LCA 1272/05

Gad Carmi
v.
Daniel Sabag

The Supreme Court sitting as the Court of Civil Appeals
[2 December 2007]
Before Justices M. Naor, E. Arbel, E. Rubinstein

Application for leave to appeal the judgment of the Haifa District Court (Judges I. Amit, Y. Elron, Y. Willner) of 29 December 2004 in CA 2174/04.

Facts: The appellant suffered from a mental illness. On 1 October 1999, the appellant attacked the respondent, who was then an eight year old child, and seriously wounded him. The appellant then attacked his own daughter and killed her. The appellant was indicted for murder and attempted murder, but because of the mental illness from which he suffered, he was found not to be responsible for his actions, and he was hospitalized in a psychiatric hospital. The respondent, through his parents, sued the appellant for compensation.

Held: Tort law does not recognize a defence of insanity according to the meaning of 'insanity' in criminal law, i.e., when the defendant did not understand what he was doing or the impropriety of his act, or could not refrain from committing the act because of a mental illness. Tort law recognizes only a defence of lack of control, when the tortfeasor had no control over his actions (such as in a case of automatism), either because of a physical or mental illness.

Appeal denied.

Legislation cited:
Penal Law, 5737-1977, ss. 34G, 34H, 34H(2), 34V(2).
Road Accident Victims Compensation Law, 5735-1975.
Torts Ordinance [New Version], ss. 1, 9, 9(a), 23, 24, 24(1), 35, 56.
Treatment of Mental Patients Law, 5751-1991, s. 15(b).

Israeli Supreme Court cases cited:
[1] LAA 741/06 *A v. B* (unreported).

[2] CrimA 549/06 *A v. State of Israel* (unreported).
[3] CrimA 118/53 *Mandelbrot v. Attorney-General* [1956] IsrSC 10 281; **IsrSJ 2 116**.
[4] CA 145/80 *Vaknin v. Beit Shemesh Local Council* [1983] IsrSC 37(1) 113.
[5] CA 5604/94 *Hemed v. State of Israel* [2004] IsrSC 58(2) 498.
[6] CrimA 125/50 *Yakobovitz v. Attorney-General* [1952] IsrSC 6(1) 514.
[7] CrimA 852/85 *Funt v. State of Israel* [1988] IsrSC 42(2) 551.
[8] CrimA 217/04 *Al-Quraan v. State of Israel* (unreported).
[9] CrimA 2325/02 *Biton v. State of Israel* [2004] IsrSC 58(2) 448.
[10] CrimA 759/97 *Ilyabayev v. State of Israel* [2001] IsrSC 55(3) 459.
[11] CrimA 392/91 *Schatz v. State of Israel* [1993] IsrSC 47(2) 299.
[12] CA 67/66 *Bar-Chai v. Steiner* [1966] IsrSC 20(3) 230.
[13] CA 360/64 *Abutbul v. Kluger* [1965] IsrSC 19(1) 429.
[14] CrimA 549/06 *A v. State of Israel* (not yet reported).
[15] CA 187/52 *Halperin v. Mayor of Tel-Aviv* [1954] IsrSC 8 219.
[16] CrimA 2/73 *Sela v. State of Israel* [1974] IsrSC 28(2) 371.
[17] CA 711/72 *Meir v. Directors of the Jewish Agency for Israel* [1974] IsrSC 28(1) 393.
[18] CrimA 382/75 *Hamiss v. State of Israel* [1976] IsrSC 30(2) 729.
[19] FH 12/63 *Leon v. Ringer* [1964] IsrSC 18(4) 701.
[20] FH 15/88 *Melech v. Kornhauser* [1990] IsrSC 44(2) 89.
[21] CA 6216/03 *Nasser v. M.H.M. Ltd* (unreported).
[22] CA 5604/94 *Hamed v. State of Israel* [2004] IsrSC 58(2) 498.
[23] CA 4733/92 *Haifa Chemicals Ltd v. Hawa* (unreported).
[24] CA 418/74 *Amamit Insurance Co. Ltd v. Weinberger* [1975] IsrSC 29(1) 303.
[25] CA 8797/99 *Anderman v. District Appeal Committee* [2002] IsrSC 56(2) 466.
[26] CA 357/80 *Naim v. Barda* [1982] IsrSC 36(3) 762.
[27] CA 2034/98 *Amin v. Amin* [1999] IsrSC 53(5) 69; **[1998-9] IsrLR 611**.
[28] CA 8673/02 *Forman v. Gil* [2004] IsrSC 58(2) 375.
[29] CA 11152/04 *Pardo v. Migdal Insurance Co. Ltd* **[2006] (2) IsrLR 213**.
[30] CrimA 186/55 *Mizan v. Attorney-General* [1967] IsrSC 11(1) 769.
[31] CrimA 2947/00 *Meir v. State of Israel* [2002] IsrSC 56(4) 636.
[32] LCA 5768/94 *ASHIR Import, Manufacture and Distribution v. Forum Accessories and Consumables Ltd* [1998] IsrSC 52(4) 289.
[33] CA 8163/05 *Hadar Insurance Co. Ltd v. A* (not yet reported decision of 6 August, 2007).
[34] CA 350/77 *Kitan Ltd v. Weiss* [1979] IsrSC 33(2) 785.

Israeli District Court cases cited:

[35] CC (Hf) 1888/66 *Yasmin v. Kahalani* IsrDC 80 161.

[36] CC (Hf) 165/92 *State of Israel v. Davidowitz* [1993] IsrDC 5753 3.

[37] SFC (Jer) 5093/02 *State of Israel v. Pimstein* (unreported).

[38] CC (Jer) 653/94 *Arbel v. Shaare Zedek* (unreported).

[39] CC (Hf) 751/93 *Stern v. Z.E. Gilad Security Co. Ltd* (unreported).

Israeli Magistrates Court cases cited:

[40] CC (TA) 118124/01 *Jarfi v. Somech* (unreported).

[41] CC (Jer) 8636/99 *Gordon v. State of Israel* (unreported decision of 19 October 2006).

American cases cited:

[42] *Williams v. Hays*, 143 N. Y. 442 (1894).

[43] *Shapiro v. Tchernowitz*, 155 N.Y.S 2d 1011 (1956).

[44] *Breunig v. American Family Insurance Company*, 45 Wis. 2d 536 (1970).

English cases cited:

[45] *White v. White* [1950] P. 39.

[46] *Hanbury v. Hanbury* (1892) 8 T.L.R. 559.

[47] *Morriss v. Marsden* [1952] 1 All ER 925.

[48] *Nettleship v. Weston* [1971] 2 Q.B. 691.

[49] *Cole v. Turner* (1704).

Jewish law sources cited:

[50] Jeremiah 17, 9.

[51] Esther 9, 5.

[52] Rabbi David ben Shelomo Ibn Abi Zimra (Radbaz), *Responsa*, part V, 239 and part VI, 2246.

[53] Rabbi Akiva Eger, *Responsa* 64.

[54] Rabbi Yaakov Ettlinger, *Responsa Binyan Zion HaHadashot*, 98.

[55] Rabbi Yehuda Assad, *Responsa Yehuda Yaaleh*, part 1, 1.

[56] Mishnah, *Bava Kamma*, 8, 4.

[57] Maimonides, *Hilechot Hovel uMazik* 4, 20.

[58] Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah*, 267, 8.

[59] Talmudic Encyclopaedia, vol. 8, 'The human tortfeasor'; vol. 17, 495 'Deaf person', 542 'Deaf persons, insane persons and minors.'

[60] Rabbi Menachem HaMeiri, *Bet HaBehira*, *Bava Kamma*, 87, 1.

[61] Rabbi Moses Sofer, *Responsa Chasam Sofer*, *Yoreh Deah*, 317.

[62] Rabbi Yosef ben Meir Teomim, *Pri Megadim*, *Orach Hayim*, General Introduction at the beginning of part 2.
[63] Prof. A. Steinberg (ed.), *Encyclopaedia of Jewish Medical Ethics*, vol. 2, 'Deaf person'; vol. 6, 'Insane person.'
[64] Maimonides, *Hilechot Mechira*, 29, 5.
[65] Babylonian Talmud, *Bava Kamma* 26a.
[66] Babylonian Talmud, *Sanhedrin* 72a.
[67] Leviticus 1, 3.
[68] Rabbi Shelomoh Yitzhaki (Rashi) on Leviticus 1, 3.
[69] Babylonian Talmud, *Arachin* 21a.
[70] Rabbi Meir Leibush ben Yehiel Michel (Malbim), *Commentary* on Leviticus.
[71] Rabbi Naftali Hertz Wessely, *HaBiur* on Leviticus.
[72] Rabbi Baruch Epstein, *Torah Temima* on Leviticus.

For the appellant — A. Huberman, S. Khatib, E. Yakobi.
For the respondent — S. Efroni.

JUDGMENT

Justice E. Rubinstein

1. This case concerns the liability in tort of a person suffering from a mental illness. It is an application to appeal the judgment of the Haifa District Court of 29 December 2004 (Judges Amit, Elron and Willner) in CA 2174/04, which, by a majority (Judges Amit and Elron, Judge Willner dissenting), denied the appeal filed by the applicant (now the appellant) against the judgment of the Haifa Magistrates Court of 5 January 2004 (Judge Sokol) in CC 12851/00. Judge Rivlin decided to refer the application for leave to appeal to a panel of three justices. On 7 December 2005, at the end of a hearing before the present panel, this Court gave leave to appeal. Now that the parties have filed their closing arguments, we are giving judgment.

Background

2. On 1 October 1999, a day that ended tragically, the appellant, his wife and their daughter, a ten month old infant, went to the park near their home. The appellant called the respondent, who was then an eight year old child, and asked him to 'say hello' to his infant daughter. Ten minutes later the appellant called the respondent once again, and when he came to him, the appellant took out a knife and stabbed him several times deeply in his neck, stomach and

hands. The respondent left the site bleeding, with his intestines spilling out of his abdomen. The appellant then proceeded to slit the throat of his infant daughter, who died immediately. The respondent was rushed to hospital, where he underwent surgery five times in ten days, and his life was saved. The appeal concerns a claim in tort that was filed by the respondent through his parents against the appellant.

3. In the criminal sphere the appellant was indicted for murder and attempted murder. On 13 March 2000, after it received several psychiatric opinions, the District Court (President Lindenstrauss and Judges Joubran and Neeman) granted an application filed by the parties, and held that the appellant had committed the acts attributed to him in the indictment, but he was not liable to any penalty because of the mental illness from which he suffered and also continued to suffer at the time of the trial. The court ordered the appellant to be hospitalized in a closed ward in a psychiatric hospital, under s. 15(b) of the Treatment of Mental Patients Law, 5751-1991 (hereafter: the criminal judgment).

The civil proceeding in the Magistrates Court

4. After the criminal proceeding ended, the respondent filed a civil claim in tort against the appellant. On 5 January 2001, the Magistrates Court (Judge Sokol) granted the claim, and found the appellant liable to pay the respondent NIS 302,940, which consisted of the following: NIS 200,000 for non-pecuniary damage, NIS 70,000 for loss of future income, NIS 20,000 for expenses and assistance and NIS 12,940 for corrective plastic surgery. In a detailed and learned judgment, Judge Sokol addressed the question of the liability of mentally ill persons in tort. The court discussed the fact that the legislature did not provide any defence against liability in the Tort Ordinance similar to the 'insanity' defence provided in s. 34H of the Penal Law, 5737-1977, but it thought that this should not be regarded as a negative arrangement. The court considered the three main approaches to this issue in English law, as they were discussed long ago by Prof. Englard (I. Englard, A. Barak, M. Cheshin, *The Law of Torts — General Theory of Torts* (second edition, G. Tedeschi ed.. 1977), at pp. 131-137 (hereafter: Englard *et al.*, *The Law of Torts*)): the *first* approach, which was the approach of the well-known English judge Lord Denning in *White v. White* [45], at p. 59, according to which 'a person will be liable in torts, even if, as a result of a mental illness, he does not know the nature or the moral character of his act' (Englard *et al.*, *The Law of Torts*, at p. 133). This approach is founded on the fundamental approach that liability in tort is based on the principle of compensation, not

fault. The *second* approach is the approach of Lord Esher in *Hanbury v. Hanbury* [46], which is also cited in *White v. White* [45], according to which criminal and tort law should apply the same standard of liability. The *third* approach is an intermediate approach that was propounded by Judge Stable in *Morriss v. Marsden* [47], according to which the tortfeasor does not need to understand the moral significance of his act, but a minimal mental element of control is required (Prof. Englard uses the term 'volition,' which means 'the mental act by means of which a person makes himself the cause of his conduct' (p. 136), i.e., the control exercised by a person's personality over the movements of his body). Prof. Englard adopted the intermediate approach. The Magistrates Court also reviewed case law in the United States, and discussed how conflicting rulings have been made on this issue.

5. After he examined the various purposes underlying the law of torts, Judge Sokol held that 'the conclusion from all of the aforesaid is that as a rule the tortfeasor's mental illness does not provide him with a defence against liability in tort' (p. 10). He therefore turned to examine whether the illness of the appellant before us exempts him from liability in tort for assault (s. 23 of the Torts Ordinance [New Version][1]), which is the relevant tort in our case, *since it contains a special mental element* — 'intentionally.' From an analysis of the criminal judgment the Magistrates Court concluded that 'the plaintiff acted with intent, will and an ability to refrain from carrying out the act,' and therefore it held that despite the mental illness from which he suffered at the time of the act, the appellant satisfied all the requirements of the tort, including the requirement of intent, and consequently it found him liable to pay compensation.

The judgment in the District Court

6. On 29 December 2004 the District Court, by a majority, denied an appeal filed by the appellant against the judgment of the Magistrates Court. The three Judges (Amit, Elron and Willner) considered the unprecedented question at length, with extensive discussion of comparative law and the theoretical elements of the law of torts. I should first point out that the District Court overturned the finding of fact in the Magistrates Court, and it held that *the criminal judgment* was also based on the second alternative provided in s. 34H of the Penal Law, i.e., a defendant who 'lacks any real ability… to refrain from committing the act' (p. 24). We shall return to examine this matter

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[1] Translator's note: the Israeli Tort Ordinance uses one word, which is translated here as 'assault,' to include both the English common law concepts of battery (unlawful physical contact) and assault (threat of unlawful physical contact).

below. The three Judges of the panel considered both the general subject of the exemption of mentally ill persons from liability in tort and the specific issue of whether the elements of the tort of assault are satisfied. Their opinions are comprehensive and thorough, and it appears that there is no argument that was not raised and considered in detail. I will discuss the main points of their opinions in brief, as a basis for our deliberations.

Judge Amit's opinion

7. Judge Amit denied the appeal, even though he found that the lack of a defence of insanity in the Torts Ordinance is not a negative arrangement (p. 13). According to him, Prof. Englard's approach recognizes an exemption from liability even in cases that satisfy the alternative provided in s. 34H(2) of the Penal Law ('lacks any real ability… *to refrain from committing the act*' — emphasis added), but he held that a more *restrictive* interpretation should be adopted, according to which only cases that fall within the scope of s. 34G of the Penal Law ('if he was unable to chose between doing it and not doing it because of *a lack of control over his body movements*' — emphasis added) will constitute a defence in tort (p. 19). Judge Amit expressed agreement with the remarks of Judge Neumann of the Haifa District Court that were uttered many years ago:

> 'The defendant had volition to shoot at the plaintiff and an expectation of harming him. He knew what he was doing. In my opinion these facts are sufficient for determining liability in tort, which is not negated because the defendant did not act with free will but as a result of an irresistible urge, even when the urge increased… *I would say in brief: volition is required for liability in tort, free will is not required*' (CC (Hf) 1888/66 *Yasmin v. Kahalani* [35], at p. 168 (emphasis added)).

Judge Amit found support for this arrangement in s. 374 of the Property Law Memorandum, 5766-2006 (hereafter: the Property Law Memorandum), according to which 'No one shall be liable in tort for an act if he was incapable of choosing between doing it and not doing it, because of a lack of control over his movements with regard to that act,' where the emphasis is placed, as stated, merely on the lack of physical control. Judge Amit based this narrow approach on the main purpose of the law of torts, which is to compensate the respondent for the damage that he suffered (p. 28).

8. Judge Amit discussed how the tort of assault requires a mental element of intent, but he held that *de facto* the tort has an aspect of strict liability, since anyone who touches another without his consent is considered

to have committed an assault, even if he has no improper intent (p. 26). Judge Amit mentioned the wording of the tort in the Property Law Memorandum, according to which 'An assault is a *conscious* use of force, whether directly or indirectly, against a person's body, without his consent' (s. 389, emphasis added), and he concluded:

> 'In my opinion, the special character of the tort of assault as a tort of strict liability or as a tort that has elements of strict liability tips the scale in favour of imposing liability on the appellant as someone who intended to harm the respondent, even if in view of his mental state he lacked intent' (p. 26).

From an analysis of the defence provided in s. 24(5) of the Torts Ordinance, Judge Amit sought to deduce that just as a person has a right of self-defence against a mentally ill person, so too does he have a right to be compensated by him.

9. Judge Amit also addressed judicial policy considerations. In the part of his opinion entitled 'On justice and public policy', he expressed the opinion that damage that is caused without fault should be borne by the tortfeasor, and not by the victim; this decision is more just, and provides the family and relations of the mentally ill person with an incentive to ensure that he does not hurt others (p. 36). He went on to say:

> 'To this we should add the concern — or perhaps the fear — that psychiatry is a less precise science than other fields of medicine… the general public, which is not familiar with fine medical-legal distinctions finds it hard to understand or accept the defence of insanity… In civil law, there is a concern that recognizing insanity as a defence in tort will lead to false claims of insanity' (pp. 37-38).

Finally, Judge Amit reviewed other legal systems, including Jewish law, but it would appear that this review did not lead to an unequivocal conclusion. Ultimately, Judge Amit proposed that the appeal should be denied.

10. I should also point out that regarding the burden of proof Judge Amir was of the opinion that the finding of the District Court in the criminal proceeding on the question of the appellant's mental state could not serve as sufficient evidence in the civil proceeding. He said that in the criminal trial the appellant needed to establish a reasonable doubt that the defence applied (s. 34V(2) of the Penal Law), whereas in civil law he needed to prove his mental state on a balance of probabilities, which he did not do. According to Judge Amit, 'this *in itself* is sufficient reason to deny the appeal' (p. 11). I should

immediately say here that in this matter I believe that we should adopt the position of Judges Elron and Willner, that —

> 'When the parties have reached an agreement that the factual findings of the District Court in the criminal proceeding should serve as a basis for the judgment in the civil proceeding, and when counsel for the state has agreed that at the time of the act the appellant was incapable of refraining from doing it, this should also be regarded as an agreed fact in the civil proceeding' (p. 57, *per* Judge Willner; see also the remarks of Judge Elron at p. 79).

This statement does not necessarily cast any light on cases in which there is no such agreement, since in those cases I am of the opinion that the position expressed by Judge Amit is correct.

Judge Willner's opinion

11. Unlike Judge Amit, Judge Willner was of the opinion that the appeal should be allowed. In her opening remarks, Judge Willner disagreed with Judge Amit and held that the absence of a defence of insanity in the Torts Ordinance is not a lacuna but a negative arrangement (p. 46), and this arrangement is justified since 'a sweeping and fundamental exemption from liability under the Torts Ordinance for someone who is mentally ill or has a mental disability would be unjust and far-reaching' (p. 46). In any case, according to Judge Willner, the liability of a mentally ill person in tort 'should be examined on its merits for each individual tort, in the same way as the liability of a healthy person is examined' (p. 47).

12. Unlike Judge Amit, however, Judge Willner held that since the tort of assault requires a special mental element ('intentionally'), this cannot be satisfied by someone 'who at the time of the act lacked free will and an ability to refrain from the act that he did' (p. 51). She said that 'intent' includes an element of will, but this means free will rather than mere volition:

> 'For the purpose of proving the element of "*intentionally*" that is required in order to satisfy the mental element of the tort of assault, it is necessary to prove that at the time of the act the tortfeasor was graced with *free will*, i.e., the *desire and ability* to choose whether to act in a certain way or not' (p. 50, emphases in the original).

For this reason, she said that:

> 'Liability in tort for assault should not be imposed on a tortfeasor if it is proved that even though the act was accompanied by

> volition, the source of the volition was a mental illness, i.e., if at the time of the act the tortfeasor did not have *free* will because of the mental illness that took hold of him and denied him the ability to make decisions' (p. 49, emphasis in the original).

These findings were based on both a dictionary analysis of the requirement of intent and the assumption that the tort of assault requires a certain degree of subjective fault. In broader terms Judge Willner held:

> 'The rationale underlying the recognition of an exemption in tort for someone who acts as a result of physical automatism is also entirely applicable in the case of someone who acts as a result of mental automatism. I see no legal, ethical or social justification for distinguishing between the cases and discriminating against someone who acted as a result of a mental illness that controlled his actions, as opposed to someone who acted as a result of a physical factor that controlled his actions. In both cases the tortfeasor is unable to refrain from committing the act' (p. 52).

13. In the part of her opinion entitled 'Thoughts about justice,' Judge Willner discussed the legal policy considerations proposed by Judge Amit. She began by citing the remarks of Prof. A. Porat that 'if the tortfeasor has a mental illness, he will be regarded as lacking volition. Consequently, considerations of compensatory justice will not justify imposing liability on him' (A. Porat, 'Law of Tort: The Tort of Negligence according to the Case Law of the Supreme Court from a Theoretical Viewpoint,' *Israel Law Yearbook* (A. Rosen-Zvi ed., 1996), at p. 373). Later Judge Willner discussed the fact that *empirically* mentally ill persons —

> '… whose minds are in any case troubled by their illness, are compelled to deal with the social and economic difficulties that they encounter on a daily basis. Research shows that these people, in addition to the disabilities that result from the illness, suffer from poverty and a lack of social resources. Research found that 80% of mentally ill persons have been diagnosed with psychoses; 90% do not earn a living…'.

These figures were based on an article of U. Abiram, 'Social Integration of Chronically Mentally Ill Persons: An Old Problem in a New Context,' 61 *Social Security* 42 (November 2001), in which he says:

> 'And finally, imposing liability on the mentally ill person is tantamount to a determination that the mentally ill person is in some sense at fault in committing the act. The finding that the

> mentally ill person is at fault is a paradox, since someone who committed the act as a result of insanity… cannot be considered, from an ethical, social or legal viewpoint, to be at fault' (at pp. 54-55).

Judge Elron's opinion

14. The main thrust of Judge Elron's position is found in the part of his opinion entitled 'Historical review and comparative law.' First he surveyed English law, the essence of which was mentioned above in the summary of the Magistrate Court's judgment. Judge Elron went on to survey the law in the United States, where there are conflicting rulings, both with regard to liability in tort in general, and with regard to torts that require intent in particular (even though I should point out that the approach that imposes liability would appear to have greater support). The same is true in New Zealand, Australia and Canada. The survey ends with a consideration of Continental law, and especially German law, which provides:

> '§ 827 Ausschluss und Minderung der Verantwortlichkeit
>
> Wer im Zustand der Bewusstlosigkeit oder in einem die freie Willensbestimmung ausschließenden Zustand krankhafter Störung der Geistestätigkeit einem anderen Schaden zufügt, ist für den Schaden nicht verantwortlich...'
>
> '§ 827. Exclusion and reduction of responsibility
>
> A person who, in a state of unconsciousness or in a state of pathological mental disturbance preventing the exercise of free will, inflicts damage on another person is not responsible for such damage…' (German Civil Code (BGB) § 827).

Alongside this exemption, the German Civil Code provides a possibility of imposing an obligation to pay compensation on the tortfeasor, if it is not possible to find a third party liable, and the tortfeasor's economic position allows and *justifies* requiring him to pay full or partial compensation:

> '§ 829 Ersatzpflicht aus Billigkeitsgründen
>
> Wer in einem der in den §§ 823 bis 826 bezeichneten Fälle für einen von ihm verursachten Schaden auf Grund der §§ 827, 828 nicht verantwortlich ist, hat gleichwohl, sofern der Ersatz des Schadens nicht von einem aufsichtspflichtigen Dritten erlangt werden kann, den Schaden insoweit zu ersetzen, als die Billigkeit nach den Umständen, insbesondere nach den Verhältnissen der Beteiligten, eine Schadloshaltung erfordert und ihm nicht die

> Mittel entzogen werden, deren er zum angemessenen Unterhalt sowie zur Erfüllung seiner gesetzlichen Unterhaltspflichten bedarf. '
>
> '§ 829. Liability to pay damages for reasons of equity
>
> A person who, for a reason stated in sections 827 or 828, is not responsible for damage caused in one of the cases stated in sections 823 to 826, shall nonetheless make compensation for the damage, unless compensation can be obtained from a third party who is charged with a duty of supervision, to the extent that in the circumstances, including the economic circumstances of the parties concerned, equity requires indemnification and he does not lack the resources needed for his own reasonable maintenance and for discharging his statutory maintenance duties' (German Civil Code (BGB) § 829).

Judge Elron said that this is also the position in France and Switzerland. At the end of the survey, Judge Elron said:

> 'It can be said that we see how complex the issue in our case is and how many different opinions there are… It can be said with a large degree of certainty that the courts have not yet contended with the question on a fundamental legal level but it would appear that they have usually decided cases intuitively by looking for a fitting solution in the cases that came before them that is consistent with their approach' (p. 77).

15. Ultimately Judge Elron agreed with the result reached by Judge Amit, but disagreed with his reasons. According to Judge Elron —

> 'No distinction should be made between persons suffering from mental illnesses and persons suffering from physical illnesses who act without any ability to determine their conduct, i.e., to *control* their conduct, and the level of the mental element required for the tort of assault should *not* be set even lower than the mental element required for the tort of negligence' (p. 80, emphases in the original).

Judge Elron criticized the approach of Judge Willner, which 'focused on the *protection* of the mentally ill tortfeasor and in practice ignored the rights of the innocent and blameless victim' (p. 84, emphasis in the original), and he discussed the growing tendency to focus on the rights of the victim in criminal trials. Finally, Judge Elron considered what should be regarded as justice in the circumstances of the specific case: 'Why should a *tortfeasor with means* be

exempted from compensating an injured person without means for the damage that he caused him?' (p. 85, emphasis added), and 'What is the law where *there is no dispute as to the economic stability* of the mentally ill person, whereas the victim has *limited means* and ability?' (p. 86, emphasis added). Judge Elron concluded by holding:

> 'I too feel *compelled* by statute in this case — by the wording of the tort of assault and the mental element required to satisfy it. But even if we are returning to the opinion that was expressed in the past — according to which the idea of compensation, rather than the idea of fault, is what lies at the heart of liability in tort — I prefer resorting to this principle to find the appellant liable. Therefore I am of the opinion that we should adopt the approach that even if someone with a mental defect cannot be considered to be aware of his actions in the normal sense, he is still the person who caused harm to another, and as such he ought to be the person who is held liable' (p. 87, emphasis in the original).

The arguments of the parties in the appeal

16. The main arguments of the parties address fundamental questions concerning liability of mentally ill persons in tort and the basic requirements of the tort of assault. The arguments were presented above, and we shall return to consider them later. The appellants claim, *inter alia*, that considerations of justice cannot be a substitute for examining whether the requirements of the tort are satisfied — an argument that is directed mainly against the opinion of Judge Elron. Alternatively, they argued that the compensation awarded should be reduced in such a way that it is proportionate to the subjective fault of the appellant.

Methodology

17. On the question of the liability of mentally ill persons in tort, Prof. Englard wrote the following:

> 'This question has two different aspects. First, it is possible that the defect in the tortfeasor's mind prevents him from forming the special mental state needed for a particular tort. In a situation of this kind, he will not be liable in tort. But this determination says nothing new, because in the absence of the required mental element, it is not possible to hold a mentally ill person liable in tort, just as it is not possible to hold a healthy person liable in such circumstances… Second (and this is the main question), assuming that the requirements of the tort are satisfied from an

> objective viewpoint, is it necessary to prove that the tortfeasor was graced, at the time of the act, with a certain degree of free will and discernment' (Englard *et al.*, *The Law of Torts*, at pp. 132-133).

Accordingly, we shall begin our deliberations with the specific question whether the appellant's mental state at the time of the incident allowed the requirements of the tort to be satisfied. Obviously, only if the answer to this question is yes will there be any reason to turn to the second and more general question of whether it is possible to impose liability on mentally ill persons who are not liable to any sanction under criminal law for the act. In order to answer the first question, we need to examine both the mental state of the appellant at the time of the incident, and the mental element required for the tort of assault. This is the path that we shall follow.

The appellant's mental state at the time of the incident

18. The claim was filed in reliance on the findings that were determined in the criminal trial in the District Court. In that proceeding, the court granted the consensual application of the parties and ordered the hospitalization of the appellant under s. 15(b) of the Treatment of Mental Patients Law, 5751-1991, which provides:

> 'If a defendant is indicted and the court *finds that he has committed the actus reus* of the offence of which he was indicted, but it decides, whether on the basis of evidence brought before it by one of the parties or on the basis of evidence brought before it on its own initiative, that the defendant was *ill at the time of the act* and therefore is not liable to any sanction, *and that he is still ill*, the court shall order the defendant to be hospitalized or to receive treatment in a clinic' (emphases added).

It would appear that at no stage did the District Court expressly and clearly determine which of the alternatives provided in s. 34H of the Penal Law applied to the defendant — subsection (1) which provides that the defendant 'lacks any real ability to understand what he is doing or the impropriety in his act,' or subsection (2) which provides that the defendant 'lacks any real ability… to refrain from committing the act.' A study of the two decisions of the District Court (the decision of 10 January 2000 (hereafter: the first decision) and the decision of 13 March 2000 (hereafter: the second decision)), gives rise to possible indications that support the two alternatives.

19. In the first decision, President Lindenstrauss cited the opinion of Dr Ben-Ephraim, who said that 'the person I examined committed the act… when

he *was unable to distinguish* between good and evil, what is permitted and what is prohibited' (p. 11, emphasis added); but later he said that the appellant 'lacked any real ability to understand what he was doing, or the impropriety in his act *and to refrain from doing it*' (p. 12, emphasis added). President Lindenstrauss addressed the fact that the interrogation of the appellant by the police showed that 'he was aware of his acts at the time of committing the offences' (p. 13), and he wished to summon the experts in order to consider the question 'whether the defendant lacked any real ability *to understand what he did* at the time of the act' (p. 13, emphasis added). Judge Joubran agreed with this position. But Judge Neeman expressly held that 'the other criterion provided in s. 34H, that because of his illness he "was *unable to refrain from doing the act*" also applies here' (p. 18, emphasis added). For this reason, Judge Neeman held: 'I see no reason or need to cross-examine the psychiatrists' (*ibid.*).

20. In the second decision, which was given after the experts were cross-examined, President Lindenstrauss cited passages from the opinion of the experts that would appear to relate only to the first alternative (p. 48, line 12 (Dr Ben-Ephraim); p. 48, line 22 (the District Psychiatrist)), and addressed the conflict between the opinions with regard to the appellant's competence to *stand trial* (with regard to his condition *at the time of the act* there was no difference of opinion). Finally the court granted the application of the parties and held 'that the defendant committed the acts involved in the offence of which he was charged, and that he was mentally ill at the time of committing the acts and therefore was not punishable, and that he was still mentally ill' (p. 54). It is hard to discover from this decision the precise state of the appellant *at the time of the act*, i.e., which of the alternatives in s. 34H applies.

21. In the civil trial, the Magistrates Court considered the mental state of the appellant on the basis of *the criminal judgment and the evidence before the criminal court*. First, the Magistrates Court considered the transcript of the appellant's statements in his police interrogation, from which it concluded 'that the defendant [the appellant] fully understood the significance of his attack on the plaintiff' (p. 17 of the judgment). The court attached particular attention to the following remarks: 'When I arrived at the park… there was a certain moment when I decided that this was it, I worked up sufficient courage, I decided that before I harm the baby and myself, I decided that I would harm another child' (p. 17). In reply to the police interrogator's question 'Why?', the appellant answered: 'Not to kill him, to harm him, for the simple reason that the doctors and the police harmed my baby… for

reasons that I do not know' (p. 17). Later, the Magistrates Court held that in the criminal proceeding the District Court:

> '… did not determine that the defendant was not liable because of a lack of volition, nor did it determine anywhere that the defendant could not have refrained from harming the plaintiff because of the mental illness. All that it determined was that the defendant did not understand the impropriety of the act' (p. 18).

If we translate this finding into the language of criminal law, the Magistrates Court was of the opinion that the appellant fell within the scope of the provision in s. 34H(1) in that 'he lacked any real ability to understand…'.

22. As stated above, this finding was overturned by the District Court in the judgment under consideration in this appeal. Judge Amit held:

> 'In my opinion, it is possible to deduce from the decision of the District Court the opposite conclusion, which is that the District Court intended to attribute to the appellant a lack of volition. At the very least, it is impossible to know which alternative the District Court intended… Consequently, the judgment of the trial court, in so far as it relies on its interpretation of the District Court decision, cannot stand' (p. 22).

Later, Judge Amit regarded the conduct of the appellant as 'automatism that deprived him of volition' (p. 24). Judge Willner held: 'In determining the mental state of the appellant at the time of committing the act, I disagree with the position of the trial court and agree with the opinion of Judge Amit' (p. 55). According to her: 'The parties agreed that when the act was committed, the appellant *lacked any real ability to refrain from doing the act*' (p. 56, emphasis in the original), and she went on to say: 'The finding of the trial court that the District Court did not determine that the appellant could not refrain from harming the respondent because of the mental illness cannot be reconciled with the decision of the District Court' (p. 56). Judge Elron did not make any express determination with regard to the appellant's mental state, but he remarked that '*prima facie* the determination of the trial court in our case that the appellant acted "*with intent, will and an ability to refrain from committing the act*" is problematic and hard to accept' (p. 83, emphasis in the original).

23. (a) Thus the District Court changed the finding of the Magistrates Court with regard to the interpretation of the District Court's judgment in the criminal trial, and it held that the appellant not only 'lacked any real ability to understand what he was doing or the impropriety in his act,' but also that he

'lacked any real ability… to refrain from doing the act.' Admittedly, in his reply to the appeal the respondent claims that 'the applicant understood the act that he committed and also intended to do it,' but I see no reason to consider this factual aspect of the matter in the court of third instance (see LAA 741/06 *A v. B* [1]).

(b) Let me explain briefly. 'The heart is most deceitful and weak; who can understand it?' (Jeremiah 17, 9 [50]). The human soul is complex, and 'to a large extent it remains an unknown science' (CrimA 549/06 *A v. State of Israel* [2]). It is hard for a healthy person to understand what is taking place in the soul of someone who has been recognized as suffering from paranoid schizophrenia. What does it mean to 'lack any real ability… to refrain from doing the act'? To the ordinary person it appears that, in the narrow meaning of the phrase, the defendant did exactly what he intended to do, and had he not wanted to do it, he would not have done it. Indeed, there are those who deny the existence of such an inability — see A. Parush, 'Insanity, Lack of Control and Section 34H of the Penal Law (Amendment no. 39) (Preliminary Part and General Part), 5754-1994', 21 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 139 (1998). The learned author describes the innovation in s. 34H as adding a 'willingness test' ('to refrain from doing the act') to the cognitive test in the old legislation ('to understand what he is doing or the impropriety in his act'). As he explains, the new legislation contains an innovation in relation to previous case law, and the wording of the amendment also constitutes an innovation, since it does not use the previously accepted term of 'an uncontrollable impulse' (see pp. 140-143). *Inter alia*, the author analyzed the case in CC (Hf) 165/92 *State of Israel v. Davidowitz* [36], which is very similar to our case. In that case, a woman killed her two young daughters by drowning them in the bath. The District Court, by a majority, found that she was not liable under criminal law, even though she understood that she was causing the death of her children, and in the opinion of most of the psychiatrists she also understood that what she did was prohibited (p. 164). According to Prof. Parush, defendants in such cases should be exempted from liability by interpreting the *cognitive* test broadly. (It should be noted that in another tragic case (SFC (Jer) 5093/02 *State of Israel v. Pimstein* [37], *per* Judge Zylbertal), a case in which the defendant killed his young daughter by drowning her, it was held that the defendant did not suffer from a mental illness and he was convicted of murder; for the earliest case of the 'willingness test' in case law, see CrimA 118/53 *Mandelbrot v. Attorney-General* [3], at p. 287 {123}, in which Justice Agranat held that the appellant lacked any real

ability to refrain from committing the act. See also A. Carmi, *Health and Law* (vol. 1, 2003), at pp. 847-867).

(c) In the circumstances of our case, however, the court's ability to arrive at conclusions from fragmented and partial citations of the expert opinions and the interrogation transcript is very limited. As we have said, only one judge in the criminal trial addressed this matter directly, and he *expressly* held that the alternative in s. 34H(2), namely the inability to refrain from doing the act, is also applicable in this case (Judge Neeman, *supra*). Indeed, the remarks of his two colleagues in the criminal trial were not absolutely clear, but in view of his express finding, and the extensive consideration by the District Court of the question of interpretation in the judgment under appeal, I see no reason to intervene in this factual finding. In the words of Justice Agranat, it would appear that 'the imaginary persecution… may become so dominating that volition is ultimately dethroned' (*Mandelbrot v. Attorney-General* [3], at p. 300 {140}). Indeed, I cannot rule out the possibility that the other approach is correct, namely that the defendant was unable to understand what he was doing or the impropriety in his action. Were we to adopt this position, our task would be easier. But *for the purpose of the civil case* we shall adopt the position that is *prima facie* more favourable to the appellant, namely that in the criminal sphere the appellant 'lacked any real ability… to refrain from doing the act.' Let us therefore turn to examine the issues relevant to the law of torts.

Social fault and moral fault

24. I cannot fail to say here that *prima facie* the consideration of this claim would have been somewhat easier had it been based on the tort of negligence, since in negligence there is liability even if the defendant is not aware of the impropriety of his actions:

> 'The concept of reasonableness (or negligence) in the tort of negligence is an objective concept. "The reasonableness of the measures of care is determined in accordance with objective criteria, which are encapsulated in the statement that the tortfeasor should act as a reasonable person would act in the circumstances of the case" (CA 145/80 *Vaknin v. Beit Shemesh Local Council* [4], at p. 131). The question is not whether the tortfeasor fell short of the standard of conduct of which he is capable ("subjective negligence"). The question is whether the tortfeasor fell short of the standard of conduct that society regards as the proper one ("objective negligence"). Indeed,

> reasonableness in the tort of negligence is not based on "personal" fault. The tortfeasor may do his best, and still act unreasonably, where the tortfeasor's competence falls short of the competence expected of the reasonable person. This was well expressed by Lord Denning, when he said that "his incompetent best is not good enough" (in *Nettleship v. Weston* [48]). The approach is that the tortfeasor fell short of the standard of conduct demanded by society (see G. Tedeschi (ed.), *The Law of Torts: The General Theory of Torts* (1969), at p. 129; I. Gilad, "On the Elements of the Tort of Negligence in the Israeli Law of Torts," 14 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 319 (1989), at p. 321, and Restatement, Second, Torts, at p. 11)' (CA 5604/94 *Hemed v. State of Israel* [5], at p. 506, *per* President Barak).

Negligent persons are examined in accordance with an objective standard, according to which society seeks to regulate conduct and spread losses, irrespective of his subjective fault. Only 'in those cases where the plaintiff's personal standard does not fall short of that of society does "moral" fault also accompany social fault' (I. Gilad, 'On the Elements of the Tort of Negligence in the Israeli Law of Torts,' 14 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 319 (1989), at p. 322). It will be recalled that even in legal systems that impose liability in tort on mentally ill persons there is case law that mentally ill persons are incapable of satisfying the requirement of intent in the tort of assault, which can be regarded as a requirement of subjective fault (see *Williams v. Hays* [42]; *Shapiro v. Tchernowitz* [43]). The fact that liability in negligence is generally imposed without subjective fault makes it 'easier' (if one can use such a word) when applying it to mentally ill persons. Certainly the tort of negligence is more suited to cases that do not concern an *initial manifestation* of the illness, which is the position in the present case, since the appellant had psychiatric problems in the past. In such cases it is possible to consider liability in tort both with regard to the mentally ill person who did not take appropriate care and with regard to additional persons (members of his family, and possibly even health and welfare authorities, without making any firm determination on this question; in our case, however, apparently no previous indications were reported). Indeed, focusing on *objective social* fault allows the court to take into account additional factors such as the economic position of mentally ill persons, the ramifications on the possibility of integrating them in the community, and influencing society's attitude towards them. But the case before us is a claim for assault.

The elements of the tort

25. (a) Section 23 of the Torts Ordinance provides:

> 'Assault 23. (a) An assault is the use of force of any kind, intentionally, against a person's body…'

(b) The special mental element required for a tort of assault is 'intentionally,' and this is one of the mechanisms for limiting liability in tort. This is also the word used in the original version introduced by the British Mandate (see G. Tedeschi & A. Rosenthal, *The Tort Ordinance from the Perspective of the History of its Creation and Amendments*, at p. 72). As a rule, this term has been interpreted in common law as referring to will and desire (G. Williams, 'Oblique Intention,' 46 *Cambridge L. J.* (1987) 417). Prof. Englard gave the definition that 'A person acts "intentionally" when he *foresees* a certain result of his act and *wants* it to happen' (Englard *et al.*, *The Law of Torts*, at p. 126 (emphasis added); see also D. Krezmer, *The Law of Torts: The Individual Torts — Assault and False Imprisonment* (G. Tedeschi (ed.), Jerusalem, 1981), at p. 8; S. Dagan, *Problems in the Law of Torts* (vol. 1, 2002), at p. 164). Intention in the present context therefore includes awareness and will (or desire) (this is also the usual interpretation of the requirement of intent in criminal law; there is no reason why reference cannot be made to criminal law in the linguistic sphere, despite the difference between criminal and tortious liability): see S.Z. Feller, *Fundamentals of Criminal Law* (vol. 1, Jerusalem, 1984), at p. 550; Y. Levy & E. Lederman, *Principles of Criminal Responsibility* (Tel-Aviv, 1981), at p. 410; CrimA 125/50 *Yakobovitz v. Attorney-General* [6], at p. 545; CrimA 852/85 *Funt v. State of Israel* [7], at p. 557. Admittedly, it has been said that from a legal viewpoint 'intent can even exist without will' (CrimA 217/04 *Al-Quraan v. State of Israel* [8], *per* President Barak), in the context of the 'foreseeability rule,' but the foreseeability rule is fundamentally an exception to the rule, and in any case there is an inherent lack of clarity as to whether it refers to 'intent' or to some kind of moral equivalent).

(c) In the case before us, the stabbing of the respondent did not occur *negligently*. It did not happen *absentmindedly*. It was an intentional act. The appellant knew what he was doing ('I decided that I would harm another child' (p. 17 of the judgment of the Magistrates Court)). He planned and foresaw the consequences ('Not to kill him, to harm him,' (*ibid.*)) and the presumption is — and no argument was raised against this — that he wanted to cause those results (CrimA 2325/02 *Biton v. State of Israel* [9]; CrimA 759/97 *Ilyabayev v. State of Israel* [10]; CrimA 392/91 *Schatz v. State of Israel* [11]). This analysis, according to which the requirement of intent relates

mainly to awareness of the *act itself* rather than the mental considerations that underlie it, is *prima facie* consistent with the definition of the tort as proposed in the Property Law Memorandum: 'An assault is a *conscious* use of force… against a person's body…' (s. 389 (emphasis added)). The explanatory notes state: 'The word "conscious" indicates that the section refers to awareness of the actual use of force against another person. The essence is the awareness of the act itself, rather than the question whether there was an intention to cause damage.' It therefore follows that the appellant satisfies all the elements of the tort.

(4) It is possible to compare this — to a very different case, of course — to the application of the tort of assault to the action of a doctor even though his intention is to cure and not to cause harm. The ordinary person does not regard a doctor as an 'aggressor'; the doctor does not intend to commit an assault — he intends to cure; but in so far as he acts without obtaining the patient's consent, he does commit an assault, despite his good intentions (see CA 67/66 *Bar-Chai v. Steiner* [12], at p. 232 (*per* Judge B. Cohen); Dr A. Azar & Dr I. Nirenberg, *Medical Negligence* (second edition), at p. 217; CC (Jer) 653/94 *Arbel v. Shaare Zedek* [38]). From the viewpoint of the law of torts, any contact without consent is considered an assault. In the words of Lord Chief Justice Holt in *Cole v. Turner* [49]: 'The least touching of another in anger is a battery' (see also CA 360/64 *Abutbul v. Kluger* [13], at p. 469, *per* Justice Silberg). Some authorities hold — in my opinion correctly — that the public misconception, i.e., the failure to understand the connection between the doctor's act and the legal concept of assault, was one of the main reasons for the decline in the use of the tort of assault with regard to medical treatment and the rise of negligence claims: Englard, *The Philosophy of Tort Law* (1993), at p. 162.

26. Let us return to our case. At this stage, when we are examining the elements of the tort, the question *why* the appellant intended to do the tortious act or why he wanted its consequences is irrelevant. The question of the motive for committing the act can arise if a defendant raises a defence argument, whether under s. 24 of the Torts Ordinance, or one of the general defence arguments, such as *necessity* (A. Barak, *The Law of Tort — The General Theory of Tort*, at pp. 294-301) or a *private defence* (Englard *et al.*, *The Law of Torts*, *supra*, at pp. 281-293). As a rule, this question has no place in the discussion concerning the elements of the tort. The question whether a mental illness constitutes a defence in *itself* will be considered below.

27. The conclusion that the question of motive is of no significance when considering whether the element of intent exists was expressed in a 'radical' manner in the judgment of Judge Neumann in *Yasmin v. Kahalani* [35], which was cited by Judge Amit and which we cited in para. 7 above. The essence of what he said was that 'volition is required for liability in tort, free will is not required.' This, in my opinion, is consistent with common sense and fairness to the victim *who bears no responsibility whatsoever*. By contrast, the responsibility of the mentally ill tortfeasor is problematic and requires consideration and deliberation, but it cannot be said that it is unfounded, and in my opinion there is a good reason for it.

28. (a) Before we turn to the question of whether a mental illness constitutes a defence, I should add that the word 'intent' in this context should be interpreted in accordance with the purpose of the legislation. The concept will not always be given the same interpretation even within the framework of civil law, and certainly its interpretation in civil law will be different from its interpretation in criminal law (see I. Englard, *Victims of Road Accidents Compensation* (third edition, 2005), at pp. 266-267); see also para. 25(b) above.

(b) I do not deny that 'intent' is an amorphous concept that is very hard to define. This can be seen from the difficulties in interpreting 'intent' in criminal law, according to the relevant sections in the Penal Law and their complex wording. There are those who seek to define the concept of intent without referring to the element of will, *inter alia* by means of concepts such as reason, cause or object (for a comprehensive review, see Y. Kugler, *Intent and the Foreseeability Rule in Criminal Law* (Jerusalem, 1997), at p. 469). It is possible that Judge Amit also sought to follow this path in our case, when he spoke of the new wording of the tort of assault as proposed by the Memorandum: 'An assault is a *conscious* use of force…' (s. 389, emphasis added); in my opinion, ultimately all of the considerations on this issue support the approach that we should identify whether there is volition, even if this volition does not amount to free will, and I return to the remarks of Judge Neumann in *Yasmin v. Kahalani* [35]. The appellant foresaw that something was going to happen as a result of his actions — and that something did indeed happen — and that is what he wanted at that moment. The intent that we are dealing with is therefore the same as in *Morriss v. Marsden* [47], as can be seen from the statements of the appellant himself.

(c) What, therefore, is the meaning of the requirement that the tort should be done willingly (and 'intentionally')? Can it not be said that in this case the

appellant did precisely what he wished to do? The latter question was answered in the negative by Judge Willner (p. 50), mainly following the dictionary definition of the Hebrew word כרצונך (literally, 'according to your will'): 'According to your will: as you wish, according to your desire, the decision in is your hands: "And they did to their enemies as they wished" (Esther 9, 5 [51])' (A. Even-Shoshan (1969 edition, vol. 6, at p. 2559). My opinion is different. In my opinion, the answer to this question is yes. The dictionary definition does not, in my opinion, include all the fine nuances of the law; the will of someone who acts intentionally is also his volition, as we have explained above.

On intent in Jewish Law

29. (1) I should add that even in Jewish law there is a lack of clarity in the definition of 'intent,' and a question frequently arises as to whether mere awareness is sufficient or whether a tangible element is needed, and if so, what does this involve (see Rabbi David ben Shelomo Ibn Abi Zimra (Radbaz, Spain and Safed, fifteenth-sixteenth centuries), *Responsa*, part V, 239 and part VI, 2246 [52]). Admittedly, it is an accepted rule that an insane person (*shoteh*) cannot have intent. This is true of sacrificial offerings (Rabbi Akiva Eger (Poland, eighteenth-nineteenth century), *Responsa* 64 [53]), and it is also true of ritual immersion (Rabbi Yaakov Ettlinger (Germany, nineteenth century), *Responsa Binyan Zion HaHadashot* 98 [54]) and criminal sanctions (Rabbi Yehuda Assad (Hungary, nineteenth century), *Responsa Yehuda Yaaleh*, part 1, 1 [55]). As the judgment of the trial court states, on the general question of the liability of insane persons in tort, Jewish law holds: 'A deaf person, an insane person and a minor are problematic in torts; whoever injures them is liable, but if they injure others, they are exempt' (Mishnah, *Bava Kamma*, 8, 4 [56]; Maimonides, *Hilechot Hovel uMazik (Laws of Tortfeasors)* 4, 20 [57]; Rabbi Yosef Karo, *Shulhan Aruch*, *Yoreh Deah*, 267, 8 [58]). Notwithstanding, it has been said that judges should punish deaf persons, insane persons and minors, in order to remove their harm from society (see *Talmudic Encyclopaedia*, vol. 17, 542, 'Deaf persons, insane persons and minors' [59], and the references cited there; see CrimA 549/06 *A v. State of Israel* [14]). Moreover, in cases similar to ours Rabbi Menachem HaMeiri (Provence, thirteenth-fourteenth centuries) explains: 'And if they harm others, they are exempt, even if they have recovered… since when they committed the act they were *compelled*' (*Bet HaBehira*, *Bava Kamma*, 87, 1 [60] (emphasis added)). The reason why an insane person is exempt, namely that he is not capable of forming intent and he is treated as someone acting under duress, also appears in other commentators and arbiters (Rabbi Moses Sofer

(Hungary, eighteenth-nineteenth centuries), *Respona Chasam Sofer*, *Yoreh Deah*, 317 [61]; Rabbi Yosef ben Meir Teomim (Ukraine, eighteenth century), *Pri Megadim*, *Orach Hayim*, General Introduction at the beginning of part 2 [62]; see also Y. Bazak, *The Criminal Liability of the Mentally Disabled* (second edition, 1972), at pp. 253-256).

(b) It may be asked — and naturally I am not an arbiter of Jewish law and am not making any ruling on the subject — whether it is also possible to regard these matters against the background of time and place. For example, a deaf person in Jewish law is not necessarily someone whose hearing is impaired but may be someone of subnormal intelligence (see the scope of the difficulties in this regard in the Talmudic Encyclopaedia, vol. 17, 495 *et seq*., 'Deaf person' [59] and see Prof. A. Steinberg (ed.), *Encyclopaedia of Jewish Medical Ethics*, vol. 2, 'Deaf person' [63], for a description of the deaf person in Jewish law sources as someone who is not entirely lacking in intelligence, but whose intelligence is weak and incapable of comprehension like other human beings (p. 538)). In other words, this is not exactly the deaf person of modern times. Is it possible that the same may be said of insane persons? In this regard, see also *Encyclopaedia of Jewish Medical Ethics*, vol. 6, 'Insane person' [63]. The definition of an 'insane person' is not simple (*ibid*., at pp. 421-423 [63]), and there are persons who are 'sometimes insane and sometimes sane' (*ibid*., at p. 452 [63], and see Maimonides, *Hilchot Mechira (Laws of Sale)*, 29, 5 [64]). Maimonides (*ibid*.) states the law as follows:

> 'If someone is sometimes in control of his faculties and sometimes not in control of his faculties, such as an epileptic, when he is in control of his faculties all of his acts are legally valid and benefit himself and others like any sane person, and the witnesses should examine the matter thoroughly; perhaps he did what he did at the beginning of his period of insanity or at the end of his period of insanity.'

I have not said the aforesaid in order to imply that this is what happened in our case, but to indicate the great complexity of the subject.

(c) It should also be added that 'Human beings are always responsible, and liable to pay full compensation, whether they act negligently or deliberately, whether awake or asleep, whether acting unwillingly or willingly, and even if others compelled him to cause damage…' (*Talmudic Encyclopaedia*, vol. 8, 'The human tortfeasor' [59], column 170; see also Babylonian Talmud, *Bava Kamma* 26a [65], *Sanhedrin* 72a [66], and elsewhere). This too may have ramifications for our case. The world of Jewish law also recognizes the

approach that 'we compel him, until he says that he is willing'; thus, for example, regarding burnt offering sacrifices the Bible says: 'he shall offer it willingly before the L-rd' (Leviticus 1, 3 [67]), and Rabbi Shelomoh Yitzhaki (Rashi) (France, eleventh-twelfth centuries) [68] says: 'Willingly: how is this the case? We compel him until he says that he is willing' (following the Babylonian Talmud, *Arachin* 21a [69]). Professor Nechama Leibowitz, in her book *New Studies in the Book of Leviticus*, cites various interpretations of the expression 'willingly.' Rabbi Meir Leibush ben Yehiel Michel (Malbim) (Ukraine-Romania, nineteenth century) [70] explains 'willingness' in two ways — 'the appeasement that [G-d] will be willing to forgive the sin' and the will or desire for something. Rabbi Naftali Hertz Wessely (Germany, eighteenth-nineteenth centuries) in his commentary *HaBiur* on Leviticus [71] explains *inter alia* 'that the word "willingness" in the Bible does not mean free will, but the opposite of anger…'. Rabbi Baruch Epstein (nineteenth-twentieth centuries), the author of the *Torah Temima* commentary on the Torah [72], explains the expression 'we compel him until he says that he is willing' as compelling a person to discover what is 'hidden in the recesses of his soul.' All of these sources show the complexity of the concept of willingness, which is not limited to one meaning.

Is a mental illness a defence in tort?

30. As stated above, the question *why* the appellant attacked the respondent may be significant when considering the question of what defences can apply. It is clear that had the appellant committed the act 'reasonably in order to protect himself or another against loss of life' (s. 24(1) of the Torts Ordinance), he would have a good defence. Case law has also recognized that the absence of certain defences in the Torts Ordinance does not constitute a negative arrangement, and for this reason, hypothetically, had the appellant raised another *necessity* argument, he would have a defence against the claim (CA 187/52 *Halperin v. Mayor of Tel-Aviv* [15]; CrimA 2/73 *Sela v. State of Israel* [16]). Does the appellant's argument that he committed his act *because* of a mental illness also constitute a defence?

31. As the lower courts said, in English law (which has precedence in interpreting the Ordinance — s. 1 of the Torts Ordinance; CA 711/72 *Meir v. Directors of the Jewish Agency for Israel* [17]) — there are, as we said above, three approaches on this question: (1) the approach of Lord Denning, who does not regard mental illness as a defence at all; (2) the approach of Lord Esher, according to which a uniform standard should be adopted for liability in criminal and tort law (the M'Naghten rules); (3) the intermediate approach of

Judge Stable, according to which the tortfeasor does not need to understand the moral significance of his act, but there is a need for a minimal mental element of control (i.e., it was held that someone who acts in a state of *automatism* is not liable in tort). This third approach — which was also proposed by Prof. Englard (Englard *et al.*, *The Law of Torts*, at p. 136) — seems to me the proper one: it is accepted in English law (Halsbury's Laws of England (fourth edition, 1999), vol. 45(2) 334) and in also in the case law of the Israeli courts that have considered the matter (*Yasmin v. Kahalani* [35]; CC (Hf) 751/93 *Stern v. Z.E. Gilad Security Co. Ltd* [39], *per* Judge Grill; CC (TA) 118124/01 *Jarfi v. Somech* [40], *per* Judge Kedar). There will be a defence in tort only in a case of *automatism*. This provides a balance that seeks to be fair to everyone. On the one hand, the courts are open to victims seeking compensation; on the other, someone who was in a state where he had no control whatsoever over his actions is not held to be liable.

32. This approach is also consistent with the Property Law Memorandum. Section 374 of the Memorandum proposes the following innovative provision:

> 'No person shall be liable in tort for an act if he was unable to choose between doing it and refraining from doing it, because of *a lack of control over his movements* with regard to that act. The provisions of this section shall not apply when the tortfeasor voluntarily caused himself to be in a state of lack of control as aforesaid' (emphasis added).

An exemption will therefore be given when the defendant is deprived of free choice as a result of *a lack of control* over his body movements. The following is stated in the explanatory notes:

> 'A new provision dealing with states of automatism and similar situations in which the tortfeasor has lost his freedom of choice. The wording of the first part of the section is similar to the wording of the first part of s. 34G of the Penal Law, 5737-1977.'

In other words, if we adopt the terminology of the Penal Law, with the necessary changes, the defence provided in s. 34H ('insanity'), *with its two alternatives* ((1) 'lacks any real ability to understand what he is doing or the impropriety in his act'; (2) 'lacks any real ability… to refrain from committing the act'), does not constitute a defence in tort; only compliance with the conditions provided in s. 34G ('lack of control') constitutes a defence in tort. This proposal helps us to interpret the existing law, in the manner described above.

33. (1) I should also say that from the viewpoint of tort law it makes no difference whether the lack of control is the result of a physical illness or a mental illness.

(2) Criminal law makes a distinction between a lack of control that originates in a mental illness and a lack of control that originates in a physical illness or an external factor, but this is because an insane automatism is included in the defence provided in s. 34H of the Penal Law (CrimA 382/75 *Hamiss v. State of Israel* [18]; Y. Kedmi, *On Criminal Law — The Penal Law* (first part, 2004), at p. 473). In civil law, which as we have said only contains a defence of a lack of control, the question of its origin is of no significance. The distinction between 'sane automatism' and 'insane automatism' is not simple from either a scientific or a legal viewpoint: assuming that the level of lack of control is identical, why should a distinction be made between a lack of control originating in a mental illness and a lack of control originating in a physical defect? Moreover, it would appear that today *there is no agreed scientific distinction between sane automatism and insane automatism* as there was in the past (see H.J.F. Korrell, 'The Liability of Mentally Disabled Tort Defendants,' 19 *Law & Psychol. Rev.* 1 (1995), and O.C. Dark, 'Tort Liability and the "Unquiet Mind": A Proposal to Incorporate Mental Disabilities into the Standard of Care,' 30 *T. Marshall L. Rev.* 169 (2004); for an example of this relationship between body and mind, see A. Bleich, Z. Solomon, *Mental Disability: Medical, Research, Social, Legal and Rehabilitative Aspects* (2002), at pp. 296-316). Today the distinction between body and mind has become unclear, and it is possible to regard certain illnesses, which used to be regarded as mental illnesses, as defects or impairments of brain functioning, i.e., organic defects.

34. I therefore propose to my colleagues that, while *insanity* (within the meaning of the term in the Penal Law) does not constitute a defence in tort law, a *lack of control* over the body's movements does constitute a defence, irrespective of whether it originates in a mental illness, a physical illness or a physical coercion by another person.

On opposing considerations

35. The decision is not a simple one. In view of the legal finding in the criminal sphere, upon which we have relied, that the mental illness from which the appellant suffered deprived him of the possibility of refraining from committing the act (and it should not be forgotten that on the same occasion the appellant also murdered his own infant daughter), it is not easy to hold that

he is 'at fault' (s. 64 of the Torts Ordinance) and that he is liable to pay compensation:

> 'Undoubtedly there is some appearance of hardship, even of injustice, in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the insufferable calamity of mental obscurity, an obligation to observe the same care and caution respecting the rights of others that the law demands of one in full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy…' (*Shapiro v. Tchernowitz* [43], citing *Cooley on Torts*).

36. Judges Amit (pp. 34-38) and Elron (p. 70) considered three main criteria that have been proposed in foreign case law (see *Breunig v. American Family Insurance Company* [44]) in favour of imposing liability in tort on mentally ill persons:

> '(1) Where an innocent person has caused damage to an innocent person, the person who caused the damage should be liable for the damage. (2) To increase the supervision exercised by persons responsible for mentally ill persons… (3) The concern that the claim will be misused' (p. 70).

I will not deny that each of these arguments has been met by counter arguments that support the opinion of Judge Willner. But in my opinion these three arguments have validity.

37. The second consideration mentioned above, namely increasing the standard of supervision required of persons responsible for mentally ill persons, is relevant both to the subject in general *and to our specific case*, and I shall therefore address this first. Indeed, a main reason for imposing liability in tort on mentally ill persons is to create an incentive for increased supervision and for the adoption of precautionary measures both by the mentally ill person and by those around him. This consideration justifies the imposition of liability in cases where there were prior indications and it was possible to take precautionary measures before the event. In *Breunig v. American Family Insurance Company* [44] it was said:

> 'We think the statement that insanity is no defense is too broad when it is applied to a negligence case where the driver is suddenly overcome without forewarning by a mental disability or disorder which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances.

> These are rare cases indeed, but their rarity is no reason for overlooking their existence and the justification which is the basis of the whole doctrine of liability for negligence, i.e., that it is unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapability was unknown to him prior to the accident.'

In that case it was held that the driver (the defendant) had forewarning, which required her to adopt precautions and to refrain from driving. The court expressly said that 'The cases holding an insane person liable for his torts have generally dealt with pre-existing insanity of a permanent nature.' This is also how Landes & Posner analyzed the judgment:

> 'The difference between *Breunig* and the usual insanity case is that when insanity comes on and causes injury without warning, there is no opportunity to avoid the injury by restraining the insane person. In *Breunig*, however, the plaintiff (*sic*) was in a position to alter her activity level before the accident occurred' (W.M. Landes & R.A. Posner, *The Economic Structure of Tort Law* (1987), at p. 130).

38. Landes and Posner also proceed to analyze the case with regard to torts that require intent. According to them, there is no justification for a sweeping defence of insanity in every case of a mental illness, but only in cases where the insanity 'is of such a nature as to prevent the injurer from forming the requisite intent' (p. 183). After proposing a possible economic analysis supporting this determination, according to their general approach to the law, the authors write:

> 'This analysis is incomplete, however, because it neglects the effect of liability in giving an incentive to the custodians and beneficiaries of the insane person's wealth to prevent him from committing torts. *This is the traditional rationale for making the insane liable*. An ingenious accommodation is suggested by the forewarning cases such as *Breunig… lack of forewarning shows that liability would have no deterrent effect* either on the insane person himself or on those who have an interest in conserving his wealth. Although *Breunig* is an accident case rather than an intentional tort case, *from an economic standpoint the question of the liability of the insane has little to do with whether the insane person is charged with an intentional or an unintentional tort*' (p. 183, emphasis added).

Thus we see that approaches that seek to impose liability in tort on mentally ill persons, and even approaches that do not give significant weight to fault, hold that it is not effective or fair to impose liability on someone who could not have taken any precautions to prevent the harm. On the other hand, it is right, effective and just to impose liability in cases where it was possible to take precautions before the event. This distinction brings the question closer to the classic tort of negligence, and it is possible to apply it with regard to parties who owe a duty of care relating to mentally ill persons.

The 'between two innocents justification'

39. Let us now turn to consider the first consideration that was proposed, which I shall express as follows: 'Where one innocent harms another, the one who caused the harm should pay for it.' Even if we assume that the appellant is 'innocent,' and this is not my opinion, this proposition should be considered. Ultimately the three judges in the District Court addressed what is referred to in the literature as 'The between two innocents justification' (Judge Amit, at p. 34; Judge Willner, at p. 53; Judge Elron, at p. 86), with reference to both the economic position of mentally ill persons in general (Judge Willner), and the position of the appellant in the case before us (Judge Elron). Admittedly, in Israeli law, as in common law generally, liability in tort is based on *fault*; a doctor who has not been negligent is not liable in tort even though he is the *cause* of the harm (s. 35 of the Torts Ordinance), and the same is true with regard to someone who makes a false representation in the belief that he is speaking the truth, or without any intent to mislead (s. 56 of the Torts Ordinance), or with regard to a person who carries out an assault without intent (s. 24 of the Torts Ordinance), or with regard to a child who causes harm (s. 9(a) of the Torts Ordinance).

40. The 'between two innocents' argument, especially when it is used to impose liability on mentally ill persons, has been criticized for many decades on the ground that it is incompatible with a legal system in which the law of torts is based on fault (F.H. Bohlen, 'Liability in Tort of Infants and Insane Persons,' 23 *Mich. L. Rev.* 9 (1924), at p. 17; R.M. Ague, 'The Liability of Insane Persons in Tort Actions,' 60 *Dick. L. Rev*. 211 (1956) at p. 221; H.J.F. Korrell, 'The Liability of Mentally Disabled Tort Defendants,' 19 *Law & Psychol. Rev.* 1 (1995)). Judge Amit held that 'the damage does not lie at a point equidistant between the appellant (the tortfeasor) and the respondent (the victim), but it lies closer to the appellant, as the person who caused the respondent's damage' (p. 34). Judge Amit also cited the remarks of Justice Berinson in FH 12/63 *Leon v. Ringer* [19]:

> 'This should be weighed in the scales of justice, not merely from the viewpoint of the tortfeasor, but also from the viewpoint of the victim, and then it is very possible that the scales will actually tip in favour of the victim. It is he who has been injured and someone should be held responsible. Is there any justification for transferring the burden from the shoulders of the tortfeasor, *who committed the tortious act*, to the shoulders of the victim, who is entirely innocent… Even from a social viewpoint, it is more appropriate that the tortfeasor should be fully liable for the damage, since he, unlike the victim, is usually insured. In this way the damage is shouldered by the public and not by the individual' (*Leon v. Ringer* [19], at p. 713; emphasis added).

Judge Amit also cited FH 15/88 *Melech v. Kornhauser* [20]. These remarks of Justice Berinson make sense to me and I agree with them; in my opinion, this is the main argument that supports imposing liability in our case. As Justice Haim Cohn said in *Justice and Law*, at p. 98: '… "saving the world" begins with "small steps".' Indeed, in the two cases cited above it was first proved that the negligent tortfeasor was *at fault*, and the question of the scope of liability only arose afterwards; in other words, in both cases it was expressly held that the fact that the tortfeasor was *at fault* justified imposing on him the burden of proof (*Melech v. Kornhauser* [20]), and the 'eggshell skull' damage (*Leon v. Ringer* [19]), and therefore these cases do not contain a proof that liability should be imposed without fault (see also CA 6216/03 *Nasser v. M.H.M. Ltd* [21]). But it cannot be denied that the 'between two innocents' argument reflects a *basic sense of justice* that has *interpretive* weight. This argument has been accepted and continues to be accepted in courts in the United States. Indeed, Judge Willner referred to National Insurance figures that show that the economic position of mentally ill persons is very difficult, and she expressed a concern that imposing liability in tort will make their economic position even worse, and even result in them being kept apart from society (see E.J. Goldstein, 'Asking the Impossible: The Negligence Liability of the Mentally Ill,' 12 *J. Contemp. Health L. & Pol'y* 67 (1995), at p. 85; Landes & Posner, 'The Economic Structure of Tort Law,' *supra*, at pp. 128-130). Moreover, Landes and Posner argue that in a case where the mentally ill person cannot be deterred, it is *more effective* to impose the damage on the victim, since he is able to minimize it both by means of insurance and by adopting other measures (p. 183). On the other hand, legal literature has also raised an argument that holding mentally ill persons liable will actually further their integration in society, *inter alia* because those who

come in contact with them and are injured by them are guaranteed compensation (see S.I. Splane, 'Tort Liability of the Mentally Ill in Negligence Actions,' 93 *Yale L. J.* 153 (1983)). Personally, I am of the opinion that the scales are tipped in favour of accepting the 'between two innocents' argument, within the scope of legal policy. I doubt — and in this I must differ from Judge Willner — whether imposing liability will significantly harm the community of mentally ill persons and their integration in society, which is highly desirable. I would like to believe that this is not the case; we need to fight the stigmas and prejudices of society that isolate mentally and physically ill persons; I had the opportunity of addressing this in the context of establishing therapeutic communities for drugs victims, when I was cabinet secretary and also served as the chairman of the council of the Israel Anti-Drug Authority. It was not easy to overcome the prejudices of towns near which therapeutic communities were established, but it transpired that it was possible even if people need to be persuaded. But we are not dealing with this in the present case. Tort cases are thankfully few, and ultimately the scales are tipped in favour of the innocent victim; and in so far as insurance is concerned, it can be assumed that among both potential tortfeasors and potential victims there are some who are capable of buying insurance and others that have relatives who are capable of buying insurance for them. Finally I will point out that a proper framework might be found in s. 829 of the German Civil Code that was cited in the opinion of Judge Elron ('Duty to Compensate for Equitable Reasons'); I believe that such an arrangement requires a legislative amendment, and this ought to be considered.

Misuse of the argument

41. The third argument that was presented in favour of imposing liability in tort on mentally ill persons was 'the concern that the claim of insanity would be misused'; this concern arises *inter alia* from the 'concern — or perhaps the fear — that psychiatry is a less precise science than other fields of medicine' (Judge Amit, at p. 37). It will be remembered that Judge Amit disagreed with Prof. Englard's approach and argued that even a defendant who acts while in a state of automatism deriving from a mental illness should not be exempt from liability in tort. According to Judge Amit, we should adopt the distinction made by Justice Agranat between 'insane automatism' and 'sane automatism' (*Hamiss v. State of Israel* [18], at pp. 734-735). This distinction, according to which only persons suffering from physical illnesses are exempt from liability, makes it unnecessary for the court to consider the intricacies of psychiatry. I think that this is a problematic distinction. It is not superfluous to point out that both Judge Willner and Judge Elron disagreed with the distinction

between a lack of control arising from a physical illness and a lack of control arising from a mental illness.

42. I do not accept the argument that imposing liability on mentally ill persons means that while a tortfeasor with a physical disability will be judged according the standard of the 'reasonable disabled person' (see *Stern v. Z.E. Gilad Security Co. Ltd* [39], at p. 331; CA 5604/94 *Hamed v. State of Israel* [22], at p. 507, *per* President Barak), i.e., according to his disability, the mentally ill person will be judged according to the general standard of the 'reasonable person' and his special status will thereby be ignored (P.J. Kelley, 'Infancy, Insanity and Infirmity in the Law of Torts,' 48 *Am. J. Juris.* 179 (2003); *Shapiro v. Tchernowitz* [43]). The picture, as we have seen, is more complex.

43. One of the policy considerations is the difficulty in proving the mental illness:

> 'One exception to the average-man rule that the law has generally refused to recognize is insanity. Considerations both of information costs and of activity level support this result. Proof of insanity is difficult; even more difficult is establishing the relationship between insanity and care' (Landes & Posner, *The Economic Structure of Tort Law*, at pp. 127-128).

Indeed, proving mental illness, even today, is in many cases more difficult than proving a physical defect. There are many borderline cases involving different kinds of mental disturbance, but I would not place the emphasis on 'information costs' as a justification for imposing liability and fault, and ultimately I would not rely specifically on this argument. In my opinion, the 'between two innocents' argument is pivotal in a legal system where the appellant is 'innocent.' We are speaking of a judicial policy decision, of a sense of justice. The law seeks to compensate a victim who is innocent of all fault, and to restore him, in so far as possible, to his position at the time of the assault — at least from an economic viewpoint — since his body may have been injured in such a way that it will never be fully healed.

44. Were the issue a simple one, we would not spill so much ink over it. Ultimately it seems to be right and proper that we adopt the assumption 'that the purpose of the law of torts is to grant the injured person a remedy for the damage that he suffered, and the purpose of the law of compensation is, therefore, to negate the consequences of the tortious act' (A. Barak, 'Assessing Compensation for Personal Injury,' 9 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 243 (1983), at p. 248). This purpose, and the *principle of fairness*

that underlies it, lead to the aforesaid conclusion that *only a lack of control over the movements of the body*, whatever its cause, constitutes a defence in tort. In the case before us, the appellant does not fall within the scope of this definition, and therefore I am of the opinion that the judgment of the District Court should be allowed to stand.

45. I have also found no reason to intervene in the quantum of damages. Appeal courts do not tend to intervene in these findings if they do not deviate from what is customary and reasonable, which is the position in this case (CA 4733/92 *Haifa Chemicals Ltd v. Hawa* [23]; CA 418/74 *Amamit Insurance Co. Ltd v. Weinberger* [24]). I also do not think that the request to reduce the compensation on the grounds of 'subjective fault' should be accepted. If the approach that I have proposed is accepted, the appellant does have liability in tort, and the amount of the compensation should be determined according to the damage that the respondent suffered.

46. If my opinion is accepted, the appeal will not be allowed. In the circumstances, we are not making an order for costs.

Justice M. Naor

I agree. I am also of the opinion that ultimately, in the absence of an unequivocal statutory provision, the question is one of legal policy. Indeed, persons suffering from a mental illness deserve our sympathy and it is very important to integrate them into society (see and cf. CA 8797/99 *Anderman v. District Appeal Committee* [25]). But in choosing between the interest of the mentally ill person and the interest of an innocent victim, I too am of the opinion that the latter prevails. Recognizing liability will also result in relatives taking better care of mental patients.

Justice E. Arbel

The question in the case before us is the liability of a mentally ill person in tort generally, and with regard to the tort of assault in particular.

1. I have read the opinion of my colleague Justice Rubinstein, in which he has thoroughly considered all the different aspects of the question. In the factual sphere, my colleague assumed that at the time of the act the appellant controlled the movements of his body, but lacked any capacity to refrain from doing the act. In the legal sphere he held that all the elements of the tort of assault are satisfied in this case, and this includes the element of intent, which he interpreted as volition but not as free will. Of the three approaches

expressed in English law with regard to the question of whether a mentally ill person who commits a tort as a result of his illness is entitled to a defence, he adopted the intermediate approach of Judge Stable, which was also proposed by Professor Englard, according to which a defendant will not be held liable only when he is deprived of free will as a result of a lack of control over the movements of his body. In view of the aforesaid, my colleague proposed that the appeal should be denied, and that the appellant should be held liable in tort to compensate the respondent.

Let me first say that ultimately I agree with the outcome in my colleague's opinion and with his assumption that, as a rule, a mental illness in itself does not give rise to a sweeping defence against liability in tort. This conclusion is founded on the purpose of the law of torts and the difference between the law of torts and criminal law. Notwithstanding, I would like to suggest a possibility that there may be cases in which a tortfeasor who is mentally ill will be exempt from paying compensation on account of various considerations of justice. Let me explain the main points of my position.

2. The question of the liability of a mentally ill person in tort is a delicate and complex question. It involves legal principles and questions of liability in tort, which are frequently discussed but remain unresolved until today. I should say at the outset that in my opinion the question ought to be resolved by the legislature, and I will discuss this later in my remarks. In any case, now that the matter has come before us, we have no alternative but to decide it on the basis of the relevant policy considerations, taking into account the purpose of existing legislation and particularly the circumstances of the case before us.

3. In *White v. White* [45], Lord Denning discussed the development of the law of torts, and how the focus of the issue of liability was transferred from the question of fault to the question of who ought to be liable for the damage. In that case Lord Denning found that the idea of compensation, rather than the idea of fault, is what lies at the heart of liability in tort, and in view of this, he held that a person will be liable in tort even if as a result of a mental illness he did not know what he was doing or whether it was morally wrong:

> 'In the case of torts such as trespass and assault, it is .... settled that a person of unsound mind is responsible for wrongful conduct committed by him before he was known by the injured person to be of unsound mind, even though it has since become apparent that such conduct was influenced by mental disease which was unrecognised at the time: and this is so, even if the mental disease was such that he did not know what he was doing

> or that what he was doing was wrong: because the civil courts are concerned, not to punish him, but to give redress to the person he has injured...' (*White v. White* [45], at pp. 58-59).

This approach makes it possible to impose liability in torts on the basis of the principle of compensation, even without considering the question of fault, and it is a broader approach that that of my colleague, who, as I have said, adopted the intermediate approach of Judge Stable (see also I. Englard, A. Barak, M. Cheshin, *The Law of Torts — General Theory of Torts* (second edition, G. Tedeschi ed.. 1977), at p. 133 (hereafter: Englard *et al.*, *The Law of Torts*)).

I am aware that a sweeping determination that the question of the tortfeasor's fault should be ignored, which is Lord Denning's approach, is inconsistent with the Israeli Torts Ordinance [New Version], 5728-1968, both in view of the requirement of fault that appears in chapter four of the Torts Ordinance and in view of the disparity between tortfeasors who cause damage as a result of involuntary acts, who are liable in tort, and tortfeasors who cause damage as a result of necessity or *force majeure*, who have a defence in tort (see Englard *et al.*, *The Law of Torts*, at p. 137). At the same time, with regard to liability in tort that is imposed on mentally ill persons, I tend to agree with Lord Denning, in view of the conceptual proposition underlying his approach that the focus should be moved from the question of fault to the question of compensating the injured party. This idea, as we shall see below, is also evident in the Israeli law of torts, as developed in legislation, case law and legal literature. Let me explain.

4. Even though there is an assortment of purposes underlying the law of torts (deterrence, punishment, dispensing justice and spreading the loss), it is clear that precedence is given — and in my opinion rightly so — to the purpose of compensating the injured party and restoring him to the position he was in prior to the tort that was perpetrated against him. The following remarks are most apposite in this regard:

> '… this assumption is like a golden thread in case law — that the purpose of the law of torts is to grant the injured person a remedy for the damage that he suffered, and the purpose of the law of compensation is, therefore, to negate the consequences of the tortious act, by restoring the injured person, in so far as it is possible to do so, to the same position that he would have been in at the time of the tortious act, had it not been for the tortious act. Compensation therefore seeks to achieve a remedial purpose' (A.

Barak, 'Assessing Compensation for Personal Injury,' 9 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 243 (1983), at p. 248).

The purpose of the law of torts is therefore to give the injured party a remedy for the damage that he suffered, and compensation is intended to negate the consequences of the tortious act. The basis for this approach is found in the understanding that communal life in human society makes individuals mutually interdependent and requires them to restrain the pursuit of their own interests by showing consideration for the interests of others. This restraint finds expression in legal arrangements that determine the limits of what is permissible and what prohibited; such is the case in criminal law, and it is also the case in constitutional law and the law of torts. In so far as the law of torts is concerned, when the prohibited act amounts to a tort, the 'classic' response is to impose liability on the tortfeasor to pay compensation to the injured party. The purpose of the aforesaid obligation is to compensate the injured party for the damage that he suffered by restoring him to his original position in financial terms (see, for example, CA 357/80 *Naim v. Barda* [26], at p. 766; FH 15/88 *Melech v. Kornhauser* [20]; CA 2034/98 *Amin v. Amin* [27], at p. 85 {631}; CA 8673/02 *Forman v. Gil* [28], at p. 381; CA 11152/04 *Pardo v. Migdal Insurance Co. Ltd* [29]; Englard *et al.*, *The Law of Torts*, at p. 25).

5. It is not superfluous to point out that the 'remedial' purpose reflects, *inter alia*, the distinction between the law of torts and criminal law. The law of torts concerns the relationship between one individual and another, which is based on an assumption of equality, and its main purpose, as aforesaid, is to compensate the injured party and restore him to his original position. By contrast, criminal law concerns the relationship between the sovereign state and the individual, and the purposes of the criminal prohibitions are to give warning of the danger that they present to the values that are essential for the existence and proper development of society, to deter persons of limited social consciousness from violating them, and to lay down the criteria for society's response to any failure to observe them. A criminal offence *de facto* constitutes a *conscious conflict* between the individual and organized society (see S.Z. Feller, *Criminal Law* (vol. 1, 1984), at pp. 62-63). Only when a person has criminal capacity, i.e., only when he is capable of comprehending the significance of his conduct and when he knows how to choose between taking action and refraining from taking action, is it possible to speak of a conscious conflict between him and society, and only then is he liable for criminal sanctions (see Feller, *Criminal Law*, at p. 63). It follows that criminal law inherently and essentially focuses on the defendant, and he is also the

subject of the main sentencing considerations: deterrence, punishment and rehabilitation. There is no sense in convicting someone of committing a criminal offence when he could not refrain from committing the criminal act, or when he did not understand what he was doing or that his conduct was wrong, since when the defendant has no ability to choose between different ways of acting and between different objectives, his act does not reflect a readiness to violate the social value that the law is intended to protect (see, for example, CrimA 118/53 *Mandelbrot v. Attorney-General* [3]; CrimA 186/55 *Mizan v. Attorney-General* [30]; CrimA 2947/00 *Meir v. State of Israel* [31], at p. 643; Y. Bazak, *The Criminal Liability of the Mentally Disabled* (third edition, 1985), at p. 11)). Against this background, we can understand the provision of s. 34H of the Penal Law, 5737-1977, which exempts a mentally ill person from criminal liability.

There is a rule that any balance between values reflects the context in which it is made, and when the context changes, so too does the actual balance (see LCA 5768/94 *ASHIR Import, Manufacture and Distribution v. Forum Accessories and Consumables Ltd* [32], at p. 451). Thus, in so far as the law of torts is concerned, the different context requires a different balance, in which the emphasis is placed, as stated above, on the injured party and on the damage that was caused to him, while the question of the tortfeasor's position, as well as his objectives and motives, is secondary and incidental, and does not lie at the heart of the case.

Moreover, criminal law may lead to the defendant being sent to prison, a consequence that no one will dispute is very serious. By contrast, in the law of torts the nature of the remedy is merely economic. Although this is likely to harm a person's property, clearly the harm is less serious than the harm caused by depriving someone of his liberty. The court should therefore bear in mind the disgrace inherent in a criminal conviction, which is not necessarily shared by someone who is found liable in tort. The aforesaid consequences mean that greater caution needs to be taken in a criminal trial with regard to the rights of the defendant. But the sweeping exemption from criminal liability granted to mentally ill persons, which is derived from this caution, is not essential in tort law.

6. As we have said, the main purpose of the law of torts — as distinct from the criminal law — is to ensure that, as a rule and subject to the conditions stipulated by statute, the tortfeasor will compensate the injured person for the damage that he caused him. Legislation and case law have recognized exceptions to this rule and, on the basis of various rationales, have

determined cases in which the victim will not be compensated for the damage that he suffered. Thus, for example, a minor who has not yet reached the age of 12 is exempt from liability in tort (s. 9 of the Torts Ordinance). The limits and scope of these exceptions are determined in the light of the rule that requires the payment of compensation to the injured party for the damage that he suffered. The following remarks are apposite:

> 'When we are speaking of borderline cases, which may, according to one construction or another, be determined in either direction, it will be right, in my opinion, to hold that *within the framework of the "margin of reasonableness" of the various legal constructions we should choose the construction and the legal solution that give the victim a complete remedy for the damage that he suffered, rather than the construction that leaves the victim without compensation, even if only in part*' (*Melech v. Kornhauser* [20], at p. 96; emphasis added).

This guideline requires us to adopt a strict interpretation with regard to defences that may be available to the tortfeasor. In our case, a strict interpretation of this kind may lead to the conclusion that a mental illness does not necessarily provide an absolute defence to being liable to pay compensation in tort, as my colleague Justice Rubinstein has indeed held. It should be emphasized that placing the burden of compensation on the shoulders of the mentally ill person does not mean that he was morally at fault for committing the act. That is a question for criminal law. We, however, are concerned with the law of torts, which focuses on the question of the injured party being compensated by the person who caused him damage.

7. This conclusion — that liability should be imposed on mentally ill persons — is also supported by additional considerations, which were addressed in my colleague's opinion and in the judgments of the Magistrates Court and the District Court that were given in this case. Thus, for example, it has been held that where one innocent person causes damage to another, the one who causes the damage should be liable for it. An additional factor that tips the scales in favour of imposing liability on mentally ill tortfeasors is the concern that the public will not accept the proposition that mentally ill persons should have a sweeping exemption from liability in tort, which may result in a loss of public confidence in the legal system. Moreover, the courts have discussed the difficulty in proving mental illness, and they have held that imposing liability in tort on mentally ill tortfeasors will prevent people who have caused damage trying to have themselves wrongfully included within the

definition of mentally ill persons. Moreover, there are some who regard imposing liability as aforesaid as an incentive to families and closely related persons to increase the supervision and care of mentally ill persons, in so far as this is required and circumstances allow. This has been discussed at length, and I agree with the approach underlying this and the main considerations that support it.

8. In my opinion, the purpose of the law of torts necessitates imposing tortious liability on a mentally ill person, even if the tort was committed as a result of his illness, and even if it is proved that he could not have refrained from doing the act. Notwithstanding, I do not rule out a decision according to which, on the basis of various considerations of justice, there will be certain cases in which it will be right to exempt a mentally ill tortfeasor from paying compensation, out of a sincere concern for the community of mentally ill persons and in view of the importance with which I regard their integration into the community (see and cf. CA 8163/05 *Hadar Insurance Co. Ltd v. A* [33]; A. Porat, 'The Law of Torts: the Tort of Negligence According to the Case Law of the Supreme Court from a Theoretical Perspective,' *Israel 5756 Law Annual* 373 (1996), at p. 391; regarding the emphasis being placed on considerations of justice, see, for example, ss. 827-829 of the German Civil Code; s. 54 of the Swiss Federal Code of Obligations; and s. 489-2 of the French Civil Code; it should be noted that the premise is that there is an exemption from tortious liability). Thus, for example, granting a mentally ill tortfeasor an exemption from paying compensation should, in my opinion, be considered when it has been proved that the injured party can be compensated by a third party. If, after the mentally ill person committed a tort, it transpires that it was possible to take steps to prevent the tort, but these were not taken, it is possible that one of the parties who was liable to take those steps may be found liable to compensate the injured party on the grounds of negligence (see, for example, CA 350/77 *Kitan Ltd v. Weiss* [34]; CC (Jer) 8636/99 *Gordon v. State of Israel* [40]), and the mentally ill tortfeasor may be granted a corresponding exemption from such liability.

It should be noted that where considerations of justice support exempting a mentally ill tortfeasor from the duty to compensate the injured party, this does not need to be a complete exemption. The court should consider a possibility of a partial or reduced liability to pay compensation, where the amount of the reduction will be determined according to the circumstances of the concrete case and the degree of control that the tortfeasor had over his actions, as shown by the professional opinions that will be submitted. In any case, it does not appear that our case falls within the scope of such cases.

I should add that it is possible to examine various possibilities of financing compensation for victims, in those cases where the mentally ill tortfeasor is not liable to pay any compensation at all or is liable to pay only partial compensation. Thus it is possible to consider establishing a national compensation fund that will shoulder the burden of compensating victims in such cases. I would point out that it is well-known that national compensation funds have been recognized by the legislature in various spheres. Thus, for example, a fund was established under the Road Accident Victims Compensation Law, 5735-1975, for victims of road accidents. The establishment of a compensation fund as aforesaid raises many questions, including the method of determining entitlement to receive payment from the fund, and the way in which the fund will be financed. In any case, if and when a decision is made to introduce a compensation mechanism in this matter, it may be assumed that a thorough debate of the issue will be held in order to examine the various issues that will arise and consider the relevant ramifications and the difficulties posed by each option.

9. As I have said, I support the result in Justice Rubinstein's opinion, according to which the appellant is liable in tort for his actions. Notwithstanding, I should point out that my colleague's opinion raises certain legal questions that have not, in my opinion, been resolved. Thus, I have not found any justification for the distinction, which has also been adopted in s. 374 of the Property Law Memorandum, 5766-2006 (hereafter: the Memorandum), which provides that 'while insanity (within the meaning of the term in the Penal Law) does not constitute a defence in tort law, a lack of control of the body's movements does constitute a defence' (para. 34 of Justice Rubinstein's opinion). This approach *de facto* adopts the approach of Justice Stable in *Morriss v. Marsden* [47], according to which liability in tort requires a minimal mental element of control, which Prof. Englard interpreted as 'the mental act by means of which a person makes himself the cause of his conduct' (see Englard *et al.*, *The Law of Torts*, at pp. 134-138). I have found no sufficient rational, ethical or social justification for distinguishing between someone who acts without any control over his body movements, who is entitled to a defence, and a mentally ill person who acts in consequence of his illness, who is not entitled to such a defence, and for distinguishing between 'sane' automatism ('automatism that deprives a person of control') and 'insane' automatism ('automatism that deprive a person of will'). In both cases a person is deprived of the ability to refrain from committing the act (see in this regard CrimA 382/75 *Hamiss v. State of Israel* [18]; *Mandelbrot v. Attorney-General* [3], at p. 298 {137-138). Cancelling the distinction between

'sane' automatism and 'insane' automatism *prima facie* indicates a need to compare the laws relating to each. In any case, I do not think that this difficulty undermines the result of my colleague's opinion, since in my opinion there is in any case a basis for finding the appellant liable in tort. I therefore leave this question to be considered at a later date.

10. Before closing, I would like to point out that, as I said above, in view of the importance of the matter and in view of the lack of clarity on this subject, I am of the opinion that the question before us is a matter that should be addressed by the legislature. The legislature's silence on this matter is particularly notable in view of the exemption from liability given to mentally ill persons in the criminal sphere (s. 34H of the Penal Law), as well as in view of the exemption from liability in tort given to minors (s. 9 of the Torts Ordinance). Much has been written in judgments of the lower courts on the legislature's silence with regard to the question of the liability of mentally ill persons in torts: does this silence constitute a negative arrangement or is it a lacuna? There is no need to discuss the matter further. The issue has been addressed in the Memorandum (see ss. 374 and 389), but I am of the opinion as aforesaid that it involves certain difficulties. The question of the liability of mentally ill persons in tort is a complex legal question, and it touches upon certain disciplines that are outside the law, such as medicine and the social sciences. Formulating a policy on this question requires a clarification and discussion of the relevant issues after hearing the appropriate professionals, including experts in medicine, education, social science and law, and any other persons who may be relevant. I am sure that this work was done before the Memorandum was prepared, and it may be assumed and hoped that the matter will be considered in depth once again after the final draft is tabled in the Knesset.

Appeal denied.

22 Kislev 5768.

2 December 2007.