injured person the choice of the manner in which he may assuage his pain and suffering. This choice replaces the choices of which the injured person was deprived as a result of the tortious act. In one case President A. Barak said with regard to compensation for non-pecuniary loss:

> 'The court awards the injured party such a sum of money that is capable of allowing the injured party to purchase pleasures that will replace those that have been lost. Therefore, when the damage is pain and suffering and awareness of the loss of the pleasures of life, the injured party will be given compensation that will allow him to purchase other pleasures, which, in so far as possible, will balance the damage that was inflicted. Someone who knows that his life expectancy has been shortened will receive compensation that will allow him to enjoy the years of life that he has left (*Estate of Robert Freilich v. State of Israel* [7]).

Thus we see that, unlike pecuniary loss which concerns a defined loss and a corresponding compensation that is also defined, non-pecuniary loss is

more abstract, and the compensation for it gives the injured party the possibility of choosing for himself the manner in which he will fill the void that has been created by the tortious act. I should emphasize that in saying this I am not trying to express the full complexity of non-pecuniary loss, nor also to make any hard and fast rules with regard to the approach that should be adopted when assessing this loss (see the different approaches that were reviewed in *Estate of Robert Freilich v. State of Israel* [7]; see also *Andrews v. Grand & Toy Alberta Ltd.* [59]; *Wise v. Kaye* [60]; *Lawrence v. Mathison* [57]). Even the adoption of a functional approach to non-pecuniary loss — and this is not necessarily always the approach that should be adopted — does not provide an unequivocal answer to all the problems. For example, there is a question as to how much the court ought to concern itself with details, where the injured person sets out before the court the remedial pleasures that he wishes to acquire and their exact cost. My opinion is that the consideration of such details is undesirable. Compensation for non-pecuniary loss is not compensation that is paid upon production of receipts, nor does it purport to set a price upon what has no fixed value. It does not seek to pass judgment on the injured person's choice, nor does it try to ascertain the exact nature of the remedial measures for which the defendant will need to pay. The compensation seeks to improve the condition of the injured person, but it does not specifically define the method in which his condition should be improved. An additional advantage that arises from this approach lies in the consistency and equality that it promotes, i.e., giving similar compensation to injured persons who suffer from similar injuries, without making the amount of the compensation dependent upon the degree of 'frugality' or 'extravagance' with which they intend to live their lives with their injury.

13. In view of all this, it is not surprising that the same injury of an injured person may often have 'pecuniary' ramifications and 'non-pecuniary' ramifications. Thus a person who has suffered personal injury may be entitled to compensation both for the 'pecuniary' aspect, such as the loss of earnings that arises from the disability and the medical expenses that are required to treat his injuries, and also for the 'non-pecuniary' aspect, such as the pain and suffering he experiences as a result of the personal injury. Consider, for example, the case of an injured person whose injuries have seriously deformed his external appearance. This physical injury, which may have pecuniary ramifications, is taken into account when awarding compensation for pain and suffering (see, for example, CA 209/53 *Weizman v. Zucker* [9]). And in another context, alongside the compensation for the pecuniary loss of

a loss of earnings, compensation is sometimes awarded — under the head of damage for pain and suffering — for the 'loss of work satisfaction' (CA 12/55 *Kleiman v. Glabgisser* [10]), in view of the belief that working men or women do not only receive an income but also job satisfaction, self-respect and social recognition.

14. A tortious impairment of an injured person's sexual functioning or his ability to enjoy sexual relations may also give rise to a right to compensation both for pecuniary loss and non-pecuniary loss. In the pecuniary sphere, the injured person may require medications or various (psychological, psychiatric or sexological) treatments. These are no different from any other medication or treatment, and they are included among those expenses for which the injured person is entitled to compensation. In addition to this, the injury may have a non-pecuniary aspect. The injured person may show that the loss of sexual functioning affected his *joie de vivre* and reduced his enjoyment of life. He may argue that his ability to form relationships and to feel closeness, warmth and love have been impaired. Indeed, in another context it has been held in the past that:

> 'Denying an adult person the possibility of enjoying sexual relations, for a considerable period of time, is a serious injury to the person who is so deprived. The sexual urge is a natural and human instinct, and the suppression of this urge against a person's will is contrary to human nature and needs' (HCJ 114/86 *Weil v. State of Israel* [11], at pp. 483-484).

Similarly —

> 'It is possible to argue that enjoying sexual relations is an inseparable part of the instinct for life and survival — personal survival and survival of the race and species — and suppressing such a major instinct in a living being is a violation of a person's dignity and his ability to realize his life as a human being' (LHCJA 5614/04 *Amir v. Israel Prison Service* [12]).

The tortious impairment of the ability to enjoy sexual relations may also be considered a part of the injury to the possibility of having a proper family life and intimacy, and indeed an injury to the possibility of having a family has often led to an award of compensation for pain and suffering — CA 52/54 *Golob v. A.B.* [13]; CA 541/63 *Reches v. Hertzberg* [14].

The approach that an impairment of sexual functioning or of the possibility of enjoying sexual relations constitutes non-pecuniary loss has found a place in our law (see for example CC (Jer) 82/94 *Panon v. State of*

Israel [49], where compensation was awarded for non-pecuniary loss as a result of 'impotence, loss of marriage prospects and shortening of life expectancy'; see also CC (Hf) 820/98 *Hattib v. Fox* [50], where it was said that 'the anguish of the plaintiff resulting from his becoming impotent will be taken into account in assessing the compensation for pain and suffering'). The same approach has been adopted in other legal systems as well. In England, for example, the court considered a case of a man who was injured in a work accident, as a result of which he suffered from impotence, loss of his sense of taste and smell and additional physical injuries. The court awarded him compensation for the loss of sexual functioning, within the scope of the non-pecuniary head of damage of loss of the enjoyment of life (*Cook v. J.L. Kier & Co.* [61]). In the United States, *Felice v. Valleylab, Inc* [54] was a case that concerned a circumcision operation that had disastrous results. The damage was serious, and the court said:

> 'Sexual pleasure, procreativity, marriage in any normal sense, these things will never exist for him. The suffering of deprivation, both physical and mental, that will accompany him throughout his life can be only vaguely imagined. What will his puberty be like? Where will he go to escape the cruel and ribald jokes of his comrades? For that matter who will be his comrades? Into what corner of his dark cell will he seek refuge when the natural urgings of his body wage battle?'

In these circumstances the court awarded the injured person a large amount of damages, which included the cost of medical treatments and an additional non-pecuniary component (see also *Hodges v. Harland & Wolff* [62]; *Isgett v. Seabord Coast Line R. Co*. [55]; *Quade v. Hartfield Enterprises Incorporated* [56]; *Hills v. Transport Commission* [58]).

Compensation for escort services

15. The District Court recognized expenses that the appellant will incur in order to pay for escort services as a pecuniary head of damage. The court assessed the compensation on the basis of one visit to an escort agency each week. The compensation that was awarded reflects the thinking that resorting to escort services provides a solution to the void suffered by the appellant because of the tortious act, and as such it constitutes pecuniary damage that can be assessed in money and compensated for, all of which in view of the purpose of restitution. I should point out immediately that in my opinion this thinking is problematic.

As I have said, there is a basis for awarding an injured person, whose ability to enjoy sexual relations has been impaired, compensation for pecuniary loss, where use of medications or a visit to a doctor, psychologist or psychiatrist (and even, perhaps, a sex surrogate therapist — we are not expressing any opinion on this matter) may help him and improve his condition. But beyond this, it would appear that the remedy that the law of compensation provides for damage of this kind is not a purpose-oriented remedy. It is questionable whether it is possible to classify the use of escort services as a remedy for the damage involved in the loss of the ability to enjoy sexual relations. A sexual encounter with an escort girl cannot be compared to a medication or a visit to a psychologist, for example, since these — the medication and the visit to a psychologist — have a clear and well-established purpose of healing or rehabilitation, and therefore they fall within the scope of the recognized pecuniary heads of damage. Moreover, the fee paid to a prostitute does not compensate for the loss of all the possible aspects of a sexual relationship and for the decreased opportunities that the injured person has in this sphere. This is not a compensation that corresponds to the damage, which is the accepted requirement for pecuniary damage. By way of comparison, let us consider the case of an injured person whose friends abandon him because of his disabilities and who argues in court that another person is prepared, for payment, to sit with him once a week and speak to him. Unless this person is a psychologist, it is hard to imagine that the court will award compensation in the amount of the capitalized rate of that 'friend for payment.' The court may admittedly take into account the injured person's need to communicate, when, for example, it is choosing between an Israeli therapist and a therapist who is a foreign worker (see, for example, CA 3417/00 *Yaniv v. Hadar Insurance Co. Ltd* [15]). But there is no precedent for the court awarding pecuniary purpose-oriented compensation, which does not satisfy the accepted and established criteria of professional therapy, for the needs for intimacy, warmth, love, conversation and the other possible characteristics of interpersonal relationships.

This void in pecuniary heads of damage is filled by non-pecuniary compensation, and for good reason. It is precisely the classification of the damage within the category of the non-pecuniary heads of damage, which give expression to an injury but refrain from defining the ways of compensating for it, that is the proper classification. This conclusion can also be reached from another perspective: consider the case of two injured persons whose ability to enjoy sexual relations has been impaired to the same degree. One wishes to avail himself of escort services. The other does not regard this

as a proper solution. He wishes to compensate for the anguish caused by his loss in other ways — perhaps by flying in a balloon, perhaps by purchasing a subscription for the theatre or for soccer games, perhaps in another manner that he will choose later in life. Is it proper that the former should receive greater compensation than the latter? Is the method chosen by the former worthy of being considered pecuniary damage, unlike the other methods that do not give rise to pecuniary compensation? Our answer to these questions is no, and this answer is proof of the correct classification of the damage as a type of non-pecuniary loss, which leaves the choice to the injured person.

The accepted rules of compensation therefore do not support the awarding of compensation that is designated for the purpose of financing escort services. Some will argue — and indeed this was argued before us — that this compensation is also inconsistent with the general principles of the Israeli legal system. We also agree with this position, and therefore we will say something on this subject.

Restitution in the light of policy considerations and public policy

16. The proper way in which society should contend with the phenomenon of prostitution has been the subject of great debate for many years. Some people regard escort girls as victims who are forced into prostitution, whereas others claim that some of them knowingly choose this path as a means of obtaining a livelihood (cf. CrimA 3520/91 *Turgeman v. State of Israel* [16]). Some seek to eliminate the phenomenon, whereas others are of the opinion that it is an unavoidable evil that cannot be eradicated (see the remarks of President M. Shamgar in CrimA 2885/93 *Tomer v. State of Israel* [17], at p. 638). Some believe that prostitution should be institutionalized, and that denouncing it and banishing it to the fringes of society ultimately harms precisely its victims, who are the women that are employed in prostitution (cf. CrimA 94/65 *Turgeman v. Attorney-General* [18]). Besides feminist groups that regard prostitutes as victims and prostitution as a violation of human rights, there are other approaches, such as that of sex-worker feminism, which seek to distinguish between forced prostitution and voluntary prostitution and seek protection for the rights of prostitutes. Various legal systems have adopted different approaches, ranging from a blanket prohibition of prostitution and everything connected with it (an approach that is common in the United States) to a regulation of the occupation (an approach that is accepted in countries such as Holland, Switzerland and Spain), with an intermediate position that prohibits certain aspects of the occupation (an approach that exists, for example, in France).

The difficult questions concerning prostitution will not, of course, be resolved here. But when considering the question before us, we should address the law in Israel and, what is no less important, the reality in Israel with regard to the prostitution industry, a reality that is reflected *inter alia* in the case law of this court. The criminal law in Israel expresses a negative attitude towards the occupation of prostitution, and especially towards pimping, exploitation and benefitting from the profits of prostitution (see CrimA 1609/03 *Borisov v. State of Israel* [19]; *Turgeman v. State of Israel* [16]). Admittedly, prostitution in itself is not prohibited. 'It is well known that prostitution (like suicide) is not an offence, and only the incitement to prostitution (like aiding or inciting suicide) constitutes an offence' (CrimA 6568/93 *Krugoltz v. State of Israel* [20]). Even the customer usually does not commit a criminal offence. However, the occupation of prostitution has criminal aspects — see for example the offence of a public nuisance resulting from the occupation of prostitution (s. 215(c) of the Penal Law) and the offence of having possession of premises for the purpose of prostitution (s. 204 of the Penal Law; see also *Turgeman v. Attorney-General* [18]; H. Ben-Itto, 'Statute, Case Law and Reality,' *Sussman Book* (1984) 55, at pp. 66-69). With regard to employers and the other persons involved in the occupation of prostitution, see the offences of pimping (s. 199 of the Penal Law); inducing a person to commit an act of prostitution and to engage in the occupation of prostitution (ss. 201-203); trafficking in human beings for employment in prostitution (s. 203A); exploiting minors for prostitution (s. 203B); advertising prostitution services of minors and adults (ss. 205A-205C) and additional offences.

17. Moreover, the situation in Israel with regard to the 'prostitution industry' is very disheartening. The serious phenomena that characterize prostitution in Israel were addressed years ago by a commission of enquiry headed by Justice Hadassah Ben-Itto (see Report of the Commission of Enquiry for Examining the Problem of Prostitution, Ministry of Justice Publishing Office, Jerusalem, 1977). The courts have on several occasions discovered serious exploitation and abuse suffered by escort girls (see, for example, CrimA 765/78 *Yanko v. State of Israel* [21]; CrimA 648/77 *Kariv v. State of Israel* [22]). Illuminating remarks can be found in this context in the State Attorney's guidelines concerning the policy for the investigation and prosecution of prostitution offences and trafficking in human beings for employment in prostitution:

> 'The phenomenon of managing massage parlours and agencies that provide escort services, which constitute *de facto* a cloak for

> the occupation of prosecution, is a very widespread phenomenon. Very often, within the framework of the various kinds of massage parlours, some of the most serious offences are committed, such as trafficking in human beings, trafficking in drugs, extortion, money laundering, etc.. We should aspire to eradicate these phenomena that arise from the occupation of prostitution, on the basis of our recognition of human dignity and the fundamental principles of the Israeli legal system. Nothing stated in this guideline should detract from the aspiration and goal of eradicating the phenomenon of prostitution in general — a phenomenon that in itself constitutes a degradation of the human dignity of women — and even if this goal takes a long time we should work to achieve it (State Attorney's Guideline no. 2.2 — Enforcement Policy for Offences Related to the Occupation of Prostitution, para. 1, Ministry of Justice website).[*]

The serious incidents that accompany the 'prostitution industry' in Israel became particularly grave when the phenomenon of trafficking in women for prostitution purposes spread. Justice M. Cheshin said that the offence of trafficking in human beings —

> '… is an especially grave offence, and it is not for nothing that anyone who commits it is liable to sixteen years imprisonment… This is an offence that is derived from contemptible phenomena that have arisen in Israel, phenomena of "importing" and abominable and contemptible behaviour towards these girls and women who are trying to find food to eat' (CrimApp 7542/00 *Hanukov v. State of Israel* [23]).

Justice Türkel also said that —

> '… the offence of trafficking in human beings for the purpose of employing them in prostitution is one of the most despicable and abominable offences on our statute books. It includes the outrage of selling human beings, the cruelty and degradation of sexual exploitation and the terror of extortion. Within this offence are contained the fear and dread that the trafficker imposes on his victims — and even on others who are involved in his trafficking — during the period of the enslavement, and

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[*] http://www.justice.gov.il/NR/rdonlyres/A799E348-DA71-439D-B1DE-A1D6E1E0D29D/0/22.pdf.

> also after they have been released from their slavery' (CrimApp 9274/01 *State of Israel v. Yishai* [24]).

18. Trafficking in human beings in Israel has reached 'alarming proportions' (Justice T. Or in *Borisov v. State of Israel* [19]). It affects the way in which we should address the whole 'prostitution industry.' In CrimApp 7544/03 *Rahimov v. State of Israel* [25], Justice D. Beinisch said the following:

> 'In view of the change that has taken place in the character of the offence of pimping against the background of the dark age of trafficking in women, the courts should reassess their attitude to the offence of pimping. The change that has occurred in the Israeli criminal scene in this sphere has found expression in new legislation whose purpose is to fight the phenomenon of the contemptible trafficking in human beings and to eradicate it utterly. In new legislation that introduced the offence of trafficking in women that came into force in July 2000, the offences of pimping were re-enacted, the maximum sentences for the offence of pimping were increased and offences of aggravated pimping were also introduced; these include offences that treat offenders so severely that the maximum sentence for them is identical to the maximum sentence provided for trafficking in human beings' (see ss. 201-203 of the Penal Law).

In CrimA 419/05 *Vodovichenko v. State of Israel* [26], Justice E. Rubinstein said the following:

> 'The State of Israel, as a society that wishes to be civilized, is at war with the shameful industry that has developed in our midst in the last decade in the sphere of prostitution, with its phenomena of trafficking in women, traffickers and their abetters, brothel owners and modern-style slave masters, who reduce human dignity to the lowest level and sully the name of the whole human race. The courts have an important role in this war. This court has repeatedly emphasized the seriousness of the phenomenon, which the legislature and the law enforcement authorities are vigorously fighting, and it has given expression to this in the cases that have come before it and will continue to do so as long as the phenomenon has not been eradicated, denounced and wiped out. The chain of trafficking and its abetters, the "buyers" of women and pimps are all targets of this

> struggle; what a degradation it is to "buy" others as if they were objects that can be transferred from one person to another!'

19. Against the background of the provisions of law and the policy that the court is adopting in view of the situation that prevails with regard to the 'prostitution industry' in Israel, we find it difficult to accept the argument that restitution requires an award of compensation whose purpose is to finance escort services. Indeed, the principle of restitution, which is the underlying principle that governs an award of damages in torts, 'is based on a perspective that focuses upon the specific damage that has been suffered by the injured person, for which the tortfeasor is liable' (*Naim v. Barda* [4], at p. 775). Notwithstanding, the principle of restitution does not stand alone nor does it operate in a vacuum. Restitution cannot be divorced, nor should it be divorced, from the society in which it is applied and from the accepted general principles of that society. Not every situation permits restitution, nor does every situation merit restitution. This approach derives not only from the understanding that case law in the law of torts may have far-reaching economic, social and other ramifications that sometimes cannot be ignored (cf. LCA 8925/04 *Solel Boneh Building and Infrastructure Ltd v. Estate of Alhamid* [27]); it derives not only from the fact that sometimes compensation that allows an undesirable situation to continue does *de facto* perpetuate that reality (see *Migdal Insurance Co. Ltd v. Abu-Hana* [6]); this approach derives its force also from an outlook that the law of compensation is a part of Israel law — a 'creature that lives in its environment' (in the words of Justice Sussman in HCJ 58/68 *Shalit v. Minister of Interior* [28], at p. 513). 'This environment' — in the words of President A. Barak — 'extends not only to the close legislative context, but also to wider circles of accepted norms, fundamental goals and basic principles. These constitute a kind of "normative umbrella" that extends over all legal texts' (HCJ 6893/05 *Levy v. Government of Israel* [29], at pp. 884-885). The law of torts and the law of compensation are not exceptions to this rule. They are a part of the fabric of Israeli law, and they operate from within Israeli society (see also J. Cassels, *Remedies: The Law of Damages* (2000), at p. 4).

20. These general principles that extend over Israeli law like a 'normative umbrella' find their way into civil law through various points of entry. One of these, which is the relevant one for our purposes, is the principle of 'public policy.' This principle is one of the legal tools that are intended to preserve the basic values of the legal system and to direct the implementation of legal rules in a way that is consistent with these basic values. This principle

‘injects’ basic values into private law (see HCJFH 4191/97 *Recanat v. National Labour Court* [30], at p. 363):

> ‘“Public policy” means the central and essential values, interests and principles that a given society at a given time wishes to uphold, preserve and develop… Public policy is the legal tool by means of which society expresses its credo. With this it creates new normative frameworks *and prevents the introduction of undesirable normative arrangements into existing frameworks*’ (*per* President A. Barak in HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [31]; emphasis supplied).

The words ‘public policy’ are stated expressly in various acts of legislation (see for example s. 30 of the Contracts (General Part) Law, 5733-1973; s. 143 of the Inheritance Law, 5725-1965; s. 16 of the Names Law, 5716-1956). ‘Public policy’ is regarded as an umbrella concept (see *Efrat v. Director of Population Registry, Ministry of Interior* [31]; see also CA 552/66 *Levital v. General Federation Medical Fund Centre* [32], 483). Section 61(b) of the Contracts (General Part) Law applies it ‘also to legal acts that do not constitute a contract and to obligations that do not arise from a contract.’ I think that in applying the principle of restitution the court has a tool that can prevent the introduction of arrangements that are inconsistent with the basic ethical principles of the legal system (see HCJ 143/62 *Funk-Schlesinger v. Minister of Interior* [33]).

21. ‘Public policy’ may affect the application of the principle of restitution where the original position or the result that the compensation seeks to achieve involves illegality or a violation of the basic values of society and the legal system. Indeed, in certain cases the court may reach the conclusion that the result of the restitution is illegal or inconsistent with those values. Then it should consider whether this restitution does not undermine the court’s function of enforcing the law or, in appropriate circumstances, of giving expression to the ethical principles and basic values that are accepted by society. But here we should utter a warning: we should take care not to deny compensation simply on the grounds of immorality. A distinction should be made between ‘enforcing morality’ for its own sake and determining a legal rule whose purpose is to prevent others being harmed or exploited. The difficulty in identifying prevailing morality, the fear that a judge will enforce his own private concepts of morality, and the fear that moral concepts that will not stand the test of time will be enforced all lie at the heart of the differences of opinion that exist on this issue (see the classic

dispute between Lord Devlin and Professor Hart: P. Devlin, *The Enforcement of Morals* (1965); H.L.A. Hart, *Law, Liberty and Morality* (1963)). Difficult questions arise with regard to the fundamental aspect of the enforcement of morality by means of an award of compensation (see R. Gavison, 'Enforcing Morality, Compensation for Breach of a Promise of Marriage and the Duty of Giving Reasons,' 8 *Hebrew Univ. L. Rev. (Mishpatim)* (1978) 282).

22. But where we are not merely speaking of enforcing morality but of preventing restitution that is tainted by criminality, exploitation or the violation of the basic rights of another person, the principle of restitution may yield to public policy. One example that has arisen in various legal systems concerns the question of compensation in cases where the loss of the plaintiffs' earnings is a consequence of unlawful (or even immoral) activity before the accident. Take the case of a plaintiff who was a thief and can no longer practice this occupation because of the damage caused by the accident. Various authorities have held that it is not possible to award compensation for this loss, even though the question is the subject of debate (C. von Bar, *The Common European Law of Torts* (2000), at no. 149). Awarding compensation in such circumstances — so they thought — is contrary to the principle that no right of action should arise from wrongdoing (*ex turpi causa non oritur actio*) (see for example in England the judgment in *Burns v. Edman* [63] and in Italy *Piccioli c. Meie Assicurazioni* [64]).

I should point out that the question of restitution in the aforesaid context is a complex one, and we do not intend to make any hard and fast rules in this matter. I should emphasize, however, that in my opinion care should be taken not to apply legal rules that will ultimately harm the victim, deny him rights and benefits and add to his suffering. An example of this is where an injured person worked as an escort girl before she was injured in an accident. In this context, it should be noted that courts in Israel have found, in various circumstances, that a woman who worked in prostitution should not be denied the right to compensation, since they regarded her as a victim and said that she did not herself commit any criminal offence nor perpetrate any wrongdoing from which, according to the well-known principle, no right of action should arise (see for example CC (TA) 2191/02 *K.A. v. Igor* [51]; LabC (BS) 4634/03 *V.M. v. Salasrabsky* [53]; NLC 56/3-180 *Eli Ben-Ami Classa Institute v. Galitzensky* [52]). And the courts were right to do so.

23. An example of another case in which the principle of restitution conflicts with the interests of society as a whole with regard to the criminal law can be found in the entitlement of an injured person, who has defrauded the tax authorities, to compensation in accordance with his real income,

which is higher than his reported income (see CA 200/63 *Tzuf v. Ushpiz* [34]). The courts have admittedly expressed discomfort and hesitation where they have been asked to assess compensation in accordance with figures that are higher than the reported income, and they have made strict probative demands in this regard; but ultimately they have ruled that compensation should be based upon the true income that has been proved (CA 5794/94 *Ararat Insurance Co. Ltd v. Ben-Shevach* [35]).

Another example of a difficulty in restitution because of illegality or immorality that existed prior to the tort is the case where the significance of the compensation is merely that it provides a means of perpetuating prohibited activity. Admittedly, in the examples given above — compensation for loss of earnings when the earnings are tainted with criminality, or assessing earnings in accordance with income that is higher than that reported to the tax authorities — the compensation was not directly intended to finance the activity or allow its continuation. But take another example, a case in which the injured person, who suffers from physical and emotional pain, petitions the court to receive compensation that is intended for buying prohibited drugs (by which I do not mean drugs that are approved for medical purposes). It would appear that here, even if the injured person miraculously proves that this compensation, with which he will buy dangerous drugs, will make it easier for him to deal with his physical pain or his emotional difficulties, the court will not be a party to this.

24. Our case is not far removed from this last example. Indeed, our conclusion is that there is no basis for the court to award compensation whose purpose is to pay for escort services. We are of the opinion that such compensation is inconsistent with the purposes of the criminal law, especially in view of the situation in Israel and the unrelenting war of the law-enforcement authorities against phenomena involved in the prostitution industry. It should be emphasized that denying compensation is not merely a matter of enforcing morality; its purpose is to prevent the encouragement and financing of phenomena that involve, at least in a large number of cases, exploitation, damage and dependence (see and cf. the remarks of Justice Cheshin in *Turgeman v. State of Israel* [16]). Israeli law is one system, and the courts that denounce the phenomena with which the prostitution industry in Israel is tainted are the same courts that are being asked to award compensation for escort services. The courts must speak with one voice. In these circumstances we should say clearly that in view of Israeli law and Israeli realities, we should not recognize the use of prostitution services as ‘compensation’ for an injured person, and there is no basis for the court to

order a payment of money that is most likely to find its way into the pockets of those persons who earn their livelihoods from the profits of prostitution.

25. It should be reiterated that our position is that it is the law of compensation itself that does not recognize the possibility of awarding compensation for a pecuniary head of damage of escort services; this is not compensation that is required by the principle of restitution. As we have said, this conclusion is not intended in any way to leave the injured person whose sexual functioning has been impaired as a result of the accident without any recourse for his suffering and without compensation for his loss. We are of the opinion that the loss should be expressed by means of two possible tracks, which can be combined with one another: *one* is the pecuniary track, namely compensation for treatments of various kinds (medications, psychological, psychiatric and other treatments), and the *other* is the non-pecuniary track, which reflects an additional possible aspect and also allows the injured person, in so far as possible, to choose the ways in which he will compensate for his pain and suffering. Indeed, there are sound reasons why the court should award the injured person compensation for the loss of sexual functioning, but there is no reason why it should allocate compensation for the pecuniary damage expressed in the costs of resorting to escort services.

Admittedly, in the present case, in addition to the pecuniary compensation that was awarded to the respondent for medications and treatments that are intended to improve his sexual functioning (in an amount of NIS 100,000, as aforesaid), there is a restriction upon the possibility of awarding additional compensation for non-pecuniary loss. We are dealing with a claim under the Road Accident Victims Compensation Law, 5735-1975, in which there is a ceiling for non-pecuniary loss (s. 4(a)(3)), and which is determined in accordance with standard rates (see the Road Accident Victims Compensation (Calculation of Compensation for Non-Pecuniary Loss) Regulations, 5736-1976). The 'standard rate' approach that is reflected in the compensation for non-pecuniary loss caused by road accidents has an element of objectivity, even though it is not arbitrary (CA 589/89 *Rakovitsky v. Yaakobov* [36], at p. 733). The compensation ceiling is the downside of strict liability. It creates a standardization of compensation, as opposed to the individualistic approach that prevails when awarding compensation for non-pecuniary loss under the Torts Ordinance (see CA 235/78 *Hornstein v. Ohavi* [37], at p. 348). The compensation awarded according to the formula provided in the law encompasses all of the aspects of non-pecuniary loss arising from the accident, namely pain and suffering, shortening of life expectancy, loss of marriage prospects, etc.. These are all taken into account

in the formula (see CA 146/87 *Katz v. Rosenberg* [38]; CA 2801/96 *El-Al Israel Airlines Ltd v. Yifrach* [39]). Nor is compensation for the impairment of sexual functioning or the possibility of enjoying sexual relations an exception to the rule; in other words, it is not excluded from the formula.

The result is that for the pecuniary head of damage of impairment of sexual functioning, the appellant should be awarded compensation of NIS 100,000, and the compensation for the use of escort services should be cancelled. The non-pecuniary aspect of the damage is included in the compensation for the non-pecuniary head of damage.

Conclusion

CA 11313/04 is allowed in the senses set out in paragraphs 5, 6, 7 and 25. The first respondent in that appeal shall be liable for the appellant's costs and legal fees in an amount of NIS 15,000.

President Emeritus A. Barak

I agree with the opinion of my colleague Justice Rivlin with regard to the quantum of damages for loss of earnings, psychiatric treatment expenses and housing expenses. I also agree with my colleague's determination that the compensation for the use of escort services should be cancelled. This consent of mine is based on the factual viewpoint according to which the appellant did not succeed in proving properly, by means of a medical opinion and other evidence, the need for resorting to escort services. With regard to the principle involved in the recognition of expenses for escort services as a head of damage that merits compensation, no decision on this question is required. The principle involved in this matter gives rise to a host of social, moral and ethical problems of supreme importance, which I would wish to leave undecided.

President D. Beinisch

I agree with the opinion of my colleague Vice-President E. Rivlin and with the result that he reached. With regard to the compensation that was awarded to the appellant and that recognizes the cost of escort services, from a factual viewpoint no basis for this compensation was proved, and this can be regarded as a sufficient reason for intervening in the judgment of the trial court on this matter. Notwithstanding, my colleague did not take the easy route, but chose to address in his opinion the important question of principle concerning the nature of the compensation for the loss of an injured person's sexual functioning or the loss of his ability to enjoy sexual relations. In this

matter I am inclined to agree with my colleague's outlook that the compensation for this damage falls at least partly outside the scope of pecuniary loss and is a part of the non-pecuniary loss, as distinct from medical and other treatments that should be recognized specifically for the purpose of compensating the damage to sexual functioning.

I also agree with the principled analysis concerning the relationship between the question of 'public policy' and the social ramifications of encouraging, even if only indirectly, the activity of those persons who live off the profits of prostitution as a result of their engaging in the prohibited occupation of pimping, and those persons who enjoy the profits of trafficking in women. For all of the reasons mentioned by my colleague in his opinion, the approach adopted by the courts that recognizes the services of escort girls as pecuniary loss that justifies 'purpose-oriented' pecuniary compensation is unacceptable. I would further add that my colleague's opinion sets out the rule of proper judicial policy, which is capable of guiding the trial courts when they award compensation in torts. Notwithstanding, I think that my colleague's legal analysis does not take into account all of the circumstances and situations in which there may arise a need to consider the relationship between pecuniary compensation and escort services, whether these may concern an escort girl who is a victim of a tort, or other situations of damage whose character and nature we have not considered and are therefore not included in the present deliberations. These are complex questions that we need not consider at the moment; the question whether there is an exception to the general rule and, if so, what is the scope of this exception, can be left to a later date.

Subject to the aforesaid, I agree with the opinion of my colleague the vice-president.

Appeal CA 11313/04 allowed in part.
24 Tishrei 5767.
16 October 2006.