CA 754/05

1. Levana Levy
2. Nissan Levy

v.

Shaarei Tzedek Medical Centre

CA 759/05

Shaarei Tzedek Medical Centre

v.

1. Levana Levy
2. Nissan Levy

The Supreme Court sitting as the Court of Civil Appeals
[5 June 2007]
Before Vice-President E. Rivlin and Justices S. Joubran, E. Hayut

Appeal of the judgment of the Jerusalem District Court (Justice I. Inbar) on 5 December 2004 in CC 4148/02.

Facts: The first appellant in CA 754/05 ('the mother') went to give birth at Shaare Zedek Medical Centre ('the hospital'). The foetus was monitored and the results were satisfactory. Because the birth was progressing slowly, the midwife asked the mother to go for a walk. When she returned three and a half hours later, it was discovered that the foetus had died in the mother's womb. The appellants sued the hospital. The trial court found the hospital liable in negligence. It denied the claim for the loss of the foetus's future earnings on the ground that the foetus never acquired the legal capacity to sue since it was not born alive. Therefore, the parents could not sue on its behalf. On the main issue of compensation for the emotional suffering experienced by the appellants as a result of the hospital's negligence, the trial court found that the mother was entitled to compensation as a main victim of the hospital's negligence, but the father was not entitled to compensation under the rule laid down in *Alsuha v. Estate of Dahan* [1], since he was a secondary victim of the hospital's negligence, and his emotional suffering did not amount to a mental illness or disturbance.
The hospital (in CA 759/05) appealed the finding of liability and the compensation awarded to the mother. The parents (in CA 754/05) appealed the denial of

compensation for the foetus's lost years of earnings, the denial of compensation for the father's emotional suffering, and the amount of damages awarded.

Held: By not making it clear to the mother that she was required to return for another examination within two hours, in accordance with the guidelines of the Ministry of Health, the hospital was liable for the death of the foetus, since it could not prove that the foetus died within the first two hours after sending the mother away for a walk.
When a foetus dies in its mother's womb, no one has a cause of action to sue for the loss of the foetus's future earnings.
(Majority opinion — Vice-President Rivlin, Justice Joubran) In terms of emotional suffering, the mother's case was on the borderline between main victims and secondary victims. The father was a secondary victim. But under the rule laid down in *Alsuha v. Estate of Dahan* [1], a degree of flexibility was recognized in 'clear and difficult cases,' which allowed the court to award compensation for emotional suffering even in the absence of mental illness or disturbance. The father was therefore entitled to compensation for his emotional suffering in addition to the compensation awarded to the mother.
(Minority opinion — Justice Hayut) Both parents were direct victims of the hospital's negligence, since they both had a direct emotional involvement in their child's birth. Therefore they were entitled to damages for their emotional suffering without resorting to the rule in *Alsuha v. Estate of Dahan* [1].

Appeal CA 754/05 allowed in part. Appeal CA 759/05 denied.

Legislation cited:
Legal Capacity and Guardianship Law, 5722-1962, s. 1.
National Health Insurance Law, 5754-1994.
Road Accident Victims Compensation Law, 5735-1975.
Women's Employment Law, 5714-1954, s. 6(h)(1).
Women's Equal Rights Law, 5711-1951, s. 3.

Israeli Supreme Court cases cited:
[1] LCA 444/87 *Alsuha v. Estate of Dahan* [1990] IsrSC 44(3) 397.
[2] CA 9328/02 *Meir v. Laor* (unreported decision of 22 April 2004).
[3] CA 6696/00 *Afula Central Hospital v. Pinto* [2002] (3) TakSC 2648.
[4] LCA 8925/04 *Solel Boneh Building and Infrastructure Ltd v. Estate of Alhamid* [2006] (1) TakSC 2609; **[2006] (1) IsrLR 201**.
[5] CA 140/00 *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [2004] IsrSC 58(4) 486; **[2004] IsrLR 101**.
[6] CA 2935/98 *Dariz v. Ararat Insurance Co. Ltd* [1999] (3) TakSC 1253.

[7] CA 642/89 *Estate of Meir Schneider v. Haifa Municipality* [2002] IsrSC 56(1) 470.
[8] CA 3798/95 *HaSneh Israeli Insurance Co. Ltd v. Hattib* [1995] IsrSC 49(5) 651.
[9] LCA 5803/95 *Zion v. Tzach* [1997] IsrSC 51(2) 267.
[10] CA 4446/90 *Eliyahu Insurance Co. Ltd v. Barnea* (unreported).
[11] CA 7836/95 *General Federation Medical Fund v. Estate of Keren Tami* [1998] IsrSC 52(3) 199.
[12] CA 6431/96 *Bar-Zeev v. Jumaa* [1998] IsrSC 52(3) 557.
[13] CA 6720/99 *Parpara v. Goldo* [2005] (3) TakSC 2525.
[14] CA 5664/98 *Kaushansky v. Malul* [2000] (3) TakSC 408.
[15] HCJ 9232/01 *Noah, the Israeli Federation of Animal Protection Organizations v. Attorney-General* [2003] IsrSC 57(6) 212; **[2002-3] IsrLR 225**.
[16] HCJ 466/05 *Reiss v. National Planning and Building Council* [2005] (1) TakSC 2333.
[17] HCJ 6976/04 *Let the Animals Live v. Minister of Agriculture and Village Development* [2005] (3) TakSC 2722.
[18] CA 243/83 *Jerusalem Municipality v. Gordon* [1985] IsrSC 39(1) 113.
[19] CA 4960/04 *Siddy v. General Federation Medical Fund* [2005] (4) TakSC 3055.
[20] CA 398/99 *General Federation Medical Fund v. Dayan* [2001] IsrSC 55(1) 765.
[21] LFA 5082/05 *Attorney-General v. A* (not yet reported decision of 26 October 2005).
[22] CFH 2401/95 *Nahmani v. Nahmani* [1996] IsrSC 50(4) 661; **[1995-6] IsrLR 320**.
[23] CA 2299/03 *State of Israel v. Trelovsky* (not yet reported decision of 23 January 2007).

Israeli District Court cases cited:

[24] CC (Jer) 1184/04 *Estate of Baby v. Sarel* (not yet reported).
[25] CC (Jer) 3161/01 *Halamsky v. State of Israel* (not yet reported).

American cases cited:

[26] *Roe v. Wade*, 410 U.S. 113 (1973).
[27] *Krishnan v. Sepulveda*, 916 S.W. 2d 478 (Tex. 1995).
[28] *Parvin v. Dean*, 7 S.W. 3d 264 (Tex. App. 1999).

Australian cases cited:

[29] *Jaensch v. Coffey* (1984) 155 CLR 549; 54 ALR 41.

Jewish law sources cited:
[30] Babylonian Talmud, Tractate *Niddah*, 31a.

For the appellants in CA 754/05 (the respondents in CA 759/05) — A. Givon.
For the respondents in CA 754/05 (the appellants in CA 759/05) — A. Carmeli, I. Shtober.

JUDGMENT

Vice-President E. Rivlin

1. We have before us two appeals of the judgment of the Jerusalem District Court (the honourable Justice I. Inbar) in CC (Jer) 4148/02.

The background

Levana Levy, the first appellant in CA 754/05 and the first respondent in CA 759/05 (hereafter: the first appellant or the mother) became pregnant in 2000 with the aid of *in vitro* fertilization. This was her first pregnancy after approximately three years of fertility treatments. The pregnancy progressed normally and she registered to give birth at the 'Shaare Zedek' Medical Centre, which is the respondent in the first appeal and the appellant in the second appeal (hereafter: the respondent or the hospital). In the thirty-ninth week of her pregnancy, the first appellant underwent an ultrasound examination. The examination showed a foetus with an estimated weight of 3.14 kg and a relatively large amount of amniotic fluid. On 24 August 2001 at approximately 11:30 p.m., after forty weeks of pregnancy, the first appellant went to the respondent's delivery room for the first time. The doctors determined that she had not begun to give birth, and they sent the first appellant home. Two days later, on 26 August 2001 at 4:00 a.m., after she felt contractions, the first appellant returned to the hospital. Her general condition, according to what was determined in the examination, was good. Her cervix was mostly effaced and was dilated to 2-3 centimetres. The foetus's pulse was monitored for approximately an hour and was found to be normal. The first appellant was sent away 'for a walk' inside the hospital. At approximately 7:00 a.m., she returned to the delivery room and was examined a second time. The cervix was dilated a little more to 3 cm. Monitoring for approximately forty-five minutes was normal. At approximately 8:00 a.m., the midwife asked the first appellant to leave the delivery room and go for another 'walk.' When the

first appellant returned to the delivery room, at approximately 11:30 a.m., it was discovered most regrettably that the foetus's pulse had stopped. An ultrasound examination confirmed the diagnosis that it was no longer living. The first appellant was admitted to the delivery room and gave birth, with the assistance of vacuum extraction, to the dead foetus. It was a girl, and she was born with the umbilical cord tightly coiled around her arm and neck.

The first appellant and her husband, who is the second appellant in the first appeal and the second respondent in the second appeal (hereinafter: the second appellant or the father; the father and mother will be referred to hereinafter jointly as: the appellants), filed a claim for damages against the respondent in the District Court.

On 1 January 2003, after more fertility treatments, the first appellant happily gave birth to twin girls.

2. The District Court focused its deliberations with regard to the liability of the hospital for the death of the foetus on two questions. *First*, did the information that was known to the hospital at 8:00 a.m. require it to keep the first appellant under constant observation in the delivery room, or was it possible, in view of that information, to send her for a walk around the hospital? *Second*, assuming that there was no need for observation in the delivery room, was the hospital negligent in the instructions that it gave to the first appellant with regard to the time when she should return to the delivery room?

An expert opinion on behalf of the appellants and an expert opinion on behalf of the respondent were filed in the court. The experts did not agree, mainly with regard to the interpretation of the monitor results and the manner in which the hospital should have acted in consequence. In view of this, the District Court saw fit to appoint its own expert.

With the three expert opinions before it, the District Court held that —

> 'The monitor findings under discussion were normal. Therefore there was nothing in them to require constant supervision of the plaintiff [the first appellant] in the delivery room… In these circumstances, it is customary to allow the woman giving birth to walk round the hospital near the delivery room and there was no real reason not to apply this rule to the plaintiff.'

The court held that the first appellant was told to return for another examination in the delivery room in three hours, or at the very least, the duty to return for an examination within two hours, which is stated in the relevant guideline published by the Ministry of Health, was not made sufficiently clear

to her. Moreover, the duty to remain in the hospital was not made sufficiently clear to her. The court held that it followed that the hospital was completely responsible for the fact that the first appellant did not undergo another examination within two hours, and thereby, especially in view of the aforesaid guideline, the hospital breached its duty of care. The court also held that there was a causal link between the failure to make the examination and the death of the foetus. On a factual level, the court held the hospital responsible for the evidential risk arising from not making the re-examination on time, and due to the lack of information, the facts were presumed against it. Therefore, it was held that had a re-examination been conducted within two hours, the medical team would have discovered that the foetus was in distress and would have carried out a Caesarean section, which would have prevented the foetus's death. In the legal sphere, it was held that, in view of the condition of the first appellant and the foetus, the medical team had the ability to foresee that changes or complications might occur during the 'waiting period,' and these might require immediate medical intervention. This is especially so in view of the guideline that determined that a re-examination should be carried out within two hours. All of this led the court to conclude that the respondent was liable for the death of the foetus.

3. After the District Court accepted the claim on the question of liability, it went on to consider the question of damages. The court rejected the appellants' claim for compensation for the foetus's loss of income during the 'lost years' for two reasons. *First*, in view of the provisions of s. 1 of the Legal Capacity and Guardianship Law, 5722-1962 (hereafter: the Legal Capacity and Guardianship Law), it was held that the foetus was 'not capable of having any liabilities or rights and therefore the plaintiffs [the appellants] were not entitled to claim as the estate or on its behalf.' *Second*, 'even if the plaintiffs could sue for the "lost years," the application to amend the statement of claim in this matter was filed in this case at a very late stage when granting it would prejudice the rights of the defendant [the respondent].' It was also held, with regard to the claim of the appellants themselves, that they had not proved that 'their emotional harm amounted to those serious cases of harm that justify the compensation of a secondary victim,' according to the rule held in LCA 444/87 *Alsuha v. Estate of Dahan* [1]. Therefore the appellants' claim for compensation as secondary victims was denied. Notwithstanding, the court distinguished between the mother and the father and held that the mother had a cause of action as a *direct victim* — a claim that was not subject to the reservations in *Alsuha v. Estate of Dahan* [1]. Therefore, the District Court awarded her NIS 300,000 in compensation for her non-pecuniary loss. The

court denied the appellants' claim for compensation for the fertility treatments that the first appellant underwent after the death of the foetus, since it was not proved that they had not intended to bring additional children into the world. But it was held that the appellants were entitled to reimbursement for the treatments that led to the pregnancy that was the subject of the claim, but the problem was that these amounts were not proved, even on a preliminary basis, in a way that would have made it possible to award compensation on the basis of a general assessment. The court awarded the appellants NIS 5,000 in compensation for travel costs, and NIS 5,000 in compensation for domestic help.

The appeals

4. The appellants claim that the mother should have been awarded double the amount of compensation she received for her non-pecuniary loss because of the great emotional suffering she endured. Such suffering involved, and led to, the failure of the first two cycles of post-birth fertility treatments, physical pains that accompanied the subsequent fertility treatments, and continuous and intense tension until the second birth. In their opinion, the father should also have been compensated for the emotional suffering that he experienced as a result of the death of the foetus, even if in a smaller amount than the increased amount of compensation that they thought the mother should have received. The appellants are of the opinion that they should have been allowed to amend the statement of claim and that they should have also been awarded compensation for the 'lost' years of the foetus's earnings. Moreover, according to them, they should also be compensated for the expenses of the fertility treatments that they incurred for the first pregnancy in accordance with the amount set out in the appellant's affidavit; for the treatments that failed until the first appellant became pregnant a second time; and for the more intensive treatments that she will need in the future. With regard to the question of the causal link, which the respondent addresses in its appeal, the appellants rely upon the judgment of the District Court. In the statement of appeal that they filed, the appellants argued that the respondent should have been found liable for interest on the compensation for pain and suffering that was awarded in the first appellant's favour, but this claim was abandoned in the closing arguments.

5. Regarding the question of liability, the respondent argues that based on the facts presented to the trial court, the first appellant was given an instruction to return for an examination two hours later, as the guideline states. But even on the assumption that it did indeed violate the duty of care that it

had to the first appellant, and even if the trial court acted rightly in requiring it to prove that there was no causal link between the negligence and the damage, it should be held that it discharged this burden. According to the respondent, 'there is no reason to assume that had the first respondent returned for a re-examination two hours later this would have prevented the umbilical cord accident that occurred, since there is no reason why a woman giving birth should not be removed from a monitor, even for more than two hours.' This is particularly true, it argues, when the previous monitor results did not indicate any foetal distress. In the respondent's opinion, the Ministry of Health's guideline does indeed provide that a woman giving birth should be checked within two hours of the previous examination, but this does not require monitoring every two hours. The respondent emphasizes that the court's expert testified that the likelihood of the umbilical cord accident in these circumstances 'is very low, [the complication] cannot be foreseen and a reasonable level of medical care does not take into account a possibility that this complication will occur.' Regarding the question of the quantum of damages, the respondent relies on the judgment of the trial court in so far as it denied the claim for the foetus's 'lost' years of earnings and in so far as it denied the claim of the father, the second appellant. The respondent further argues that there was no basis for determining that the death of the foetus caused the first appellant direct harm. The damage caused to the first appellant was the pain and suffering that she experienced as a result of the death of the foetus in her womb. This damage is in fact identical to the damage claimed by the second appellant, and according to the respondent, in view of the rule in *Alsuha v. Estate of Dahan* [1], her claim should be denied just as his was. The respondent adds that the trial court rightly denied the claim for compensation for the fertility treatments in the past and the future, since the expenses were not proved, some of them were covered by the National Health Insurance Law and moreover no connection was proved between any of them and the incident that was the subject of the claim.

Liability

We have examined the respondent's claims regarding the question of liability, and we have concluded that there are no grounds for intervening in the trial court's findings on this issue. The court considered the first appellant's testimony against the testimony of the midwife who treated her, and it held that —

> 'The plaintiff [the appellant] was told to return for a re-examination in the delivery room in three hours. Looking at

> matters in the light most favourable to the defendant [the respondent], we can say that the duty to return for an examination within two hours was not made sufficiently clear to the plaintiff.'

This conclusion is supported by the fact that the first appellant was not given a sheet of instructions for the waiting time, which is called 'waiting approval,' as the Ministry of Health guideline requires. In addition, the length of the waiting time that the midwife prescribed for the first appellant was not written in the medical record in real time, and the time when the first appellant was asked to return that was originally written (10:00 a.m.) was changed (to 11:00 a.m., according to the midwife as a result of a clerical error). The nature of the instructions that were given to the first appellant is a matter of fact. The appeal court does not tend to intervene in factual determinations of this kind, and there is no reason to depart from this rule in this case. We are in full agreement with the trial court that the guideline determined by the Ministry of Health, which says that 'the period when the woman giving birth is waiting should not exceed a period of two hours without a re-examination,' outlines the minimum level of care that is required. From the testimonies of the doctors and the midwives that were reviewed by the trial court it can be seen that this is also the accepted practice, and that there is almost no one that contests that this is the proper practice, as a minimum standard. Indeed, as the trial court said, 'there is no doubt that any reasonable hospital and its medical staff in the delivery room can and should have anticipated that a failure to make a re-examination within two hours might harm the plaintiff [the first appellant] and the foetus irreparably.' Therefore the hospital's failure to comply with the guidelines was a breach of its duty of care to the first appellant.

7. The question of the causal link in our case is more complex. The consideration of this matter gives rise to two questions of fact. *First*, if the hospital had examined the first appellant within a period of two hours from the time when she was told to 'wait,' would the foetus's distress have been discovered? *Second*, assuming that it would have been possible to notice the distress, would it have been possible to prevent the foetus's death (cf. CA 9328/02 *Meir v. Laor* [2])? The evidence in this case leads us to answer both questions in the affirmative.

The death of the foetus was caused by the tightening of the umbilical court around its neck. On this there is no dispute. The District Court went on to find that:

> 'According to the testimonies of the experts, it is not possible to know at what time the umbilical court tightened around the

> foetus's neck until it caused its death, although it is reasonable to assume that the death occurred at some time between 7:45 a.m. and 11:30 a.m.… The lack of factual certainty in this matter derives from the negligent omission of the defendant, since had the plaintiff returned to the delivery room within two hours and had she been monitored — as was required by the guidelines and as was done each time she came to the delivery room — it would have been possible to know very easily whether at 10:00 a.m. the foetus was dead or not. Moreover, if at that time the foetus was alive it would have been possible to know in addition whether it showed signs of distress or not. Identifying signs of distress could have led to a Caesarean section, which could have prevented the foetus's death.'

We agree with these remarks. The sequence of events allows us to limit the period of time during which death of the foetus occurred. During part of that time, the first appellant was not monitored because of the hospital's negligence. Delaying the monitoring prolonged the period of factual uncertainty. Had the first appellant been examined in accordance with the aforesaid guideline, it is possible that the foetus's distress would have been discovered in time, and its life would have been saved. We do not know this, nor will we ever know it, because the answer to this question would have been determined by a test that was never carried out. Indeed, this is precisely the purpose of the guideline concerning re-examination within a maximum of two hours: to prevent, at the sensitive moments before the active birth begins, too much time passing without monitoring and supervision, so that it will be possible to recommend a solution for the possible developments. Failure to carry out the examination results in factual uncertainty with regard to the state of the foetus and with regard to the possible courses of action at the time of the examination — which was not made. In these circumstances, the first appellant was deprived of the possibility of proving, on the usual balance of probabilities, that had the first appellant been examined after two hours, the foetus's death would have been prevented. But this cannot destroy their claim. When the defendant, by its negligence, made it impossible to prove the claim in the normal way, the doctrine of evidential damage can come to the plaintiff's rescue:

> 'It is an established rule that probative damage that is caused by the defendant in appropriate circumstances justifies passing the burden of proof from the plaintiff to the defendant. If there is dispute with regard to facts that could have been proved had it not

> been for the defendant's negligence — had it not been for the probative damage that was caused — the facts will be determined to be as the plaintiff claims, unless the defendant can persuade the court that the facts are as he claims. In other words, the burden of proving those facts, with regard to which probative damage was caused because of the defendant's negligence, passes from the plaintiff to the defendant' (*Meir v. Laor* [2], at para. 13 of the judgment).

8. Indeed, even negligence as a result of not carrying out medical supervision and tests that may indicate the causes of damage may pass the burden of proof to the defendant (see *Meir v. Laor* [2]). In our case, the District Court held that the hospital's negligent omission in not carrying out a re-examination of the first appellant within two hours justifies the burden of proof being passed to it. Therefore the court assumed that 'had a re-examination been carried out within two hours, the medical staff would have discovered that the foetus was in distress and would have carried out a Caesarean section, which would have prevented the death of the foetus.' Since the respondent was unable to refute this assumption on the balance of probabilities, the District Court held that there was a causal link between the negligence and the ensuing damage. We also see no reason to intervene in this finding of the District Court, which is based solidly on the evidence brought before it.

9. We would, however, like to point out that the expression 'evidential damage,' which is frequently used in the case law, requires clarification. The doctrine of evidential damage that our legal system has recognizedis nothing more than a rule concerning the passing of the burden of proof in cases where the negligence of the defendant has denied the plaintiff essential information for proving his claim. This doctrine belongs to the world of *rules of procedure and evidence*. It makes it possible, in certain circumstances, to determine factual presumptions. Case law has not been called upon to determine a *head of damage* of 'evidential damage' which gives rise to an independent cause of action for the loss of information, as the learned Prof. Porat and Prof. Stein proposed — a proposal that has also been called 'the evidential damage doctrine' (A. Porat and A. Stein, 'The Evidential Damage Doctrine: Justifications for Adopting It and Applying It in Typical Cases of Uncertainty as to the Cause of Damage,' 21 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 191 (1998); see CA 6696/00 *Afula Central Hospital v. Pinto* [3], at p. 2654). This proposal, with its various aspects, has encountered both criticism and support (see I. Gilead, 'The Evidential Damage Doctrine: Has the Burden

of Proof been Discharged?' 30 *Hebrew Univ. L. Rev. (Mishpatim)* 317 (2000); A. Porat and A. Stein, 'The Evidential Damage Doctrine: Response to Criticism,' 30 *Hebrew Univ. L. Rev. (Mishpatim)* 349 (2000)). We are not called upon to consider this in the present case.

10. Regarding the legal causation, here too we are in complete agreement with the District Court: it has been proved. As the court held:

> 'It is sufficient that it could have been foreseen that during the "waiting" time there might occur changes or complications in the condition of the plaintiff and the foetus, which would require immediate medical intervention. In our case there is no difficulty in determining that the medical staff had the ability to foresee this, since it was precisely for this reason that the guideline contained instructions that the re-examination should be carried out within no later than two hours.'

Indeed, that conclusion is also reached by the risk test: the failure of the hospital to timely examine the first appellant placed her and the foetus she was carrying in her womb at risk that something that required immediate treatment might happen without being timely discovered and treated. Unfortunately, this risk was realized, and it resulted in the death of the foetus.

Until now we have followed the footsteps of the District Court, and we have seen no reason to deviate from its path. Our conclusion on the question of liability is therefore the same as its conclusion: the hospital is liable for the death of the foetus. From here let us turn to examine the amount of compensation to which the appellants are entitled.

The lost years

11. The District Court denied the appellants' claim for compensation for the lost years of earnings of the foetus that died just before it was born, for two reasons: *first*, the court held, in view of the provisions of s. 1 of the Legal Capacity and Guardianship Law, 5722-1962, that the foetus was 'not capable of having any liabilities or rights and therefore the plaintiffs were not entitled to claim as the estate or on its behalf.' *Second*, it was held that even if the appellants could have sued under this head of damage, their application to amend the statement of claim was filed at a late stage and granting it would have prejudiced the respondent's rights. The appellants, for their part, argue once again that they should have been awarded compensation for the 'lost years,' despite the fact that the District Court did not allow them to amend the statement of claim and raise this claim. In their opinion, 'there is no

substantial and/or moral reason why a distinction should be made in this matter between a foetus that is born and a foetus that died during its birth.'

12. This claim should be denied. Admittedly, on the basis of the rule decided in LCA 8925/04 *Solel Boneh Building and Infrastructure Ltd v. Estate of Alhamid* [4], it is questionable whether the mere fact that the application to amend the statement of claim was filed at a 'late stage' of the trial was sufficient in order to deny the claim of compensation on the head of damage of the loss of earnings in the 'lost years.' But even had the appellants claim not been denied for procedural reasons, it should have failed, in the circumstances of the case, on its merits.

The right to compensation for the lost years of earnings is given to someone whose life is shortened as a result of a tort, and if he dies before a claim is filed on his behalf, it is given to his estate (see CA 140/00 *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [5]). The injured person's dependants have an independent right of action for loss of support and his heirs have the right to sue for their share of the estate. Parents of a child who is injured, whether he survives or dies, do not themselves have a right to claim for damage that was caused directly to their child; this is the case as a rule, and it is also the case with regard to the head of damage of loss of earning capacity. The right to claim, as a cause of action, belongs to the child himself. This is true even if his guardians are managing his case for him. The appellants, the parents of the foetus that died before it came into the world, do not have any causes of action for the damage that was allegedly caused to the foetus itself. Therefore we are left only with the question whether the foetus, which died before it was born, has the right to claim for damage that it suffered, if indeed the occurrence of damage can be proved.

13. The answer to this depends on the question of the beginning of life. This question has been addressed by various legal systems in various contexts, and they have contended with it in different ways (see, for example, M. Halperin, 'Termination of Pregnancy — Legal, Moral and Jewish Law Aspects,' 27 *Medicine and Law* 84 (2002); W.E. Buelow, 'To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus,' 71 *Temple L. Rev.* 963 (1998)). The law on its own — in so far as it can stand on its own — is incapable of deciding it. It needs to listen to the wide variety of voices emanating from various disciplines — including the arts, the life sciences and the social sciences — and distil from them and from within

them an answer to the question before it. This task is not an easy one. It was well expressed in a certain context by President M. Shamgar:

> 'Every discussion of issues concerning birth is inherently *conceited* and arouses *great sensitivity*. It is conceited because the matters before us are complex and multi-faceted, and the legal perspective cannot encompass the entirety of their essence and nature. In this matter there is a kaleidoscope of elements that are founded on various disciplines, including medicine, philosophy, theology and sociology, which cannot be fitted into the accepted legal classifications and cannot be fully addressed by applying legal criteria only. In these fields, therefore, careful legal steps are advisable…' (M. Shamgar, 'Issues concerning Fertility and Birth,' 39 *HaPraklit* 21 (1990); emphases in the original).

The Supreme Court of the United States said in *Roe v. Wade* [26]:

> 'We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer' (*Roe v. Wade* [26], at p. 159).

14. In our case, the question of the entitlement to sue makes a decision on the more difficult question unnecessary. Even if you say that the foetus on the verge of life is a person, and it is like a baby who has just been born, so that it is possible to say that it has itself suffered damage, it — as opposed to its parents — must still confront the claim that it does not have the right to sue for this damage. The appellants did not address this argument. A precondition for having a cause of action is a legal capacity to have rights and liabilities. According to s. 1 of the Legal Capacity and Guardianship Law, 'Every person is capable of having rights and liabilities from the end of his birth until his death.' Therefore an infant who is born stillborn does not acquire the capacity to have rights and liabilities (see I. Englard, *The Legal Capacity and Guardianship Law, 5722-1962* (second edition, 1995), para. 13-1, at p. 30; S. Jellinek, *Wrongful Life: Rights of Claim and Compensation* (1997), at pp. 104-109), and no estate is set up to replace him. Therefore, a foetus that is harmed as a result of negligence and is born stillborn cannot sue for the damage that it suffered. This is not to say that it did not suffer an injury — in my opinion it did indeed suffer an injury — but in practice the appellants did not succeed in showing that the law recognizes tort liability Indeed, an infant who is born

after he is injured while in his mother's womb can, so it would appear, sue for the damage caused to him, from the moment that he acquires capacity for liabilities and rights, when his birth is completed. This was discussed by Prof. I. Englard, who said:

> 'Injuries to the foetus itself give rise to the question whether there is tortious liability with regard to it. With regard to a person who is born alive, but suffers damage as a result of an injury to him when he was a foetus, the legal question from a conceptual viewpoint is whether the elements of the tort of negligence are satisfied in his case (the existence of a duty of care and its breach). The accepted opinion is that assuming that the foetus does not have a legal personality, it is possible to recognize the existence of the aforesaid elements and to impose liability on the tortfeasor vis-à-vis the victim after he is born, i.e., when he acquires legal capacity. By contrast, when the injury causes the death of the foetus before it is born, liability in tort should not be recognized. Section 1 of the Legal Capacity and Guardianship Law expressly provides that the foetus does not have a legal personality before its birth is completed, whereas in the special cases where a foetus is recognized as having rights, the condition is that it is born alive. Therefore a compensation claim brought on behalf of a foetus that died in its mother's womb as a result of a road accident was rightly denied. Of course, the right of the woman to compensation for the loss of her offspring is another matter' (see Englard, *The Legal Capacity and Guardianship Law, 5722-1962*, at p. 33).

In these circumstances, the logical conclusion is that there is no other person who can have a cause of action for the foetus's lost years of earnings, in so far as it is at all appropriate to speak of such a loss with regard to a foetus that died while still in its mother's womb. Section 1 of the Legal Capacity and Guardianship Law establishes a limit to the lost years rule, and the logical conclusion is that this limit is justified. We will return later to the woman's 'loss of her offspring,' to use the words of Prof. Englard.

Reimbursement of expenses

15. In the trial court the appellants claimed for the reimbursement of expenses that they incurred both for the purpose of the pregnancy which is the subject of the claim and for the fertility treatments that the first appellant underwent after the foetus died. The District Court held that the appellants are

entitled to reimbursement for the expenses they incurred during the pregnancy that is the subject of the claim, but that they are not entitled to reimbursement for the expenses they incurred in order that the first appellant might become pregnant after the death of the foetus. The reason for this is that they did not prove that, had the foetus survived, they would not have brought additional children into the world. With regard to the expenses for the pregnancy that was the subject of the claim — to which it was held the appellants were entitled — the District Court thought that no factual basis was established that allowed it to award them, even by way of an estimate. Therefore, the court did not consider the respondent's claim that these treatments are covered by the National Health Insurance Law. But, the court held that it was possible to draw an analogy between the travel expenses that the appellants incurred for the second pregnancy in order to determine the travel expenses that they incurred for the purpose of the first pregnancy, and it awarded them compensation in a global amount of NIS 5,000. The court also awarded the appellants, by way of an estimate, compensation for nursing expenses that were incurred after the unfortunate incident, in an amount of NIS 5,000. The appellants claim that they should also have been compensated for the treatments that failed until the first appellant became pregnant a second time and for the additional treatments that she will need in the future. According to them, the appellant's affidavit was sufficient in order to prove the amounts that were claimed.

16. The appeal on this issue should be allowed. *First*, from a theoretical point of view, we cannot deny the claim that the appellants should be compensated for the expenses involved in the 'last' pregnancy that they have or will try to have in their life together. Had the unsuccessful pregnancy not failed — and it makes no difference if this was the first pregnancy or not — the last pregnancy is the one that they would not have had, had they finished building their desired family 'earlier.' This determination is, of course, not entirely certain, since it is not possible to know for certain how the appellants' lives would have developed had the failed pregnancy succeeded; it is possible that other constraints would have prevented them from bringing the number of children that they wanted into the world. But from a practical point of view, it is doubtful that the appellants should be required to prove all this. It is clear that at least some of the expenses that the appellants incurred during the unsuccessful pregnancy were wasted, and they should be compensated for these. Indeed, the expenses accompanying each pregnancy may be different. But in these circumstances, where the damage is certain and the ambiguity is inherent in the case, we are of the opinion that a degree of flexibility — a kind of estimate — should be adopted, and it should have been held that the

expenses that they incurred for the second pregnancy (or any other pregnancy) reflect the loss that they incurred. Had the first appellant not become pregnant in the time that passed until the judgment was given, it would have been possible to rely on the amounts incurred by the appellants for the first pregnancy in order to determine the amount of the loss that they suffered. Moreover, in so far as the actual failure of the first pregnancy had financial implications, the appellants are also entitled to compensation for them. This would be the case, for example, if the mother lost a reasonable amount of hours of work as a result of the unfortunate incident that she experienced, as the first appellant does indeed claim in our case.

We have considered the appellants' affidavits and their claims, as well as the claims of the respondent. Despite the fact that the appellants did not properly prove each element and component of the amounts that they claimed, we are of the opinion that the compensation for the pecuniary loss that they suffered should be increased, on a global basis, to an amount of NIS 20,000. Therefore a sum of NIS 10,000 should be added to the amount awarded to them by the District Court.

The damage to second degree victims

17. The appellants believe that the amount of compensation awarded to the first appellant for the damage she suffered as a result of the hospital's negligence — in their words, 'for pain and suffering and the loss of the pleasures of life' — should be increased, and that the second appellant should also have been compensated for this head of damage. The damage claimed by the appellants was detailed in the affidavits they filed. The following is how the first appellant described her difficult experience:

> 'My husband and looked forward with great anticipation to our firstborn daughter and I have no words to describe our huge and profound loss as a result of her death. This was a precious pregnancy, which was achieved after many years of fertility treatments, and when I became pregnant we were happy during every moment of the pregnancy; we were in euphoria. Throughout the pregnancy I was told that the pregnancy was progressing properly and that the baby was healthy. The loss of the baby was very hard for both of use and as a result of this traumatic incident I suffered bouts of depression, I had no energy, I had no desire to do anything, I had outbursts of crying, all kinds of thoughts. I did not even want to see the baby. I felt physical

> and emotional weakness, helpless, I did not function at all and I needed the help and support of my husband and family…
>
> Throughout the [second] pregnancy I suffered from tension, I wanted to feel the foetuses all the time, their movements, and if I did not feel anything for half an hour to an hour, I would rush to Hadassah Ein Kerem hospital. I rushed to the hospital for every little thing…
>
> After the twins were born, I recovered somewhat, but the pain and the suffering still exist and will never disappear. There are deep scars that remain. Every time I recall the incident, I shake all over. Moreover we want more children, and the chances that I will succeed in becoming pregnant once again are slight.'

For his part, the second appellant declared:

> '… it is difficult for me to describe the terrible disappointment and the great pain that resulted from the death of the baby. As a result of the traumatic delivery, my wife went into depression, she had no energy or desire for anything and she cried all the time…
>
> In the recent pregnancy, my wife and I were very tense and we always wanted to feel the pulse and the movements of the foetuses. We went many times to Hadassah, over every little thing… After the birth of the twins, we recovered somewhat from the traumatic incident that we underwent, the wound is healed but the scar remains and it still hurts. We wish to increase the family but the chances that my wife will succeed in becoming pregnant once again are slight…'

18. In reply, the respondent argued in the District Court that in order to be granted compensation on this head of damage, the appellants needed to satisfy the conditions in *Alsuha v. Estate of Dahan* [1], since they were second degree victims who claimed emotional damage. It should be recalled that this ruling established four conditions for the compensation of secondary victims who are injured indirectly and suffer emotional harm as a result of a tort that caused direct damage to another person. These four conditions, as developed in case law that followed the judgment in *Alsuha v. Estate of Dahan* [1] are the following: *first*, the secondary victim is a close family member of the main victim, even though it is also possible, in exceptional and appropriate cases, that a secondary victim who is not a close family member will be compensated; *second*, as a rule the secondary victim should be personally affected by the event, but the court did not rule out entirely the possibility that

a relative who was affected indirectly by the event might have a right, if the harm to him was foreseeable in the circumstances of the case; *third*, there is a requirement of proximity of place and time between the occurrence of the secondary victim's damage and the harm to the main victim; this requirement has been given a flexible interpretation; it has been held that the court should not rule out the possibility that damage that occurred far away from the scene of the incident, or at a different time, or as a result of continuous exposure as opposed to an immediate shock may also be compensated; it has been held that the critical requirement is the existence of causational proximity; *fourth*, serious emotional harm that amounts to a mental disease (psychosis) or a mental disturbance (neurosis) involving a considerable amount of disability is required (in one case it was held that an emotional disability of 15% was insufficient and in another case it was held that a 20% emotional disability was sufficient). An injury of this kind can only be proved with a medical opinion (see *Alsuha v. Estate of Dahan* [1], at pp. 433-436; T. Strasberg-Cohen, 'Emotional Damage of a Secondary Victim,' *Shamgar Book* (part 3, 2003), at p. 5; CA 2935/98 *Dariz v. Ararat Insurance Co. Ltd* [6], at p. 1254; CA 642/89 *Estate of Meir Schneider v. Haifa Municipality* [7], at pp. 474-476; CA 3798/95 *HaSneh Israeli Insurance Co. Ltd v. Hattib* [8], at pp. 653-655; LCA 5803/95 *Zion v. Tzach* [9]; *Afula Central Hospital v. Pinto* [3], at p. 2657. With regard to the fourth condition, see CA 4446/90 *Eliyahu Insurance Co. Ltd v. Barnea* [10]; *Zion v. Tzach* [9]; CA 7836/95 *General Federation Medical Fund v. Estate of Keren Tami* [11]; CA 6431/96 *Bar-Zeev v. Jumaa* [12], at pp. 573-575; CA 6720/99 *Parpara v. Goldo* [13], at p. 2534; CA 5664/98 *Kaushansky v. Malul* [14], at p. 410; Strasberg-Cohen, 'Emotional Damage of a Secondary Victim,' *supra*, at pp. 12-19). The most inflexible of the entitlement restrictions as formulated in *Alsuha v. Estate of Dahan* [1] is the restriction concerning the extent and nature of the damage. Whereas the various rules of proximity proposed in *Alsuha v. Estate of Dahan* [1] are characterized by a certain degree of flexibility, which allows a future extension of the class of persons entitled, the restriction concerning the extent of the damage — in so far as emotional damage is concerned — has been interpreted strictly and uncompromisingly.

The *Alsuha v. Estate of Dahan* [1] rule limited the entitlement of secondary victims to compensation for the emotional damage they suffer. It does not apply to the right of someone who is directly injured by the tort. Such persons are entitled to compensation for emotional damage in accordance with the ordinary rules of compensation provided by the relevant law (see Strasberg-Cohen, 'Emotional Damage of a Secondary Victim,' *supra*). As we have said,

the respondent argued in the trial court that the appellants were secondary victims and that they did not prove that their emotional injury was one of those serious injuries that justifies the compensation of a secondary victim.

19. The District Court was of the opinion that in so far as the first appellant was concerned, she was not a secondary victim, and therefore the rule in *Alsuha v. Estate of Dahan* [1] did not apply to her. With regard to the second appellant, however, the court thought that he should indeed by classified as a secondary victim, and since he did not satisfy the fourth condition concerning the extent of the emotional injury, he was not entitled to compensation for 'non-pecuniary loss.' As the court said:

> '… The answer to the question whether the plaintiffs need to satisfy the reservations in *Alsuha v. Estate of Dahan* [1] depends upon whether they are classified as main victims or secondary victims. In order to make this classification, we should examine who was the victim of the tort in this case. This examination shows that in the concrete circumstances of the case the tort was committed against the plaintiff mother. It cannot be said that the tort was committed against the foetus, since it did not become a legal personality against whom a tort can be committed. The plaintiff therefore is not one of the secondary victims of the tort… but she is a main victim. In these circumstances the rule in *Alsuha v. Estate of Dahan* [1], which, as we have said, concerns compensation for secondary victims, does not apply at all.
>
> The position is different with regard to the plaintiff father, whose suffering and distress derive mainly from the harm that the defendant caused to his wife — the main victim. The plaintiff is therefore required to satisfy the conditions of the rule in *Alsuha v. Estate of Dahan* [1], including the condition concerning the necessary extent of the injury. Since it has not been proved that the plaintiff satisfies this condition, he is not entitled to compensation for non-pecuniary loss. Admittedly, this distinction between him and the plaintiff is somewhat fine, but I fear that in view of the rules in *Alsuha v. Estate of Dahan* [1] and *Afula Central Hospital v. Pinto* [3] it cannot be avoided.'

20. The District Court thus propounded the following theory: the foetus that the first appellant carried in her womb does not have legal capacity for liabilities and rights. Therefore it cannot be said that the tort was directed at it, but only at its mother. Therefore, according to the trial court, the first appellant

is a main victim (or more correctly, a primary victim) of the tort, and the *Alsuha v. Estate of Dahan* [1] rules does not apply to her. The foetus's father, according to this theory, is a victim whose injury is secondary when compared with the injury of the mother, the first appellant. The District Court was aware that the theory that it propounded requires a distinction between the mother and the father. It recognized the fact that this distinction might give rise to a degree of discomfort, but it was of the opinion that 'in view of the rules in *Alsuha v. Estate of Dahan* [1] and *Afula Central Hospital v. Pinto* [3] it cannot be avoided.'

What is the difference between a primary victim and a secondary victim, and what is the difference between tangible damage and intangible damage?

21. The determinations of the District Court are not free from doubt. The fact that the injured party does not have legal capacity does not necessarily mean that no tort was committed against him. Certainly it does not rule out the existence of an injury to the foetus. It is certainly possible to propose a theory according to which an injury was inflicted — and even that a tort was committed — but its victim does not have legal capacity and therefore he cannot claim relief for it. This approach is possible, for example — to take a totally unrelated case — where an animal has experienced abuse (see and cf. HCJ 9232/01 *Noah, the Israeli Federation of Animal Protection Organizations v. Attorney-General* [15]; HCJ 466/05 *Reiss v. National Planning and Building Council* [16]; HCJ 6976/04 *Let the Animals Live v. Minister of Agriculture and Village Development* [17], at p. 2729). *A fortiori* it is certainly the case when we are speaking of a human being. But even without deciding this question, and as we shall clarify below, there was indeed a basis for the theory that the mother should be classified as a main victim, and even if she is not, the parents should be awarded compensation within the framework of the *Alsuha v. Estate of Dahan* [1] rule.

22. The classification of injured parties as main victims or secondary victims follows logically from an examination of the nature of the causal connection between the damage they suffered and the tortious conduct. The main victim is the person whose injury — to his person or his property — is a direct consequence of the tort; the secondary victim is someone who was injured as a result of the injury inflicted upon *another*. Every direct injury may of course have a variety of peripheral ramifications, like a stone that falls into a pool of water and creates a ripple effect. The persons who saw the incident and suffered emotional harm constitute merely one subcategory of secondary victims. The other groups include, for example, the dependants of the injured

person, beneficients the employer of the injured person and additional victims. What connects all of these people is the fact that the harm to them originates in harm to another interest that is not theirs. Apart from this, it would appear that they have little in common, and therefore different rules apply to different categories of secondary victims. We are concerned in this case only with secondary victims who fall within the scope of the *Alsuha v. Estate of Dahan* [1] rule — those persons who are injured as a result of the consequences of, or exposure to, the incident in which the main victim was injured.

23. The distinction between the types of *victim* is related, in appropriate cases, to another distinction that concerns the types of *damage*. This latter distinction refers to two types of damage — tangible damage that is caused as a result of physical harm to persons and property, on the one hand, and intangible damage that is caused without any such physical injury, on the other. The term 'non-tangible damage' reflects the fact that the damage does not stem from any physical experience (see E. Rivlin, 'Trends to Increase the Scope of Compensation for Intangible Damage and Non-Pecuniary Loss,' *Shamgar Book* (part. 3, 2003), at p. 21). The intangible damage may include damage to intangible property, i.e., pure economic loss — property loss that is caused without any physical injury to persons or property. This is admittedly pecuniary loss, but it occurs where the result of the tortious act is expressed solely in terms of economic loss, as opposed to a direct personal injury or physical damage to property and the losses involved in these kinds of damage. Here too we are speaking of 'direct' as opposed to 'indirect,' but the distinction here does not relate to the victim but to the damage. This dichotomy is also not complete, but before we discuss this proposition, we should make another supplementary comment: both tangible damage and intangible damage — each in its own way — can be divided into personal injuries (whether physical or emotional) on the one hand, and property damage on the other. With regard to personal injuries, whether they are included in the category of tangible damage or whether they are included in the category of intangible damage, they can be divided into pecuniary loss and non-pecuniary loss. Pecuniary loss includes, for example, loss of earnings and medical expenses (it is better to call these pecuniary loss and not property loss, in order to distinguish them from property damage in general, and to restrict them to pecuniary loss that is the result of personal injury). Examples of non-pecuniary personal injuries are pain and suffering, loss of the pleasures of life, and loss of life expectancy.

24. So much for the distinction between types of damage; now let us turn to the distinction between victims. Here too we should distinguish between two

categories: *one*, the direct victims, i.e., those persons who are injured as a direct result of a tortious act (the first category of risk); *the other*, the indirect (secondary) victims, whose damage derives from their being aware of the damage to another. It should be noted that the direct victim may also be considered, for the purpose of some of his damage, as a secondary victim, where some of his damage is direct (a direct result of the tortious act) and some is indirect (a result of exposure to the damage to another). Therefore it has been said that the primary damage is not 'relevant' to a claim for the secondary damage. The courts have not always been aware of this distinction even though the result they reached has been correct. We would, therefore, like to address this issue further.

In CA 243/83 *Jerusalem Municipality v. Gordon* [18] liability was imposed for intangible damage to victims in the primary risk category. In *Alsuha v. Estate of Dahan* [1] the entitlement to compensation was also extended to persons who did not fall into the primary risk category and were not directly affected by the tortious act, even if they were not themselves witnesses to the tortious act. The *Alsuha v. Estate of Dahan* [1] rule did not only address *intangible* pecuniary loss but also *intangible* non-pecuniary loss. The loss of the secondary victims — whose entitlement to compensation for that loss was examined in *Alsuha v. Estate of Dahan* [1] — is the *intangible* loss that was caused to them, i.e., damage that was caused to them without a relevant physical injury, damage that is not the result of physical harm to them personally. The distinction between them and the 'category of primary victims' does not relate to the actual 'involvement' of these victims in the accident or the tortious act. The fact that they themselves suffered personal injuries in the incident does not exempt them from the restrictions of the *Alsuha v. Estate of Dahan* [1] rule, where they are claiming (pecuniary or non-pecuniary) loss that was caused to them because they were affected by an injury *to another*. This damage is not causally related to the physical injury that they suffered in that incident, but to the injury suffered by another. Therefore an approach that attaches importance to the plaintiff's actual presence at the scene of the incident and the plaintiff's actual suffering of a physical injury is of no value. In other words, in so far as we are speaking, for example, of an emotional injury that has a causal connection with physical damage that was caused to the plaintiff, his claim is a claim for tangible damage and therefore it is not subject to the logic that led to imposing restrictions on the entitlement to compensation. By contrast, the fact that the person who suffered an emotional injury was physically injured in the same incident does not make all of his damage tangible damage. Therefore where the emotional damage that he

suffered was caused by exposure to the suffering of another, and is not causally connected to the physical damage caused to him, this is not tangible damage and the restrictions of the *Alsuha v. Estate of Dahan* [1] rule will apply to the entitlement to compensation. The damage is therefore classified as intangible in cases where no physical injury is caused and also in cases where it is ancillary to an irrelevant physical injury, i.e., to the physical injury of another.

25. This is the law as it stands. From the perspective of the law as it should be, in my opinion it is questionable whether there is any logic in ruling out liability for intangible personal injury that was caused to someone outside the primary risk category (indirect intangible personal injury), where we are speaking of emotional damage that is not serious. Persons who are emotionally harmed are only one group of those who suffer indirect physical injuries, and of all indirect victims in general. A person who is injured indirectly may also be someone who is injured physically, such as a person who suffered a heart attack when he heard the news that his relative was injured. Is it possible to say that the restrictions of the *Alsuha v. Estate of Dahan* [1] rule do not apply to this secondary physical injury? If so, what is the justification for the distinction between the case of someone who suffered a minor heart attack and someone who suffered a minor emotional injury? Perhaps there is no longer any basis for saying, in the age of modern medicine, that an emotional injury is not (a kind of) physical injury? But the question of the law as it should be is not under discussion at the moment.

The parents as victims

26. How should we classify the appellants in this case? With regard to the first appellant, she is not merely a secondary victim. The examination that was not carried out because of negligence should have been made on her body. The foetus died in her womb, when its umbilical cord was still attached to her placenta. It is possible that she even felt that the foetus in her body had died. Indeed, her primary injury is a special one. The damage that was caused to her is also intangible non-pecuniary loss. As she described in her affidavit, she suffered pain and distress as a result of the death of another — the foetus that was in her womb. She did not herself suffer physical personal injury in the usual sense. In a certain sense she is on both sides of the dividing line between a secondary victim and a main victim, with one foot on each side. Placing her on one side of the line or the other would appear to have consequences: if you say that the first appellant is a secondary victim and her emotional damage is not ‘tangible,’ then according to the rule in *Alsuha v. Estate of Dahan* [1] she

should not be awarded compensation for the emotional damage that she suffered. If you say otherwise, she will be entitled in any case to compensation for her suffering. A determination that the biological mother is the person who is entitled to compensation as a primary victim will very difficult, of course, in cases created by fertility technology, such as when a surrogate mother is involved.

27. The *Alsuha v. Estate of Dahan* [1] rule foresaw the possibility that borderline cases would arise, and it left flexible boundaries that would make it possible to apply it to 'hard cases.' This flexibility naturally allows a space between the category of main victims and the category of secondary victims for a limited category of intermediate cases. We should therefore turn to examine the application of the rule in this case. Let us first say that from the perspective of the actual liability, we do not think that a distinction should be made between the father and the mother. Indeed, the natural characteristics that place the mother on the borderline between a secondary victim and a primary victim do not exist for the father. Therefore the damage that he suffers, at any rate, is entirely an intangible personal injury, as opposed to the damage that was caused to the mother. It also appears that the father should be classified as a secondary victim, since he only suffered damage because he was exposed to the events that befell the mother and her offspring. The fact that the foetus did not manage to acquire a legal personality of its own does not in itself mean that it was not injured, and in any case it does not change the manner in which the damage occurred: first harm was done to the foetus and in consequence harm was done to its parents. From this viewpoint it is difficult to create a logical distinction between the case in which the foetus died a short time after the birth and the case where it was born stillborn.

Let us examine the outcome in light of our case law and classify the tortious act in accordance with the methods of classification that we have outlined. Only an examination of this kind will offer us a consistent and coherent answer.

Three out of the four conditions laid down in the *Alsuha v. Estate of Dahan* [1] rule are satisfied in our case, in so far as we regard the parents or either of them as secondary victims whose damage resulted from the death of their child before it was born as a result of negligence: *first*, the 'secondary' victims are closely related to the injured party; *second*, the mother, and frequently the father also, are personally affected by the tortious incident. The mother, as we have said, is likely even to feel that the foetus is no longer moving in her womb. The parents may be exposed directly to the unfortunate results of the

examinations. The mother experienced with her own body the horror of giving birth to the dead foetus, and the father witnessed it; *third*, both parents — so it may be assumed — experienced the pain and suffering on the spot, immediately after they became aware of the death of their child. Their emotional suffering is a direct and immediate consequence of the death of the foetus and sometimes is certainly preceded by a feeling of severe shock. But it would appear that no one disputes that both of the appellants do not satisfy the *fourth* condition established by the *Alsuha v. Estate of Dahan* [1] rule — the condition that concerns the degree of the emotional injury. This can also be seen from the judgment of the trial court. Clearly not every parent whose child dies before he is born will suffer as a result a significant emotional disability. But the appellants suffered great pain and emotional distress as a result of the death of the foetus before it was born. This can be seen from their affidavits. This is defined legally as 'minor' emotional damage, since it is damage that is not expressed in a percentage of emotional disability, but in the circumstances of the case, as we shall see immediately, we are of the opinion that this is real damage that should be recognized in a claim of secondary victims. Pain is not merely physical pain and suffering; it is also emotional pain. A person may suffer emotional pain even when the psychological injury to him does not cause a permanent disability percentage. This is damage that is not substantial, according to the meaning of this term in the *Alsuha v. Estate of Dahan* [1] rule, but this does not rule out the entitlement to compensation for non-pecuniary loss. When we are speaking of a primary victim, this is not the subject of dispute. Thus, for example, the Road Accident Victims Compensation Law, 5735-1975, offers real compensation for non-pecuniary loss, not only where the emotional disability is not expressed in a 'disability percentage,' but also where the physical disability does not amount to a permanent percentage. Where we are speaking of a secondary victim, we also need to examine the claim in accordance with the principles in *Alsuha v. Estate of Dahan* [1].

28. The *Alsuha v. Estate of Dahan* [1] rule, as we have said, foresaw the possibility that 'hard cases' would arise in this area, and it left an opening for creating a limited intermediate group of exceptional secondary victims, who do not satisfy the conditions that it established, and yet liability to those persons will be recognized. The court emphasized that the four conditions do not constitute a closed list, and that the rule should be examined on a case by case basis:

> 'In the course of the process of determining the conceptual duty of care, a sorting operation is therefore needed to distinguish from all the foreseeable cases of emotional damage those that should

> be included within the limits of the scope of liability. It is possible to try and list the set of criteria according to which the court should examine the existence of liability to compensate for emotional damage. Naturally this is not an exhaustive list, and it will be subjected to the test of judicial activity and the development of case law on a case by case basis' (*ibid*. [1], at p. 432).

The court left a list of questions for future consideration, and in particular, it refrained from establishing strict rules with regard to the *fourth* condition — which, as we have said, is not satisfied in our case — according to which a serious injury that amounts to a mental illness or a mental disturbance is required. It was held that —

> 'This question will certainly need to be re-examined by the courts on a case by case basis, taking into account the circumstances and the testimonies of medical experts that will be submitted on this question. But it is clear that cases that do not fall within the scope of a recognized psychosis may only give rise to a claim in clear and serious cases' (*ibid*. [1], at p. 436).

'Clear and serious' cases have not been examined in the past, and therefore, this court affirmed the validity of the requirement of this restriction. Thus, for example, in *Zion v. Tzach* [9], the court reiterated:

> 'The category of persons who are emotionally harmed by an injury to their beloved ones may be broad and of considerable scope and their emotional harm is genuine and reflected in distress, sorrow, mourning and pain. This is an injury that is unfortunately a part of our lives, with which every victim needs to contend on his own, and it cannot be translated into pecuniary values unless it amounts to a serious level of injury. Society is not able to pay compensation for a minor injury to every type of indirect victim. Therefore we should introduce a restriction as to the severity of the injury, which will remain valid…' (*ibid.* [9], at p. 278; see also *Dariz v. Ararat Insurance Co. Ltd* [6]).

But the possibility that in 'clear and serious' cases the fourth condition should be relaxed was, as we have said, taken into account in the decision in *Alsuha v. Estate of Dahan* [1], and it remains valid. Does the case before us — which is without doubt a 'serious case' — belong to that category of intermediate cases in which the fourth condition should be relaxed? In order to answer this question, we should return to the considerations that lie at the heart

of the rule. Therefore, the question before us is whether it is desirable that a tortfeasor should be liable for secondary damage suffered by parents of a child that died before it was born. There is no doubt that the mother's case is included among these cases. The injury to her is not one of intangible damage; at least it is not an injury that is entirely intangible. She is also not an indirect victim; at the very least she is a victim that suffers both direct damage and indirect damage. Thus we see that the mother's case is included in those 'clear and serious' cases where the requirement of the amount of the damage is flexible.

29. The father's claim should also be examined in the light of the rule in *Alsuha v. Estate of Dahan* [1]. Two main considerations lie at the heart of the aforementioned four conditions that the rule in *Alsuha v. Estate of Dahan* [1] established for compensating a secondary victim for emotional loss: the concern that the courts would be flooded with meritless claims or with claims for insignificant loss, and the concern that human conduct would be held up to too high a standard. This was discussed by President Shamgar in his judgment:

> 'The legal policy considerations seek to balance the various interests. Causing personal injury by negligence is an event that occurs in the real world. This event naturally is not limited to causing the actual damage, but it has secondary repercussions and side-effects, including the fact that it is a source of emotional injury, of various kinds and to various degrees, that are caused to others. Thus, for example, causing a personal injury to one person can cause various emotional injuries to an unspecified number of victims, starting with the close relatives of the injured person, then his circle of friends and finally a countless number of bystanders, who happen to see the actual event, read about it in a newspaper or see it or its immediate consequences on a television broadcast.
>
> Determining the limits of tortious liability in the case before us solely in accordance with a possibility of the physical expectation of an emotional injury will lead to a result in which the tortfeasor, who caused someone a personal injury by negligence, will find himself liable to compensate a large number of persons whose feelings and psychological stability were affected by the negligent incident. Such a result is of course inconceivable, both from the viewpoint of the heavy burden that it would impose on the tortfeasor in particular and on human conduct in general, and also

> from the viewpoint of the burden it would place on the legal system, which would be called upon to extend the protection of the law to the interest of not suffering emotional harm. Applying the foreseeability test on its own will result in a large increase in claims, which will doubtless include claims for insignificant damage, meritless claims and imaginary claims. A legal system that already has great difficulty in coping with the epidemic of claims, because of the restrictions imposed upon it, will be confronted by twice or three times the number of claims for each accident; a reasonable legal policy cannot permit this' (*ibid.* [1], at pp. 431-432).

Therefore, the first reason underlying the rule is the concern for an efficient legal system, in which the courts will not be inundated by trivial and meritless claims. In our opinion, this consideration does not apply in this case. The opening that will be created by removing the fourth condition for the claim of the foetus's father, in circumstances of the kind before us, is narrow: we are speaking only of making it possible for parents to receive compensation if their foetus died as a result of negligence before or at the time of its birth. We assume that the foetus itself, unlike a child that is born alive, cannot sue for his tortious death. His injury is reflected indirectly in his parents' claim. Were the parents not entitled to sue for the 'loss of their offspring,' all that the tortfeasor would be required to pay in many cases would be the pecuniary loss caused to the parents. This loss is mainly embodied in the expenses incidental to the pregnancy. Thus it would be unreasonably 'cheap' to cause the death of a foetus, and in particular it would be 'cheaper' to cause its death than to cause it a permanent injury, since, as we said above, if it is born alive, it will apparently be able to sue for the damage caused to it (cf. *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [5], at p. 514 {122}). The foetus's injury is, and should be, reflected in his parents' claim, and if there is only one of them — because, for example, the mother died in childbirth — in the claim of one of his parents (see *ibid.* [5], at pp. 515-516 {124-126}). Thus we see that the first reason underlying the rule in *Alsuha v. Estate of Dahan* [1] is not valid in our case.

30. The other reason underlying the rule is the concern of imposing too great a burden on human conduct. This is the reason underlying the concern of excessive deterrence, and in this context it is based upon a protection of liberty. A concern that there will be an excessive exposure to claims for insignificant damage may disproportionately affect the freedom of human beings to express themselves, to act, to be creative and to develop, within the

margin of tolerance that society can be expected to endure. The significance of this reason is a willingness to allow the important principle of restitution, which lies at the heart of the law of damages, to yield where we are speaking of minor damage for which compensation will harm human liberty more than it will achieve restitution. As President Shamgar said: 'Minor emotional injuries are an everyday occurrence in the reality of our lives, and a person should overcome these on his own' (*Alsuha v. Estate of Dahan* [1], at p. 436). This reason is also of little weight in our case. First, the damage caused to the parents as a result of the death of the foetus, and especially the emotional injury, is not usually a trivial matter that does not merit compensation. This is damage that we should expect the tortfeasor to foresee in so far as the foresight concerns the special victims — the parents to be. The need to exercise a special degree of care when treating a pregnant woman is a need that has been expressed in the case law (see *Afula Central Hospital v. Pinto* [3]; see also the remarks of Justice E. Hayut in CA 4960/04 *Siddy v. General Federation Medical Fund* [19]). Holding a hospital liable for negligence that results in the death of a foetus will not impose upon it a heavy burden that will lead it to act undesirably in order to protect itself. Quite the contrary!

The result that follows from all of the aforesaid is that the hospital should also have a duty to compensate the father of the foetus that died before it was born as a result of the hospital's negligence, even if he does not suffer an emotional injury that amounts to significant emotional disability. This is one of the 'difficult cases' that fall within the scope of the rule in *Alsuha v. Estate of Dahan* [1]. This special case has been addressed by the Court of Appeals of the State of Texas, which rejected the distinction between a father and a mother with regard to the grief and anguish arising from the loss of their offspring:

> '… we perceive no compelling state interest in a gender-based denial of a father's right to recover damages for his own mental anguish from the negligently caused loss of his viable fetus, a denial which "perpetuates the myth that only a woman grieves and suffers the mental anguish caused by the loss of a baby in the womb," *Krishnan v. Sepulveda* [27], at p. 483 (Gonzalez, J., dissenting)' (*Parvin v. Dean* [28], at p. 279).

Damages are intended to compensate for the pain and suffering of the parents — pain and suffering that derive from the damage that was admittedly caused to 'another,' but that 'other' is their own flesh and blood. In this sense the father, and not just the mother, is a 'quasi-direct' victim. The compensation

also reflects additional aspects of the non-pecuniary 'loss' resulting from the death of the foetus: the physical and emotional hardships involved in a pregnancy that the parents endured in vain since it did not produce a child — those of the mother, but also to a large extent those of the father at her side; the pain and suffering involved in the birth itself; the loss of the potential to become pregnant in the future in view of the passage of time (a factor that is of particular significance in the case before us); the loss of the companionship and love of the child; and perhaps other aspects as well. All of these — which involve both 'main' damage and 'secondary' damage — jointly give rise to a special head of damage of the loss of a child who had not been born, similar to the proposal of Prof. I. Englard who, as stated above, used the expression 'loss of offspring.' There are those who say that this head of damage even has a place in the field of pecuniary loss, for example from the perspective of loss of the foetus's future support of the parents (see the comprehensive article of Perry and Adar, which focuses on the question of a wrongful abortion, but is also relevant to our case: R. Perry & Y. Adar, 'Wrongful Abortion: A Wrong in Search of a Remedy,' 5 *Yale J. Health Policy, Law & Ethics* 507 (2005), at pp. 515-521). This question has not been raised in the case before us.

31. Thus we see that there is no reason why we should not impose liability for the secondary damage suffered by parents of a foetus that died. In practice this result has already been adopted in case law. This happened in the judgment given by this court in CA 398/99 *General Federation Medical Fund v. Dayan* [20]. In that case the Supreme Court approved, almost without any reasoning, a judgment of the District Court in which, by way of a compromise judgment, substantial amounts of compensation were awarded for the non-pecuniary loss caused to parents who lost their child at an advanced stage of the pregnancy as a result of medical negligence.

32. This is also the prevailing trend in American law (see Perry and Adar, 'Wrongful Abortion: A Wrong in Search of a Remedy,' *supra*, at pp. 526-530; L.K. Mans, 'Liability for the Death of a Fetus: Fetal Rights or Women's Rights?' 15 *U. Fla. J. L. & Pub. Pol'y* 295 (2004), at pp. 305-310). In most states the parents can, as a rule, file a compensation claim for the death of a foetus that died as a result of a tort before it was born. The parents' claim is filed under the states' wrongful death statutes. In the past, the possibility of suing for compensation was subject to the sweeping condition that the baby was born alive. But in the vast majority of states, this requirement has been repealed since the middle of the twentieth century. It remains valid only in a minority of states. Most of the states that repealed this requirement have restricted the cause of action and made it conditional upon the foetus having

developed and reached a stage, before it died, where it could survive outside its mother's womb (even if with artificial help) or a stage where it moves on its own (quickening). Recently, several states have repealed even this restriction and have recognized the claim of parents even when the foetus died at an earlier stage of development (see Mans, 'Liability for the Death of a Fetus: Fetal Rights or Women's Rights?' *supra*; D.M. Marks, 'Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question,' 37 *Akron L. Rev.* 41 (2004); M.K. Shah, 'Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life,' 29 *Hofstra L. Rev.* 931 (2001), at pp. 939-952; 62A Am. Jur. 2d *Prenatal Injuries: Wrongful Life, Birth or Conception* §3, §29).

When parents in the United States have a cause of action, the amount of the compensation that they can claim is determined within the framework of the recognized heads of damage, by virtue of the wrongful death statutes that are applicable in the relevant state (and by virtue of the case law that has followed them). In general, these laws recognize pecuniary loss caused to parents, and in some states also non-pecuniary loss, including the pain and emotional suffering caused to them (Perry and Adar, 'Wrongful Abortion: A Wrong in Search of a Remedy,' *supra*, at pp. 530-538; T.S. Jost, 'Rights of Embryo and Fetus in Private Law,' 50 *Am. J. Comp. L.* 633 (2002), at p. 642; 62A Am. Jur. 2d *Prenatal Injuries: Wrongful Life, Birth or Conception* §21). It should be noted that some states recognize the claim of the foetus's estate to compensation, *inter alia* for the years of earnings that it has lost (Perry and Adar, 'Wrongful Abortion: A Wrong in Search of a Remedy,' *supra*; this claim is also sometimes conditional upon the foetus having developed to a stage where it can survive outside its mother's womb: *ibid*., at p. 556).

33. Were we not to recognize the entitlement of the couple to compensation, in a case where a foetus dies before its birth as a result of negligence, in the absence of a claim by the foetus the damage that is caused would be left without any relief, with all that this implies. Clearly, where a baby dies after being born alive, the ordinary rules of liability and compensation apply (see recently CC (Hf) 1184/04 *Estate of Baby v. Sarel* [24] (Judge S. Berliner); CC (Jer) 3161/01 *Halamsky v. State of Israel* [25] (Judge M. Drori)).

34. What is the amount of compensation to which the appellants are entitled? Determining the amount of compensation for the damage under discussion, like any task of quantifying personal injury and especially non-

pecuniary loss, is not simple. The amount — as we have seen — represents various aspects and various repercussions of the death of the foetus. It is possible that often there will be grounds to distinguish between the mother and the father in determining the amount of the compensation for non-pecuniary loss, similar to the line of reasoning that guided the District Court (cf. *General Federation Medical Fund v. Dayan* [20]). In any case, the assessment of the damage will be made in each case in accordance with its circumstances.

35. In light of the circumstances of this case, and mainly the difficulty the appellants experienced in achieving a pregnancy, the length of the pregnancy and the proximity to its conclusion, on the one hand, and the fact that they ultimately did not lose the possibility of becoming parents and even succeeded in bringing twin girls into the world , on the other, we have decided that it would be right not to intervene in the amount of the compensation for the non-pecuniary loss awarded to the first appellant, but in addition to award the second appellant compensation for the non-pecuniary loss caused to him, in an amount of NIS 250,000 as of the date of the judgment of the District Court. Admittedly the amounts awarded here are significantly less than those awarded back in 1999 in *General Federation Medical Fund v. Dayan* [20] to each of the parents in that case, but in that case the judgment was given pursuant to a settlement, and we are of the opinion that this case does not justify intervention in the decision of the District Court by awarding additional compensation to the first appellant.

I have read the opinion of my colleague Justice Hayut, and it would appear that she is prepared to extend the category of primary victims even further than I am proposing. According to her approach, the parents will have an independent cause of action as direct victims even in a case where a child that was born alive but died subsequently as a result of negligence during the birth has a cause of action; she also does not rule out the possibility that we should consider giving an independent cause of action to the parents as direct victims even when the injured child remains alive. It would appear that this extension has not hitherto been recognized in case law and I also see no possibility of making a distinction between parents whose child has been injured as a result of medical negligence and parents whose child has been injured as a result of another tortious act.

I agree entirely with my colleague's outlook with regard to the emotional and psychological involvement of the father during the birth process, and the fact that his claim should be examined within the framework of the rule in *Alsuha v. Estate of Dahan* [1], with the flexible limits as outlined in my

opinion, does not derogate from the extent of his involvement and the extent of the injury to him in a case where the child dies; I have referred in this regard to the important remarks uttered in *Krishnan v. Sepulveda* [27], with which I agree unreservedly. The anguish and grief are shared by both parents as a result of the loss of offspring. This grief is what makes the father, and not only the mother, a 'quasi-direct victim,' as I have said in my opinion.

The classification of certain victims as secondary victims, as determined in the rule in *Alsuha v. Estate of Dahan* [1], was made for reasons of legal policy, which include considerations of the cost of the compensation, evidential difficulties and additional policy criteria; in no sense is this classification intended to say that the injury of the secondary victim is necessarily less serious than the injury of the primary victim. There may certainly be cases in which the primary victim — who is injured physically — recovers completely, whereas the secondary victim, who suffered emotional damage as a result of his exposure to the injury caused to the primary victim, remains disabled for the rest of his life. Indeed, it is not the damage done to the 'secondary victim' that is secondary, but it is the characteristics of the factual causal link that relate to the injury that are classified by case law on two levels.

Conclusion

36. The appeal is allowed as stated in paragraphs 16 and 35. The respondent will be liable for the appellants' court costs and their legal fees in an amount of NIS 20,000.

Justice E. Hayut

1. Like my colleague Vice-President E. Rivlin I too am of the opinion that there are no grounds for intervention in the findings and conclusions of the District Court with regard to the question of liability, including with regard to the question of the causal connection, and I accept the approach that in the circumstances of this case it is possible to determine, in reliance on the doctrine of evidential damage, that there was a causal connection between the breach of the duty of care imposed on the hospital and the death of the foetus, in view of the factual uncertainty created by the negligence of the hospital. I also agree with the conclusion that the foetus itself — despite the negligence of the hospital — does not have a cause of action for the injury that caused its death, since its tragic death was caused while it was still in its mother's womb and before its birth ended. With regard to the question of the damage, I agree with my colleague's position that we should award the appellants compensation on a global basis for the expenses that they incurred in the circumstances of the case, as well as compensation for the non-pecuniary loss

that each of them suffered. Notwithstanding, the reasons that have led me to adopt this result, in so far as the compensation for non-pecuniary loss is concerned, are different from my colleague's reasons, and the amounts that I think should be awarded for this head of damage are different from those awarded by my colleague, and I would like to expand upon this below.

2. The District Court distinguished between the first appellant and the second appellant with regard to the level of risk applicable to each of them, when it said:

> 'It cannot be said that the tort was committed against the foetus, since it did not become a legal personality against whom a tort can be committed. The plaintiff therefore is not one of the secondary victims of the tort, which was the status of the parents in the *Pinto* case, for she is a main victim. In these circumstances the rule in *Alsuha v. Estate of Dahan* [1], which, as we have said, concerns compensation for secondary victims, does not apply at all.
>
> The position is different with regard to the plaintiff father, whose suffering and distress derive mainly from the harm that the defendant caused to his wife — the main victim. The plaintiff is therefore required to satisfy the conditions of the rule in *Alsuha v. Estate of Dahan* [1], including the condition concerning the necessary extent of the injury. Since it has not been proved that the plaintiff satisfies this condition, he is not entitled to compensation for non-pecuniary loss. Admittedly, this distinction between him and the plaintiff is somewhat fine, but I fear that in view of the rules in *Alsuha v. Estate of Dahan* [1] and *Afula Central Hospital v. Pinto* [3] it cannot be avoided.'

My colleague the Vice-President does not agree with this theory that was proposed by the District Court. First, he disagrees with the District Court's determination that the tort should be regarded as one that was committed against the mother merely because the foetus does not have the legal capacity to have rights and liabilities, and he says in this regard that 'It is certainly possible to propose a theory according to which an injury was inflicted — and tort even committed — but its victim does not have legal capacity and therefore it cannot claim relief for it.' Second, my colleague disagrees with categorical determination of the District Court that the first appellant should be classified as a main or primary victim in this case. In discussing the various types of damage and the various types of victim that have been recognized by

the law of torts in Israel my colleague says that the mother, the first appellant, is on the borderline between a secondary victim and a main victim, in his words 'with one foot on either side,' whereas with respect to the father my colleague agrees with the conclusion of the District Court that he is only a secondary victim, when he says that 'his damage only befell him because he was exposed to the events that befell the mother and her offspring.' In view of his conclusions with regard to the classification of the appellants, my colleague goes on to examine the right of both appellants to compensation for non-pecuniary loss in accordance with the conditions determined in this regard in the rule in *Alsuha v. Estate of Dahan* [1], and he says that three of the four conditions laid down in that rule are satisfied in our case, namely that our concern is with victims with a close degree of proximity to, and who were directly and personally affected by the tortious event, and who immediately experienced the pain and suffering and the emotional loss caused by the death of the foetus. The difficulty according to my colleague's approach arises in this case with regard to the fourth condition laid down by the rule in *Alsuha v. Estate of Dahan* [1], which requires a serious emotional injury that amounts to a mental illness or a mental disturbance in order for the the secondary victim to be entitled for compensation by reason thereof.t. Indeed, it is not disputed that the emotional injury that the appellants suffered in this case is not expressed in a disability percentage. The appellants also did not file any medical opinion to prove the existence of any such disability and their claims with regard to the non-pecuniary loss are based solely on the great pain and suffering that they were caused in the circumstances of the case, as set out in the affidavits which my colleague cited.

3. The strict implementation of the rule in *Alsuha v. Estate of Dahan* [1] to the facts in the case before us would therefore lead therefore to the denial of the appellants' appeal and the allowing of the respondent's appeal the result being that the two appellants would be left without any compensation for the non-pecuniary loss caused to them. But in my colleague's opinion there is room for a certain extension of the rule in *Alsuha v. Estate of Dahan* [1] in the special circumstances of the case under consideration, in view of the real emotional injury caused to the appellants, even though it is not the type of serious damage that satisfies the fourth condition laid down in the rule in *Alsuha v. Estate of Dahan* [1]. My colleague finds a basis for this in the actual rule in *Alsuha v. Estate of Dahan* [1], which foresaw the possibility that 'difficult cases' would arise in this area and therefore, in his words, 'it left an opening for creating a limited intermediate group of exceptional secondary victims, who do not satisfy the conditions that it established, and yet liability

to those persons will be recognized.' Both the mother's case and the father's case are in my colleague's opinion included among these 'clear and difficult cases' in which there is room for flexibility in applying the criteria laid down in the rule in *Alsuha v. Estate of Dahan* [1] with regard to the seriousness of the emotional injury, even though with regard to the amount of the compensation he sees a basis for distinguishing between the two by leaving the compensation in a sum of NIS 300,000 awarded by the District Court to the mother unchanged, while awarding the father compensation in a sum of NIS 250,000 for the non-pecuniary loss caused to him.

4. As I have said, I agree with the result reached by my colleague, according to which both parents should be awarded compensation for the non-pecuniary loss that they suffered in the circumstances of the case. But the legal path that has led me to this result is different from the path taken by my colleague, and the amounts of compensation that I would have awarded each of the appellants in the circumstances of the case are higher than those awarded by my colleague. In my opinion, non-pecuniary loss caused to parents who lose their child during the birth as a result of medical negligence is not secondary damage and the parents who are injured as a result of this tort are not secondary victims but main victims in the primary risk category. Therefore the rule in *Alsuha v. Estate of Dahan* [1] is not relevant and in my opinion should not be applied in cases of the kind before us, and consequently there is no need to be flexible with regard to any of the conditions laid down by the rule for the purpose of awarding compensation to the parents for the pain and suffering that they were caused. According to my approach, the mother should be classified as a main victim in cases of the death of the foetus in her womb as a result of medical negligence during the birth process, since she is directly involved in the birth process and the act of giving birth during which the damage is caused, and the same is true with regard to the father. I cannot accept my colleague's approach in this regard that the damage to the father derives solely 'because he was exposed to the events that befell the mother and her offspring.' Indeed, this component of the non-pecuniary damage that is caused to the father certainly exists, but first and foremost the father should be regarded as a main victim because of the pain and suffering that he is caused as the father of the foetus that he lost as a result of the hospital's negligence. This is especially true in this case because of the fact that the pregnancy was achieved by the appellants with great difficulty and after fertility treatments that lasted three full years. This approach whereby the damage caused to the parents in these circumstances should be regarded as direct damage and as damage that is not dependent on the damage caused to

the foetus itself is based on the recognition of the event of giving birth as the climax of the birth process and as a pivotal and major experience from the perspective of both of the parents. Indeed, this experience is usually the result of a partnership and a joint physical and emotional effort of the spouses as parents, and our traditional sources say of this: 'There are three partners in a human being, the Holy One, blessed be He, the father and the mother' (Babylonian Talmud, *Niddah*, 31a [30]). In LFA 5082/05 *Attorney-General v. A* [21], President Barak emphasized the value of partnership in parenting when he said:

> 'Parenting is based on a partnership between the mother and father beginning with impregnation, followed by the stages of the pregnancy and the birth, and continuing with the joint raising of the child.'

In view of this approach that regards the parents as partners in the birth process, it follows in my opinion that both of them should be regarded as being directly involved in the birth event and as main victims as a result of negligent acts or omissions that led to an injury to the foetus during that event. Admittedly, from a purely physical viewpoint, the mother naturally has a major role in the process as the person carrying the foetus in her womb and as the person from whose womb the foetus emerges into the world. But this does not, in my opinion, detract from the extent of the father's emotional and psychological involvement in the process (except in cases where such involvement does not exist for one reason or another). The difference between the father and the mother that I have indicated does perhaps justify a difference in the amount of compensation, but it does not justify placing them in different risk categories. In other words, with regard to liability both parents should be placed in the same risk category and in my opinion this should be the primary risk category. An important reason, apart from the reasons that were described above, that supports the approach that the parents should be placed in the primary risk category in cases of the kind we have before us concerns the main purposes that the tort of negligence seeks to realize. I am referring to the fact that at the heart of the tort there lies a social interest that seeks to prevent, in so far as possible and with the proper balances, negligent conduct that causes damage, and in our case society has a clear interest in preventing negligent conduct of medical staff that may cause the death of foetuses during birth. It would appear that this deterrent purpose will be achieved most effectively if the hospital that was negligent is held liable to the parents of the dead foetus as main and direct victims, rather than as secondary

victims that are subject to the restrictive and liability-limiting conditions laid down in the rule in *Alsuha v. Estate of Dahan* [1].

5. For all the reasons that I have enumerated, I am of the opinion that the tortious death of a foetus in his mother's womb should not be regarded as damage that is caused to 'another,' but as damage that is caused directly to the parents who stand in the front line of the potential victims to whom the hospital owes a duty of care with regard to the birth process. I should also say that it is not the unborn foetus's lack of capacity to sue that in my opinion justifies placing the parents in the first risk category, but it is their direct and immediate involvement in the birth, which we discussed above, that gives them this status (for trends in Israeli law that promote an equal approach that regards the father as a full partner in the birth and raising of his children, see s. 3 of the Women's Equal Rights Law, 5711-1951; s. 6(h)(1) of the Women's Employment Law, 5714-1954, and CFH 2401/95 *Nahmani v. Nahmani* [22], at p. 789 {482}). Therefore according to my approach the parents have an independent cause of action as direct victims even in a case where a child whose birth has ended but dies subsequently has a cause of action as a result of medical negligence during his birth, and the two causes of action are not mutually exclusive. For the very same reasons I would be prepared to go on to examine, in an appropriate case, the question — which does not arise in this case — whether there is a basis for saying that the parents should also have an independent cause of action of this kind as direct victims when the child is left disabled as a result of medical negligence during his birth, as opposed to an injury that is caused to a child or another immediate family member as a result of medical negligence that did not occur during the birth process (but see in this regard CA 6696/00 *Afula Central Hospital v. Pinto* [3] and CA 2299/03 *State of Israel v. Trelovsky* [23]).

6. In conclusion, were my opinion accepted, we would distinguish between a case like the one before us, in which the parents were caused damage as a result of the tortious death of the foetus during the birth and between a case, such as the one in *Alsuha v. Estate of Dahan* [1], in which the parents were caused damage as a result of the injury to their child. In the second case it is indeed clear that the parents are secondary victims because their damage arises entirely from the damage 'to another,' whereas in the first case we are dealing in my opinion with damage that is caused to the parents as direct victims because they are themselves involved as parents in the process of bringing a child into the world that culminates in the actual birth. The result of classifying the appellants as direct victims of the hospital's negligence is that it is possible to compensate them directly for the non-pecuniary loss that

they suffered even if they do not prove that they suffered a serious emotional disability as a result of the incident, as required by the fourth condition in the rule in *Alsuha v. Estate of Dahan* [1]. Therefore no flexibility in this condition is required for this purpose. In the present case, taking into account all of the relevant circumstances, including three years of fertility treatments that were wasted, I am of the opinion that the compensation payable to the parents for non-pecuniary loss should be set at NIS 500,000 for the mother and NIS 350,000 for the father. With regard to the global compensation for the pecuniary loss, as stated above, I agree with my colleague's position as set out in paragraph 16 of his opinion.

Justice S. Joubran

In the disagreement between my colleagues as to the reasons why compensation should be awarded to the appellants for the non-pecuniary loss that they suffered, I agree with the opinion and reasoning of my colleague Vice-President E. Rivlin. Notwithstanding, because of the complexity of the issue before us, I cannot refrain from discussing the reasons underlying this conclusion of mine.

1. My colleagues chose to confront the difficult issue before us in this case in two different ways: my colleague the Vice-President chose to do so by means of a certain degree of flexibility in the rule laid down in LCA 444/87 *Alsuha v. Estate of Dahan* [1], in so far as it concerns the requirement that it imposed with regard to the seriousness of the emotional damage. Thus, even though the appellants did not prove that the damage caused to them is significant emotional damage, as required by the rule in *Alsuha v. Estate of Dahan* [1], the Vice-President determines that liability to them will arise, because their case falls within the scope of those 'clear and difficult' cases that are capable of justifying a degree of flexibility in that rule. By contrast, the solution proposed by my colleague Justice E. Hayut is an extension of the category of primary victims. According to her, in the case before us the two parents have an independent cause of action because of their direct and immediate involvement in the event of the birth. Even though I see considerable logic in her position, I am of the opinion that the solution proposed by my colleague the Vice-President is preferable, both from the viewpoint of proper legal policy and because of the lack of clarity and the future negative ramifications that may result from an enlargement of the category of primary victims. Let me explain my position.

2. It would appear that the key to solving this case lies in examining the definition of how victims are classified and applying this to the case before us.

The distinction between a direct victim who is in the primary risk category and an indirect victim is a distinction that is based on well-established case law. Thus the basic principles for this distinction were already laid down in *Alsuha v. Estate of Dahan* [1], where it was said that:

> 'The direct victim of the negligent act is *the person who is killed, injured or placed in danger*. It is with regard to him that the duty not to cause him personal injury has been breached. The relatives of the injured person who were emotionally harmed as a result of the injury to him fall within the "secondary risk category"'(*ibid*. [1], at p. 436; emphasis supplied); see also CA 2299/03 *State of Israel v. Trelovsky* [23]).

Elsewhere my colleague the Vice-President discussed the nature of this distinction, which focuses on the question of the causal connection between the personal physical injury caused to the victim and his emotional damage. He says:

> 'The decisive distinction with regard to the entitlement to compensation should be based on the existence or non-existence of a relevant physical injury, which is causally connected to the emotional injury and not merely to the "involvement" in the accident… Where the emotional damage suffered by him [the victim] is caused as a result of exposure to the suffering of another, and is not causally connected to the personal physical injury, it is not tangible damage. The emotional damage in this case is not causally connected to the physical injury suffered by that plaintiff but to the physical damage caused to another, and therefore it is intangible damage' (E. Rivlin, 'Trends to Increase the Scope of Compensation for Intangible Damage and Non-Pecuniary Loss,' *Shamgar Book* (part. 3, 2003), at p. 21, 37)

Thus we see that the relevant test does not concern the question of who was the target of the negligence, but it focuses entirely on the question of the causal connection between the physical injury and the emotional damage caused as a result (*State of Israel v. Trelovsky* [23]; see also the detailed remarks in the opinion of my colleague the Vice-President, especially in paragraphs 22 and 24). Applying the language of this rule to the case before us does not allow us to place the father in the primary victim category. I think that no one will dispute that the emotional damage caused to the father is very great indeed. The grief and anguish of the loss of the foetus, the suffering and torment involved in the lengthy and exhausting fertility treatments, the keen

anticipation of the child that was about to be born and the bitter pain upon hearing that it had died — all of these were equally the fate of the mother and the father. As a father of children, I too agree with the finding that the father is also very emotionally involved in the birth process, an involvement that in many cases is no less than that of the mother. But it should be remembered that the emotional damage caused to the father, no matter how great it may be, does not arise from a direct physical injury caused to him. I have difficulty in accepting the position that the father was physically injured by the tort committed by the respondent during the birth, since he was certainly never placed in any direct physical danger. It was the foetus that the mother carried in her womb that suffered direct physical injury as a result of the respondent's actions, even though it had no legal capacity as my colleague the Vice-President says. The mother is the one who in the natural course of events was exposed to a real physical danger because of the complications in the birth process. Although no one disputes the deep emotional involvement of the father in the birth process, the emotional damage that he suffered derived from his identification with the suffering that the mother experienced and from his being a full partner on an emotional level in the birth process. The emotional damage of the father and the mother — and here I see no basis to make a distinction between them — also derives from their exposure to the physical injury to the foetus, an injury that led to the loss of the infant that they so eagerly anticipated. In view of this, and since the emotional suffering that the father experienced is not a consequence of a direct physical injury to him, I see no basis for defining him as a direct victim.

3. My colleague the Vice-President rightly discussed the fact that classifying a certain victim in the category of secondary victims is not intended to say 'that the injury of the secondary victim is necessarily less serious than the injury of the primary victim' (see paragraph 35 of his opinion). The whole purpose of this classification is to define the limits of liability in torts, by addressing the characteristics of the causal connection to the injury. The remarks made by President M. Shamgar in *Alsuha v. Estate of Dahan* [1] are pertinent in this regard:

> 'We call the first duty [the duty of care to someone who suffers personal injury] the "main" one, not because of the weight of its consequences in comparison to the "secondary" duty, since it is possible that the results of a breach of the secondary duty will be more serious than those of the main duty… but because a breach of the main duty of care is a factual prerequisite for the accompanying breaches, even in those circumstances where the

consequences of the main injury end before the consequences of the secondary injury end' (*ibid*. [1], at p. 431).

In this regard President Shamgar referred to a case that happened in England (*Jaensch v. Coffey* [29]). In that case the main victim, a spouse who suffered the injury, recovered, whereas his wife, the secondary victim, developed a mental illness from which she continued to suffer.

4. My opinion is that every possible care should be taken to prevent an encroachment upon the limits of the definition of the main victim. My colleague Justice Hayut was prepared to go further and to examine in an appropriate case the question whether parents should have an independent cause of action as direct victims even when the child remains disabled as a result of medical negligence during his birth. But in that context the question may arise as to how in such a case it will be possible to distinguish between emotional damage that is caused to parents directly as a result of the negligence during the birth and damage that is caused to them indirectly by their exposure to the suffering and damage that are the fate of the disabled child that survives. If we break down the wall that has been built around the category of primary victims, as they have been defined hitherto in case law, the work of identifying the borderlines between a main victim and a secondary one will become more and more difficult. Thus a recognition of the emotional damage that was caused to the father as direct damage, even though he did not experience any physical damage, may give rise to the question of why any significant physical injury to an infant that does not arise from the birth, which automatically involves a serious emotional injury to his parents who are raising him, should not lead to them being included in the definition of primary victims? My opinion is that taking the step of expanding the category of primary victims who will be entitled to compensation for the non-pecuniary loss caused to them, without being required to overcome the various obstacles established by the rule in *Alsuha v. Estate of Dahan* [1], will undermine the delicate balance between the various purposes lying at the heart of this rule.

5. Indeed, the circumstances of the case before us are exceptional. The father's involvement in the birth process, the emotional damage that he suffered as a result of the death of the child, an injury that is no less than the mother's injury, are what led my colleague the Vice-President to distinguish him from other secondary victims and to define him as a 'quasi-direct victim.' These reasons also lay at the heart of the Vice-President's determination that the case before us falls within the scope of those 'clear and difficult' cases that are capable of justifying flexibility in the application of the rule in *Alsuha v.*

Estate of Dahan [1], or to be more precise in the strictest condition of the four restrictions, the one concerning the severity and nature of the emotional damage.

In this context it is important to point out that the rule in *Alsuha v. Estate of Dahan* [1] was originally formulated as a flexible rule, and it left flexible margins for exceptional cases, for cases in which the emotional damage that would be caused to someone close to the injured person would merit protection, even if it did not satisfy the four restrictions established by it. This, I think, resulted from the foresight that any attempt to determine in advance rigid criteria for applying it would result in an injustice in unusual and exceptional cases. Thus in another case President M. Shamgar said with regard to the rule in *Alsuha v. Estate of Dahan* [1]:

> 'The criteria set out above, which as we have said do not constitute a closed list, deliberately did not outline precise guidelines for delimiting the issue, which is in the preliminary development and planning stage in our legal system' (CA 642/89 *Estate of Meir Schneider v. Haifa Municipality* [7], at p. 476; see also *Alsuha v. Estate of Dahan* [1], at para. 20).

Similarly, in LCA 5803/95 *Zion v. Tzach* [9] it was said that the rule in *Alsuha v. Estate of Dahan* [1] is:

> '… a clear and general rule, which contains flexible criteria that do not constitute a closed list and yet are capable of marking out the proper borders between cases where a person may be compensated for secondary damage and those where he may not' (*ibid*. [9], at p. 274).

The need to create a clear and yet flexible rule, which can be adapted in difficult and exceptional cases that do not satisfy the strict requirements of the four restrictions, and the recognition that the rule in *Alsuha v. Estate of Dahan* [1] will continue to develop from time to time are what form the basis for allowing the exception that makes it possible to recognize emotional damage, even if it does not amount to a mental illness, when we are dealing with 'clear and difficult' cases such as the one before us. In view of this, I am of the opinion that awarding compensation to the father by including his case within the scope of the exception of clear and difficult cases is the most appropriate course of action.

6. With regard to the mother, examining whether she is a direct victim or whether she is an indirect victim is more complex, and it is with good reason that my colleague the Vice-President thought that she stands on the borderline

between secondary and main victims. Indeed, it is not possible to ignore the fact that the mother is the person who physically carried the foetus inside her and it is she who experienced with her body the traumatic event of the death of the foetus in her womb and the extraction of the foetus from the womb when it was no longer alive. Although she did not suffer a significant physical injury, it is clear that she was likely to suffer some degree of emotional injury, which is related to the physical risks to which she was exposed, risks that did not threaten the father. Thus it is not impossible that the emotional disability that she suffered was in part a consequence of the birth complications and in part a direct consequence of the great suffering and anguish that she was caused as a result of her child's death, pain and suffering that were also shared by the father as a full partner in the birth process in the emotional-psychological sphere. This intertwining of the two types of damage is what made it difficult for my colleague the Vice-President to determine whether the mother is an indirect or direct victim. This difficulty was discussed by Justice T. Or in another case, where he said:

> 'A difficulty could have arisen had the emotional disability that they suffered been in part a result of the accident in which they were injured and in part a result of the fact that they saw the serious injury to the deceased, without it being possible to determine which part of the disability was caused by each of these two factors. We do not need to express our opinion as to the legal outcome in such a case' (CA 3798/95 *HaSneh Israeli Insurance Co. Ltd v. Hattib* [8], at pp. 654-655).

But in our case, since it has been proved that the exception concerning 'clear and difficult cases' also applies to the first appellant's case (see para. 28 of the Vice-President's opinion), defining her as a main victim or an indirect victim cannot change the determination that she is entitled to compensation for the non-pecuniary loss that she suffered.

7. In view of all of the aforesaid, I have therefore seen fit to support the position of my colleague the Vice-President and the result that he reached, as stated in paragraphs 16 and 35 of his opinion.

Appeal CA 754/05 allowed in part. Appeal CA 759/05 denied.

19 Sivan 5767.

5 June 2007.