CA **10085/08** and
Counter Appeal
CA 6339/09
CA 7607/09

Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel

v.

1. Estate of the late Tufik Raabi
2. Israeli Consumer Council

The Supreme Court sitting as the Court for Civil Appeals
[29 November 2010]

Before Justices E. Hayut, U. Vogelman, Y. Amit

Israeli Legislation Cited

Class Actions Law, 5766-2006, ss. 20, 22, 23
Restrictive Trade Practices Law, 5748-1988
Banking (Service for Customer) Law, 5741-1981
Equal Rights for Disabled Persons Law, 5758 – 1998, ss. 19 (54) - 19 (64)
Male and Female Workers Equal Pay Law 5756- 1996, s. 11
Standards Law 5713-1953, ss. 9(a), 17 (a) (1), 17 (b)

Israeli Supreme Court Decisions Cited

[1] CA 1338/97 *Tenuva Central Cooperative for the Marketing of Agricultural Produce in Israel Ltd v. Raabi*, IsrSC 57 (4) 673 [2003]

[2] CA 1977/97 *Barazani v. Bezeq Israel Telecommunications Company Ltd,* IsrSC 55 (4) 584 (2001);

[3] FHC 5712/01 *Barazani v. Bezeq Israel Telecommunications Company Ltd,* IsrSC 57 (6) 385 (2003);

[4] CA 2781/93 *Daaka v. Carmel Hospital, Haifa* IsrSC 53(4) 526 **[1998-9] IsrLR 409**

[5] LCA 3126/00 *State of Israel v. E.S.T. Project Management and Manpower* Ltd, IsrSC 57 (3), 220 (2003)

[6] FHC 5161/03 *E.S.T Project Management and Manpower Ltd v. State of Israel,* IsrSC 60 (2) 196 (2005)

[7] CA. 8430/99 *Analyst I.M.S. Trust Funds Management (1986) v. Ard Industrial*

Investment and Development, 256 IsrSC 56 (2)

[8] LCA 4556/94 *Tetzet v. Zilbershatz*, IsrSC 49(5) 774 (1996);

[9] CA 345/03 *Reichart v. Raabi Moshe Shemesh Heirs* (not yet reported) 7.6.2007)

[10] CA 3506/09 *Zaig v. Waxelman, Waxelman Accountants* (not yet reported)(4.4.2011)

[11] CA 3613 *Ezov v Jerusalem Municipality* IsrSC 56 (2) 787 (2002).

[12] LCA 8733/96 *Langbert v. State of Israel – Israel Lands Administration*, IsrSC 55 (1) 168 (1999).

[13] CA 7028/00 *A.B.A. Trust Funds Management Ltd v. Elsynth Ltd* (not yet reported, 14.12.2006)

[14] HCJ 2171/06 *Cohen v. Knesset Speaker* (not yet reported, 29.8.2011)).

[15] CA 10262/05 *Aviv Legal Services Ltd v. Hapoalim Bank, Head Management* (not yet reported, 11.12.2008)

[16] CA 3901/96 *Local Planning and Building Committee v. Horowitz*, IsrSC 56 (4) 913, 328 (2002)

[17] CA 4576/08 *Ben-Zvi v. Prof. His* (not yet reported, 7.7.2011)

[18] CA 8126/07 *Estate of the Late Bruria Zvi v. Bikkur Holim Hospital* (not yet reported, 3.1.2010);

[19] CA 9590/05 *Rahman Nuni v. Bank Leumi LeIsrael Ltd* , (not yet reported 10.7.2007)

[20] CA 6153/97 *Shtendal v. Prof. Yaakov Sadeh* , IsrSC 56 (4) 746 (2002)

[21] CA 9936/07 *Ben David v. Dr. Entebbe* (22.2. 2011)

[22] CA 9817/02 *Weinstein v. Dr. Bergman*, (not yet published, 16.6. 2005)

[23] LCA 9670/07 *Anon v. Anon* (not yet reported,6.7.2009)

[24] CA 2967/95 *Hanan Vakshet Ltd v. Tempo Beer Industries Ltd*, IsrSC 51 (2), 312 (1997)

[25] FHC 4693/05 *Carmel Haifa Hospital v. Malul* (not yet reported, 29.8.2010)

[26] 355/80 *Anisimov Ltd v. Tirat Bat-Sheva Hotel*. IsrSC 35 (2) 800 (1981)

[27] CA 4022/08 *Agbaba v. Y.S. Company Ltd*],(21 October 2010 paras 10 – 24;

[28] C.A. 754/05 *Levi v. Share Zedek Hospital*) (2007) **IsLR 2007** 131

[29] CA *Reznik v. Nir National Cooperative Association for Workers Settlement* [not yet published] (20.7 2010]

[30] CA 1509/04 *Danush v Chrysler Corporation* (not yet published, 22.11.2007)

[31] CA 9134/05 *Adv. Eliezer Levit v. Kav Of Zafon, Cooperative Association for Services Ltd* [not yet reported, 7.2.2008)

[32] AAA 2395/07 *Accadia Software Systems Ltd v. State of Israel – Director of Tax and Stamp Duty* 27.12.2010)

[33] CA 7094/09 *Borozovsky Conveyancing Ltd v. Ichurn Itur Veshlita Ltd* (14.12.2010)

American Cases

[34]*Affiliated Ute Citizens of Utah v. United States* 406 U.S. 128, 153-154 (1972) ;

[35]*Binder v. Gillespie* 184 F.3d 1059, 1063-1064 (9th Cir. 1999)

[36]; *Poulos v. Caesars World Inc*. 379 F.3d 654, 666 (9th Cir. 2004

[37] *Kennedy v. Jackson National Life Insurance Company,* 2010 U.S. Dist. Lexis 63604, 25-28 (N.D.Cal 2010)

[38] *Negrete v. Allianz Life Insurance Company of North America* 238 F.R.D 482, 491-492 (C.D. Cal. 2006)[.

[39]*Klay v. Humana, Inc.*382 F.3d 1241, 1259 (11th Cir. 2004)

[40] *Johnson v. The Goodyear Tire & Rubber Company, Synthetic Rubber Plant*, 491 F.2d 1364, 1379-1380 (5th Cir. 1974);

[41]*Cooper v. Allen*, 467 F.2d 836, 840 (5th Cir. 1972)

[42]*Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 417 (5th Cir. 1998);

[43]*Reeb v. Ohio Department of Rehabilitation and Correction*, 435 F.3d 639, 650-651 (6th Cir. 2006);

[44] *Fuhrman v. California Satellite Systems*, 179 Cal. App. 3d 408, 424-425 (1986);

[45] *Altman v. Manhattan Savings Bank*, 83 Cal. App. 3d 761, 767-769 (1978);

[46] *Stilson v. Reader's Digest Association, Inc*., 28 Cal. App. 3d 270, 273-274 (1972);

[47] *Birnbaum v. United States*, 436 F. Supp. 967, 986 (1977).

[48] *Bates v. UPS* 204 F.R.D. 440, 449 (N.D. Cal. 2001)

[49] *Olden v. LaFarge Corp*. 383 F.3d 495, 509 (6th Cir. 2004)-

[50] *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 782-787 (9th Cir. 1996)

[51] *Wal-Mart Stores, Inc. v Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)

[52] *Midwestern Machinery v. Northwest Airlines* 211 F.R.D. 562, 572 (D. Mn. 2001)

[53] *McLaughlin v. American Tobacco Co.*

[54]*: Pettway v. American Cast Iron Pipe Co*., 494 F.2d 211 (5th Cir. 1974);

[55] *Stewart v. General Motors*, 542 F.2d 445 (7th Cir. 1976);

[56] *Bowe v. Colgate-Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973);

[57] *United States v. Wood, Wire & Metal Lathers Int. Union, Local Union* 46, 328 F.

[58]*Hood v. Eli Lilly & Company* 671 F. Supp 2d 397, 434-453 (E.D.N.Y. 2009)

[59] *Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320 (N.D. Ill. 1991)(

[60] *Allison v. Citgo Petroleum*, 151 F.3d 402, 414-415 (5th Cir. 1998);

[61] *Lemon v. Int'l Union of Operating Engineers, Local No. 139, AFL-CIO* 216 F.3d 577 (7th Cir. 2000);

[62] *Jefferson v. Ingersoll Int'l, Inc.* 195 F.3d 894 (7th Cir. 2001);

[63] *Reeb v. Ohio Department of Rehabilitation and Correction*, 435 F.3d 639 (6th Cir. 2006).

[64] *Fibreboard Corp*., 893 F.2d 706, 712 (5th Cir. 1990).

[65] *Windham v. American Brands, Inc*., 565 F.2d 59 (4th Cir. 1977)

[66] *Redish; Powell v. Georgia-Pacific Corporation*, 119 F.3d 703, 706 (8th Cir. 1997)

[67] *Airline Ticket Commission Antitrust Litig*, 268 F.3d 619, 625 (8th Cir 2001)

[68] *Folding Carton Antitrust Litig*. 744 F.2d 1252 (7th Cir. 1984)

[69] *Houck v. Folding Carton Admin*. Comm., 881 F.2d 494 (7th Cir. 1989)

[70] *Cuisinart Food Processor Antitrust Litig*38 Fed. R. Serv. 2d (Callaghan) 446 (D. Conn.1983).

[71] *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*

[72] *Domestic Air. Transp. Antitrust Litig*

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JUDGMENT

Justice E. Hayut

The decision forming the subject of the appeals before us was given in a consumer class action that was approved for filing against Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel Ltd (hereinafter – "Tnuva"). The suit concerns the misleading of the consumer public and the production of a dairy product in contravention of the official standard in force on the dates relevant to the suit, by reason of the addition of silicon to long lasting low fat (1%) milk, that was manufactured and marketed by Tnuva, without making any mention of the silicon component on the product.

Factual Background and the Process of Approving the Suit as a Class Action

1. At the end of 1993 a problem of over-frothing arose in the process of mixing long lasting milk containing 1% fat (hereinafter: "the milk") as a result of a problem in one of the machines on the production line. Given the high cost of the malfunctioning machine (about 300 – 400 thousand U.S dollars) the personnel of the Rehovot dairies decided to solve the problem of frothing by adding a chemical substance known as "Polydimethyilsiloxane" , the trademark for which is E-900, to the milk. This substance is known as "silicon" and was purchased by the dairy in Rehovot, from Amgal Production of Chemicals (1989) Ltd (hereinafter: "Amgal") without informing the central management of Tnuva. The Amgal company purchased the silicon from an English company. The aforementioned addition of the silicon to the milk continued from 25 January 1994 until 6 September 1995, just after the affair was exposed. During that period the Tnuva dairy in Rehovot produced and marketed to the public an overall amount of 13 million liters of milk.

The addition of the silicon to the milk was first exposed in the media on 30 August, 1995 and Tnuva's initial reaction consisted of a sweeping denial of the allegation against it. This was the case both in an interview of the director of the Tnuva Milk department, Mr. Yosef Yudovitz and in the official press releases on behalf of Tnuva published in a number of papers on 31 August, 1995, in which it stated that the Tnuva long life milk was free of the silicon supplement and that independent laboratory tests verified this (similar pronouncements also appeared on 1 September, 1995). The Tnuva representatives continued to deny the addition of silicon in a hearing conducted in the Knesset Economic Committee on 5 September 1995, but soon after that, on 10 September 1995 an internal commission of inquiry appointed in the wake of the publication determined that indeed a silicon supplement had been added to the long life milk that contained 1% fat, in the Tnuva dairy of Rehovot, and the commission's conclusions were published in the media. In the wake of these conclusions, Tnuva recalled all of the cartons of 1% long life milk from the shelves of the stores, to which it was feared that the silicon had been added, and the manager of the Rehovot dairy was suspended from his position. The National Food Service of the Ministry of Health likewise decided that Tnuva would have to destroy all of the milk containing silicon and it was prohibited to use it, even as food for animals. It was further decided on 12 September 1995 to revoke the permit that had been given to Tnuva confirming appropriate conditions of production. Tnuva on its part decided on the same day to establish a commission to investigate the affair, which would give recommendations on "lessons to be learnt and conclusions to be drawn in each and every area that it found appropriate, including personal conclusions" The committee headed by Prof. Yehuda Danon, and after it had heard the testimonies and examined the documents, it published the "Committee's Report on the Examination of Long Life Milk" (hereinafter: the Danon Committee Report"). In the framework of the Report criticism was leveled against senior workers in the Tnuva dairy, against the senior management of Tnuva by reason of the absence of supervision and inspection in the Tnuva dairy, and even against the Food Service in the Ministry of Health, and the Institute for Inspection and Quality in the Trade and Industry Office that was supposed to have conducted supervision and inspection of the quality of the

food.

2. The state on its part on 30 January, 1996 filed an indictment against Tnuva in the Magistrates Court of Rehovot, and against its CEO and against the manager of the Milk Department and the manager of the dairy for offences of misleading in an advertisement, pursuant to ss. 2(a), 7 (a)(1), 23 and 27 of the Consumer Protection Law 5741-1981 (hereinafter:
"Consumer Protection Law") and against Tnuva and the manager of its dairy in Rehovot for the offences of failing to comply with an official standard pursuant to ss. 9(a), 17 (a)(1) and 17 (b) of the Standards Law 5713-1953 (hereinafter:"Standards Law"). On 4 March 1997 the defendants were convicted by force of their confessions for the offences that were ascribed to them, and the Court accepted the plea bargain that was reached between them and the state, in accordance with which a financial penalty was imposed on Tnuva and the other defendants (the financial penalty imposed on Tnuva was for the sum of NIS 28,000).

Another proceeding instituted against Tnuva was the present proceeding, which began in a suit filed in the Tel-Aviv Jaffa District Court on 14 September, 1995 by the late Tufik Raabi (hereinafter: "Raaabi") along with an application for the certification of the suit as a class action (CF 1372/95, Mot. 11141/95. In his (amended) suit, Raabi claimed that he had consumed long lasting low fat (1%) milk during the relevant period and that the silicon was not specified as one of the ingredients on the packaging of the product, and as such Tnuva had violated the provisions of sections 2,4, and 17 of the Consumer Protection Law. Raabi further alleged a infringement of an "unwritten contract" with him and with the consumer public in its entirety and negligence on the part of Tnuva in all of the stages involved in "production, supervision, marketing and advertising of the facts related to the addition of the prohibited material to the milk and the fact of the reasonable probability of a real and/or potential health hazard in the product that it marketed". In his petition Raabi requested restitution of the sums he had paid in consideration for the milk that he had purchased in the relevant period and compensation for the mental anguish caused to him by the addition of the silicon and by reason of the "misleading and contemptuous" conduct of Tnuva. Raabi's request for his suit to be recognized as a collective action relied on Chapter F'1 of the Consumer Protection Law, which at that time included an arrangement for the filing of a collective action based on the grounds specified therein.

3. The Tel-Aviv District Court (the late Honorable Judge M. Telgam), on 13 June 1996 certified Raabi's request to file a class action in the name of all of the milk consumers during the relevant period, but the court stressed that in this case it would not certify the remedy of restitution because Raabi had already consumed the milk and had not claimed that any real damage had been caused by its consumption, and he further stressed that even though there was nothing to prevent Raabi from proving that his health had been damaged thereby, he was not permitted to represent the members of the group regarding "future bodily damage".

An appeal and a counter appeal against the certification decision were filed by the parties to the Supreme Court (CA 1338/97 *Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel Ltd v. Raabi* [1] (hereinafter: *Decision on the Certification Request)*). Tnuva challenged the certification of the suit as a class action and Raabi challenged the determination that the class action would not include the remedy of restitution, and the fact that there was no award for legal fees in his favor. The Israeli Consumer Council joined as a party to the hearing (Raabi and the Israeli Consumer Council will hereinafter be referred to as "the representative plaintiffs"), and in the Attorney General joined as a party in the appeal proceedings, in support of the confirmation of the class action

4. On 19 May, 2003 in a majority decision, this Court rejected the aforementioned appeals filed by the parties and left the decision of the District Court intact in the sense of certifying the filing of a class action. Regarding this, Justice M. Naor held that the damages claim by Raabi concerns the non-pecuniary damage that was caused to him by negative feelings, and feelings of disgust, which stem from the consumption of milk that contains silicon "with all of the

associations attendant thereto" and that damage of this kind was prima facie "remunerable damage". The justice further ruled that the addition of the silicon supplement to the milk in defiance of the standard constitutes an infringement of individual autonomy, and that under the circumstance this not a "trivial matter) (*de minimis*), and that despite the fact that the Consumer Protection Law does not contain a provision that enables a compensatory award for the benefit of the public or the benefit of a group (all or in part) the court is permitted to award this kind of remedy in a suit under the Consumer Protection Law in appropriate cases in which there is a structural difficulty in locating the consumers. All the same, Justice Naor ruled that the Court would not intervene with the District Court's decision not to award restitution in this case. Regarding the plaintiffs' group Justice Naor ruled that it would include all those who had consumed long life milk of 1% to which silicon was added during the period between 23 October 1994 and September 1995", having regard for the fact that the provision in the Consumer Protection Law that allowed the filing of a collective action came into effect on the 23 October 1994 and the fact that in the month of September 1995 the dairy products containing silicon were removed from the shelves.

Deputy President, S. Levin concurred with the ruling of Justice Naor (subject to the issue of awarding a remedy to the public being left as requiring further consideration), and Justice Proccaccia ruled in her minority opinion that the suit should not be recognized as a class action. She held that the chances of Raabi's personal suit succeeding are not "self evident" and in her view, "the claim concerning the injury as a result of the inclusion of the supplement in the food product, in deviation from the standard, but without having caused any damage to health, does not dictate, "self evidently" that damage flows naturally in the regular course of events". Justice Proccaccia added that she would also have refrained from approving the suit as a class action in accordance with the discretion conferred to the court in this matter (s. 35A of the Consumer Protection Law), inter alia given the fact that the nature of the alleged damage is not necessarily common to the entire consumer public, and "it is connected to the individual health threshold of each consumer and significantly dependent upon it."

The Class Action Proceedings

5. Once the suit was certified as a class action, the District Court (Judge Dr, E. Benyamini) ordered the publication of a notification to the public and the filing of amended claim sheets in accordance with the prescribed conditions of the certification. In the amended statement of claim that they filed, the representative plaintiffs claimed that the approximate number of members in the plaintiff group was estimated at about 43% of the population, which constitutes over two million consumers, and that the members of the group should be compensated for infringement of their autonomy and negative feelings occasioned by inter alia deception, contempt, mental anguish, nausea, aversion to essential food products, fear and anxiety. According to the representative plaintiffs, the members of the group in their entirety should receive compensation of NIS 8000 for each consumer included in the plaintiff group. Tnuva on its part argued that the claim relating to the infringement of individual autonomy should be rejected, because no such infringement was actually caused, and if caused, it was minor and peripheral, in the category of *de minimis*. In this context Tnuva stressed, *inter alia* that the addition of silicon to the milk did not harm the consumers and that silicon was a recognized, approved, and frequently used food supplement all over the world.

6. The first stage of preliminary proceedings in the Lower Court was intended, *inter alia* to crystallize the proceedings for the hearing and the means of proving the suit. In this framework the Lower Court ruled that the evidentiary stage would not be divided into separate hearings for the question of responsibility and the question of damage. The court further rejected Tnuva's request to establish a system for proving the non-pecuniary damage on an individual basis, ruling that already at the preliminary stage "it was clear that the only way of proving damage in this case, if at all, in the absence of any method for locating the purchasers of the milk, is by way of market surveys for the entire consumer public, or even a few sample affidavits of milk consumers, along with the affidavit of [Raabi]" (para. 14 of the decision). On

the other hand, the court left open the question of whether it was possible to award general compensation to the entire plaintiff group based on this form of proof. In addition the court ruled that insofar as in accordance with the standard silicon was prohibited for the use of cows' milk for drinking, there was no need to rule on the question of whether its use constitutes a health hazard, but it added that when examining the non-pecuniary damage caused by an infringement of autonomy and negative feelings, importance attached to the question of whether there are studies that show the possibility of damage to health as a result of the use of silicon and the question of the quantity necessary to cause such a risk. The reason for this is that if there are experts who contend that there is a possibility of damage to health, then it becomes necessary to address the question of the consumer's right "to decide whether he was interested in refraining from taking any risk involved in the consumption of the milk". The court further ruled that to the extent that there was proof for the ground of the claim and the alleged damage, and it was determined that compensation should be ruled for the benefit of the group or the public, it would consider the appointment of an expert- examiner and Tnuva would be obligated to supply him with the required economic data.

On 13 October, 2004 the Court actually appointed an expert-examiner in accordance with Regulation 124 of the Civil Procedure Regulations, 5744-1984 (Prof. Yechezkel Ofir, an expert in economic and marketing (hereinafter – Ofir)), and in its decision of 17 March, 2005 the Court further ruled that "the relevant population for this claim is, essentially, the people who actually purchased the milk" and that the intention was to those who purchased the milk *in Israel* (para. 16 of the decision). All the same, in that decision the Court ruled that the plaintiff group would also include persons who had consumed the milk in hotels, restaurants, and cafes (as distinct from those who consumed it at places of work and who did not actually purchase the milk that was consumed), notwithstanding that with respect to them it would be difficult to prove an infringement of autonomy because they did not choose the category of milk that they had drunk..

The Partial Decision of the District Court

7. In its partial decision of 7 October 2008 the District Court ruled that the class action suit should be accepted. In its opening comments the Court noted that the Class Action Law, 5766-2006 (hereinafter – "the Law" or the "Class Action Law") which was enacted and came into force after the certification of the suit as a class action, would also apply to suits pending at the time of its publication, and hence would also be applicable to this particular class action suit. Even so, the Court ruled that "regarding the ground of claim and the plaintiff group, a decision would be given in accordance with the Consumer Protection Law, which as stated, only applies to the a "consumer" as defined in the law", while also pointing out that with the enactment of the Class Actions Law, the representative plaintiffs had not petitioned to amend the statement of claim and broaden the scope of the group in accordance with the broadened grounds of claim for which a class action can be filed under the Law.

In the partial decision the Court conducted an extensive survey of the evidentiary material submitted to it, including, inter alia, the Report of the Danon Committee, an expert opinion and public opinion surveys. Regarding the criminal proceedings, the Court held that for purposes of the class action it was not possible to base "factual findings" on the holdings of the Court in the criminal proceedings, inter alia because in that proceeding, witnesses were not heard and evidence was not submitted. Still, the Court ruled that Tnuva's admission to the commission of the offences and the convicting verdict also constitute evidence against it in the proceeding at hand (whether by force of an admission of a litigant or by force of the provision of section 42A of the Evidence Ordinance [New Version] 5731-1971).

As a preliminary remark, with implications for both the grounds of the suit and the proof of damage, the Court ruled that it was not required to rule on the "scientific question" pertaining to the existence of a health risk in the drinking of milk containing silicon, and that for purposes of

the suit it was sufficient to examine the question of whether it was possible to rule out the possibility of such a health hazard. The Court determined that based on the evidentiary material presented, it could rule that even if there was no proof that the drinking of milk containing silicon caused, or was liable to cause immediate health damage to the consumers, it was not possible to rule out the existence of a health hazard in the long term, especially for children. The Court added that according to its approach, the consumers were entitled to know that the milk contained silicon in defiance of the law and the relevant standard, and that in these particular circumstances it was not possible to rule out the health risk involved its consumption, and it also added that had it been required to rule on the aforementioned scientific question it would answered it in the affirmative, given the existence of a standard which was presumably based on considerations of public health and which would transfer the onus of proving the absence of a health hazard to the party in breach, and Tnuva, had not discharged that onus.

8. In adopting Raabi's version, which was that he purchased within the State of Israel (and not within the areas of Judea and Samaria) as claimed by Tnuva, low fat long life mile of Tnuva which was produced in the Tnuva dairy in Rehovot in the period relevant to the suit, the Court held that Raabi has a *personal ground of claim* against Tnuva. The Court likewise held that even had its conclusion been different it would not have determined the fate of the class action, inasmuch as following the certification, the suit was that of all of the members of the group, and at all events, it was possible to replace a representative plaintiff who lacked a person grounds of claim, by force of s.8(c) (2) of the Class Actions Law

Regarding the existence of the *ground of misleading*, the Court noted that in fact it was not disputed that Tnuva misled its consumers and added that "misleading" is too delicate a word to describe Tnuva's conduct, which bordered on consumer fraud". This act of misleading, he added ,was done intentionally with respect to matters that were most definitely essential from the consumers' perspective, because it was an act of misleading regarding the essence and nature of the product (s. 2(a)(1) of the Consumer Protection Law), its components (section 2(a) (2) of the Consumer Protection Law), the risks involved in its use (s. 2(a)(4) of the Consumer Protection Law), and relating to its compliance with the standard (2(a) (11) of the Consumer Protection Law). The Court stressed in this context that the milk was a product that was supposed to be "as pure and natural as possible" and that to a large degree it was consumed by a relatively vulnerable population. It should also be added that the misleading in this case was compounded with the breaching of the obligations imposed on Tnuva by force of the Standards Law, and in this context the Court addressed the fact that the Israel Standard relating to drinking milk which prohibited the addition of silicon to milk is a binding official standard which also involves (as opposed to the "general" Israeli standard) "significant obligations", and it is prohibited to produce or to trade in a product that does not comply with its conditions. By the same token, Tnuva did not indicate the existence of the silicon supplement on the packaging, and in doing so breached its disclosure duties pursuant to section 4(a) of the Consumer Protection Law, because the product that did not meet the requirements of the standard and was substantively defective and in accordance with section 17 (a) of the Consumer Protection Law. The Court further held that once it was proved that Tnuva as a dealer had made a misleading representation, the assumption should be that the consumers were exposed to the representation and acted upon it, and the Court emphasized that misleading with respect to the Consumer Protection law can also take place by way of failure to make proper disclosure. In this context the Court further ruled that it was not necessary to prove what exactly each consumer knew and the presumption was that the consumer placed his trust in the dealer and there were no grounds for imposing a duty upon the consumer to clarify whether the product he had purchased complied with the requirements of the Law or the standard. In view of this the Court ruled that in the case before us the foundation of misleading was fulfilled.

9. In referring to the rule established in CA 1977/97 *Barazani v. Bezeq Israel Telecommunications Company Ltd,* [2] at p. 584 (hereinafter "*Barazani*"); and FHC 5712/01 *Barazani v. Bezeq Israel Telecommunications Company Ltd* [3] at p. 386 (2003) (hereinafter

Further Hearing Barazani the Court noted that the misleading of a consumer constitutes a grounds in tort, by force of the provision of s. 31 (a) of the Consumer Protection Law, and that as such, it was subject to the "doctrinal first principles of the Tort Ordinance [New Version]. The Court further added that even if it was a conduct based grounds (as opposed to consequential) for the purposes of the receiving compensation it was necessary to prove damage and a causal connection between the act of misleading and the damage, as wall as the consumer's awareness of the misleading picture and his reliance thereupon. In our case, so ruled the Court, there was misleading by way of omission, "and it is undisputed that the consumers relied on the fact that the milk that Tnuva produced complied with the requirements of the Law and the standard also indicating that Tnuva never claimed to the contrary.

Regarding the *categories of damage* by dint of which the action was approved as a class action, the Court noted that these included "non pecuniary, non-tangible, damage that included negative feelings, such as the feelings of disgust, mental anguish and discomfort, as well as the infringement of individual autonomy" , the thrust of which was the right to formulate a decision whether to agree to a certain proceeding, in a considered, intelligent and informed manner and with knowledge of the relevant facts. The Court further noted that the non-pecuniary damage caused as a result of the infringement of autonomy admitted of compensation even in the absence of bodily damage, in accordance with the criteria established CA 2781/93 *Daaka v. Carmel Hospital, Haifa* [4] 526 (hereinafter – *Daaka*). In that context the Court rejected Tnuva's claim that the suit should be rejected given that the injury falls into the category of a "trivial matter", holding that that fact of the damage being mild need not stand in the plaintiff's way, and the very fact that the act damaged the public at large indicates that the act is not trivial. According to the Court's approach, the severity of the act in this case must be assessed from the perspective of the group in its entirety and not that of the individual consumer. According to this approach an act consisting of the misleading of the broad consumer public regarding the contents and legality of the production of milk, which is a basic product, cannot be considered as "trivial"..

Regarding the proof of personal damage that was caused to Raabi, the Court adopted the essence of his claim, which was that as a result of his exposure to the case he experienced negative feelings such as disgust, anger and annoyance by reason of the fraud and anxiety regarding the consequences of drinking. The Court noted that though it could be argued that Raabi's feelings were "exaggerated" it was not possible to argue with subjective feelings., and it rejected Tnuva's claim that his feelings stemmed from the publications in the media according to which silicon is suspected of being a carcegengous product. Regarding the damage caused to the members of the group, the Court noted that in principle they were obligated to prove the alleged damaged that they sustained, but that in a mass collective action, as in the case before us, it is not practically possible for each one of the members of the group testify, or even to actually locate all of the milk consumers. Referring to Regulation 9 (c) of the Consumer Protection (Procedure for a Class Action), 5755-1995, and s. 20 of the Class Actions Law, the Court ruled that under these circumstances it would suffice to prove the damage in "from a general perspective". The Court noted that the representative plaintiffs had sufficed with the testimony of Mr. Raabi and in the expert opinion prepared by the experts Prof. Mevorach and Dr. Katz on behalf of *Maagar Mohot* based on a telephone consumer survey (hereinafter: "computer survey"), and that they should rather have filed the affidavits of a number of consumers; however, its position was that the evidence filed was sufficient for the proof of the damage and the determination of its rate, and in this context the Court rejected the claims raised by Tnuva against the consumer survey and its reliability, noting inter alia that drafters of the expert opinion had made a reliable impression, and that they had knowledge and experience in their field.

10. Giving detailed consideration to the results of the consumer survey the Court noted that the survey indicates that the range of negative feelings (including revulsion, anxiety, fear, anger hatred, disappointment) were to a large or intermediate degree shared by about 66% of the milk

consumers. At the same time, the Court accepted Tnuva's claim concerning a certain inconsistency between the data presented and its claim that in the fifth question, (pertaining to the time at which the negative feelings emerged) the interviewees should not have been presented with the representation whereby the publications concerning the health hazards of silicon were verified both by the Ministry of Health and by Tnuva. However, since the two questions defined by the Court as "cardinal" questions in the survey (the feelings of the interviewees and the grading of their severity) were asked before the question tainted with the aforementioned defect, the Court deemed that there was no concern that the survey was biased. The Court was prepared to assume, to be on the safe side, that the survey's findings tended to somewhat exaggerate the negative feelings, but ruled that this did not lead to the conclusion that the survey was defective in its entirety, and it further held that it had been persuaded that the survey was adequately grounded and that its findings were consistent with plain common sense.

In this context the Court further added that Tnuva on its part had sufficed with claims against the consumers survey presented by the representative plaintiffs, but did not present its own consumer survey from the relevant period and one can only wonder why. Accordingly, despite the element of exaggeration evident in the survey data presented by the plaintiffs, the Court deemed that its conclusion should be accepted, namely that various non-pecuniary damages were caused to the majority of the consumers, unrelated to the question of the health hazards involved in the consumption of milk containing silicon. On this count the Court dismissed Tnuva's claims, based on the survey conducted by Prof. Gotlieb on its behalf in 2004 and the expert opinion of Prof. Hornik and Prof. Perry that it had submitted. The Court stated that indeed there is a hierarchy in the categories of infringements of individual autonomy, but this, and the conceivable existence of damages graver than those in the case at hand, does not compel the conclusion that Tnuva's conduct did not cause a substantial infringement of the consumer's autonomy. The Court also rejected additional arguments made by Tnuva concerning the proof of the damage in this case, pointing out, inter alia, that for purposes of proving the damages head of infringement of autonomy it was not necessary to prove that the plaintiff would have refrained from acting in the manner that he acted had he been aware of the true situation, and for our purposes – that the consumers would have refrained from purchasing the milk had they known that it contained silicon. *A fortiori* there is an infringement of the consumers' autonomy when it can be reasonably assumed that most of them, indeed, would not have purchased the milk had they known that the "classic health product" was actually manufactured in defiance of the Law and the standard, using silicon at a rate that was ten times greater than the rate permitted in other food products, and especially if they had known that some of the experts maintain that consumption of milk containing silicon may be a health hazard. In this context the Court rejected Tnuva's argument that silicon is a food supplement in other food products and is not harmful, pointing out that the silicon was purchased by Tnuva as a cleaning product, and which was not supposed to have been in the milk. The Court further noted that the infringement of individual autonomy emerges clearly from the consumers' survey, but its approach was that it was not necessary to produce evidence of this damage – "the infringement of autonomy occurs along with the violation of the obligation to provide the consumer with all of the information, and the violation is an immanent result of tortuous conduct. The denial of the consumers' right to decide whether to purchase and consume Tnuva milk, in a balanced, informed and knowing manner, being aware of the relevant facts, constitutes independent remunerable damage, even in the absence of any other damage, and even absent proof that the consumers would have avoided purchasing the milk had they known all the facts". The Court added that the fact that Tnuva concealed the insertion of the silicon into the milk from its consumers, combined with the fact that this was a matter critical for the consumers, is proof of the infringement of the consumer's autonomy in terms of being denied the right to choose the product of his choice in a considered, intelligent and informed manner, in other words the right to prefer a product that does not contain silicon manufactured in compliance with the requirements of the law and the standard. The Court further ruled that the

right to autonomy is a basic constitutional right, the infringement of which mandates a appropriate and significant compensation.

11. Regarding the *evaluation of the damage* the Court held that it was appropriate to have consideration for the gravity of the infringement of the right on Tnuva's part in this case, and the infringement's influence on the consumers' decision and its degree of importance for them (in as much as the issue concerns a basic, "pure" product consumed by a vulnerable population. The Court added that even after giving consideration for the fact that the feelings of the interviewees may have been significantly affected by the media publications concerning the health hazard attendant to the consumption of milk containing silicon, half of those asked experienced negative feelings that are unrelated to anxiety, and it ruled that feelings of anxiety do not necessarily stem from the publications, but rather from Tnuva's conduct. In this context the Court rejected the claim that the media publications severed the causal connection between the acts of Tnuva and the damage, stressing that the consumer cannot be expected to undertake an in-depth investigation of medical studies before he purchases milk, and if the addition of silicon to the milk was proscribed by law and the standard, and there are experts who deem that it may constitute a health hazard under certain circumstances, then the fear of the consumers is understandable and natural. This concern, it was ruled intensifies the infringement of the consumer's autonomy, just as it intensifies the accompanying negative feelings. The consumer is permitted to assume, and presumably did assume that the milk standard is intended to protect his health , and when Tnuva absolutely ignored the standard, the fear for health is justified and well based, even without the publications to the effect that silicon is suspected of being carcegenerous.

Accordingly, it was held that it had been proved that the group in its entirety had incurred damage by reason of infringement of individual autonomy. The Court further determined that about *a half of the group's members* suffered non-pecuniary damage that found expression in various negative feelings, based on the consumers' survey and an estimation that took into account the possibility that exaggerated media publications had partially contributed to the negative feelings.

Regarding the *size* of the group, in other words, the number of consumers in Israel who purchased the silicon during the determining period (between 23 October, 1994 and September 1995) for domestic needs, or for hotels, restaurants and cafes, the Court endorsed the expert opinion of Ofir, the court expert, being impressed by his reliability and expertise, and preferring it over the expert opinions submitted by Tnuva. The Court further mentioned that Ofir had determined (based on the weighted average of the various methods of calculation) that 166, 307 households had purchased the milk, but given that in an average household a number of people purchase milk, Ofer determined that the number of people who had purchased the milk ranged between 166,307 (number of households) and 330,000 (adult purchasers) with a tendency towards the lower number. This being so, the Court determined that the number of members in the group, i.e. the adults who purchased the milk during the relevant period, was 220,000 people, and that the members of this group were entitled to compensation for an infringement of their autonomy and a half of them were entitled to additional compensation by reason of negative feelings.

12. The plaintiffs requested that the *remedy* be calculated the sum of the damages to be awarded to each one of them multiplied by their total numbers and in this context the Court noted that the high road was indeed that of individual compensation for each member of the group (sections 20(a)(1) and 20 (a) (2) of the Class Actions Law). This however is only possible when the number of members in the group is not large, when their identities are known and where they are able to prove their damage in the customary manner. On the other hand, there is a need for a certain degree of flexibility in proving damage when there is a practical difficulty of requiring each group members to prove his claim in the customary manner (by reason of their large numbers or because they cannot be expected to retain the relevant documents), and also where there is no practical means of locating all the members of the group

or where many of them will simply not bother to prove their damage due to its low rate. To overcome the difficulties involved in proving damage, its allocation and quantification in such cases, case law in the U.S.A developed a mechanism known as (FCR) Fluid Class Recovery, which was dwelt upon extensively by this Court. The Court did not ignore the fact that the case law in the U.S.A in this context is not uniform but deemed that with the necessary caution "ideas can be drawn from it" for our purposes, while stressing that from the Explanatory Note to the Class Actions Law it emerges that the Israeli legislator "had this mechanism". The Court referred to section 20(a) (3) of the Class Actions Law in accordance with which the Court is entitled to award overall compensation to a group, indicating that this section refers to the granting of a *personal remedy* to the members of the group and seeks to overcome the difficulty in calculating personal damage. The Court likewise referred to section 20 (c) of the Law that allows an award of a general compensation *to the public* or to *the members of group, all of them or in part*, while pointing out that this section is intended for cases in which it is not possible to locate the members of the group or to pay them compensation on a personal basis, notwithstanding that for purposes of granting this remedy too it is appropriate "to attempt to evaluate the sum of personal compensation owing to each individual member of the group in order to determine the sum of the overall compensation, and to ascertain that the sum of overall compensation does not exceed the estimated sum of aggregate damage that was caused to the group members…. it is likewise important to determine, at least by way of estimation the number of members in the group. This will assist the court to determine in the most accurate manner possible the overall sum for the group, for purposes of granting a remedy to the group or to the public" (para. 107 of decision).

On the other hand, the Court stressed that this sum of overall compensation does not necessarily reflect the product of the sum of personal damage suffered by each member multiplied by the number of members in the group, and some of the group's members may actually not receive compensation at all, whereas other, non-members, will benefit from the compensation. The Court further added that the infringement of autonomy and the "negative feelings" in this case are at all events non-pecuniary damages the determination of which by definition requires estimation and hence by nature cannot be precise. Accordingly, it is possible to determine the compensation for non-pecuniary damage by way of estimation alone and then to multiply it by the number of members in the group, which can similarly be determined on the basis of estimation, or the global payment can be determined by way of estimation. The Court mentioned that at all events, the unavoidable reality of it being an estimate need not negate the granting of a remedy in the group's benefit. The Court did not ignore the fact that section 20 (a)(3) of the Law states that the court may award an overall pecuniary compensation that will be divided between the members of the group, provided that it admitted of "precise calculation" but it deemed that this term should be interpreted in accordance with the purpose of the law and the section. The Court further mentioned that this term is missing from section 20 (c) of the Law, which deals with a remedy for the benefit of a group or the public and that s. 20 (e) of the Law stressed that the demand for the proof of damage would not prevent compensation for non-pecuniary damage. The Court further mentioned that occasionally the practical goal of the legal process requires that compensation be awarded in accordance with a uniform criterion even if it is clear that there are differences between the various plaintiffs, and this is the case at hand. The Court addressed the consumers survey that was presented and ruled that it proved the damage relating to the negative feelings in accordance with the degree of certainty required in a civil proceeding, especially having consideration for the fact that it only concerned the criterion or calculating the global compensation that could be determined on the basis of an evaluation. Similarly, the Court noted that in the decision pertaining to application for confirmation of the suit as a class action, the Supreme Court assumed that there was no escaping the award of compensation for the benefit of the group, and it further mentioned that Tnuva's claims in the respect undermine the decision to approve the suit as a class action. The Court further rejected Tnuva's alternative claim to the effect that at the very most it was possible to base the compensation on "wrongful profit" that it

gained by reason of the acts forming the subject of the suit. The Court likewise rejected Tnuva's claim that at the end of the day it had only incurred losses by reason of the affair and as such it had no wrongfully gained profits. The additional claim raised by Tnuva as an alternative claim, argued that the profit made reached amounted to NIS 350,000 only and it was likewise rejected by the Court

Regarding the determination of the damage, the Court stressed that in its claim sheets Tnuva did not refer to section 20 (d)(2) of the Class Actions Claim which authorized the court to have consideration for the damage liable to be caused to the defendant or to the public requiring its services due to the payment of the compensation. All the same, and even though no claims or explicit data was presented to it regarding this matter, the Court ruled that the evidential material indicated that the compensation would not impair the ongoing activity of Tnuva or jeopardize its economic stability and that at the very most, the compensation would have a negative effect on its profits in the near future. The Court similarly emphasized that in order to achieve the aims that are at basis of the class action, the remedy for the plaintiff groups must be efficient and substantive.

13. For all of the reasons mentioned, the Court decided on a monetary remedy in favor of the group, by force of s. 20 (c) of the Class Actions Law, to be calculated on the basis of an identical sum for each member of the group. The Court further ruled that awarding compensation for the sum of NIS 8000 for each member of the group, as requested by the representative plaintiffs, was perhaps appropriate for a personal claim, but in this particular class action would have meant a monetary remedy amounting to an overall sum of NIS 1.76 billion, which is unreasonable. Having consideration for the entirety of the data, the Court ruled that Tnuva should pay a global sum of NIS 55 million, which reflects personal damage at the sum of NIS 250 for each member of the group (NIS 250 X 220,000), while pointing out that this sum, and even in excess thereof, was most definitely suffered by each members of the group, even if only by reason of the breach of individual autonomy.

The Court further determined that the sole practical remedy was the remedy in favor of the group, which should be divided in accordance with three objectives:

(1) Awarding a benefit to the members of the group by reducing the price of the product (or increasing its contents without raising the price). The Court noted the difficulties involved in the realization of this remedy, noting that its certification would require an economic expert opinion, the certification of the Director of Antitrust and the position of the Attorney General, and supervision of its execution by force of s. 20 (f) of the Law;

(2) Transfer of part of the compensation sum to a research and scholarship fund in the field of food and nutrition which have implications for public health

(3) Distribution of milk free of charge to populations in need via non-profit organizations so involved.

The Court further ruled that "the allocation of the sum between the three approved objectives will be determined after it becomes possible to confirm the discount from the price, in accordance with the conditions determined, and after an allocation plan is filed for the two other objectives", and it noted that it could be expected that the parties would reach agreement concerning the manner of allocation of the sum of compensation in accordance with the above, so that the Court would not be compelled to enforce a settlement upon them.

Regarding the compensation for the representative plaintiffs and the legal fees for their attorney, the Court noted that the application for a legal fees award for the sum of NIS 400 million is unreasonable and unfounded. It further ruled that at that stage the compensation and legal fees should not awarded given that the final conclusions had yet to be drawn regarding the manner of allocating the overall sum of compensation, but after having considered the criteria for the determination of the rate of legal fees and compensation, the Court ordered the payment of an intermediate sum "against the account of the final sums" as follows: compensation to Raabi's heirs for the sum of NIS 150,000; compensation to the Consumers Council for the sum

of NIS 250,000; legal fees for the sum of NIS 500,000; and court expenses for the sum of NIS 100,000.

Tnuva rejected the partial decision of the trial court and appealed against it in this Court (CA 10085/08; hereinafter – the Tnuva appeal); the representative plaintiffs on their part filed a counter appeal against the decision (hereinafter: the appeal of the representative plaintiffs) but before the hearing of these appeals, the District Court gave a supplementary decision

The Supplementary Decision of the District Court –

The Final Compensation and Legal Fees Awarded and the Manner of Allocating the Compensation

14. In the supplementary decision of 17 June 2009, the District Court gave effect to the agreements reached by the parties, with the cooperation and the agreement of the Attorney General. The agreements were as follows: (a) The allocation between the three objectives would be – the discounts arrangement 22%, the research and scholarship fund 33.33%, and the distribution of milk products to the needy 44.6%; (b) the distribution of milk products (not only the long lasting milk forming the subject of the suit) would be over a period of five years, beginning as of the commencement of fulfillment of the decision, via a NPO known as "*Latet"* ["To give" – Trans.] and *Mishulhan leShulhan* ["From One Table to another Table" – Trans.]*;* (c)For purposes of transferring the compensation for research purposes in the field of food and nutrition, a research fund would be established, headed by the Chief Scientist of the Ministry of Health. The management of the fund (whose members are stipulated in the agreement) will select the research programs that will be entitled to the scholarships and supervise them. The sum of the compensation will be utilized over a period of five years, unless the need arises to continue to use the sum thereafter as well; (d) the particulars of the discounts arrangement will be formulated following the decision on the appeal filed against the partial decision and will be based on the existing data at that time and will apply to all categories of long lasting milk (1% to 3% fat) and will be completed within five years from the commencement of execution. This arrangement merited the certification of the Director of Antitrust but the Court noted that there might be a need to return to the Court in the event of a significant time period passing until the beginning of its execution. The Court further mentioned that should the parties fail to agree on the details of the discounts arrangements, it would appoint an expert to determine its details. The Court further added that the execution of the partial decision in accordance with the agreements specified would be delayed until a decision was given on the appeal that was filed against it.

Regarding the final compensation and legal fees the Court ruled that the interim sums determined in the decision were to be supplemented by the following sums: Raabi's heirs would receive compensation for the sum of NIS 350,000; the Consumer Council would receive compensation for the sum of NIS 750,000; the attorneys of the representative plaintiffs would receive the sum of NIS 2,000,000 and regarding this the parties agreed that the compensation would be paid within thirty days of handing down the supplementary decision, as well as 60% of the fees that was to be awarded and that payment of the balance would be postponed until after the decision on the appeal. Finally, the Court ruled that an advertisement should be published in the three main newspapers, including the central elements of the decision.

The parties have also challenged the supplementary decision before us. The representative plaintiffs on their part appealed this decision (CA 6339/09) and Tnuva too has requested our intervention (CA 7607/09). The parties' claims in the appeals against the partial decision and the supplementary decision (which will hereinafter be jointly referred to as "the decision" were filed together).

Tnuva's Claims

15. Tnuva claims that the Lower Court's decision should be overturned, and alternatively that the sum of compensation ruled against it should be significantly reduced. They claimed that the District Court had aimed at accepting the class action and had avoided the accepted

procedural rules. Tnuva further argues that from the decision it emerges that the basic principles of tort law do not apply to consumer class actions for non-pecuniary damage, and that this unlawfully defies the parameters of the Class Actions law contrary to its language, its guiding principles and in defiance of the law determined in the further hearing in the matter of *Barazni* [2] . Tnuva claimed that the Lower Court actually cancelled the requirement for a causal connection between the misleading and the damage, and emphasizes that in the decision in the matter of *Daaka* [4] the infringement of the autonomy stemmed from the urgency of the information and its centrality in the individual decision making process. It follows that when the information does not influence the individual decision making process there is no basis for awarding him compensation. Alternatively Tnuva claims that if the *Daaka* [4] decision is interpreted as a decision that which abandons the requirement of the causal connection, it should be restricted to its specific context and the exceptional circumstances in that case that pertained to the infringement of informed consent to medical treatment, and it claimed that a deviation from the classical rules of tort is not justified in the context of the tort consumer deception and deviates from the Supreme Court's decision in the *Barazani Further Hearing* [3] Here, Tnuva refers to the Court's decision to the effect that for purposes of compensation under the tort head of infringement of autonomy, there is no requirement for an examination of the personal particulars of each victim, and the conclusion is that the victim himself does not constitute a factor in the calculating formula

Tnuva further claims that the representative plaintiffs did not prove that they incurred any damage as a result of its acts and that in fact, the damage was caused as a result of media publications and not as a result of the negating of their choice in purchasing milk. Tnuva further claims that the Court erred in its estimation of the sum of compensation in a uniform manner for all members of the group, notwithstanding the differentiation in the sum of compensation that the members of the group are prima facie entitled to based on their personal particulars. Its claim, which it seeks to anchor in the Israeli and American case law, is that non-pecuniary damages are by definition individual and cannot be assessed in a uniform manner, and that they include the damage caused by infringement of autonomy which likewise is individual-subjective. Furthermore, Tnuva claims that in the case at hand compensation for the group and the public should not have been awarded and that at all event there was no basis for calculating the overall damage based on a simple multiple of the number of members in the group by the rate of personal damage. Tnuva also claims that the sum assessed by the Court as representing the damage from which each member of the plaintiffs group suffered - NIS 250 – is an arbitrary sum that was determined without any supporting evidence and without giving any substantive reasons for the manner of its determination. In addition, Tnuva points out that in awarding a uniform damage the Court failed to distinguish between the members of the group, who according to its own determination had suffered from negative feelings as a result of the consumption of the milk, and those who did not suffer these feelings; nor did it distinguish between those for whom the fact of the addition of the silicon would have influenced the decision to consume the milk and those for whom it would not have influenced is consumer conduct.

16. Tnuva also claims that the overall compensation awarded by the Court is exaggerated and unprecedented and it stressed that its entire profits from the sale of milk during the relevant period stood at NIS 3.4 million. The claim was that the Court actually awarded *penal compensation* as attested to by the "penal" terminology that is used in the decision, even though this has not place in the framework of a class action, in accordance with the provisions of section 20 (e) of the Law.

Tnuva found an outstanding example of this in the Court's rulings regarding the health hazard in the consumption of food containing silicon and argued that the sole purpose of the discussion of the matter was to clarify to the reader exactly "why Tnuva is deserving of a punishment". Tnuva claims that in this matter the Court handed down contradictory decisions as well as decisions that contradict that which was stated in the decision relating to the

certification application. It further argues that the trial court avoided the exercise of its authority to rule on the veracity of the claims of the representative plaintiffs, and that it imposed a "featherweight" evidentiary because it contented itself with the existence of a few studies (which were presented to it incidentally), without ruling on their veracity, and without having been presented with a detailed expert opinion on the matter. Tnuva emphasized that the official standard prohibited the addition of any substance to the milk (apart from Vitamin A or D in particular circumstances) and did not relate specifically to the addition of silicon. Similarly, Tnuva claimed that the official force of the standard had already expired in 1998 and that it was no longer binding upon milk producers, and that in other standards it had been permitted to add silicon to food products, even to such as are consumed by infants, in quantities similar to those that it added to the long standing milk and in dimensions in excess of those involved in the case at hand. Tnuva further added that the trial court's determination that the health hazard could be inferred from the very violation of the standard was unfounded and was actually in contravention of the provision of s. 17C (a) of the Standards Law. Tnuva further argued that the absence of a health hazard from the consumption of silicon may be inferred from the Danon Committee Report and the holdings of the court in the criminal proceeding conducted against it. At all events, its approach was that even given a determination of the possibility of a health hazard, this would not constitute sufficient basis for a ruling of compensation, because compensation cannot be ruled based on a possibility, not proven, of negative feelings being caused by a theoretical risk to health. In this context Tnuva added that the Court's determination to the effect that milk is a "natural and pure" product cannot stand, because the consumer conception is that milk is a processed product that contains different food supplements and only a minority of consumers are of the opinion that was presented by the Lower Court. Tnuva also dwelt on the discrepancy between the compensation awarded in the case at hand and the compensation ruled in other class actions.

17. Tnuva further claimed that s. 20 (c) of the Class Actions Law establishes compensation for cases in which there is no possibility of determining or locating the members of the plaintiff group, and hence the Lower Court erred when determining that the section applies when it is not possible to determine the sum of the damage. Tnuva stresses that the section was not intended to "supersede" the regular rules of evidence and to enable an arbitrary determination of the amount of scope of the damage and sums of compensation. Furthermore, Tnuva argues that the Lower Court erred in determining that the compensation mechanism of s. 20 (a)(c) of the Law differed from that of s. 20 (c) of the Law, claiming that compensation under s.20(c) was also subject to the requirement of "precise calculation" prescribed in s. 20 (a)(c) of the Law. Accordingly, compensation for the public benefit or for the benefit of a particular group can only be awarded when personal compensation would not be practical were the requirement of "precise calculation" to be complied with. Tnuva submitted that insofar as the case at hand does not admit of accurate calculation of the damage or even estimation based on "stable" statistical data, the Court had no choice other than to reject the suit. Tnuva further added that in the U.S.A., when there is no possibility of accurately calculating the damage to a group or where the damage is non-pecuniary, the Court does not approve the filing of a class action.

Alternatively, Tnuva claims that even if the case at hand warrants the ruling of compensation for the benefit of the group's members, it should not have been assessed in the manner adopted by the Lower Court. Its argument was that since the damage caused to each member of the group cannot be determined it is not correct to arbitrarily determine the compensation based on multiplying any particular sum of damage by the number of members in the group. Rather, it should be based on the "wrongful profit" that it accumulated. Tnuva claims that compensation based on calculation of profit overcomes the difficulties in the case before us: it would reflect the consequences of the event that gave rise to the suit; it would prevent the difficulty of assessing non-pecuniary damage and the unified "pricing" of the negative feelings, despite the differences between the members of the group. It will also prevent the difficulty of assessing damages in accordance with unsubstantiated surveys.

According to Tnuva, the profit it gained from the execution of the wrong is NIS 1,645,900 in the terms of the principal, and with the addition of the interest and linkage differentials (from the middle of the period) it comes out to NIS 4,981,616. Alternatively, Tnuva claims that the compensation should be calculated based on the sum saved by using the silicon to solve the problem of frothing, which comes out to USA$400,000 (which with the addition of linkage differentials and interests comes out to NIS4, 346,991). It was claimed that this sum can be supplemented by a reasonable deterrent factor. In addition, Tnuva claims that even if it be determined that the number of members of the group should be multiplied by any particular sum of damage, certain substantive defects in the method of evaluation conducted by the Lower Court must still be remedied. Its claim was that this multiplication should only include consumers who suffer from substantive negative feelings due to the consumption of milk and it should not include feelings related to "positions or viewpoints" which they hold as a result of the Tnuva's conduct (such as temerity and contempt). Tnuva's position is that based on the data presented in the court, consumers who answer that definition constitute about 15% of the members of the group defined by the District Court. Tnuva also maintains that the number of members in the group should be fixed at 166,000 (the minimal threshold determined in Ophir's expert opinion) and alternatively at 200,000 (allegedly claimed by Ophir in his testimony.

18. Tnuva further claims that the sum awarded by the Lower Court for remuneration and legal fees is excessively high, emphasizing that it constitutes 7% of the total sum of compensation. In addition, it claims that this sum deviates from the guiding criterion for such matters, prescribed in the Law (ss. 22 and 23 of the Law) and in settled case-law. Regarding the Israeli Consumer Council Tnuva argues that the former did not invest significant work, nor did it assume any risk; that it is a budgeted statutory body and not a private person who requires incentives; that the Consumer Council did not initiate the proceeding and joined it at a relatively late stage; and finally, that its degree of involvement was minimal and negligible. Regarding the legal fees of the representative plaintiff's attorneys, Tnuva claims that the fee is unprecedented, that has no consideration for the manner in which the suit was handled and the discrepancy between the remedies that were requested and those that were ultimately awarded, and adds that the sums awarded by the Lower Court are liable to pave the way towards abuse of the tool of the class action.

Claims of the Representative Plaintiffs

19. In the counter appeal, the representative plaintiffs claim that given the Court's holding that the sum of NIS 8000 for each consumer is appropriate for a personal claim, there is no justification for reducing it to NIS 250 just because the context is that of a class action. They stressed that Tnuva too did not claim that the defense under s. 20 (d)(2) of the Class Actions Law was applicable to this case. The representative plaintiffs further claim that the reduction of the compensation empties the class action proceeding of its contents and is inconsistent with the Court's determinations to the effect that grave damage was caused, justifying commensurate compensation. The representative plaintiffs add that increasing the compensation sum will not harm the public, inter alia having consideration for the sales data and profits of Tnuva, and they complain that the group of those represented was significantly reduced, to include only those who purchased the milk regularly, whereas it should also have included incidental purchasers. They add that the sole reason for the reduction of the group was that Tnuva provided partial information to the court expert who was appointed for purposes of assessing the size of the group.

The representative plaintiffs further claim that Tnuva's pleadings ignore the decision given on the certification application, in an attempt to revisit an already settled matter. Regarding Tnuva's claims concerning the health risks posed by the milk, the representative plaintiffs claim that the Lower Court ruled on this matter in the wake of Tnuva's request to present evidence on the matter and that the findings themselves were over and above what was required. According to the representative plaintiffs, the very prohibition on the addition of silicon to the milk in an official, binding standard (published as a regulation of legislative effect) and its breach,

combine to establish the grounds for claim in the framework of the suit. In addition, there was proof of the grounds for action under the Consumer Protection Law (also having consideration for the provisions of the Standards Law). It was proven that silicon posed a potential health hazard, and it was proven that Silicon was aware of the problem and of the defect involved in the addition of silicon to the milk. In this context the representative plaintiffs stress that when Tnuva purchased the silicon from the Amgal company, it made a representation that it was purchasing it as a cleaning material and they also stress that silicon was added to the milk at a rate that was ten times higher than the level permitted under the provisions of the silicon producer for purposes of using silicon in food (they claim that the silicon was added at a rate of one liter per 10000 liters of milk, whereas according to the manufacturer's instructions it is permitted to add it at the rate of a "ten parts for a million"). The representative plaintiffs further claim that both in relation to Raabi and in relation to the group as a whole, damages had been proved with respect to infringement of autonomy and negative feelings relating to the consumption of milk. The representative plaintiffs stress that in this context it was proved that had the consumers been aware of the existence of silicon in the milk they would not have purchased it, and this is by virtue of both the importance of the official standard and the fact that its breach renders the product "worthless at best". The representative plaintiffs also add that there are likewise no grounds for interfering with the findings of the Court regarding the occurrence of damage and the gravity of Tnuva's acts in view of the positive impression made by the witnesses and the experts on behalf of the court. They also stress that the autonomy of the individual is a constitutional right, and hence its infringement should merit commensurate compensation, and they claim that this does not constitute an award of punitive compensation.

The representative plaintiffs add that there are no grounds for interfering with the Lower Court 's holding that the damage caused as a result of the infringement of autonomy is an inherent element of the tortuous conduct, and that this is also the conclusion from the *Daaka* [4] ruling. In addition, they claim that in the present case it is appropriate to award uniform compensation based on an assessment stating that inasmuch as the right to autonomy is a constitutional right, it is an identical right for each member of the group, and that the provisions of the Class Actions Law enable a cumulative calculation of the damage incurred by all the members of the group. They further add that the damage caused in this case is essentially given to assessment by way of estimation; that the arrangements in the Law enable the proof of damage in a manner that is not particularistic and individually based but rather general and all inclusive and that the tendency in case law is consistent with the need to award uniform and equal compensation to all of the plaintiffs as such. The representative plaintiffs stress that this result does not contradict the ruling given in the *Barazani Further Hearing* [3] and they add that as opposed to Tnuva's argument, the FCR mechanism does not negate awarding compensation in cases of this kind, indicating that in certain cases American case law awarded "average compensation" multiplied by the estimated number of members in the group. They further state that the FCR mechanism is essentially intended for the distribution of overall compensation, and that the current criticism of this mechanism pertains to the question of distribution of compensation to a group or the public and not to the manner of evaluation of the compensation in accordance therewith.

20. The representative plaintiffs further request to dismiss Tnuva's argument for reducing the sum of compensation owing to them, emphasizing that the compensation awarded to them constituted a mere 2.5% of the sum ruled in favor of the group as a whole. The attorneys for the representative plaintiffs argue that in fact the Court "punished" them for the discrepancy between the sum ruled in favor of the group (which was unjustifiably reduced) and the remedy which they petitioned for in the name of their principals. Their argument is that in this context the Court mistakenly applied the provision of s. 23 (b) (5) (which provides that in ruling attorneys fees the court may have consideration for the discrepancy between the remedy sued for and the remedy actually awarded), and that it failed to consider all the relevant factors The attorneys for the representative plaintiffs claimed that they had done a significant amount of work, directing attention to the novel claims that they raised in the proceeding, and they

challenged the Lower Court 's determination that part of the proceeding had not been properly conducted, pointing out that all of their objections had been relevant.

The Class Action and the Consumer Protection Laws - Meeting of Principles

21.The class action is a special procedural tool for the effective and efficient promotion of principles, values and substantive legal rights. This legal institution is currently regulated in the Class Actions Law which is a comprehensive and detailed framework law that established standard rules for the filing and conducting of class actions. The Law was enacted in 2006 after this Court called upon the legislator to regulate the institution of a class action in a comprehensive statutory arrangement (see LCA 3126/00 *State of Israel v. E.S.T. Project Management and Manpower Ltd* [5]; FHC 5161/03 *E.S.T Project Management and Manpower Ltd v. State of Israel* [6], but the importance of the class action had been recognized in Israel many years before the enactment of the Class Actions Law. Thus, a series of laws and "local" arrangements relating to the filing and conduct of class actions was already in place, most of which were incorporated as chapters in those laws during the nineties of the previous century. They included provisions that are essentially similar to the criteria and conditions the fulfillment of which enables the filing of a class action in that particular realm. See Chapter F'1 of the Restrictive Trade Practices Law, 5748-1988 (hereinafter – the Restrictive Trade Practices Law); Chapter F'1 of the Banking (Service for Customer) Law, 5741-1981 (hereinafter – the Banking Law); ss. 19 (54) - 19 (64) of the Equal Rights for Disabled Persons Law, 5758 – 1998; s. 11 of the Male and Female Workers Equal Pay Law 5756- 1996. All of these specific arrangements were repealed with the enactment of the Class Actions Law (see ss. 32 – 35, 38 – 40, and 42 of the Class Actions Law) and even before its enactment, the *E.S.T* [6] decision negated the possibility of basing a class action on Regulation 29 of the Civil Procedure Regulations, 5744-1984, which until that time had served as a normative source and a procedural framework for the filing of class actions in areas lacking a specific statutory arrangement as mentioned above.

This importance of the class action was discussed by this Court both before and after the enactment of the Class Actions Law in a series of decisions that address its advantages as a legal tool for enabling the realization of the right to file a personal claim in cases where the filing of a claim was not profitable or not feasible for the individual. In addition, this Court's case-law has dwelt upon the importance of the class action in the promotion of public interest as a legal tool that assists in the efficient enforcement of the law and deters financial magnates who rely on the passivity of the individual, abuse their power, and harm unincorporated groups such as consumers or investors in securities. An additional element of importance of the class action considered in the case-law is that this procedure prevents the multiplicity of suites and hence saves judicial resources, and from this perspective too, the institution of class actions makes its contribution from a public interest perspective (for the definition of the objectives and goals of the Class Action, see s.1 of the Class Actions Act; on this matter see also: CA. 8430/99 *Analyst I.M.S. Trust Funds Management (1986) v. Ard Industrial Investment and Development*, [7] at p. 256; 8 LCA 4556/94 *Tetzet v. Zilbershatz*, pp. 783-785 [8]; CA 345/03 *Reichart v. Raabi Moshe Shemesh Heirs*, paras. 8 – 9 of opinion of the President Beinisch [9]; Sinai Deutch "A Decade for the Class Action Suit – Interim Summary and Looking to the Future *Shaarie Mishpa*t 4, 9, 21- 24 (5765) (hereinafter – Deutch - Decade for the Class Action); Steven Goldstein and Talia Fisher "Interaction Between Mass Actions and Class Action: Procedural Aspects" *Mishpatim* 34, 21, 24- 26 (5764) (hereinafter – Goldstein and Fisher)).

Along with the inherent advantages of the class action it should be remembered that incorrect use of this tool involves not insignificant dangers (see *Analyst* [7], at p 256; *Tetzet* [8], FHC *E.S.T* [6] at p. 785 [6] at p. 237; Alon Klement "The Boundaries of the Class Action in Mass Tort", *Mishpatim* 34, 301, 325- 331 (5764) (hereinafter – Klement, Boundaries of the Class Action)). The laws of class action and their judicial supervision are thus intended to maintain an appropriate balance between the risks and chances of the proceeding and to ensure

that it realizes the legal, economic and social goals for the promotion of which it was established (see CA 3506/09 *Zaig v. Waxelman, Waxelman Accountants* [10] paras. 7 – 8 ; and *Tetzet* [8] at pp. 785 – 786).

22. One of the outstanding areas in which the advantages of the class action are demonstrated is the laws of consumer protection. Israeli legislation contains a large series of legislative acts intended for consumer protection. The central law in this context is the Consumer Protection Law, enacted in 1981. This law includes detailed provisions concerning the duties and prohibitions applicable to dealers, in other words, to manufacturers, importers, tradesmen and providers of services, with the aim of subjecting the business sector to a regime of appropriate conventions of behavior, to establish fair game rules in dealer-consumer relations, and to prevent the misleading of consumers with regard to an asset or service that he consumes (on the goals of the Consumer Protection Law - see Sinai Deutch, *Consumer Protection Law* 120 – 126 (Vol. A. 2001); Explanatory Note for the Draft Bill (*Hatza'ot Hok* 1469, 302- 303, 5740). Other laws intended for a similar purpose are for example, the Banking Law (Service to Customers), Supervision of Financial Services (Insurance) Law, 5741-1981 and the Restrictive Trade Practices Law. These laws and additional laws admitting of classification in the category of consumer protection law regulate various aspects of this protection and are intended to prevent unjust enrichment on the part of large financial concerns or on the part of State authorities, at the expense of the individual.

The point of departure for consumer protection law is the structural imbalance that characterizes the consumer transaction when struck between a financial body, occasionally a large and multi-tentacled company, or even a retail trader and the individual consumer (assuming that he lacks the size advantage of organized consumption). The legislator accordingly pinpointed this population sector as requiring intensified legislative protection to ensure that the dealer, having the advantages of knowledge and economic ability, does not misuse these advantages for reaping quick profits at the consumer's expense, while deceiving him in essential matters affecting the nature of the transaction. For example, the Consumer Protection Law seeks to ensure that when entering into a transaction the consumer has full and fair information concerning the nature and the details of the transaction, the assumption being that this will enable the consumer to plan his actions and enter into a transaction that is optimal and desirable from his perspective. Additional prohibitions in the Consumer Protection Law concern the exploitation of the consumer's distress, exploitation of his physical or mental weakness, or his ignorance of the language, and the prohibition of exerting undue influence upon him (see CA 3613 *Ezov v Jerusalem Municipality* [11], at p. 801; LCA 8733/96 *Langbert v. State of Israel – Israel Lands Administration* [12], pp. 175- 176 (hereinafter – *Langbert*); Sinai Deutch "Consumer Class Actions: The Requirement for Personal Reliance on the Misrepresentation of the Deceiver" *Nethanya Law Review* 2, 97, 110 – 114 (5762) (hereinafter – Deutch, The Requirement for Personal Reliance). Apart from the importance of the consumer protection laws in redressing the imbalance of power between the dealer and the consumer and strengthening the consumer's personal autonomy, these laws are also important in realizing public interest of inestimable importance such as: the notion of consumer sovereignty; protection of the right to welfare and social rights, promotion of the principle of fairness in trade, protection of the reliability of the local market, and maintaining trust in the social order and the provisions of the law.

23. Having synoptically outlined the underlying objectives and goals of consumer protection law, and the objectives and goals of the class action as a legal procedural institution, we can easily identify the "meeting of principles" between the goals intended to be promoted by the class action tool and the values and rights that these laws seek to protect. Hence, the class action can overcome both the inbuilt balance of power between the dealers – those with the economic advantage - and the consumers, and the lack of profitability that frequently accompanies the filing of a claim by the isolated consumer, given the relatively small amount of damages he has incurred (See *Barazani* [2]; Deutch - The Requirement for Personal

Reliance, 115. Regarding the systems for civil enforcement in the area of consumer protection, see Moshe Bar-Niv (Bornovski)).

Indeed, the tool of the class action is actually one of the most significant measures placed by the legislature at the consumer's disposal for the enforcement of his rights under the laws of consumer protection (see Deutch – a Decade for the Class Action, 18 – 20 according to which most of the class actions filed in Israel are "consumer actions" by force of the various consumer laws. On the other hand, the implementation of the provisions pertaining to consumer class actions has also been criticized. See Deutch "Consumer Class Actions – Difficulties and Proposed Solutions" *Bar Ilan Law Studies* 20, 299 (2004); see also CC (Center) 5567-06-08 (Nazareth) *Bar v. Ateret Industries 1996 Ltd*, para. 39 [ ] where the court observed that in many of the cases it would have been preferable had the consumer deception been handled in an alternate framework, such as the imposition of punitive compensation rather than as a class action proceeding). As mentioned, the provisions for filing a class action under the Consumer Protection Law used to be included in Chapter F'1 of that law, along with additional enforcement measures included therein, inter alia - the administrative mechanism in the charge of the Commissioner of Consumer Protection, and the Consumer Protection Authority, and the criminal system which purported to enforce the norms established by this law via the criminal law With the enactment in 2006 of the Class Actions Law and the establishment of a comprehensive framework arrangement for the filing and conduct of class actions, came the revocation inter alia of Chapter F'1 of the Consumer Protection Law, so that as of today, as mentioned, the provisions of the Class Actions Law govern the filing and the conduct of class actions in all areas, including in the areas of consumer protection (see s. 3 of the Class Actions Law, and item 1 of the Second Schedule of the Law).

Tnuva's Act of Misleading

24. The proceeding before us began with an application for the certification of a class action, filed in 1995 in reliance on the provisions of Chapter F'1 of the Consumer Protection Law. As described above in the chapter on the facts, already in 1996 the District Court approved the filing of Raabi's personal claim as a class action, and Tnuva's appeal against the certification decision was rejected by this Court in the year 2003 (CA 1338/97). The proceedings for the certification of the class action were similarly handled in accordance with the provisions of Chapter F'1 of the Consumer Protection Law then in force. However, after the District Court began hearing the approved class action, the Class Actions Law was enacted, and as indicated by the decision of the Lower Court, its provisions provided the basis for the decision on various issues, including the provisions pertaining to the compensation and fees. The application of these provisions to our proceeding was correct, given the provision of s. 45 (b) of the Class Actions Law, which determines that the provisions of the Law (apart from the provision of s. 44) "shall also apply to application for a certification of a class action and a class action that was pending before the court on the date of publication of this law" (see CA 7028/00 *A.B.A. Trust Funds Management Ltd v. Elsynth Ltd* [13] paras 16-18 ; HCJ 2171/06 *Cohen v. Knesset Speaker* [14] para. 46. The Lower Court further added, and rightly so, that even though the Class Actions Law did not limit the grounds for a class action exclusively to the "consumer", as defined in the Consumer Protection Law, the class action in this case should be adjudicated in accordance with the original grounds that were based on the Consumer Protection Law and in relation to a consumer group answering the definition of "consumer" in that law ("one who purchases an asset…..primarily for his personal, domestic or family use", given that the representative plaintiffs did not apply to amend the claim and file additional evidence in the wake of the new law, that broadened the circle of potential plaintiffs in this context (and see Alon Klement "Guidelines for the Interpretation of the Class Actions Law, 5766-2006), *Hapraklit* 49, 1354-135 (5767) (hereinafter – Klement).

25. In the class action before us it is claimed that Tnuva violated the prohibition on misleading established in s.2 of the Consumer Protection Law, which provides that

> A dealer shall do nothing—by an act or an omission, in writing,

> by word of mouth or in any other manner—likely to mislead a consumer as to any matter material to a transaction (any such act or omission hereinafter referred to as a "misleading act"...)

The thrust of the misleading act ascribed to Tnuva is that Tnuva added silicon to low fat (1%) long lasting milk without this ingredient being mentioned on the packaging and in defiance of the official and binding standard in force at that time, and in so doing mislead the members of the group, consumers of long lasting milk regarding a "material aspect of the transaction" pertaining to the "the quality, nature, quantity and type of any commodity or service" (s. 2 (a) (4); and "the conformity of the commodity or service to a standard, specification or model" (s. 2 (a)(11).

It was further claimed that Tnuva breached the duty of disclosure imposed on it as a dealer, pursuant to s. 4 (a) of the Consumer Protection Law, to disclose to the consumer, inter alia:

> (1) any defect or qualitative inferiority or other feature known to him that materially diminishes the value of the commodity;

Likewise it was claimed that Tnuva had breached the obligation of indication as prescribed in section 17 of the Consumer Protection Law, which likewise expresses the broad duty of disclosure imposed on the dealer and which provides inter alia that:

> A dealer shall indicate the following particulars upon, or upon a thing attached to, goods intended for the consumer:
>
> ------
>
> (a) the quantity of the commodity and a detailed statement of the basic materials of which it consists.

The prohibition on misleading and the duty of disclosure and indication imposed on dealers in accordance with the Consumer Protection Law, were intended to realize one of the Law's central underlying goals, namely providing all of the information required by the consumer in order to enter into an intelligent engagement that gives true expression to the principle of the freedom of contractual engagement (see *Langbert* [12], p. 175 – 176).

26. The Lower Court accepted the claims of the representative plaintiffs, and in its decision ruled that the Tnuva had committed an act of misleading that was prohibited under the Consumer Protection Law and had breached its statutory duties of disclosure by adding silicon to the milk without disclosing that fact to the consumers and without disclosing that the addition of silicon as stated contravenes Standard No. 284 of the Israeli Standards Institution, which at that time was the official and binding standard for purposes of "cow's milk for drinking" (hereinafter: "the standard).

Evidently, at this stage of the hearing of the appeal, Tnuva no longer contests the fact that it mislead its consumers. Indeed, in the summations filed on its behalf in the appeal it confirms that it "mislead the consumers by way of omission in its failure to indicate on the packaging of the long standing milk that a froth preventing food supplement was added, bearing the trade name "E-900" (section 2.1 of Tnuva's summations). Similarly, it would seem that there can be no doubt regarding the consumer's right to be aware of the ingredients of the product that consumes . This right is the basis of the duties of disclosure and indication imposed on the dealer in this context, which we addressed above, and it may be asserted that these duties become doubly important when considering that the issue concerns milk which is a basic food product consumed by numerous consumers.

As mentioned, one of the substantive matters to which the prohibition of misleading applies under the Consumer Protection Law is the "conformity of the asset or service to the standard, specification or model" (s. 2 (a)(11)). In our case Tnuva contravened the prohibition in this sense too because the definition in s. 105 of the standard enumerates the materials that can be added to the various milk products and silicon is not included among these products. Our concern is with a standard that was declared as the Official Standard on 13 October. 1987

(*O.G.* 3473, 2274). As such Tnuva is bound by s. 9 (a) of the Standards Law, which prohibits the production and the sale of a milk product that does not comply with the requirements of the standard (for an analysis of the grounds for declaration of a standard as official and the duties established by the standards (see Eliyahu Hadar, *Behind the Standards Law,* 56- 92 (1997)), and accordingly Tnuva mislead its consumers with respect to the product's conformity to the standard (see also s. 107.5 of the standard, which establishes that the supplements – if added - must be indicated, and see Official Standard No. 1145 regarding the "Indication of Prepackaged food"). Parenthetically, it bears note that nonetheless, in 1998 the declaration concerning the official status of some of the sections, including s. 105, was cancelled, and today they have the status of recommendations only (see Notification of Expired Validity of Standards (Food Standards) as Official Standards, *O.G.* 4649, 5759, 334, 336). Tnuva argues this issue is also of substantive significance for purposes of this proceeding too, and this claim will be discussed below.

27. As mentioned, Tnuva no longer disputes the fact that its acts are tainted by having been misleading within the meaning of the Consumer Protection Law and by its violation of the disclosure duties imposed on it by force of that Law. Nonetheless, Tnuva maintains that the Lower Court erred in ruling that it must compensate the group members for the non-pecuniary damage allegedly caused to them under the circumstances. The thrust of Tnuva's claims as dwelt upon above, is that the act of misleading did not cause any real and compensable damage to any of the group members , and that even if thy incurred real damage, the causal connection between the alleged damage and the act of misleading was not proved. At all events, Tnuva further added that the Court erred in holding that compensation must also be awarded under the head of infringement of autonomy to group members in respect of whom it was not proved that they had experienced negative feelings due to their consumption of milk containing silicon.

Misleading a Consumer as a Wrong in Tort in the Representative Context

28. The legal field in which the consequences of the Tnuva's actions must be examined in this case is the field of Tort, referred to by s.31 (a) of the Consumer Protection Law, which instructs us that:

> "Any act or omission in contravention of Chapters Two, Three or Four shall be treated as a civil wrong under the Civil Wrongs Ordinance (New Version)"

Our concern is with a consumer tort rooted in the Consumer Protection Law, but the body and head of which are formulated in accordance with the basic principles and doctrines of Tort Law. In other words, to merit a pecuniary remedy based on a consumer tort the plaintiff must prove damage and demonstrate the causal connection between his tortuous conduct and the alleged damage. This applies both to an individual suit relying on a Consumer Protection Law and to a class action relying on that kind of tort (see comments of Justice (former title) M. Cheshin in *Barazani Further Hearing* [3]. Still, it bears note that to the extent that our concern is with a class action, the court's application of Tort Law must also be based on the specific principles and rules drawn from the specific field of class actions, which occasionally pose practical problems relating to the location of the members of the group and awarding compensation to each one of them, as well as difficulties in proving the causal connection and proving the damage caused to each one of the group members. There may also be cases in which had a single plaintiff filed a monetary suit by reason of a consumer tort his suit would have been rejected by reason of the negligibility of the remedy – being in the category of *des minimis,* which does not justify compensation under the general law of Tort (see s. 4 of the Tort Ordinance). On the other hand, when concerned with a consumer tort committed against an entire group of consumers and not just against the single plaintiff, the court will be required to take a different perspective of the remedy requested in the name of the group in the framework of the class action. In such a case the court will be required to examine the class action and the requested remedy taking into account the underlying principles of this specific proceeding, which is intended inter alia to provide a solution to sub-enforcement in cases in

which the individual claim would be considered as a negligible claim. When hearing a class action the court cannot limit itself to examination of the remedy in accordance with the regular laws of Tort that would be applicable to an individual suit, and its decision must incorporate the principles and rules drawn from the specific field of class actions.

The need to combine the general laws of Tort with the principles and rules drawn from the laws of class actions, inter alia by relaxing the requirements pertaining to the proof of the damage caused to the members of the group, was dealt with by Justice M. Cheshin (former title) in *Barazani Further Hearing* [3] (*ibid*, 423 – 425). Today, with the enactment of the Class Actions Law, the legislature has equipped us with a detailed statutory arrangement that consolidates the principles and the rules to be applied to the various kinds of class actions and provides a solution to the typical difficulties, some of which we dwelt upon above, and which may arise in this particular proceeding. For example, s. 20 of the Law, to which we will return below, relates to "proof of entitlement to a remedy and payment of financial compensation" and prescribes the specific arrangements for the award of remedies in class actions. The unique nature of the class action proceeding and the need for awareness thereof in the application of principles of the general law of Tort to such an action were addressed by Deputy President E. Rivlin in CA 10262/05 *Aviv Legal Services Ltd v. Hapoalim Bank, Head Management* [15] where he stated that:

> It cannot be denied that that in certain cases the collective-representative character of the proceeding may affect the manner of examining the causal connection, just as it has implications for other elements. The subject of the causal connection in class action suites was discussed at length in *Barazani Further Hearing* [3]. The majority view as penned by Justice Cheshin dwelt on the basic need for fulfillment of the elements of a personal claim as a condition for the certification of the representative proceeding, specifically the foundation of the causal connection required for certain grounds of claim. The court noted that the representative context may influence the interpretation of the foundation of the personal grounds, but noted that this possibility was limited and qualified. *Conceivably and without making a definite determination on the matter at this time, the Class Actions Law may extend this possibility in view of its emphasis on the collective aspect and its relaxation of the conditions required to be fulfilled for the collective action, all with the purpose of realizing the objectives of the class action…* A strict and case specific interpretation of the foundation of the causal connection would thus be liable to seal the fate on numerous class actions, contrary to the objective of the Class Actions Law. According to another approach, *in suitable cases there would be an examination of the causal connection from the perspective of a "meta-plaintiff" who reflects the shared interest of all of the potential plaintiffs, and takes the cumulative damage into account. Such an examination of the causal connection could fulfill the requirement of the causal connection even in cases where it would not have existed in accordance with the individual case based examination.*

De Minimis

29. The representative plaintiffs claimed that the group members should be compensated for the non-pecuniary damage caused to them under the circumstances, under two heads of damage: One of them is the infringement of the personal autonomy of the group members and the other for the negative feelings that they experienced upon being informed that they had

drunk milk containing silicon.

Upon certifying Raabi's claim as a collective suit this Court, per Justice M. Naor, in the decision on the certification application, ruled that:

> "The damage claimed by Raabi consists of non-pecuniary damage; negative feelings and feelings of repulsion. The non-pecuniary damage claimed by the plaintiff is the feeling of repulsion stemming from the fact that the case concerns silicon, with all of its negative associations. In my view, damage of this kind is *prima facie* compensable damage. The act of misleading regarding the contents of the milk in this case is *prima facie* an infringement of individual autonomy" (p. 681- 682 of the decision).

In that decision, this Court further noted that the infringement of individual autonomy had already been recognized in Tort Law as a compensable head of damage, referring to the decision in *Daaka* [4]. In its discussion of the class action that was certified as stated, the Lower Court deemed that in the circumstances of our case the group members suffered non-pecuniary damage and in this context dismissed Tnuva's claim that the failure to specify all of the product's ingredients did not gave rise to an infringement of autonomy and did not justify the alleged negative feelings. This is Tnuva's argument before us.

Indeed, a defect in the indication of a food product's ingredients will not always warrant compensation for infringement of autonomy and negative feelings, and there may certainly be cases in which notwithstanding the existence of a particular defect in reporting the contents of a product, compensation will not be justified. Justice Naor dwelt on this point in the decision on the certification of the application, noting that:

> The insertion of a silicon supplement in the milk, in defiance of the standard constitutes an infringement of individual autonomy, but my comments should not be taken to mean that any case of a deviation from a provision of a standard or of inaccurately reporting its contents will justify a suit. There may be quite a few cases in which a slight deviation from the provisions of any particular standard, even where it concerns food, will not justify a personal suit and by extension a class action. A suit will not be justified where the infringement is *de minimis* .... (p, 684).

I concur with Justice Naor's comments, but they are of no avail to Tnuva in this case, for as noted by the Lower Court, the harm in this case is not in the category of *de mimimis* from the collective-representative aspect.

30. In support of its claims in this matter Tnuva presented the expert opinion of Prof. Hernik who evaluated "from the perspective of a researcher of consumer behavior (the marketing person) whether and if so to what extent, there was an infringement of what is referred to as the consumers' 'autonomy of will'". In his expert opinion, Prof. Hernik acknowledged that in principle and conceptually there was an infringement of the autonomy of will in any case in which the list of contents does not actually conform to the ingredients of the product, except that in order to assess the degree of harm one must evaluate the influence of the misleading act on the consumer's ability to choose. Prof. Hernik determined that according to his approach, the harm to infringement of autonomy caused to the consumers in this case was negligible and that the misleading media publications had generated a public storm, and lead to an 'imaginary infringement' of autonomy of the consumers' will." Tnuva also presented the expert opinion of Prof. Michael Perry who reached a similar conclusion and noted that in accordance with the criterion he had established for examining whether substantive harm had been caused to the autonomy of the consumer's will, the harm in this case did not exceed a harm that was "trifling" and did not justify compensation.

I do not accept this approach and as I mentioned above, my view is that the Lower Court

was correct in its dismissal of Tnuva's claim that the harm was "trifling" and "negligible" and not deserving of compensation.

The concept of "*de minimis*" is one that does not admit of advance demarcation and in another context it has already been ruled that:

> The question is how to measure harm and when to consider harm as being minimal, The answer depends on the nature of the right that was violated, the purpose of the infringement and additional circumstances of each particular case, and in accordance with which it may vary from case to case (see citation in CA 3901/96 *Local Planning and Building Committee v. Horowitz* [16]

In the case at hand Tnuva added silicon to low fat long lasting milk to overcome the problem of over frothing and it chose this solution to save the cost of replacing a machine that was broken. In doing so Tnuva contravened the official standard then in force, according to which it was prohibited to add supplements to the milk that were not specified in that standard. Furthermore, Tnuva failed to indicate on the packaging that the milk contained silicon and the Lower Court established a factual finding that the silicon added to the milk was purchased by Tnuva as a cleaning material from the Amgal company (paras. 35 and 144 (b) of the decision). In its appeal Tnuva challenges this factual finding but I have not found grounds for interfering with it, and given that this finding remains intact it supports the conclusion that in the first place Tnuva sought to conceal the fact that it had added silicon to the milk. A similar conclusion also emerges from Tnuva's conduct after the exposure of the case, when it denied having added silicon to the milk. Tnuva's problematic conduct as described supports the presumption that the omission of silicon from the list of the ingredients specified on the relevant package was not incidental and that its purpose was to blind the consumers to the fact that the milk it produced and marketed included this ingredient, in the knowledge that this was a substantive matter that was likely to influence the consumers' decision whether to purchase the milk.

This was therefore a conscious and illegitimate act of misleading by the intentional concealing of information with all of its attendant severity in terms of the relations between Tnuva as a dealer and the relevant consumer group. Furthermore, silicon is an artificial chemical substance which has absolutely no nutritional value and should not be found in milk. Accordingly, the reasonable consumer does not expect to find it in milk. Tnuva's effort in its summations to present the silicon, *post facto* as a popular "food supplement" in food products lacks sufficient anchorage in the evidence and cannot be accepted, especially given that it emerged that the Tnuva's sole reason for adding the silicon was its desire to resolve the problem of frothing for a low cost. Likewise, no substantive significance can be given to the fact that the standard for cows milk for drinking was officially cancelled already back in 1998. Tnuva repeatedly stresses this fact in its summations and attempts to derive therefrom that adding supplements to the milk, including the addition of silicon, is not a negative act However, it would seem undisputed that even after the cancellation of the aforementioned standard as a binding standard, silicon did not become a supplement for milk with any of its producers, including Tnuva. We may therefore continue on the assumption that even in the absence of a binding standard, this was a substance that the reasonable consumer would not expect to be added to the milk that he consumed.

31. Another claim stressed in Tnuva's summations is that silicon is not likely to cause damage to health. Regarding this matter Tnuva relies inter alia on the conclusion of the Danon committee and the findings of the Magistrates Court in the criminal proceeding, as well as on the expert opinion of Dr. Aharon Eizenberg and Prof. Nissim Garti, submitted on its behalf. In the absence of damage to health Tnuva contends that no damage was caused to the milk consumers that we are concerned with and that at the most this is a trifling matter that does not warrant compensation. Indeed, the representative plaintiffs did not present an expert opinion on their behalf to prove the allegation hat silicon is injurious to health and neither did the

District Court rule on this matter, writing that:

> Indeed, it has not been proved that drinking milk containing silicon caused or is liable to cause immediate harm to the health of consumers. However, in the view of Health Ministry experts, also representing the position of the Ministry of Health as presented by the Attorney General in the appeal against the decision to certify the suit, it is not possible to rule out the existence of a health hazard in the long run, primarily to children, in the wake of drinking milk that contains silicon in view of the fear of consumption in excess of the acceptable daily intake (ADI)…
>
> In the framework of this proceeding there is no cause for ruling on the scientific question of the degree to which the drinking of milk containing silicon poses a health risk. For purposes of this claim *it suffices that the existence of such danger cannot be ruled out, at least according to some of the experts*. From the plaintiffs' perspective, it suffices that it was proved that Tnuva's consumers were entitled to know, upon deciding to purchase milk that it had produced, that it contained silicon in defiance of the law and the standard *and that under certain circumstances one cannot rule out the risk to health posed by its consumption"* (para. 35, emphasis added).

In this ruling, the Court relied largely on the position of the Attorney General that was submitted to this Court in the framework of an appeal against the decision concerning the certification of the suit as a class action, which it stated that:

> In an examination conducted by the National Food Authority of the Ministry of Health, it was not found that this substance is harmful to health, but the *fact that there was a determination of ADI* [acceptable daily intake) *indicates that in excess of ADI there is no certainty concerning its safety in terms of health and the existence of a long term risk cannot be ruled out.* Given that in Israel large quantities of milk are consumed (not necessarily long lasting milk) primarily by children, then with respect to the consumption of milk containing silicon the consumption may exceed the ADI level. The position of the Ministry of Health is therefore that it lacks information indicating that silicon is harmful to health, but *it cannot rule out the existence of a long term risk, in cases involving the consumption of large quantities* [para.3, emphasis added]

In addition, regarding this matter it would not be superfluous to refer to the Danon Report which Tnuva seeks to rely upon. The Danon Commission did indeed conclude that experience shows that silicon is not harmful to health, does not cause birth defects and that there is no scientific proof of it being carcinogenous (p. 55 of the Danon Commission Report). All the same, the Commission took into consideration the fact that Tnuva had added silicon to the milk "to a degree that exceeded what was permitted according to the manufacturer's instructions, without examining and considering the effects of its heating and the attendant dangers. The Report further mentioned that "attempts were made in the dairy to reach a dosage that would be suffice for the required blocking of the froth, but without consulting with any entity in the Ministry of Health or any other licensing authority", and that the silicon was added to the milk in a quantity and dosage that exceeded the level approved for foods other than drinking milk that this fact "necessitates an additional investigation of matters relating to the ordering of the material and the use thereof (p. 14-15 of the Danon Commission Report).

Accordingly it is difficult to accept Tnuva's claim that there are unequivocal conclusions regarding the influence of the silicon added to the milk with respect to its influence on the consumers' health, and this is sufficient grounds for not interfering with the Lower Court 's conclusion that under certain circumstances one cannot rule out the possible health risk involved in the consumption of milk containing silicon. Similarly, I also accept the Lower Court's position that at all events every person has the right to choose whether he wishes to expose himself and his family to the material the nature of which is unknown to him. Hence, the fact that it was not positively proved that silicon is actually liable to harm consumers' health has implications for the intensity of the infringement of autonomy (see *Daaka* [4], p. 583; Nili Karako-Ayal, "Estimation of Compensation Due to Damage from Infringement of the Right to Autonomy" - in the wake of CA 2781/93 *Ali Daka v. Carmel Hospital*, *Hamishpat*, 11, 267, 270-271 (5767) (hereinafter – Karako-Ayal)), but not on its infringement per se as a result of the fact that the consumer introduced a chemical substance into his body, the essence and character of which were unknown to him without having had the opportunity of deciding whether he wanted it (see s.1 of the Attorney General's response to Tnuva's application to submit additional evidence in the framework of the hearing on the application for certification in this Court. Regarding the significance of the health risk in class action proceedings in the case law of the District Court, see also CF 2593/05 (Tel-Aviv Jaffa) *Solomon v. Guri Import and Distribution Ltd*, para. 44 [ ] ; CF 1624/07 (Capp 8767/07)(Tel-Aviv Jaffa) *Hova v. Milko Industries Ltd* [ ](27.1.2020); CF. 1126/07 (CApp 3058/07) (Tel-Aviv Jaffa) *Arges v. Tnuva Central Cooperative for Marketing of Agricultural Products in Israel Ltd*, para. 16 [ ] ; CF 1545/08 *Alfasi v. Super Pharm Israel Ltd* [ ] and CF 1424/09 ((Tel-Aviv Jaffa) *Guttman v. Neviot – Teva Hagalil Ltd.*

In view of all the above, there is grounds for the Lower Court's determination that under these circumstances there was an infringement of the consumer's autonomy to decide whether or not he desired to consume milk containing silicon and prima facie this is not a "trifling" infringement falling into the category of *de minimis*, not warranting compensation.

32. This conclusion gains added force inasmuch as our concern is with a class action in which it was proved that Tnuva's act of misleading harmed the broad consumer public and the Lower Court rightly ruled that under these circumstances the severity of the harm must be examined from the perspective of the entire group and "not from the perspective of an isolated consumer". Indeed, I already mentioned the approach whereby the *de minimis* rule does not apply, in the simple sense, to the foundation of damage in a typical class action, insofar as "its central feature is the accumulation of insignificant instances of damage, which when considered individually would not have materialized into a legal proceeding; this approach has established itself in the case law of this court (see *Aviv Legal Services Ltd* [15], para. 10; also see comments of Justice Mazza in *Barazani Further Hearing* [3], 447). All the same, it should be emphasized that the fact that a large group of plaintiffs in a class actions alleges an accumulation of minor damages, does not necessarily negate the possibility that the matter is *de minimis* from the group perspective as well. As noted, the precise borders of this concept do not admit of determination in advance and in a class action proceeding the answer to the question of whether the damage is of a minimal nature that does not warrant compensation depends on the circumstances of each case and may change having consideration for the particular circumstances of each case.

At all events, in the case before us, given the existence of a large group that alleges damage as a result of Tnuva's actions, the severity of which from a consumer perspective has already been discussed, precludes the conclusion that the matter is *de minimus*, even in the context of a class action. This is the case even though one cannot rule out the possibility that the existing discrepancy between the members of the group in terms of the intensity and scope of the injury may lead to the conclusion that had each member of the group filed a personal claim the remedy claimed by each one of them separately would be *de minimis*. Another question concerns the number of group members who are entitled to compensation for this

injury and what is the rate and the model of compensation for purposes of ruling in our case. When considering the number of the members of the group entitled to compensation attention should also be given to the issue of splitting up the compensation for non-pecuniary damage in the current case. The reason for this is that the Lower Court held that compensation should be awarded for the Tort head of infringement of autonomy and separately for the tort head of negative feelings. It will be recalled that in this context the Lower Court accepted the position of the representative plaintiffs and in reliance on the consumer survey that was presented to it (adjusting its results downwards), and ruled that: "a uniform rate should be ruled for the infringement of individual autonomy, whereas with respect to about half of the members of the group it will be supplemented by damage by reason of negative feelings" (para. 84 of decision). Nonetheless, it bears note that ultimately the Lower Court ordered the payment of overall compensation (NIS 55 million), stating that this sum "reflects the personal damage that is estimated for each individual of the group, of the sum of NIS 250 (para. 134 of decision), and without actually distinguishing between the heads of damage that were mentioned and without differentiating between the members of the group in its entirety whom it had determined were entitled to compensation for the infringement of autonomy and half of the members of the group, who were additionally entitled to compensation for negative feelings. Accordingly in their appeal the representative plaintiffs challenge this ruling, and we must therefore address the fundamental issue of the splitting up of the non-pecuniary compensation, as mentioned.

However, prior to addressing the subject of the scope of the compensation awarded we must first address the essence of the central damages head which was at the forefront of this class action.

Infringement of Autonomy

33. In the *Daaka* [4] case, Israeli law recognized for the first time that the non-pecuniary damage involving the infringement of autonomy is "damage" in the sense of the Torts Ordinance, and that as such is compensable (on compensation for non-pecuniary damage in Tort Law in general, see s. 76 of the Torts Law. Also see CA 4576/08 *Ben-Zvi v. Prof. His* [17] (hereinafter: *Ben Zvi*); Eliezer Rivlin " Compensation for Non Pecuniary Damage – Broadening Tendencies" - *Shamgar Volume*, Part 3, 21, 45 (2003); Yifaat Biton *Dignity Aches: Compensating Constitutional Harms*, 9 *MISHPAT UMIMSHAL* (Haifa University LR) 137 (2005) (hereinafter: Biton). In the *Daaka* [4] case the court held that the fundamental right to autonomy means the right of every person "to decide his or her deeds and wishes in accordance with his or her choices, and to act in accordance with those choices". It ruled that this right encompasses all of the central aspects of a person's life, from which it may be derived *inter alia* that "every person has freedom from unsolicited non-consensual interference with his of her body". It further held that this freedom is one of the expressions of the right to dignity given to every person, and is anchored in Basic Law: Human Dignity and Freedom.

These rationales, which in *Daaka* [4] lead to the recognition, protection and compensation for an infringement of autonomy of the body, are relevant and applicable to cases in which there is an infringement of the victim's autonomy in central aspects of his life due to the denial of his freedom to choose and the breach of the duty of disclosure to him. For example, the court recently recognized the damages head of infringement of autonomy in a case in which the autonomy violated was that of the family relatives of the deceased person, and pertained to the manner of treating his body (see in *Ben- Zvi* [17]. Hence, contrary to Tnuva's claim, the recognition of the damages head of infringement of autonomy is not, and should not be limited to cases of medical negligence or exclusively to autonomy of the body. The principles underlying the recognition of this head of damages and the constitutional right protected by such recognition, in appropriate cases, will justify compensation for infringement of autonomy even where other torts are concerned, such as the consumer tort in our case (see Tzachi Keren-Paz "Compensation for Violation of Autonomy: Normative Evaluation, Developments and Future Trends" *Hamishpat* 11, 187, 192-194 and the examples cited in the footnotes) (2007)

(hereinafter – Keren-Paz); Dafna Barak – Erez, "Constitutional Torts in the Era of Basic Rights" *Mishpat UMimshal* 9, 103, 121-122, 129 (2006)). In her in her decision to certify Raabi's suit as a class action, Justice Naor was guided by the approach that rejects the limitation of the boundaries of the damages head of non-pecuniary damages for infringement of autonomy to Tort of negligence in general and specifically medical negligence. Her approach was rightly adopted by the Lower Court when it awarded compensation for the damages head of infringement of autonomy, having found that by its actions Tnuva had committed an act of misleading against Raabi and against the group of consumers that he represented, by failing to disclose the existence of silicon on the packaging of the milk that it produced and marketed.

34. It is important to note that in the *Daaka* [4] case the infringement of autonomy was classified as a head of non-pecuniary damage in the framework of the tort of negligence, and not as a separate tort in its own right. Following the decision in *Daaka* [4] the view was expressed that it was appropriate to recognize the infringement of autonomy as a constitutional tort that gives rise to an independent grounds of claim (on this, see the comments of the Deputy President in CA 8126/07 *Estate of the Late Bruria Zvi v. Bikkur Holim Hospital* [18]; *Ben-Zvi* [17] in para. 54 of his decision and in the same vein, the opinion of Justice Amit, in *Ben Zvi* para. 21. Also see Rivlin, 45 and see and compare to Keran Paz; Nili Krako Ayaal "The 'Informed Consent' Doctrine – An appropriate Ground of Claim where the Patient's Right to Autonomy was Violated" *Hapraklit* 49, 181, 222-223 (2006)). However, our case law has yet to give deep consideration to this weighty issue of recognizing a new tort created by case-law and the case at hand does not require a discussion and decision on the matter. The reason is that the representative plaintiffs in this case took the path of settled case -law, and classified the infringement of autonomy as a non-pecuniary head of damage in the framework of the tort of misleading which it attributed to Tnuva in accordance with the Consumer Protection Law. Inasmuch as the representative plaintiffs did not claim in the Lower Court or before us that in this context the plaintiff's right to compensation for infringement of autonomy should be recognized as a *(sic)*right ,should be recognized as an independent tort based on the violation of a constitutional right entitling the plaintiff the issue can be left pending further examination and there is not cause for us to address the matter on refer to it on our own initiative.

The Requirement of a Causal Connection

35. Tnuva further added that the Lower Court erred by deviating from the law set forth in *FHC Barzani* [3] dwelt on above, and had actually waived the requirement for a causal connection between the act of misleading and the damage. Tnuva claimed that the representative plaintiffs failed to prove that their decision would have been influenced by having been informed in advance. Since the grounds of misleading, by definition, requires that the consumer rely upon the dealer's conduct, then absent proof of such reliance, according to Tnuva, there are no grounds for an act of misleading under the Consumer Protection Law.

On the other hand, the representative plaintiffs claim that to the extent that the concern is with the head of damage in the form of infringement of autonomy, then it will be regarded as having been proved, even if the victim would have acted in the same manner had he been presented with all of the information, and that at all events, in the case at hand it had positively been proved that the consumers would not the purchased milk containing silicon.

36. Indeed, in the *Further Hearing Barazani* [3] and we already addressed this point above, the court ruled that the requirement for a causal connection in s. 64 of the Tort Ordinance also applies to consumer torts pertaining to misleading advertising, and even where the tort is grounds for a class action. All the same, the court also ruled that to the extent that the matter concerns consumer torts, the requirement of reliance deriving from the requirement for a causal connection will be interpreted broadly so as not to include to direct reliance only" but also "an indirect causal connection by way of a reasonable chain of causes from the publication and until the consumer" (*ibid.,* 414- 415). In *Barazani* [2] it was further ruled that in a class action proceeding based on the provisions of Chapter F'1 of the Consumer Protection Law and

its relevant regulations enacted by force thereof (provisions that as stated were cancelled in the interim in the Class Actions Law) it may be necessary to relax the stringency in proving the causal connection having consideration for the nature of this unique proceeding, and the fact that "the court is entitled to prescribe appropriate methods of proof at its own discretion for the causal connection between the misleading publication and the damage caused to each one of the members of the group, including the damage that was caused to each and every one of them (*ibid.*, 424). In that matter there was no proof at all of a causal connection, not even indirect, as claimed by Barazani, given that Barazani was not actually exposed to the publication. For this reason the court dismissed Barazani's application to approve his personal claim as a class action and ruled that his personal suit does not show any grounds.

Tnuva's attempt to rely on the *Barazani* ruling and to claim that in this case too it was not proved that there was a causal connection between its conduct and the non-pecuniary damage being claimed, cannot stand, for a number of reasons:

First, the claim was raised by Tnuva at the stage following the certification of the class action and to the extent that it is directed against the group as such, it must be remembered that three years after the decision in the *Further Hearing Barazani* [3], the Class Actions Law was passed, unifying all of the principles and rules to be applied to the various categories of class actions. The Law consists of a comprehensive, detailed statutory arrangement, including the methods of proving entitlement to the remedy being claimed, and inter alia it enables the granting of remedies for the public good in appropriate cases where it is not practical to prove the damage caused to each member of the group and *a fortiori* the causal connection between the damage and the tortfeasor's conduct (s. 20 (c) of the Law). As specified below, this outline was adopted by the Lower Court and under these circumstances the demand to prove the causal connection between Tnuva's conduct and the damage in respect of each individual of the group is problematic.

Second, the decision in *Barazani* [3] concerned misleading by action due to the misleading advertisement of *Bezeq* concerning the tariffs per conversation, and as mentioned it was held that insofar as Barazani was not even exposed to the misleading advertisement, there was no causal connection between the publication and his alleged damage. Our case on the other hand concerned misleading by omission committed by Tnuva in its failure to disclose the fact of the silicon being added to the milk. Tnuva claims that the plaintiffs must prove that had they been exposed to that fact in a timely manner they would not have purchased the milk. It would seem that a requirement of a plaintiff to prove that had he been aware of the fact he would have acted otherwise would be particularly difficult to prove and in many cases even impossible. Indeed, this position is reinforced to the extent that our concern is with a class action. On the difference between misleading by an act and misleading by omission with respect to proving a causal connection in the representative context, see our comments in CA 9590/05 *Rahman Nuni v. Bank Leumi LeIsrael Ltd* [19] which overturned the District Court's decision to dismiss the application for certification of a class action because of the plaintiff's failure to prove the causal connection. In our judgment in the appeal we reversed this decision and ordered that the file be remanded to the lower court, indicating that "it seems that the question of the requirement of the causal connection in this case is also worthy one further consideration. This matter involves complex questions, the first of which is whether to apply the rule set by this Court for purposes of the ground of misleading, in FHC 5712 *Barazanai* [3] even where it concerns the grounds of "non-disclosure" (*ibid.*, para. 6) (regarding the similar approach taken in American Law in various contexts, see: *Affiliated Ute Citizens of Utah v. United States* 406 U.S. 128, 153-154 (1972) [34]; *Binder v. Gillespie* 184 F.3d 1059, 1063-1064 (9th Cir. 1999) [35]; *Poulos v. Caesars World Inc*. 379 F.3d 654, 666 (9th Cir. 2004) [36]. See also, CF (Tel-Aviv-Jaffa) 2405/04 *Ben Ami v. Hadar Ltd* [ ] paras. 72- 73 (14.2.2010).

We may thus conclude that to the extent that the consumer tort on which the class action is based on is misleading by way of omission, (by way non-disclosure) this may justify leniency

regarding the proof of the causal connection between the wrongful conduct and the alleged damage.

Third, as opposed to the *Barazani* case [2], which was a monetary claim (tariff differentials), the head of damage being sued for in this case pertains to non-pecuniary damage in the form of infringement of autonomy. Regarding this head of damage it was ruled that there was no need to prove a causal connection between the failure to disclose relevant information and the choice made by the victim (see: *Daaka* [4], 567-570; CA 6153/97 *Shtendal v. Prof. Yaakov Sadeh* [20], at p. 760; CA 9936/07 *Ben David v. Dr. Entebbe* [21] para 11 of Justice Hendel's decision; CA 9817/02 *Weinstein v. Dr. Bergman*,[22] para. 18). For a critique of the *Daaka* [4] decision, see Assaf Yaakov "Informed Consent and Duty to Disclose, *Tel-Aviv University Law Review* 31, 609 (2009). The rationales in this context that guided the court in *Daaka* [4] and in other matters pertaining to medical negligence are applicable to the same degree with respect to an infringement of autonomy caused as a result of the consumer tort committed by a dealer who misled a consumer. Indeed, the non-disclosure per se involves the denial of the consumer's freedom of choice. In our case, by failing to specify silicon as one of the components of the product, Tnuva deprived the consumers of the possibility of making an intelligent choice and deciding whether they wish to purchase and consume it. This suffices as proof of an infringement of autonomy. Another question is whether this suffices to establish a right to compensation or whether it must further be shown that consequential damage was also caused to the plaintiff, finding expression in negative feelings given the denial of his freedom of choice. I will address this point further on.

37. At all events, even had we ruled that the circumstances of this case necessitated bringing proof that the members of the group would not have purchased the milk had they known that it contained silicon, this requirement for a causal connection in a class action might conceivably have been satisfied by a determination in the manner of a "collective causal connection" (on this see *Aviv Legal Services* [15]para. 10). This kind of collective causal connection may be substantiated by the assumption that the group members, and at least the majority thereof, would have replied in the negative had they been asked in advance whether they would purchase milk to which Tnuva had added an artificial supplement the nature of which they were ignorant, and in defiance of the standard, in order to overcome the problem of excessive frothing (compare C.F. 1036/66 (Capp. 1877/06) (Tel-Aviv Jaffa) *Tal v. Rabin Medical Center (Beilinson Campus)*, para. 12) [ ] See also regarding the use of "generalized evidence" in American Law: *Kennedy v. Jackson National Life Insurance Company*, 2010 U.S. Dist. Lexis 63604, 25-28 (N.D.Cal 2010) [37]; *Negrete v. Allianz Life Insurance Company of North America* 238 F.R.D 482, 491-492 (C.D. Cal. 2006)[38]; *Klay v. Humana, Inc.*382 F.3d 1241, 1259 (11th Cir. 2004) [39]. Regarding the exception to the application of the doctrine in cases in which extensive differentiation between the members of the group was proved, see *Poulos v. Caesars World, Inc*. [36]. Further support for the application of this doctrine in the circumstance of the case before us can be adduced from the fact that it was Tnuva's intentional actions that created the situation which encumbered the process of locating the members of the group and the conduct of an individual examination of each of the elements that must generally be proved in the according to the law of tort. Additional support for the existence of a causal connection between the act of misleading committed by Tnuva and the consumers' choice to consume the milk, can be fond in the trends evidenced in the consumers survey that was presented, and which we will address further on.

38. Tnuva further adds that at all events, the publications in the press concerning the damage to health caused by silicon consumption severed the causal connection between its own acts and the bad feelings experienced by consumers, which it claims were by and large the result of publications that post facto turned out to be unfounded. This claim regarding the causal connection is not grounded in evidence, and in this matter as the one whose act of mass misleading caused uncertainty regarding the precise influence of the publications on the feelings of the consumers, it is Tnuva that bears the onus of proving the opposite (compare:

Johnson v. The Goodyear Tire & Rubber Company, Synthetic Rubber Plant, 491 F.2d 1364, 1379-1380 (5th Cir. 1974)[40]; *Cooper v. Allen*, 467 F.2d 836, 840 (5th Cir. 1972) [41]. Accordingly, this argument is rejected.

Assessment of the Compensation for the Infringement of Autonomy – The Objective Approach and the Splitting Up of the Compensation for Non-Pecuniary Damage.

39. How does one assess the compensation for the tort head of infringement of the right to autonomy?

Based on the constitutional features of the right to autonomy some favor the objectification of the assessment of the compensation for its infringement. For example, Dr. Tzahi Keren-Paz argues that "freedom of choice can be viewed ….as an asset with objective value" and hence "it is appropriate to award a sum that reflects the social value attaching to the denial of freedom of choice. This sum should even be awarded absent proof of consequential, subjective damage (feelings of shock and anger) by reason of the denial of freedom of choice" (Keren-Paz, 196-198). Keren-Paz sees special justification for an objective assessment of compensation for infringement of autonomy in the consumer context. In his view, "the deterrent consideration (that focuses on the dealers) must also justify the compensation award in circumstances in which the compensatory factor (that focuses on the legitimate damaged interest of the consumer) does not provide sufficiently strong support for the compensation due to the problem of under-deterrence of the dealers…"(Keren-Paz, 242). The scholar Dr.Nili Karko-Ayal likewise suggests that compensation should be assessed in accordance with the value of the right to autonomy on the one hand, and the gravity of its infringement, on the other hand (see Karko-Ayal and see the opinion of Judge Strasbourg-Cohen in the *Daaka* case [4], at p. 619).

This approach deviates from the traditional principles of the laws of tort, that are based on a subjective, individual assessment of amount of compensation, and from the conception of compensation as being intended to restore the victim's position to the status *quo ante* and to provide him a remedy for the damage caused to him, including non-pecuniary damage. This point was mentioned by Justice Or in the *Daaka* case [4] when he awarded compensation for a victim under the tort head of infringement of autonomy, where he said:

> Naturally, matters relating to the proof and the extent of damage are determined in accordance with the particular data in each individual case and the evidence submitted in court. The substantive criterion for generally determining the amount of compensation to which the victim is entitled is the criterion of restoring the situation to its original [*ex ante* – ed.] state. This criterion is an individual one. It requires an individual assessment of the gravity of the harm caused to the specific victim (p. 582-583)

The difficulty involved in application of a "pure" objective criterion for purposes of determining the sum of the compensation for an infringement of autonomy was likewise addressed by scholar Prof. Dafna Barak-Erez in her discussion of claims filed by the individual against an authority, where she emphasized that in this context as well:

> …the principles of tort should not be deviated from by awarding compensation that is detached from the concrete infringement and its circumstances. The sum of the damages cannot and need not reflect the universal value of the right… compensation that purports to reflect the general value of the right should be rejected for a number of reasons. First it is illegitimate from a principle-value based perspective, because it purports to attach a price tag to the right itself. Second, it benefits the plaintiff in a manner that extends beyond his own particular damage, and thus deviates from the principle of restoring the s*tatus quo ante*. In

> the realm of Tort law, compensation is determined in accordance with the damage to the victim himself, and not in accordance with the value of his right from the perspective of the other person (Dafna Barak-Erez, *Constitutional Torts* 277 (1993) (hereinafter – Barak-Erez)).

It is not superfluous to mention that in academic writing in the field of tort one can discern trends that deviate from the traditional perception whereby Tort law is intended to grant remedial damages to the specific victim in order to restore the *status quo ante*. Hence for example, there are some who contend that punitive damages that are not derived from the victim's damage may in appropriate cases provide a solution to sub-enforcement and therefore constitute an efficient form of deference A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998), as well as to heal societal damages caused by the tortfeasor to the victims who did not come to court (Catherine M. Sharkey,*Punitive Damages as Societal Damages*, 113 Yale L. J. 347 (2003). Deputy President, E. Rivlin recently addressed this matter in the matter of *Ben Zvi* [17] in where he treated the matter of punitive damages, noting that today, the case law in Israel too has recognized the court's authority to award damages of this kind in the framework of the law of tort, and he also mentions that :"*despite the sharp analytical distinction between punitive damages and remedial damages, on a practical level the contradiction is not so sharp, at least in the realm of non-pecuniary damage"* (paras. 37- 39 of his opinion, see also in LCA 9670/07 *Anon v.Anon* [23], paras 22-27 or the opinion of Justice E. Rubinstein, and the opinion of the Deputy President E. Rivlin).

However, to the extent that the compensation to be evaluated and awarded is claimed as part of a class action, one must remember the provision of section 20 (e) of the Class Action Law, which provides that:

> In a class action the Court shall not adjudge exemplary compensation and it shall also not adjudge compensation without proof of damage….but the aforesaid shall not prevent the award of compensation for other than monetary damage.

Thus, the Class Actions Law stymied the possibility of awarding punitive damages in a class action. All the same, the Law established other special compensatory mechanisms that enable realization of the principle of remedial justice, for example, by way of imposing a cy-pres obligation on the tortfeasor for the damage caused, and principles of efficient deterrence, such as obligating the tortfeasor to provide a remedy for the public interest for the widespread social damage that he caused, and I will address this matter below.

40. I do not accept the objective approach to the evaluation of the sum of damages for infringement of autonomy that I reviewed above. The head of damage of infringement of autonomy is encapsulated in the negation of the victim's freedom of choice, and in the majority of cases involves the non-disclosure of a matter that is critical for the victim. Accordingly at the very least as far as it concerns class actions, a presumable starting point for evaluation of the non-pecuniary damage caused to those whose autonomy was violated, is that as a result of that infringement they experience anger, frustration and insult (of varying degrees of intensity, according to the concrete circumstances of the case). These feelings which resulted from the tortfeasor's conduct, justify compensation for non-pecuniary damage. However, there is no conclusive presumption that these feelings are experienced by the victim in every case of an infringement of autonomy. Accordingly, should the tortfeasor successfully prove that notwithstanding that his conduct negated the freedom of choice of the plaintiff or of the members of a group, they remained indifferent and unmoved, it may be determined that they are not entitled to damages under this head of damage because in truth, despite the denial of their freedom of choice, they did not sustain any non-pecuniary damage as a result. My approach, whereby the compensation for infringement of autonomy is awarded by reason of the subjective consequential damage expressed in feelings of anger, frustration and other similar

negative feelings caused by the tortfeasor's conduct, gives rise to the another conclusion – that there are no grounds for severing the compensation for infringement of autonomy from the compensation for mental anguish and negative feelings caused to the victim *by that infringement* (as distinct from the non-pecuniary head of damage relating to other infringements in framework of the same claim). A different approach to this matter was expressed by the Lower Court, even though, at the end of the day, as mentioned, the Lower Court awarded a sum total of NIS 250 as non-pecuniary damages for each member of the group without distinguishing between those members of the group who experienced negative feelings and those regarding whom it was proved by the consumers survey did not suffer feelings of this kind (regarding this matter, see the dispute between the Deputy President E. Rivlin and Justice Y. Amit, in the matter of *Ben – Zvi* [17] (see Keren-Paz, 203-208).

A conclusion similar to my conclusion on the matter also emerges from the findings of Justice M. Naor in the decision given in the appeal on the decision to approve Raabi's suit as a class action. In that context Justice Naor relates in the same breach to the non-pecuniary damage caused by the infringement of autonomy and to the negative feelings attendant to that damage. In her own words:

> …..[t]he damage claimed by Raabi is *non-pecuniary damage, negative feelings and feelings of revulsion.* The non-pecuniary damage which he claims is characterized by the feeling of revulsion that stems from the fact that the material concerned is *silicon* with all of its attendant associations. In my view damage of this kind is compensable damage. The act of misleading concerning the contents of the milk in this case, prima facie, constitutes, *an infringement of individual autonomy*. Our concern is with a food product. Consumers are entitled to determine what to ingest into their mouths and bodies and what to avoid. For example, if a person wishes to only eat kosher food and *post facto* it becomes clear to him that the food that was misleadingly presented to him, was not of that nature, *will feel a sense of revulsion and an infringement of his autonomy…* (*ibid.* 681-682, emphases added).

Indeed, to the extent that it concerns Raabi - the representative plaintiff – after hearing his testimony and the testimony of his son, the Lower Court ruled that Raabi had experienced substantial negative feelings upon becoming aware that the milk that he had consumed contained silicon, and that Tnuva had refrained from specifying this component on the packaging; in the words of the Lower Court:

> ,,,[a]s a result of these acts the plaintiff was denied the ability to make an intelligent and informed choice concerning the purchase of an alternative product, that does not contain a supplement that it prohibited by law for use in milk for drinking. It is likewise clear that the negative feelings experienced by Raabi stem from the acts of Tnuva. It could be claimed that these feelings were exaggerated, having consideration for the fact that it was not proved that silicon causes a health risk. But one cannot dispute his [Raabi's] feelings as such: *[Raabi] subjectively felt a sense of disgust (nausea), anxiety, as a result of having drunk the milk containing silicon as well as anger and rage by reason of the fraud.* All of these fall into the category of non–pecuniary damage that is neither peripheral nor negligible and is indeed compensable… " (para. 57, emphases added).

There is no justification for interference with these rulings of the Lower Court, for as stated they are based on the testimonies of Raabi and his son, and on the Court's direct

impression from those testimonies. However, in order to determine the precise compensation to be awarded, if at all, in favor of the group on whose behalf Raabi handled the class suit, proof of subjective damage caused to Raabi will not suffice and additional complex questions must be addressed, relating to proving the entitlement of the members of the group to the pecuniary compensation that was claimed, including, *inter alia*, the question concerning the difference between the group members who experienced negative feelings as a result of the denial of their right to chose whether nor not to consume milk containing silicon and the group members who remained indifferent to the aforementioned denial of their free choice.

41. As mentioned above, under the circumstances, at the time of the handing down of the decision on the class action it was not possible to individually identity each member of the group and to determine the individual right of each one of them to a remedy. As such it was not possible to rule on the class action in favor of the group in accordance with the evidentiary paths set forth in section 20(a) of the Class Actions Law. In order to determine the compensation, the Court was required to utilize the framework of s. 20 (c) of the Class Actions Law, which was intended for those cases in which "Court concluded that, under the circumstances, pecuniary compensation for all or some members of the group is not practical, either because they cannot be identified and the payment cannot be made at a reasonable cost, or because of other reason".

Based on the opinion of Prof. Ofir, who was appointed as expert on the Court's behalf, the Lower Court ruled that during the relevant period 220,000 consumed the long-lasting milk containing silicon. Basing himself inter alia on the data he received from Tnuva, Prof. Ofir estimated that the number of households that had purchased the milk stood at NIS 166,307, and in his testimony in Court Prof. Ofir noted that the number of adult purchasers during the relevant period stood at 330,000. As such, according to his approach, the number of members in the group ranged from between 166,307 to 330,000 (p. 672 of the protocol). The Court's determination that in this context one should consider a group number about 220,000 persons is therefore a cautious and conservative estimate (see comments of Prof. Ofir, p. 672 – 674 of the protocol), which will not be interfered with.

What remains to be examined is how many of those belonging to the aforementioned group of milk consumers actually experienced negative feelings as a result of the infringement of their autonomy.

The representative plaintiffs submitted an expert opinion drawn up by Dr. Katz and Prof. Mevorach, based on a consumers survey, from which it emerges that 26% of those questioned, who represent the general population, were indifferent to the publication to the effect that the milk contained silicon. Under the assumption that this percentage, pertaining to the general population, is also likely to reflect the interviewees who did not actually consume the long lasting low-fat milk during the relevant period, it would be appropriate to address the essential findings of the expert opinion that reflect the percentage of consumers of this milk before the publication from out of the total population (43%), and the percentage of consumers from out of these who continued to drink this milk even after the publications concerning the inclusion of silicon therein (30% out of the 40%, which represents 13% of the entire population). The expert opinion of Dr. Mevorach and Dr. Katz indicates that 66% of those who previously consumed long lasting, low fat milk of Tnuva (which they claim represent 28% of the total population) experienced negative feelings in the wake of that publication, at various levels of intensity, including "revulsion, nausea, anxiety, fear, anger, hatred, disappointment, deceit, lying, fraud, temerity, contempt, irresponsibility, bad feelings (section 3 of the survey), whereas 30% continued to consume the milk even after the publication.

In our case and based on the data presented by the representative plaintiffs, there are grounds to conclude that some of the group members remained indifferent to the addition to the silicon to the milk. 26% of those asked specifically stated that this was their feeling: "indifference, no problem, not correct and other feelings that are not negative"- page 5 of the expert opinion of Dr. Katz and Dr. Mevorach, subsection (b) of the answers to question 3, and

"nothing, unmoved and indifferent" and "they made a mountain out of a molehill" – (the encryption page of the answers to question 3), and in the absence of a datum in the survey conducted regarding how many of those questioned had consumed silicon in the past, I think that the percentage of "indifferent consumers" can be derived from the datum in the expert opinion relating to those who continued to consume long lasting milk even after the publication of the silicon matter (30% of the overall number of consumers in the past, and 13% of the entire population). Accordingly, from out of the overall number of consumers of long lasting low fat milk during the relevant period, the number of whom stood at 220,000 according to the determination of the Lower Court there should be a reduction of 30% of "indifferent consumers" who did not experience negative feelings even after having been informed that the milk that they had consumed contained silicon, and that Tnuva refrained from indicating this element on the packaging. The scope of the group entitled to compensation for the infringement of autonomy that caused them negative feelings, therefore stands at 154,000 people.

42. In its pleadings, Tnuva objected on a number of counts to the Lower Court's willingness to base findings and conclusions on the consumer survey relied upon in the expert opinion of Dr. Katz and Dr. Mevorach. Basing findings concerning subjective feelings on surveys is problematic. Even so, inasmuch as the Lower Court ruled that the structure for proving the pecuniary compensation to be awarded in this case is the one prescribed by s. 20 (c) of the Class Actions Law in view of the practical impossibility of identifying the group members and in ruling individual compensation, under the circumstances, the reliance on an expert opinion based on a consumers survey gives expression to a degree of leniency regarding the modes of producing evidence which is occasionally required in the context of class actions. The need for such leniency was already addressed by the court in *Barazani* [3], as mentioned above and is now grounded in explicit legislation in the provision of s. 20 (c) of the Class Actions Law (on the "enlisting" of statistic data for proof of damage where there is structural vacuum in terms of the possibility of presenting individual data, see and compare: Eliezer Rivlin and Gai Shani "A Rich Conception of the Principle of Restoring the Status Quo Ante in the Doctrine of Compensatory Damages" , (hereinafter: Rivlin and Shani); Gai Shani: "The Principle of 'the Matter Speaks for Itself' in the Law of Torts – Revisited"; A. Porat & A. Stein Tort *Liability under Uncertainty* 87-92 (2001); Naturally, the court's reliance on the expert opinion based on the consumers survey is conditional upon the court having found the expert opinion to be worthy of reliance, having considered the entirety of claims raised regarding it.

In the case before us, having examined the survey's findings, the expert opinion of the Dahaf Institute on Tnuva's behalf (drawn up by the expert, Dr. Mina Zemach), and the expert opinion of the Court expert who gave his opinion on the survey, the Court held that "The testimony of Professor Mevorach and Prof. Katz made a reliable impression, and my impression is that they are professionals with experience and knowledge in their field" (para. 60). The Court rejected Tnuva's claim that the survey's results are biased, and that the questions presented to the interviewees included the assumption that silicon causes health hazards. For example, Dr. Mina Zemach on Tnuva's behalf mentioned question three that was presented to the interviewees ("What did you feel in the wake of the publications concerning Tnuva's insertion of silicon into long lasting low fat milk, and *its health risks*?"). She claimed that the final clause of the question relating to health risks was altogether unnecessary and that there was reasonable grounds to fear that "this biased wording contributed to part of the serious defects of the study" (page 4 of the expert opinion, page 11 of the expert opinion). Rejecting this assertion, the Court ruled that the presentation to the interviewees was authentic because it was proved that at that time there were publications concerning the health risks of silicon. All the same, to be on the safe side, the Court was prepared to assume that the survey's findings that tended to exaggerate the negative feelings somewhat, even if not to the extent of justifying the survey's disqualification, as claimed by Tnuva, should be taken into account when determining the number of consumers who experienced negative feelings (about half according to the Lower Court's holding as opposed to 66% according to the survey). There was no

justification for interfering with the conclusion that the wording of question number three did not warrant interference (regarding this, see comments of Prof. Mevorach in his testimony, p. 287 – 291, 296- 298 of the protocol). Furthermore the Court further ruled, correctly, to disqualify the fifth question of the survey, in which the interviewees were asked "Did your negative feelings emerge immediately with the initial publications or after that publications were also verified by the Ministry of Health and by Tnuva. The Court noted that this question contains potentially misleading information because of the possible implication that Tnuva and the Ministry of Health had verified the publication concerning the health hazard, when in fact this was not the case/

Accordingly no defect can be found in the Lower Court's willingness in this case to rely on the expert opinion of Dr. Katz and Prof. Mevorach (that relies on a consumers survey) for purposes of determining the portion of the group that experienced negative feelings as a result of the infringement of their autonomy. By extension our own reliance on this expert opinion cannot be negated as a means of determining the size of the group, along with the deletion of the "indifferent consumers" as set forth in section 41 above.

The Degree of Damage

43. We are required to determine the degree of damage, which in this case means the non-pecuniary damage incurred by consumers as a result of drinking milk containing silicon. Assessing the degree of damage expressed in victim's negative feelings of anger, frustration and insult, and other like feelings caused by the tortfeasor's wrongful conduct, and determining the compensation owing to him by reason of such damage, is no easy task. The reason is that damage of this kind is essentially subjective-individual damage, largely dependent upon the personal emotional barometer of each individual. This point was addressed by Justice T. Or in the *Daaka* [4] case in his ruling on the specific, non-pecuniary damage incurred by the plaintiff due to the infringement of his autonomy. He wrote the following:

> The damage in this kind of case involves a predominantly subjective aspect, giving rise to inevitable difficulties in assessing it. Ultimately, the sum of compensation in each particular case, similar to compensation for other non-pecuniary damages, is a matter of judicial discretion, and it is thus determined by making an evaluation based on all the relevant circumstances and the impression of the court. The court must therefore adopt a balanced approach. It should give the appropriate weight to the fact that basic human rights were violated, which dictates an award of appropriate compensation as opposed to a symbolic compensation. On the other hand, considering the difficulties inherent in the procedure of accessing the damage, judicial restraint is required, and exaggerated compensation awards should be avoided.

If the assessment of non-pecuniary damage for infringement of autonomy poses difficulties in individual cases, the difficulty is multiplied sevenfold when the court is required to assess the damage in a class action, and particularly when it is impossible to locate the members of the group and form an individual assessment regarding each member concerning the intensity of the infringement of autonomy and the subjective negative feelings experienced by reason of the infringement. The subjective nature of the damage also impedes upon 'damage averaging' and for this reason in the U.S.A. there is a reluctance to approve a class action for compensation for non-pecuniary damages (see *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 417 (5th Cir. 1998)[42]; *Reeb v. Ohio Department of Rehabilitation and Correction*, 435 F.3d 639, 650-651 (6th Cir. 2006)[43]; *Fuhrman v. California Satellite Systems*, 179 Cal. App. 3d 408, 424-425 (1986) [44]]; *Altman v. Manhattan Savings Bank*, 83 Cal. App. 3d 761, 767-769 (1978) [45]; *Stilson v. Reader's Digest Association, Inc*., 28 Cal. App. 3d 270, 273-274 (1972)[46]; *Birnbaum v. United States*, 436 F. Supp. 967,

986 (1977) [48].

See also the comments of Justice A. Proccaccia in a minority opinion in the decision on the application for certification, 697.

In Israel, this approach was rejected by Justice Naor, with whom the Deputy President S. Levine concurred. In the application for certification, Justice Naor held as follows:

> The court will not award penal compensation in a class action, and similarly will not rule compensation without proof of damage, other than as specified in item 9 of the Second Schedule. However, *the aforementioned does not preclude the ruling of compensation for non-pecuniary damage* (emphasis added).

All the same, while there is no impediment in principle to the awarding of non-pecuniary compensation, in the framework of a class action, cases may arise in which the difficulty of determining the rate of damage will justify non-certification of the filing of a class action or its dismissal on its merits (regarding this, see the case law of the district courts before and after the enactment of the Class Actions Law (CC (TA-Jaffa) 388/96 *Yaari v. Israel Lands Administration*, [ ] s. 6 (e) and (f); CC (TA-Jaffa) 2331/06 *Lubinsky v. Nazrian*, [ ] 5- 6 ; CApp (Naz.) 1528/05 *Barzilai v. Frinir (Hadas 1987) Ltd*,[ ]s. 27.2 (d). On the other hand, see CC (TA-Jaffa) 1586/09 *Hayyut* v. *Telran Immediate Messages Ltd* [ ]para. 4 (b) (5); CC (TA) 1341/00 *Mazal v. Discovery International Modelling Agency Ltd* [ ].

44. In our case, the Lower Court deemed that the difficulties in assessment of damage by reason of it being pecuniary damage and by reason of the practical difficulty of locating the members of the group and forming an individual impression of the damage caused to each one of them, do not justify the dismissal of the class action. For purposes of assessing the damage and fixing the compensation, it resorted to the specific mechanisms of s.20 of the Class Actions Law, and fixed the complex model for compensation that we described above, and in accordance with which it ultimately determined the remedy.

In this appeal, Tnuva again argues that our concern is with tortuous compensation that is generally assessed on an individual basis, and that given the representative plaintiff's failure to prove the precise damage caused to each member of the group, the Court erred in its failure to dismiss the suit for that reason. Tnuva further claims that the damage in this case does not admit of "uniformity"" because the degree of damage incurred by each consumer differed, hence it argued that the sum awarded by the Court to each member of the group (NIS 250) was arbitrary and with no evidentiary grounding and should thus be set aside.

The representative plaintiffs claim on the other hand that the Lower Court rightly determined that this case admits of an "average reasonable compensation" which when multiplied by the number of the members of the group would constitute the overall sum of compensation and that its determinations in this regard are consistent with the legislative intention as well as with the American case law in this context. However, their claim is that the sum per individual as determined by the Court is too low and in their appeal they seek to fix it at a minimum of NIS 8000, in view of the Court's own determination to the effect that had it been confronted with an individual claim, this is the sum that is could have awarded for non-pecuniary damage.

45. Section 20 of the Class Actions Law, titled " "Proof of Entitlement to Remedy and Payment of Pecuniary Compensation" provides as follows:

> (a) If the Court decided all or part of a class action in favor of all or part of the group in whose name the class action was conducted, than as part of its decision to award pecuniary compensation or other relief to members of the group it may make, inter alia, an Order specified below, as the case may

be, on condition that doing so will not place an unnecessarily heavy burden on members of the group or on the parties:

(1) to pay pecuniary compensation or to provide some other relief, at a rate and in a manner that it will prescribe, to each member of the group whose entitlement to the said compensation or relief has been proven;

(2) that each member of the group prove his entitlement to the compensation or other relief;

(3) to pay pecuniary compensation in an overall amount and how to calculate the share of each group member, on condition that the total compensation can be calculated exactly on the basis of evidence before the Court: if the Court ordered compensation to be paid in a said overall amount, then it may order how the remaining amount is to be divided among the members of the group in proportion to their damage, if one or several members did not claim their share, did not prove their entitlement to compensation or relief, were not located or could not be paid their share for some other reason; however, no member of the group shall receive pecuniary compensation or other relief in excess of the full compensation or relief due to him; if, after the said distribution to the members of the group an amount is left, then the Court shall order it to be transferred to the State Treasury.

(b) If the Court ordered that every group member prove his entitlement to pecuniary compensation or other relief, then it may make Orders about:

(1) how and when entitlement shall be proven by members of the group and how it is to be divided, and for that purpose it may appoint a person with suitable qualifications (in this section: the appointee); if the Court decided to appoint an appointee, then any person who deems himself injured by an act or omission of the appointee may apply to the Court that ordered the appointment and the Court may approve, cancel or change the act or omission and make any Order on this matter, all as it finds proper; the appointee's pay and expenses, as well as how they shall be paid, shall be prescribed by the Court;

(2) the payment of expenses to a group member, in an amount to be set by the Court or by the appointee, for the trouble involved in proving entitlement to the said compensation or relief.

c) If the Court concluded that, under the circumstances, pecuniary compensation for all or some members of the group is not practical, either because they cannot be identified and

> the payment cannot be made at a reasonable cost, or because of some other reason,

In the *Reichart* [9] case, Justice Adiel pointed out in that in class actions there are a variety of methods of determining the damages, which are applied to a broad range of circumstances and in addressing the provisions of section 20 of the Class Actions Law he stated that:

> …[O]n the other hand the point of departure may be the means of proof prescribed in s. 20 (a) (2) of the Class Actions Law….
>
> whereby damage is proved by affidavits filed by each member of the group. Additional means of proof, essentially similar to the individual process, are based on the determination of damage for each member of the group, but without the conduct of the detailed process of filing affidavits, but rather by a general calculation based on undisputed factual data or admitting of simple proof. Naturally, the two methods may be combined by drawing up a general formula to be applied to each individual of the group, in accordance with data specifically concerning him. On the other hand, there are additional ways of determining compensation, based on determining an overall sum of damages that was caused to the group in its entirety, using the methods outlined above. Finally, in cases in which the damage cannot be calculated (even where it is undisputed that it was incurred) there is the possibility of determining the sum of compensation by way of estimate (para. 67 of his opinion).

Justice Adiel further noted that Israeli law, similar to American law outlines two principal methods for determining damages in class actions. The first is the *individual calculation* whereby the damage is determined giving distinct consideration to each member of the group. According to this approach, after establishing the responsibility of the defendant in the question common to all of the group members, a separate decision is made regarding the damage caused to each one of its members and the cumulative sum of damages proved by the group members will constitute the sum of the defendant's final liability. This method of calculation is anchored in s. 20 (a) (1) and (2) of the Class Actions Law, cited above. Its advantage is that is consistent with the method of compensation prescribed in the General law and the principles of rectificatory justice on which it is based. It is generally involves the acceptance of affidavits from the group members or a calculation based on undisputed factual data or such as admits of simple proof (see *Reichart* [9], para. 67). In American law various additional mechanisms were established, intended to assist in the individual assessment of damages in an efficient and economic manner (see e.g. *Bates v. UPS* 204 F.R.D. 440, 449 (N.D. Cal. 2001) [48] – the conduct of separate actions following the date of establishing the tortuous liability); *Olden v. LaFarge Corp*. 383 F.3d 495, 509 (6th Cir. 2004) [49]- the appointment of an expert whose role was to conduct separate hearings for each victim). Some of these found their way into Israeli law (see se\. 20 (b)(1) of the Class Actions Law (see *E.S.T Project Management*[6], pp.. 246-347; and *Tetzet* [8], 788)

46. Given the advantages of the approach based on individual calculation, it would seem that it is to be preferred or purposes of determining the remedy in class actions, to the extent that it is possible and this indeed was the approach taken by the court in *Reichart* where it stated that "inasmuch as our case enables the determination of damages on an individual basis, I see no grounds for taking the path of the overall calculation (see *Reichart* para. 72). However this approach is not always applicable. The difficulty in applying it arises for example when the group members cannot be identified or located; when under the circumstances it is not possible to present data or documents sufficient for proving individual damage; when the damage incurred by each member of the group is minimal and presumably the group members or most

of will be unwilling to cooperate for purposes of proving it on an individual basis. Likewise, where the clarification of the individual damage caused to each one of the group members requires the investment of expensive resources and considerable judicial time which have no justification under the circumstances, (see Steven Goldstein "The Class Action Suit – For What and Why*" Mishpatim* 9 (5739 416, 430 – 431) (hereinafter: Goldstein))

The first difficulty that we addressed, of locating the members of the group is characteristic of representative plaintiffs in consumer matters (see decision in the certification application, p. 685) and as mentioned, this difficulty also arose in our case given the impossibility of locating all of the consumers who consumed long lasting low fat milk during the relevant period. In confronting difficulties of this nature and others, some of which we mentioned, American law developed a second method of calculation – the *method of overall calculation* which was also adopted in Israeli law. According to this method, a "group compensation" can be determined on the basis of the damage caused to the group as a whole, even if the damage incurred by each member of the group was not proved prior to the determination of the overall compensatory sum. The purpose is to prevent the frustration of the goals of the class action in cases in proving individual damage is problematic. In the same vein, there were cases in which American case law resorted to "hybrid mechanisms" such as: an expert using a statistical formula to calculate the damages of the group members; an expert who conducts hearings and individual evaluations in relation to a representative sample of victims (*Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 782-787 (9th Cir. 1996)[50](even though it appears that the use of this mechanism was restricted in a recent case: *Wal-Mart Stores, Inc. v Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) [51] (hereinafter *Wal-Mart*); the division of the group into sub-groups bearing typical features and the determination of an overall compensatory sum for each sub-group (see also LabA (NLC) 633/08 *Erez v. Gal Maton Newspaper Marketing and Distribution Ltd* [23], para. 18 (11 January, 2011)

The development of the system of overall calculation in American law began with the establishment of the Fluid Class Recovery mechanism (FCR), dwelt upon by the District Court in its decision. In its classical format, this is a three stage mechanism intended for compensation of the group members, and was described by the Californian Supreme Court as follows:

> First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts" (The State of California v. Levi Strauss & Co. 41 Cal. 3d 460, 472-473 (1986)

(hereinafter: *Strauss*)

The first stage of this mechanism is the determination of the sum of the group compensation which the defendant must pay and which he will deposit in a special fund established for that purpose. At the second stage members of the group are given an opportunity to prove (at level of proof lower than the accepted level in personal suits) the individual damage and in doing so receive their portion as personal compensation. At the third stage the balance of the sum is allocated in accordance with the various models that were developed by the court for that purpose. It is quite apparent that the three stages of the FCR process described do not provide an answer to all of the difficulties we mentioned. For example, in cases which preclude a determination of the sum owing to each member of the group, or such as the case before us, in which there is no possibility of locating the members of the group. In order to provide a solution for these cases American law developed a variety of methods that deviate from the classic FCR model, some of which will be considered in what follows, along with the

challenges raised against them, as we will presently show. (until here Case Review)

47. In Israeli case law, the overall calculation approach was mentioned as a possible method of calculation already before the enactment of the Class Actions Law. For example, Justice (former title) Cheshin wrote in the *Barazani Further Hearing* [3] that: "Where awarding separate compensation for each of the group members is not practical, the court is permitted to obligate the defendant to pay compensation using special compensatory systems or other remedies, as it deems appropriate, provided obviously that the defendant is not compelled to pay more than the damage that was actually incurred" (*ibid*, at p. 425. See LCA *E.S.T.* [5]; the decision on the certification application, at pp. 685-688; CC (TA – Jaffa) 2036/01 *Mannela v. Mifal HaPayis* [ ] para. 8). The mechanism of the overall calculation method was further established as part of the individual arrangements interspersed among the various legislative acts and by force of which class actions could be brought in the past (see e.g. the provisions established in s. 216 (b) of the Companies Law, 5759-1999; in s. 46I of the Restrictive Trade Practices Law, 5748; s. 16 I of the Banking (Customer Service) Law 5741-1981). This mechanism appears in s. 20 (a)(3) of the Class Actions Law, that as mentioned, replaced the individual arrangements and which regarding this matter states that the court may rule that:

> "payment of pecuniary compensation in an overall amount and how to calculate the share of each group member, on condition that the total compensation can be calculated exactly on the basis of evidence before the Court…."

Furthermore, s. 20 (a)(3) of the Law contains a provision regarding the division of the compensation according to which in the event of a balance remaining after the distribution of the compensation to those victims who proved their damages and claimed compensation, it will be allocated proportionately between the group members, "provided that no member of the group shall receive pecuniary compensation or other relief in excess of the full compensation or relief due to him" and in that case the balance will be transferred to the State Treasury.

This provision is essentially similar to the classic format of the FCR mechanism mentioned above, and it enables the Court to determine overall compensation subject to the conditions prescribed in the section. In *Reichart* [ ] the court emphasized in this regard that the condition for the determination of overall compensation under s. 20 (a) (3) of the Law is that "the sum of overall compensation admits of precise calculation based on evidence before the court", and the court further added that "in terms of the principles for calculating the damage and its manner of determination, including the evidentiary law concerning weight and admissibility, there is no substantive difference between the methods used for an overall calculation and the methods used for establishing individual damage…". The court further stressed in *Reichart* [9] that even at the stage of allocating compensation among the group members consideration may be given to special individual data that is proved with respect to its individual members (para. 64 of the decision).

The difference between the various alternatives established in s. 20(a) relating to the manner of calculating the compensation and its allocation among the group members is that in first two alternatives (s.s. (1) and (2) the method of calculating damage proceeds from the individual to the general, and the sum imposed on the defendant is the sum total of the amounts to be received by each one of the group members. In the third alternative, on the other hand (s.s. (3)) the process is reversed in the sense that initially the overall sum for the which the defendant is liable is determined, after which that sum is allocated between the group members in accordance with the court's instructions, and subject to the caveat that overall compensation will not be awarded unless admitting of precise calculation based on the evidence before the court.

48. We already mentioned that the classic format of the FCR mechanism did not resolve all of the problems that arose in American Law concerning entitlement to a remedy and pecuniary compensation in class actions. This is also true with respect to the overall calculation

method prescribed in s. 20 (a)(c), under the inspiration of that mechanism. The Israeli legislator was aware of this and hence added further mechanisms in s. 20 (c) of the Class Actions Law for determining remedies in class actions. Given the importance of this section for our purposes, we will again present the provision verbatim, which provides as follows:

> "If the Court concluded that under the circumstances pecuniary compensation for all or some of the members of the group is not practical either because they cannot be identified and the payment cannot be made at a reasonable cost or because of some other reason then it may order other relief to be given for the benefit of all or part of the group or for the benefit of the public, as it deems appropriate under the circumstances of the case"

Is the court's permission to grant a remedy under this section "for the benefit of all or part of a group" or "for the benefit of the public" subject to the conditions enumerated in s. 20(a)(3) of the Class Actions Law, including the condition concerning "exact calculation" of the sum of overall compensation, as argued by Tnuva?.

The Lower Court dismissed this claim and ruled that:

> Section 20 (a)(3) [enables] the calculation of the overall compensatory sum for the group, and the waiver of individualized proof of damage. However, this is still considered as *personal* compensation or a remedy for those members of the group who can be located and whose entitlement was proved, by way of allocating the sum of overall compensation between the those members. This must be clearly distinguished from the additional possibility at the court's disposal under s. 20(c) of the Law, to rule *a relief for the benefit of all or part of the group* or *for the benefit of the public* in those cases in which *the Court concluded that under the circumstances pecuniary compensation for all or some of the members of the group is not practical either because they cannot be identified and the payment cannot be made at a reasonable cost or because of some other reason*" (para. 104 of the decision, emphasis in source).

Thus, according to the approach of the Lower Court s. 20(a)(3) of the Law establishes an independent for the determination of remedies and compensation in collective suits, existing alongside the other tracks prescribed in this context in s. 20(a)(1) and (2) and in s. 20(a)(3). The Lower Court further added that in any case it was also unable to accept the interpretation that Tnuva attempted to give to the requirement for "precise calculation" included in s. 20(a)(3) of the Law, writing that:

> Regarding that requirement for "precise calculation" of the overall sum of pecuniary compensation, it bears note that this requirement is implemented in a liberal manner in the U.S.A. and it would seem that the legislative intention in Israel was to the take the path of American judicial experience. As noted by Hon. Justice Adiel (paras. 63 and 67) the overall calculation in U.S.A. relies on statistical calculations, such as sample testing, or the use of mathematical models, which by definition do not lead to a "precise" calculation of the damage caused to the group. Likewise, and this point too was mentioned by Judge Adiel, the overall calculation system is used to overcome the difficulty of "simply calculating the damage of each individual of the group", for example, in the absence of admissible documents or the difficulty of locating all of the members of the group. Likewise, there is a difficulty in "precisely" calculating non-pecuniary

> damage, which necessarily involves estimation. Under these circumstances it is clear that the calculation of the compensation cannot be mathematically precise, and this was not the legislative intention. It is further important to point out that the requirement for "precise calculation" of the sum of the overall compensation was established in section 20(a)(3) of the Law, which deals with *personal compensation*, for the group members, but not in s. 20(c) of the Law which relates to the a remedy for the *for the benefit of the group* (para. 100 of the decision, emphasis in source).

49. I accept the Lower Court's position that the mechanisms of s. 20 (c) of the Class Actions Law are intended to provide an answer for those cases in which it is not possible to precisely calculate the damage and distribute it according to one of the mechanisms prescribed in s. 20 (a) of the Law. Indeed, contrary to the position presented by Tnuva, s. 20(a) is not limited to difficulties in *distributing the compensation* between the members of the group ("because they cannot be identified and the payment cannot be made at a reasonable cost*"*). Section 20 (c) of the Law enables the award of a flexible remedy "for the benefit of the group" or *"*the benefit of the public" even in cases in which the awarding of compensation to the members of the group is not practical "for some other reason". Another reason of this kind may exist in those cases that preclude a precise calculation of the overall damage given that the data indicating the damage are not external data, such as a price hike of defined sum, but rather a collection of individual damages the precise proof of which depends on the testimony of each and every member of the group and obtaining these testimonies is problematic – by way of example – if there is no possibility of identifying the members of the group. In that situation, adherence to the regular rules of compensation in tort would frustrate the rationale and the underlying goals of the institute of the class action, which is intended to "protect the interest of the individual harmed who does not bother bringing an action; it represents a public interest in enforcing the provisions of the Law of which the class action is a part; it has a deterrent value against the violation of Law; it prevents the abuse of power by holders of control, whose portion of the capital is occasionally totally disproportionate to their power, and hence prevents manipulations at the expense of the "small investor"; it saves resources and prevents the multiplicity of suits" (CA 2967/95 *Hanan Vakshet Ltd v. Tempo Beer Industries Ltd* [24] at p. 323. See also the goals enumerated in s. 1 of the Law). It is for these reasons that the Class Actions Law outlines special arrangements that "occasionally deviate from the regular law and leave a broad margin of discretion for the court) *Hanan Vakshet Ltd v. Tempo Beer Industries Ltd (*as per President D. Beinisch, para. 6 of her opinion).

Structural failures of the kind discussed above in terms of the ability to prove "by precise calculation" the overall damage that was caused to the group or the individual damage caused to each member of the group, are particularly typical of consumer class actions. In cases of this kind there is an increased risk that the tortfeasor will profit and the profits reaped as a result of the tort committed will remain in his hands purely because of the difficulty of arriving at a precise calculation of the damage which is spread over a large group of victims who cannot be identified (see Deutch, "A Decade for the Class Action Suit", 33). American case-law refers to these profits as "ill-gotten gains". Regarding the justification for deviating from the classic principles of rectificatory justice in tort in this context, the Supreme Court of California wrote the following in the aforementioned *Strauss* case:

> Fluid recovery may be essential to ensure that the policies of disgorgement or deterrence are realized. Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts" (*Strauss*, p. 472).

50. Indeed, s. 20 (c) of the Class Actions Law deviates substantially from the correlative principle underlying the regular principles of compensation which mandate total correlation between the circle of victims and the circle of the compensated. Compensation funds are not transferred to the victims and are used for "the benefit of the group" as such or "the benefit of the public", the assumption being that the victims will derive indirect benefit. As such, the victims' interest in receiving compensation for the damage incurred is not realized in full. However, from the victim's perspective the alternative of no remedy at all being awarded would support the award of a remedy for the benefit of the group or the public, because partial and indirect benefit is preferable to not receiving any remedy at all.

A similar rationale also underlies the developing trend that has developed in general Tort law, other than in the context of the class action, in cases of repetitive tendency. This tendency reflects the recognition that when applying the balance of probability rule in examining the causal connection between the acts of a particular tortfeasor and the damages caused to the victims at large it is preferable to promote the principle of rectificatory justice, even by way of *cy pres comme possible*, because the application of the principle in the classical sense, will in many cases achieve a result that is altogether remote from the restoration of the status quo ante. This point was addressed by Deputy President E. Rivlin in FHC 4693/05 *Carmel Haifa Hospital v. Malul* [25] where he noted:

> …in certain cases the principle of rectificatory justice should be adjusted so that it focuses on the overall picture and not just on the isolated claim of a particular plaintiff before the court. This enables a harmonization between the conception of rectificatory justice and the notion of relative compensation (para. 52 of his opinion. See also in para. 48 of Justice M. Naor's opinion).

If the general law of tort is prepared to deviate from the principle of correlativity in suitable cases then *a fortiori* it is both appropriate and correct to do in class actions. This is because in the class action and primarily those concerning consumer wrongs, the fundamental principle and goal that we seek to realize focuses on the achievement of effective and efficient deterrence against the dealers who breach the law and the consumers' rights (see Deutch. "A Decade for the Class Action Suit", 33). For otherwise the ones who profit are the tortfeasors who are large bodies that provide services to immense numbers of clients, and as such spread their damages among a large group of victims whose identity is not known, and their ill-gotten gain will remain in their own hands. Redressing the injury caused to the individual victim on the other hand, is a less dominant interest in the class action given the fact that in most cases the damage caused to the individual consumer is relatively minor.

Regarding the awarding of a remedy in the area of class actions in the U.S.A. by application of the principle of *cy pres comme possible* which originates in the laws of trust and means "as near as possible" and is also referred to as "next best recovery" see Natalie A. DeJarlais, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Action*, 38 HASTINGS L.J. 729 (1987); Stewart R. Shepherd, *damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972)(for a critique of the expansive application of this principle, see M. H. Redish, P. Julian & S. Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative And Empirical Analysis*, 62 FLA. L. REV. 617 (2010) (hereinafter" Redish).

Hence, in terms of policy considerations both those anchored in the general rules of tort and those specific to the laws of class actions, we should strive to ensure that inability to identify the victims does not create an insurmountable obstacle to filing a claim in court (see A. Porat, "Collective Liability in Tort Law", *Mishpatim* 23, 311, at pp. 384-385), and see also comments of Justice E. Mazza in *Barazani Further Hearing* [3], at pp. 449 – 451). In this context, for purposes of the class action proceedings the possibility of awarding a remedy for the benefit of a group or the public as established in s. 20 (c) of the Class Actions law constitutes an

important component.

51. All the same, we should not forget that another one of interests to be pursued in the class action proceeding is that of fairness to the defendant and protection of his substantive and procedural rights. From this perspective, and given that our concern is with a monetary remedy, we are obligated to ensure that the relaxing and flexibility of the procedural rules anchored in the Class Actions Law do not produce a situation in which obligation imposed upon him exceeds the sum of the damage that he caused) (regarding the dismissal of the motion to certify a class action inter alia by reason of this concern, see *McLaughlin v. American Tobacco Co.* [53]. Indeed, from the tortfeasor's perspective less importance attachés to the question of how the compensation is distributed. His substantive interest concerns the extent of the sums that he will be obliged to pay, and less with the question of how they are utilized thereafter. The desire to protect the interest of the defendant as mentioned underlies, inter alia, the provisions of the s. 20 (e) of the Class Actions Law, which negates the awarding of exemplary damages against the defendant and also negates the awarding of compensation without proof of damages (apart from in a suit in accordance with s. 9 of the Second Schedule). Another balance between the public interest of the victims on the one hand, and the defendant's interest on the other hand may also be found in the provision of section 20 (d)(2) of the Class Actions law in accordance with which in the awarding of the remedy the court may also have consideration for "the damage that is liable to be caused – by the payment of compensation, its amount or the manner of its payment – to the defendant, to the public that uses the defendant's services or to the general public by damaging the defendant's economic stability, as opposed to the expected benefit for members of the group or for the public". Parenthetically, it should be noted that Tnuva did not make any claims in court in reliance on the provisions of s. 20(d) (2) of the Law. It was for this reason that the Lower Court found no reason to consider these provisions and there are no grounds for us to address them at the appeal stage.

52. American case-law offers a variety of approaches to the question of whether and under what circumstances the sum of compensation in class actions can be determined other than by a precise calculation. Some have contended that where there is no possibility of determining the overall sum in a precise manner, there are generally no grounds for using the FCR doctrine (on this interpretation of the FCR doctrine, see Michael Malina, Fluid Recovery as a Consumer Remedy in Antitrust Cases, 47 NYU L. Rev. 477, 488-491 (1972)). All the same, in order to resolve the difficulties that arise in this context the various U.S.A. courts, the courts have developed statistical mechanisms that enable the evaluation of the damage caused to a group, while waiving to certain degree the demand for "precision" (hence damage was determined in relation to the average wage which was determined based on statistical means, see*: Pettway v. American Cast Iron Pipe Co*., 494 F.2d 211 (5th Cir. 1974) [54]; *Stewart v. General Motors*, 542 F.2d 445 (7th Cir. 1976)[55]; *Bowe v. Colgate-Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973) [56]; *United States v. Wood, Wire & Metal Lathers Int. Union, Local Union* 46, 328 F. Supp. 429, 442 (S.D.N.Y. 1971)[57]. Similarly, the court enabled proof of damage by way of sampling and by means of other statistical methods. See e.g. *Hilao v. Estate of Ferdinand Marcos* [50]. For a different approach see *Hood v. Eli Lilly & Company* 671 F. Supp 2d 397, 434-453 (E.D.N.Y. 2009) 453 [58].

In Another case (*Long v. Trans World Airlines, Inc*. 761 F. Supp. 1320 (N.D. Ill. 1991 [[59]) the court wrote that:

> "Defendant has no "right" to an individualized determination of damages for each plaintiff; the desire for accuracy must be balanced against other factors such as the burdens of discovery in relation to the size of the individual claims." (*Id*. at 1327).

Even among scholars it has been contended that creative use should be made of "aggregate proof) in order to assess the rate of collective damage caused to the members of a group. This

was noted by the scholars A. Conte & H.B. Newberg, in their book *Newberg on Class Actions* (Vol. 3, 4th ed.2002):

> "There are occasions when it is feasible and reasonable to prove aggregate monetary relief for the class from an examination of the defendant's records, or by use of a common formula or measurement of damages multiplied by number of transactions, units, or class members involved, *or by reasonable approximation with proper adherence to recognized evidentiary standards*". (*Id.* 476).

53. The interests we have examined that underlie the class action lead to the conclusion that where a remedy is awarded for the benefit of a group or the benefit of the public under s. 20 (c) of the Class Actions Law, we should aspire to ensure that the overall sum of liability is consistent with the overall damages caused by the defendant. In order to determine this sum there is no impediment to adopting a method of estimation, which is an accepted and recognized method in our system for quantifying damages in cases in that do not admit of precise calculation of the damage incurred by the individual victim. This point was addressed by this Court in CA 355/80 *Anisimov Ltd v. Tirat Bat-Sheva Hotel* [26],:

> In those cases, in which, the nature and character of the damage, enable the production of accurate data, the victim-plaintiff must do so, and should he fail to do so damages will not be awarded to him. On the other hand, in cases in which the character and the nature of the damage render it difficult to prove the degree of damage and rate of compensation with certainty and accuracy, it will not frustrate the victim's claim, and it will suffice if adduces such data as can reasonably be obtained, while granting discretion to the court to make an estimate that supplements that which is missing (p. 899).

It was further ruled that in appropriate cases statistical data can be used for determining the scope of the damage (see; Rivlin, Shani, at pp. 506 – 507), and the expert opinion. As such, and *a fortiori,* this method may be used where it concerns a group. All the same, it is stressed that the evaluation of the damage by estimation does not mean the determination of an arbitrary amount which seems to be no more than a guess, and the court using its discretion in such a case must base the sum it determines upon appropriate anchors that enable the evaluation of damage by way of estimation, as stated (see *Daaka* [4] at p. 583, Barak Erez, 277).

54. The non-pecuniary damage which the Lower Court was requested to award in this class action is in the genre of damages the nature and character of which do not admit of precise calculation and in cases of individual claims too, will always be subject to the court's estimation (apart from compensation claims for road accidents in respect of which the Compensation for Road Accident Victims (Calculation of Compensation for Non-Pecuniary Damages) Regulation 5736-1976 (hereinafter Road Accident Regulations), prescribes formula for determining non-pecuniary damage as a derivative of the rate of disability and a ceiling sum determined in the ss. 4 (a)(3) and 4 (b) of the Compensation for Road Accident Victims Law, 5735-1975). Regarding the essence and the methods for calculating non-pecuniary damage in differing contexts, see CA 4022/08 *Agbaba v. Y.S. Company Ltd* [27], paras 10 – 24; C.A. 754/05 *Levi v. Share Zedek Hospital* [28]).

In s. 20 (e) of the Class Actions Law, the legislator authorized the court to award compensation for non-pecuniary damage caused to the group member. However, the determination of non-pecuniary damage in the present case is no simple task. As mentioned, there is no possibility of identifying the group members who consumed long lasting, low fat milk during the relevant period for the suit, and hence the Court availed itself of statistical data and expert opinions in reliance upon which it reached a conservative, cautious determination

that the group comprised 220,000 members. We concluded that the reference group for purposes of compensation for damage occasioned by infringement of autonomy is limited to that portion of the consumers group who incurred consequential damage due to the infringement of autonomy and who experienced negative feelings in various forms upon becoming aware that the milk they drank contained silicon. Our determination regarding the number of group members included in the group of those entitled to the said compensation (154,000) was also based on statistical data and the expert opinions presented in the proceeding. Our concern is therefore with a group numbering over 100,000 people, whom can be neither identified nor located, and even were it possible to locate them, it is doubtful whether it would even be appropriate to instruct each one of them, or even some of them to submit an affidavit specifying the intensity of the negative feelings that they experienced in order to award compensation in accordance with one of the mechanisms established in s. 20 (a) of the Class Actions Law. Given the impossibility of determining compensation based on individuated evidence or precise calculation and the impossibility of identifying the members of the group entitled to compensation, we are left with the compensatory mechanism established in s. 20 (c) of the Class Actions Law, which enables the determination of overall compensation based on an estimation for the benefit of the group or the public. The question that presents itself is how, if at all, to estimate the "collective" non-pecuniary damage in this case, and whether the fact of its being non-pecuniary damage that is characterized by subjective, individualistic features, should preclude the possibility of "uniformity" in determining the overall sum of compensation, due to the differences between the victims in terms of the results of the damage.

In rejecting Tnuva's claim in this context, the Lower Court ruled that "It is no longer possible to make a sweeping claim that uniform compensation cannot be awarded for non-pecuniary damage, absent the possibility of proving individuated damage" (para. 128) and hence the court fixed the sum of compensation at NIS 55 million, stating that this sum reflects uniform compensation for the sum of NIS 250 for each victim (220,000 X 250) for the non-pecuniary damage caused to the members of the group. The Court further mentioned that had a non-pecuniary compensation for Tnuva's action been awarded in the framework of an individual suit, the sum of the compensation would have been higher, but the court's approach was that this context demanded consideration of the fact that the issue was one of overall compensation being ruled for the group in its entirety or for the benefit of the public, in the absence of the possibility of having consideration for the individual damage caused to each one of its members. In the courts' words:

> [*a*]*fortiori* the court does not examine the individual damage of each member of the group, given that not only is the remedy awarded to the group as a whole, but it is also given to the group and not to its individuals. The court is even entitled to fix the overall sum of compensation for the group based on estimation. This does not mean that the court should avoid the determination of important parameters for purposes of calculating the overall damage. The court must definitely determine the number of members in the plaintiff group, at least by way of estimate. Similarly, the court must assess the scale of the individual damage caused to each one of the group members, to ascertain that the overall sum of compensation awarded to the group does not exceed the aggregate damage caused to its individuals. However, at the end of the day, the court must determine an overall sum of compensation to be awarded to the group having consideration for the totality of considerations, but it must not ignore the fact that the compensation is not intended as *individual* = compensation for each of the group members. The *overall* compensation must be commensurate and in proportion

> to the wrongful act and the circumstances of its commission, even if the division of the sum by the number of group members would indicate a lower rate of compensation by comparison to the rate of *individual* compensation that would have been awarded had a personal claim been filed against the defendant by reason of that tort.
>
> Granting the plaintiffs' request would have meant determining Tnuva's liability for an overall sum of NIS 1.76 billion (NIS 8000 X 220,000 members of the group). It is absolutely clear that this result is unreasonable and unrealistic. Having considered all of the circumstances as set detailed above, I determine an overall sum of compensation for the group of NIS 55 million which reflects an estimated rate of damage for each members of the group of the sum of NIS 250. This degree of damage, and even higher, was most definitely caused to each member of the group, even if only by reason of the infringement of individual autonomy (para, 134 (b) of the decision, emphasis in source).

55. In this appeal, Tnuva challenges the determination of the compensation according to the mechanism prescribed in s. 20 (c) of the Law, arguing that given the type of the damage (non-pecuniary damage, with subjective-individual features), and given the impossibility of proving the damage to the group in terms of its individual members due to the impossibility of identifying its members, there were no grounds for determining uniform compensation for the group, even at a minimal rate NIS 250 for each individual). On the other hand, Raabi claims that given the Court's view that the appropriate compensation for the infringement of autonomy had it been a personal suit was not less than NIS 8000, it should have awarded that rate of compensation multiplied by the number of members in the group (which was similarly challenged on the part of Raabi, as detailed above), and the fact that such a significant figure was received as a result

Indeed, in cases in which there is significant differentiation between the group members it may yield the conclusion that the matter is not suited for adjudication as a class action (see s. 8 of the Class Actions Law; CA *Reznik v. Nir National Cooperative Association for Workers Settlement*[29] paras. 24 – 27 (hereinafter: *Reznik*), See also LabApp (Nat.) 425/00 *Goldberger v. Guards Association Ltd* [ ] para. 8 ; Civ.App. (Naz) 1528/05 *Barzilai* v. *Ferinir (Hadas1987*) *Ltd* (para. 27.2) [ ]; on the other hand, see TM 105/06 (CivApp.30858/06) (Tel-Aviv-Jaffa) *Feldman v Municipalities Sewage Association* (*Dan Region*) para. 52 ; CF (Tel-Aviv-Jaffa) 2719-06 *Levi v. Israeli News Company Ltd* para. 17; and see also Klement, "Boundaries of the Class Action", at pp. 345-346). It would seem however that the claim concerning differentiation between the group members has the power to bring about the non-certification of the suit as a class action and even its rejection if certified, in those cases in which the differentiation has implications for the establishment of liability or even the very existence of an actionable cause. The main concern in this context is that it may prejudice the defendant's right to a fair proceeding and to be able to defend himself against each and every one of the group members. This happened in the *Resnik* [29] case where the defendants raised the prescription claim, the decision on which was not necessarily identical with respect to each and every member of the group, and for that reason the court did find grounds for its certification as a class action. In that case Justice Gronis stated that "Certain solutions for the absence of homogeneity between the group members are found in ss. 20 (a) – (c) of the Class Action Law, that includes provisions regarding the remedy that will be awarded by the court". The court further added that it was not required to rule on the question of the "cases in which the suit should be certified as a class action notwithstanding the existence of individual features, by having resort to the mechanisms of s. 20 of the Class Actions Law, or other

solutions" but it still saw fit to stress that there are cases in which "these solutions are unable to provide a solution" and as a result they cannot be certified for filing as a class action (*ibid,* para. 27). The issue of differentiation (the foundation of commonality) between the group members was likewise the subject of discussion in recent decision of the Supreme Court of the U.S.A in the *Wal-Mart* issue. In that case a request for certification of a class action was filed in the name of a million and a half employees of the Wal-Mart network based on illegal discrimination against them as women with respect to matters of salary and promotion. The trial instances and the appellate instance certified the suit as a class action *Dukes v. Wal-Mart Stores, Inc*. [51] . The Supreme Court however reversed the decision, ruling that the suit should be be certified in view of the plaintiffs' failure to prove that the company had conducted a general policy of discrimination, in other words, it failed to prove the existence of a grounds for claim regarding every single group member. It also held that under the circumstances it was not possible to calculate a compensation sum by statistical methods and by way of a representative sampling, *inter alia* in view of the defense claims in the law itself, which the company was able to raise regarding each and every company in the group.

Tnuva's argument concerning differentiation is to no avail in our case. Its argument relates exclusively to negating the possibility of awarding uniform compensation for the non-pecuniary damage sustained by the group members under the circumstances, in view of what it claims is the lack of uniformity among the victims in this context. In the Court's eyes, this differentiation did not justify the non-certification of the suit as a class action and I concur with the stance of the Lower Court that neither does it preclude the award of a remedy after the clarification of the class action that was certified as stated. First, even in suits that are not conducted as class actions in which there are multiple plaintiffs, such as suits for building defects, the court does not refrain from awarding uniform compensation by way of estimation for the non-pecuniary head of damage (on "uniformity of damage" for mental anguish in regular suites filed on behalf of a number of plaintiffs, see the district court decisions cited in para. 121 of the decision). Second, as distinct from differentiation among the members of the potential group, that may have implications for the existence of an actionable cause and the basic entitlement of each member to a remedy, where the differentiation concerns the sum of compensation, it finds its solution in the various mechanisms of s. 20 of the Class Actions Law that deal with the remedy that the court is authorized to award. The establishment of these mechanisms is intended to ensure that the differentiation among the group members regarding the determination of the remedy, just like other difficulties in proving damage which stem from the inability to identify or locate the group members, will not frustrate *in limine* the clarification of the matter by way of a class action and the realization of the goals upon which this proceeding is based in terms of the public interest and in terms of the group concerned, which we dealt with above at length. Accordingly, differentiation relating to the rate of the damage, will not in general prevent the clarification of the class action and the award of a remedy in the framework thereof, including with respect to the award of uniform compensation that will be determined by way of estimation, unless under the circumstances of the particular case prevent the award of an appropriate remedy in accordance with one of the mechanisms set forth in s. 20.

56. That said, it would not be superfluous to note that differentiation between the group members may occasionally be raised as an argument for denying certification of suit as a class action, or against the award of a uniform compensation in the framework thereof, specifically from the perspective of the potential group members, in those cases in which awarding uniform compensation prejudices the rights of those group members who wish to prove their suit on an individualized basis and thereby merit larger compensation. American case-law treated this concern as a potential violation of due process rights, which in turn lead to the rejection of the certification applications for class action suits, stressing the fact that the mechanisms established in the relevant statutory provisions do no include the right to opt-out of a class action proceeding, see - Federal Rules of Civil Procedure , *Allison v. Citgo Petroleum,* 151 F.3d 402, 414-415 (5th Cir. 1998) [60]; *Lemon v. Int'l Union of Operating Engineers, Local No. 139, AFL-CIO* 216 F.3d 577 (7th Cir. 2000) [61]; *Jefferson v. Ingersoll Int'l, Inc.* 195 F.3d

894 (7th Cir. 2001) [62]; *Reeb v. Ohio Department of Rehabilitation and Correction*, 435 F.3d 639 (6th Cir. 2006) [63].
For additional cases in which class actions were not certified in the U.S.A. against the background of the differentiation between the group members, see In re *Fibreboard Corp*., 893 F.2d 706, 712 (5th Cir. 1990) [64]; *Windham v. American Brands, Inc*., 565 F.2d 59 (4th Cir. 1977) [65]. However, in the U.S.A. this approach is not relevant to certification applications for class actions in accordance with legislative provisions that contain mechanisms for an opt-out right.

Israeli law in this context differs. The Class Action Law mandates the registration of the application to certify the suit as a class action, and the registration of its certification in the Class Actions Register (ss. 6 (a) and 14 (b) of the Law, and irrespective of the nature of the suit each and every group member is entitled to give notice that he does not wish to be included therein (s. 11 of the Law). Moreover, proponents of the approach that views the group as an entity in its own right have opined that there is need for a "sacrifice" on the part of each member of the group of with respect to his individual rights as a litigant, in view of his obligation to "tie his fate" with the fate of the group (see David L. Shapiro, *Class Actions: The class as Party and Client*, 73 Notre Dame L. Rev. 913, 919 (1998).

The claim raised by Raabi in his appeal concerning the paucity of the uniform sum that was awarded is not based on the claim of differentiation and the claim that any particular member of the group suffers as a result. Raabi does not dispute the fact that in this case, in the framework of a class action, it was not possible to clarify the individualized damage incurred by each and every group members nor does he dispute that it was not possible to identify or locate them. His claim relates solely to the smallness of the sum awarded as uniform compensation (NIS 250), given the fact that the Lower Court expressed its view that had the case been adjudicated as an individual claim it would have been appropriate to award far higher compensation (NIS 8000). Accordingly, Raabi claims that the sum of uniform compensation for purposes of calculating the overall compensation for the benefit of the group should be set at NIS 8000.

57. Examination of the Raabi's testimony (pp. 71-81 of the protocol) indicates that over a period of years that included the entire period that was relevant for the class action (23 October 1994 until September of 1995) he consumed significant quantities of long lasting low fat milk. However, the range of consumers of long lasting milk is varied both in terms of the duration of the consumption period and in terms of the scope of consumption. Hence, it may be assumed that the relevant group includes those who did not consume the milk for the duration of the period, those who consumed it in far smaller quantities than those consumed by Raabi and those who drank fresh milk on a regular basis and who only consumed the long lasting milk that they had purchased on rare occasions, when under various circumstances it served as substitute for fresh milk. This varied range of consumers of long lasting milk that contained silicon must be taken into consideration when determining the uniform compensation to be awarded for the violation of the autonomy of the group members who suffered consequential damage as a result. The claim of the representative plaintiffs' that the group in its entirety should be awarded the same compensation (NIS 8000) that was demanded by Raabi as the main plaintiff, fails to consider the differentiation between the group members that we discussed above, and for that reason alone we can dismiss the claim. Furthermore, contrary to the position of the Lower Court, even on an individual level I see no justification for awarding Raabi compensation for the sum of NIS 8000 (as valued on the date of the suit) for the damage head of infringement of autonomy. This takes into account the fact that we are no concerned with an infringement of the highest conceivable level and the fact that as distinct from compensation awarded in other contexts of non-pecuniary damage, our concern is with negative feelings experienced by the group members for a limited time, the peak of which was presumably when it became known to those who had consumed the milk, post factum, that it contained silicon. In other words, the non-pecuniary damage is not of the kind that accompanies the victim for life, such as pain and suffering in the wake of permanent physical

disability as a result of medical negligence. As such I think that on an individual level too, even where it concerns a permanent consumer of long lasting low-fat milk for the entire relevant period, the compensation sum awarded for consequential damage (feelings of anger, frustration, revulsion, anxiety, fury etc) resulting from the infringement of his autonomy should not be exaggerated. *A fortiori*, the uniform compensation to be awarded to the entire group should not be exaggerated, given the differentiation between its members in terms of the scope of the damage and its intensity.

58. This brings us back to the question of what constitutes the group compensation to be awarded in the case at hand, and whether the path taken by the Lower Court was appropriate for its ruling. As mentioned, the Lower Court concluded that compensation amounting to NIS 1.76 billion, which is arrived at by multiplying NIS 8000 for an individual by the number of group members (220,000), is a result that "is unreasonable and unrealistic" and it therefore set the sum of the overall group compensation at NIS 55 million, stating that this sum "reflects an estimated individual damage of NIS 250 for each of the individuals of the group".

In view of the great variety in the group in terms of its habits of consumption of long lasting milk containing silicon and in view of other features of the infringement of autonomy which we discussed above, including: the intensity of the infringement, and the fact that one can imaging higher rates of intensity, and the limited duration of the time during which the members of the group experienced negative feelings, I believe that the sum of NIS 250 can be accepted as a sum that is commensurate for purposes of setting the individual, uniform compensation. The multiplication of this sum by the number of group members who suffered consequential damage by reason of the infringement of autonomy gives us an overall compensation sum of NIS 38,500,000 (250 X 154,000). In its pleadings, Tnuva proposed that to the extent that it be obligated to pay compensation, it would be appropriate that the profit it made should serve as a basis for its calculation, indicating that the profit was NIS 1,645,900 in terms of the principal and with the addition of interest and linkage differentials (from the middle of the period) - NIS 4,981, 616. In principle, this model for calculating compensation should not be negated (on the approach whereby compensation based on denial of the tortfeasor's profits realizes the principle of corrective justice in the law of tort, in appropriate cases, see Ernest J. Weinrib *Restitutionary Damages as Corrective Justice* 1 THEORETICAL INQUIRIES IN LAW 1 (2000). It has even been claimed that this model is preferable for class actions in which the compensation awarded is a compensation for the benefit of the public under s. 20 (c) of the law. This is because in cases like these there is no real correlation between the obligation imposed upon the tortfeasor and the public of those who are compensated, and the purpose of remedying the damages of the victims is not really achieved due to the practical inability to identity the members of the group, to identify them or to compensate them. As such, the emphasis should be placed on the other objectives of the law of tort, including effective deterrence and prevention of unlawful enrichment of the tortfeasor. Indeed, the use of unlawfully obtained profit as a departure point for calculating compensation maintains the correlation between the intended purpose of the compensation and the manner of its calculation. However, even though on the level of principle the model based on the denial of profit for calculating compensation for the benefit of the public under section 20 (c) of the Class Actions Law should not be dismissed, it must be remembered that this model is not appropriate and not applicable in all of the cases. For example, it would difficult to apply it in a case which the tortfeasor did not profit as a result of the wrongdoing. As such, when awarding compensation for the benefit of the public the court must examine all of the data before it, and in accordance therewith to formulate the model best suited for its ruling. In our case, at the very outset Tnuva did not present us with detailed, substantiated and reliable data on the basis of which it would have been possible to examine the possibility of calculating overall compensation based on the denial of profit model. For example, Hagit Adler (who was employed in Tnuva as of 1996 and who served as the marketing manager when she gave her affidavit), stated that at the time of giving the affidavit (November 2004) “Tnuva does not have ….precise data regarding the rate of profitability of long lasting milk of 1% fat during the

relevant period (section 17 of the affidavit). Adler did propose to base the findings in this case on the rate of the profitability of long last milk with 1% fat on the later years (1999 – 2001), but regarding these years too, the only thing that was attached was a page of pricing relating to these years, taken from a document that was not presented in full, the authorship of which is not clear nor the data on which it is based, One of the other possible models or purposes of determining compensation for the benefit of the public, is the model that was adopted by the Lower Court and which we too endorsed. This formula, based on statistical data (regarding the number of victims) and uniform individual compensation, complies – albeit in the form of cy-pres calculation - with the traditional and accepted method of calculating compensation in torts law. All the same, and given that our concern is with cy-pres calculation, the application of the this model must be subject to the caveat that the cy-pres calculation must be done with the requisite caution and tend to be conservative, so that the sum of overall compensation will not spill over into the realm of punitive exemplary compensation which are not to be awarded in representative suits, pursuant to the legislative fiat in section 20 (e) of the Class Actions Law.

In conclusion, the overall compensation that should be imposed on Tnuva in this case according to the model that we endorsed is fixed at NIS 38, 500,000 as valued at the date of the decision of the Lower Court, (17.10.2008).

The Method for Distributing the Compensation Awarded for the Benefit of the Public

59. In order to balance between the public objectives and the private objective, American law has formulated a variety of mechanisms for providing a remedy for the benefit of the group in its entirety or for the public benefit, including discount mechanisms ("price rollbacks"); the transfer of the compensation funds to government body by way of their designation for goals that will benefit the actual victims ("earmarked escheat"); a "consumer trust fund"; and in appropriate cases, the relative participation (pro rata) of the current group members in balance of the funds ("claimant fund sharing" (regarding this, see Strauss, at pp. 473- 476). All the same, there are those who have sharply criticized the use of collective compensatory mechanisms for the public benefit in cases in which it is difficult or impossible to the individually compensate the members of the group (see e.g. *Redish; Powell v. Georgia-Pacific Corporation*, 119 F.3d 703, 706 (8th Cir. 1997) [66]; *In re: Airline Ticket Commission Antitrust Litig*, 268 F.3d 619, 625 (8th Cir 2001) [67].Regarding the variety of approaches adopted in American case-law on this matter and the differing approaches to the most optimal correlation between the distributive mechanism and the goals of the particular suit and the interests of the group members, see *In re Folding Carton Antitrust Litig*. 744 F.2d 1252 (7th Cir. 1984) [68] ; *Houck v. Folding Carton Admin*. Comm., 881 F.2d 494 (7th Cir. 1989) [69]; In *re Cuisinart Food Processor Antitrust Litig*.38 Fed. R. Serv. 2d (Callaghan) 446 (D. Conn.1983) .[70]; *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n* [71]], 84 F.3d 451 (DC cir. 1996); *In re Domestic Air. Transp. Antitrust Litig*, 148 F.R.D. 297 (ND Ga 1993) [72] .

On the approaches adopted by scholars on this issue, see Newberg, 505-543; Anna L. Durand, *An Economic Analysis of Fluid Class Recovery Mechanisms*, 34 STAN. L. REV. 173 (1982); Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591 (1987); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. Rev. 991 (2002).

See also Goldstein, 430- 431. on the use of systems of collective compensation in the Common law states, see RACHEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE, 426-430 (2004)

As indicated by the provision of section 20 (c) of the Class Actions Law, the Israeli legislator chose an approach that enables an award of compensation for the benefit of the group as a whole and for the benefit of the public according to a system of collective compensation,

even in the cases in which technical reasons preclude individuated compensation for the group members. In doing so the legislator expressed the view that the public goals which the Class Actions Law is designed to serve and which we dwelt on at length above are of no less importance than the private goals and hence the reason to strive to realize those goals even where various difficulties prevent the proving of the precise aggregate of the individual damages caused to the group and the maintenance of conformity between the public of victims and the public of those who are compensated. At the same time, it is important to note that according to the hierarchy prescribed by section 20 (c) of the Class Actions Law, preference should be given, to the extent possible, to compensatory mechanisms that reflect such conformity, and even when awarding compensation according to section 20 (c), in the absence of the possibility of awarding it under sub-sections (a) and (b), every effort should be made to structure the mechanism for distribution of compensation in a manner that achieves at least an element of connection between the public of those compensated and the public of victims.

60. In the case before us, regarding the distribution of the Lower Court held as follows regarding the distribution of the

> "Having consideration for the difficulties involved in the solution of the reducing the price of milk, given the immense sum of overall compensation ruled in favor of the group (NIS 55 million) and for reasons of the benefit of the group and the public – the sum of the compensation should be designated for three essential goals – *First*, benefitting the group members by reducing the price of the product (or increasing the contents without raising the price); *second* – research and scholarship fund in the field of food and nutrition which have implications for public health; *third* - distribution of milk free of charge to populations in need via non-profit organizations so involved (para. 144 (O), of the decision, emphasis in source).

In holding that one of the objectives for which part of the compensation sum should be awarded is the providing of a benefit via a discount from the product price, the Court, by its own account, was at the every least attempting to establish a group connection between the victims of Tnuva's conduct and those who would gain from the benefit. However, in our case it is doubtful whether such a connection actually exists. The connection which the Lower Court sought to establish in this context proceeds from the assumption that those who consumed long lasting low fat milk of Tnuva during the relevant period continue to do so today as well. The problem is that there is only a low probability that this assumption actually materialized, inter alia because of the passage of time and changes in consumption habits and even more so when considering our conclusion to the effect that compensation for infringement of autonomy during the relevant period (23 October 1994 – September 1995) should not be awarded exclusively according to objective criteria and the victims group should be limited to those who suffered consequential damage as a result of the infringement and experienced revulsion, frustration, anger, and other similar negative feelings. When supplementing this by the considerable dangers generally involved in a discounts arrangement that requires a detailed examination of the influence manner in which the arrangement affects the relevant market (see Amir Israeli "Settlement in a Class Actions that Infringes Free Competition, in the wake of CF 1012/02 *Yifaat v. Delek Motors Ltd* [ ] *Hearat Din* 2 (2) 112, 118 – 125) (5665), and the need to receive a reconfirmation from the Director of Antitrust (due to the passage of time from the time of that the gave the previous confirmation in this context) it would seem that in the current case it is preferable to waive the allocation of part of the compensation for the purposes of the discounts arrangement and to focus on the two other objectives determined by the Lower Court, which serve worthy interests for the benefit of the public in its entirety. The portion deducted for purposes of the discount arrangement will be divided equally between these two objectives and hence the compensation sum shall be

distributed in the following manner:

a. For the study and research fund – 44.33% and for the distribution of milk products to the needy 55.66%.

b. The distribution of the milk products (and not just long lasting milk that formed the subject of the claim) will be effected over a period of five years from commencement date for the execution of the decision, by way of the 2 non-profit organizations *"latet"* and "*Mishulhan leShulhan"* both of which supply food to dozens of other non-profit organizations around the country, as held by the Lower Court in its decision of 17 June 2009, which gave force to the agreements reached between the parties with the cooperation of the representative of the Attorney General and with his consent, attached to the notification of the parties dated 10 June 2009, in the Lower Court (hereinafter: *"*the supplementary decision").

c. For purposes of transferring the compensation for research purposes in the field of food and nutrition, a study fund will be established, headed by the Head Scientist of Ministry of Health. The fund management will choose the studies that are to receive scholarships, and will supervise them. The members of the management will be the entities specified in section 6C of the agreements reached between the parties and which were approved in the supplementary judgment. The intention is to use the entire sum of compensation earmarked for the study fund within 5 years, unless it becomes necessary to use the sum thereafter as well, in keeping with the Lower Court's decision in the supplementary decision.

Compensation for the Representative Plaintiffs and

61. In its partial decision and its supplementary decision the Lower Court ordered the payment of compensation and advocates fees to the representative plaintiffs and their attorneys, and all told ordered Tnuva to pay the sum of NIS 500,000 to the Raabi heirs; the sum of NIS 1,000,000 to the Israel Consumer Council and the sum of NIS 2,500,000 to the attorneys of the representative plaintiffs.

Tnuva argues that according to the criteria outlined regarding this issue in the Class Actions Law, there were no grounds for awarding such high sums to the representative plaintiffs and their attorneys. In this context Tnuva contends inter alia that the involvement of the Israeli Consumer Council in this context was only minimal, that it did not assume any risk and did not require any monetary incentive for acting in consumer related matters. It further submits that the rate of the compensation and advocates fees awarded is far in excess of the rate awarded in other cases, and that in this context it would have been appropriate to have consideration for the discrepancy between the sums demanded by the representative plaintiffs (who initially set their at NIS 4 billion) and the sum that was finally awarded.

The representative plaintiffs on the other hand claim that there are no grounds for interfering in the rate of compensation fixed by the Supreme Court, which does not deviate from the criteria prescribed by statute and case law in this context. On the other hand, they see cause for interfering in the sum of fees awarded to their attorneys and contents that the considerations that guided the court in this matter were mistaken. Inter alia they argued that there was no basis for the finding of the Lower Court to the effect that "the case was not always handled in "the best and most efficient manner" and that under the circumstances there were no grounds for attaching weight to the discrepancy between the sum demanded and the sum awarded and that their attorneys invested extensive and intensive work over the years in this precedential case, which is tremendously important from a public and consumer perspective. As such they claim that an order should be given for fees amounting to 20% of the overall sum of compensation.

62. The criteria for the determination of compensation for the representative plaintiffs are set forth in section 22 of the Class Actions law, which states:

Compensation for the representative plaintiff

22. (a) If the Court decided all or part of a class action in favor of all or part of the group, including by way of approving a compromise, then it shall order compensation to be paid to the representative plaintiff,

taking into account considerations said in subsection (b), unless it concluded – for special reasons that shall be recorded – that that

is not justified under the circumstances of the case.

(b) When it sets the amount of compensation the Court shall, inter alia, take these considerations into account:

(1) the effort exerted and the risks assumed by the

representative plaintiff by bringing and conducting the class action, especially if the relief requested in the action is declaratory relief;

(2) the benefit which the class action yielded for members of the group;

(3) the degree of public importance of the class action.

(c) In special cases and for special reasons that shall be recorded, the Court may:

(1) adjudge compensation to the petitioner or representative plaintiff, even if the class action was not approved or if the

class action was not decided in favor of the group, as the

case may be, taking the considerations said in subsection (b) into account;

(2) adjudge compensation to an organization that participated in hearings of the class action under the provisions of section 15, if it found that to be justified by the trouble taken and the contribution made by its said participation in the hearings.

Section 23 of the Law established criteria for the ruling of the legal fees of the representative attorney, as follows

23. (a) The Court shall set the representative attorney's legal fees for conducting the class action, including the petition for certification; the representative attorney shall not accept legal fees in excess of the sum determined by the Court as aforesaid.

(b) When it sets the representative attorney's legal fees under subsection (a), the Court shall, inter alia, take the following considerations into account:

(1) the benefit which the class action yielded for members of the group;

(2) the complexity of the proceeding, the trouble taken by the representative attorney and the risk he assumed by bringing and conducting the class action, as well as the expenses he incurred for that purpose;

(3) the degree of public importance of the class action;

(4) the manner in which the representative attorney conducted

the proceeding;

(5) the gap between the relief sought in the petition for approval and the relief adjudged by the Court in the class action….".

The criteria for determining compensation and legal fees are essentially similar and reflect the desire to incentivize the filing of class actions (on the importance of this consideration see Moshe Telgam, "The Class Action – Considerations for the Determination of Fees and Compensation" *Shaarei Mishpat* 4, p. 227 (5768). All the same, it should be noted that an overincentive in this context could encourage the filing of trivial suits or "inflated" suits with no justification, given that those filing these suits would be primarily interested in the compensation and legal fees that they could expect to receive (on the negative influence of trivial suits and the attendant concern of a weakening of the standing of the class action, see CA 1509/04 *Danush v Chrysler Corporation* [30] para. 15). An additional, and important criteria for the determination of legal fees, reflected in s. 23 of the Law cited above, is the existence of a commensurate relationship between the legal fees and the effort invested in the suit and the benefit it produced. The Law further adds and prescribes in this context a number of criteria intended to guide the conduct of the attorney of the representative plaintiff' so as to create a positive incentive for conducting the suit efficiently and fairly (see CA 9134/05 *Adv. Eliezer Levit v. Kav Of Zafon, Cooperative Association for Services Ltd* [31] para. 12 (hereinafter – *Levit*), regarding s. 23 of the Law. And see also AAA 2395/07 *Accadia Software Systems Ltd v. State of Israel – Director of Tax and Stamp Duty* [32] para. 20 (hereinafter – *Accadia*); CA 7094/09 *Borozovsky Conveyancing Ltd v. Ichurn Itur Veshlita Ltd* [33] paras 11- 14). As evidenced by the wording of ss. 22 and 23 of the Law, the list of considerations enumerated is not exhaustive and is intended to outline "general guidelines which attest to the general intention of the law and the objectives it seeks to realize" (see *Levitt*, para. 12). That said, in general the criteria enumerated in the law may be divided into three principal categories: considerations of expenses, considerations of yield for the group represented, and considerations of public guidance (see Klement, at pp. 158 – 162).

63. A central question to be considered in determining the rate of compensation and the legal fees is whether the filing of the class action was necessary in order to merit the particular remedy (*Levit* [31] para. 14). The case before us is a classic example of a case which would not have been decided had it not been for the class action. In determining the compensation the court gave consideration to this central consideration as well as to the other pertinent considerations, indicating that the task of differentiating between the representative plaintiffs was done for the main part by the Consumer Council, and in dwelling on the importance of creating incentives for the filing of suits for the Consumer Council as well. The Court further dwelt on the fact that this case made an important contribution to the group and the public and addressed the protracted time period during which the suit was conducted. Regarding the legal fees to be awarded to the representative attorneys the Court addressed the immense amount of work that they had invested, the tremendous benefit bestowed by the suit itself, its importance for the group and for the public as a whole, and the complexity of the issues raised in the file. At the same time, the Court stressed the gap between the remedies demanded and what was ultimately granted, noting that the suit had not always been conducted in the best and most efficient manner"

The rule that the appellate forum does not interfere in the rate of legal fees awarded by the trial forum applies to and is implemented with respect to the rates of legal fees and compensation awarded in class actions, other than in cases where one of the sums awarded is legally flawed or where the decision of the trial forum is otherwise fundamentally flawed in a manner that warrants intervention (see *Accadia* [32] para. 28, *Analyst* [7] at p. 263). The policy of non-intervention in sums awarded as legal fees and compensation by the trial forum is even more appropriate where it concerns considerations pertinent to the manner in which the proceeding was conducted. In the case at hand, the Lower Court examined all of the relevant considerations and balanced between them as required. Accordingly, had we not reached the

conclusion that the sum of compensation to be imposed on Tnuva should be significantly reduced, we would not have intervened in the sums of compensation and legal fee that it awarded. However, since we set the sum of compensation at NIS 38,500,000 instead of NIS 55,000,000 awarded by the Lower Court I think that this also warrants a reduction in the sum of compensation that Tnuva has to pay to the representative plaintiffs and the legal fees to be paid to their attorneys. I therefore propose that we set the sum of compensation for the Raabi heirs at the sum of NIS 300,000, the compensation for the Israeli Consumer Society at NIS 550,000 and the rate of legal fees for the representative attorneys at NIS 1,500,000. In order to remove all doubt, it is clarified that the sums specified above, like the sum of compensation awarded, are according to their value on the day of the decision of the Lower Court (7 October 2008).

Final Word

For all of the reasons set forth above I propose to my colleagues to partially allow Tnuva's appeal with respect to the rate of the compensation (CA 10085/08) and its appeal regarding the compensation for the representative plaintiffs and the fees of their attorney (CA 7607/09). I further propose to my colleagues to dismiss the counter appeal of the representative plaintiffs in CA 10085/08 and their appeal against the decision in CA 6339/09)

Under the circumstances and bearing in mind that these appeals raised questions of principle that were fleshed out for the first time since the enactment of the Class Actions Law, I would propose to my colleagues not to make any order for the costs of the appeal proceeding

Justice

Justice I. Amit

I concur with the comprehensive and thorough judgment of my colleague Justice Hayut. My colleague concluded that compensation for infringement of autonomy should only be awarded to those group members who experienced various negative feelings upon becoming aware that they had drunk milk containing silicon. My colleague's approach is consistent with the view that I expressed in CA 4576/08 *Ben Zvi v. Prof. His* [17] paras. 25 – 29, according to which an infringement of autonomy is now included within the framework of non-pecuniary damage. An infringement of autonomy means negating the victim's freedom of choice by failing to disclose a substantive detail, but the infringement of autonomy *is expressed* by negative feelings such as anger, frustration, insult, revulsion,shock etc.

Justice

Justice E. Vogelman

I concur with the comprehensive judgment of my colleague, Justice E. Hayut. I am a partner to my colleague's conclusion that the objective approach to the assessment of compensation for infringement of autonomy should not be accepted and that accordingly, where proved that some of the members of the group remained indifferent to the infringement of autonomy, there are no grounds for awarding compensation for that head of damage.

Justice

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"

said in subsection (b) into
account.