CA 4493/05

1. Eyal Yerushalmi
2. Beit Nir Kibbutz
v.
1. Polaris Machine Imports Ltd
2. Yaadim Development Co. Ltd
3. Yoav HaRamati
4. Dan Horovitz

The Supreme Court sitting as the Court of Civil Appeals
[22 February 2006]
Before Justices A. Grunis, M. Naor, E. Hayut

Appeal of the judgment of the Tel-Aviv-Jaffa District Court (Judge Z. Brun) on 14 March 2005 in CC 3413/98.

Facts: The first respondent agreed to sponsor the first appellant to represent it in a motorbike race in Egypt. In the race the first appellant was seriously injured. There was no statutory duty to take out personal accident insurance for the first appellant, and no such insurance had been taken out. The main issue in the appeal was whether the first respondent had been negligent in not taking out insurance for the first appellant or at least in not ascertaining that the first appellant had taken out insurance for himself.

Held: In general, where there is no statutory duty to take out insurance, one party to a joint venture will not be required by the tort of negligence to take out insurance for the other, unless there is a special relationship between them or a reliance of one party on the other. In this case there was no such special relationship or reliance.

Appeal denied.

Legislation cited:
Aviation Services Licensing (Aviation Schools) Regulations, 5731-1971, r. 4(5).
Contracts (General Part) Law, 5733-1973, ss. 24, 26.
Immunization Victims Insurance Law, 5750-1989, s. 2.

Insurance Contract Law, 5741-1981, chs. 2 and 3.
Motor Car Insurance Ordinance [New Version], 5730-1970, s.2.
National Insurance Institute Law [Consolidated Version], 5755-1995, s. 79.
Road Accident Victims Compensation Law, 5735-1975.
Sports Diving (Imposing an Insurance Liability on Divers) Regulations, 5740-1980
Sports Law, 5748-1988, s. 7(a).
Sports Driving Law, 5766-2005, ss. 2(c), 15, 23(c), 30(b), 34, 35.
Torts Ordinance [New Version], 5728-1968.

Israeli Supreme Court cases cited:

[1] LCA 11049/03 *Israeli Phoenix Insurance Co. Ltd v. Nidaf* [2004] (1) TakSC 3305.

[2] FH 20/82 *Adders Building Materials Ltd v. Harlow and Jones GMBH* [1988] IsrSC 42(1) 221.

[3] CA 37/86 *Levy v. Sherman* [1990] IsrSC 44(4) 446.

[4] CA 735/75 *Reutman v. Aderet* [1976] IsrSC 30(3) 75.

[5] CA 153/04 *Rabinovitz v. Rosenbaum* [2006] (1) TakSC 1549.

[6] CA 485/60 *Berman v. Marziof* [1961] IsrSC 15 1913.

[7] CA 371/90 *Subhi v. Israel Railways* [1993] IsrSC 47(3) 345.

[8] CA 4025/91 *Zvi v. Carroll* [1996] IsrSC 50(3) 784.

[9] CA 285/73 *Lagil Israel Trampoline and Sports Equipment Ltd v. Nahmias* [1974] IsrSC 29(1) 63.

[10] CFH 7794/98 *Moshe v. Clifford* [2003] IsrSC 57(4) 721.

[11] CA 140/00 *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter* [2004] IsrSC 58(4) 486; **[2004] IsrLR 101**.

[12] CA 3464/05 *Paz Oil Co. Ltd v. State of Israel* [2006] (3) TakSC 430.

[13] CA 145/80 *Vaknin v. Beit Shemesh Local Council* [1983] IsrSC 37(1) 113.

[14] CA 2906/01 *Haifa Municipality v. Menora Insurance Co. Ltd* [2006] (2) TakSC 2504.

[15] CA 931/99 *Menorah Insurance Co. Ltd v. Jerusalem Candles Ilum (1987) Ltd* [2002] IsrSC 56(2) 550.

Israeli District Court cases cited:

[16] CC (TA-DC) 2474/86 *Netzer v. Kanfonit Light Aircraft Co. Ltd* [1994] (2) IsrDC 441.

American cases cited:

[17] *East River Steamship Corp. v. Transamerica Delaval Inc*., 476 U.S. 858 (1986).

[18] *LaClair v. Silberline Manufacturing Co., Inc.*, 379 Mass. 21, 393 N.E. 2d 867 (1979).

English cases cited:

[19] *Henderson v. Merrett Syndicates Ltd* [1995] 2 A.C. 145, [1994] 3 All ER 506 (HL).

[20] *Van Oppen v. Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA).

[21] *Reid v. Rush & Tompkins Group PLC* [1989] 3 All ER 228 (CA).

[22] *Naylor v. Payling* [2004] EWCA (Civ) 560 (CA).

For the appellants — S. Savion.
For the respondents — E. Levi.

JUDGMENT

Justice E. Hayut

Synopsis of the facts and details of the legal proceedings

1. The first appellant, who was born in 1961 and is a member of the Beit Nir Kibbutz (the second appellant), was injured on 12 October 1994 during the Pharaohs' Rally motorcycle race in Egypt in which he participated (hereafter: the accident). As a result of the accident the first appellant seriously injured his back and was left paralysed in the lower half of his body. In a claim that he filed at the National Insurance Institute, the first appellant argued that he participated in the race as an employee of the first respondent that engaged, at the times relevant to the case, and among other things in the business of importing KTM all-terrain motorcycles. The first appellant rode one of these motorcycles during the race in which he was injured (hereafter: the motorcycle). The first appellant's claim to recognize the accident as a work accident was rejected by the National Insurance Institute even though after the accident the first respondent reported to the National Insurance Institute that he was its employee. The National Insurance Institute decided in this context that, according to the information received by it, the accident did not occur 'in the course of and as a result of' the first appellant's employment with the first respondent and therefore it concluded that it was not a 'work accident' as defined in s. 79 of the National Insurance Institute Law [Consolidated Version], 5755-1995 (hereafter: the National Insurance Institute Law). In its judgment of 23 September 1997, the Beer Sheba Regional Labour Court (the honourable JudgeJ. Hoffman) adopted the position of the National Insurance Institute and rejected the first appellant's version of events that the accident

was a work accident. An appeal that the first appellant filed in the National Labour Court was also denied in a judgment of 8 June 1999 (the honourable President S. Adler, Vice-President Y. Eliasof, Judge Y. Flitman, Workers' Representative S. Guberman, Employers' Representative G. Stoietzky).

2. When the first appellant's claim was denied by the Regional Labour Court, the appellants filed a monetary action in the Tel-Aviv-Jaffa District Court against the first respondent, the second respondent (a company that imports agricultural machines that managed its business on the premises where the first respondent operated) and also against the third and fourth respondents, who are the directors of the first respondent and shareholders in both companies. In his action the first appellant continued to claim that he went to the race as an employee of the first respondent and he argued that the first and second respondents, as his employers, breached their undertaking in the contractual sphere to ensure his maximum safety. The first appellant further argued, alternatively, that the accident occurred as a result of the negligence of some or all of the respondents towards him when he rode the motorcycle that was under their complete control, and that they had the burden of showing that they were not negligent because the incident that caused the damage was more consistent with the conclusion that they acted without reasonable care than the conclusion that they acted with reasonable care. In addition to these arguments, by means of which the first appellant sought to attribute liability for the actual accident to some or all of the respondents, the first appellant raised additional claims in the contractual realm and in torts with regard to the duty owed to him by some or all of the respondents to purchase for him a personal accident insurance policy to cover damages of the kind that he suffered as a result of the accident. The first appellant further argued that the respondents breached this duty and as a result of this he was left without cover for the damage that resulted from the lack of insurance for his participation in the race. The kibbutz, the second respondent, based its claim against the respondents on the fact that it paid for the damage that was caused to the first appellant as a result of the accident.

3. In its judgment of 14 March 2005 the District Court (the honourable Judge Z. Brun) denied the action. The court held that the decision of the Labour Court gave rise to collateral estoppel with regard to the first appellant's claim that he participated in the race as an employee of the first respondent. Beyond what was strictly necessary for its decision, the District Court went on to find that the very same conclusion could be drawn from the evidence presented before it. The court said in this regard that the relationship between the first appellant and the first respondent was created as a result of an

advertisement published by the first respondent in which it said that 'it wanted to send on its behalf three experienced and qualified all-terrain riders to compete in the Pharaohs rally.' The first appellant, who is a mechanic by profession and an amateur race driver, had taken part in the past in various races in Israel and abroad. He replied to the advertisement and during August 1994 he concluded a basic oral arrangement with the first respondent with regards to the terms of his competing in the race on its behalf. Only subsequently, on 30 August 1994, did the first appellant and the first respondent reach an additional agreement that the former would be employed by the latter as a mechanic. The District Court held that from the evidence that was presented it was persuaded that 'the participation of the plaintiff in the race was not a condition of his employment and it would have happened even without the sponsorship of the defendant' and that 'we are speaking in a case such as this of funding in return for advertising only, without any employee-employer relationship.' The District Court went on to agree in this respect with the remarks of the Regional Labour Court, which said:

> 'This factual position is consistent with the definition that the company was a "sponsor" of the plaintiff's participation in the race and it should not be defined in this framework as his employer. A sponsor means a company or an agency that funds the expenses of the project in return for advertising, facts that even the plaintiff does not dispute.'

The District Court also said that the arguments of the first appellant with regard to the liability of some or all of the respondents for the accident 'do not have an evidentiary basis' and he abandoned them in the course of the trial. In addition the District Court held that there is no basis for the claim insofar as it was directed against respondents 2-4. The court therefore focused its decision on the question of whether the first respondent breached its obligations and undertakings to the first appellant inasmuch as if failed to ensure that he was insured for personal accidents for the risks of participating in the race. In this respect the District Court held that the group of Israeli motorcycle riders whom the first appellant joined for the purpose of the race was a group that was independent of the first respondent and it was privately organized for this purpose, and the first respondent, so the District Court held, 'did not organize or manage this group.' The District Court also held, relying *inter alia* on the testimony of the first appellant himself, that it was not agreed between him and the first respondent, either expressly or by implication, that the first respondent would insure him for personal accidents and therefore no contractual obligation should be imputed to the first respondent in this regard.

In its judgment the District Court did not address the claim of negligence raised by the first appellant against the first respondent because it did not take out personal accident insurance for him. Therefore there is no decision in the judgment on the question of whether the first respondent is liable under the law of torts for the economic damage caused to the first appellant (and the second appellant for redressing the the damage) as a result of his not having the aforesaid insurance.

This led to the appeal before us.

The arguments of the parties

4. The appellants argue that the trial court erred in finding that they were estopped from arguing that an employment relationship existed between the first appellant and the first respondent because of the rule of *res judicata* and because of collateral estoppel which applies in this context as a result of the decisions of the Labour Courts. They claimed that the tests for the existence of an employment relationship for the purpose of the National Insurance Institute Law differ from the tests that apply in this regard under the law of torts. The appellants go on to argue that evidence that was presented in the Labour Court is not admissible in the civil court and that one of the witnesses who was involved in the case and testified in the civil court did not testify at all in the Labour Court. On the merits of the matter the appellants once again claim that there was an employment relationship between the first appellant and the first respondent for the purpose of his participation in the race. They claimed the first appellant was under the complete control of the first respondent, the offer that he accepted was in fact an employment offer and he would not have taken part in the race had he not been sent by the first respondent. The appellants also claim that the payment of the expenses for the race by the first respondent, its contract with additional sponsors, the organization of training races, the sending of a mechanic to the race on its behalf in order to supervise the first appellant, and the lack of any distinction between the first appellant's work as a mechanic and his participation in the race, all show the active involvement of the first respondent in the organization of the race that is not explained by a mere sponsorship. Alternatively, the appellants claim that the first appellant participated in the race as an agent of the first respondent and that the latter took upon itself, by its conduct or by implication, a contractual duty to insure him. The appellants further argue that the first respondent breached the duty of care that it had as the employer or principal when it failed to take the precautionary measure that was required in the circumstances of the case to ensure that any damage to the first appellant would be compensated

and passed on to others by purchasing insurance for him or at least by ensuring that he bought such insurance for himself. The appellants further argue that when someone carries out a dangerous task for another person, that other person is obligated to insure him or to make sure that he has insurance for the risks involved in that task, since that other person has all the information concerning the risks involved and he has the necessary financial resources to pay for it. According to the appellants, the first respondent was in fact aware of the risks involved in the race and even insured the mechanic that it sent on its behalf with the first appellant against these risks. The appellants also argue that imposing a duty on someone who funds sporting activity to ensure that the risks are covered by insurance is capable of serving the interests of society in promoting sport and is consistent with the proper standard of conduct provided in the Sports Law, 5748-1988 (hereafter: the Sports Law). The appellants raise additional arguments with regards to the fact that the first appellant relied on the first respondent's responsibility for insurance in view of its undertaking to pay all the expenses of the race, in view of its purchase of compulsory insurance, and in view of an express request that the first appellant claims to have made to it in this regard. Alternatively, the appellants argue that the first respondent was negligent in that it made a representation that the participation of the first appellant in the race was within the framework of an employment relationship or an agency relationship between him and the first respondent and that he was therefore insured, and also in its failure to examine the instructions given to the participants in the race. With regards to the third and fourth respondents, the appellants argue that by inducing the first appellant to participate in the race without insurance, they took an unreasonable risk that amounts to an abuse of the veil of incorporation in such a way that it justifies the lifting of the veil in the relationship between them and him. The appellants also argue that the third and fourth respondents were personally negligent in that they did not ensure that insurance had been taken out and in that they initiated the first appellant's participation in the race even though they did not have any previous experience in organizing a project of this kind.

5. The respondents rely on the judgment of the District Court and argue that the in this case, the judgment of the Regional Labour Court that held that the accident was not a work accident satisfies all of the conditions that give rise to collateral estoppel. The respondents argue in this regard that the difference between the procedural arrangements and the rules of evidence in the Labour Court and those in the civil court are of no relevance in this case, and that the estoppel was intended to prevent a situation in which the Labour Court and the civil court arrive at contradictory conclusions on the basis of the

same evidence. On the merits of the case the respondents argue that there is no basis for intervening in the factual determination of the trial court, which was properly based on the evidence that shows that the first appellant did not participate in the race as an employee of the first respondent. The respondents further argue that this court should accept the findings of the District Court that the case involves a sponsorship transaction that was based on advertising the motorbike in return for a contribution to the expenses of the race and the sale of the motorbike at a cheap price to the first appellant, and not on an employment relationship or agency, and that within the framework of this transaction the first respondent did not undertake to purchase personal accident insurance for the first appellant. With regard to the appellants' claim concerning liability in torts, the respondents claim that this argument constitutes the introduction of a new claim into the case, which is not permitted, and in any case the claim should be rejected. The respondents further argue that the issue here is one of voluntary insurance and that the first appellant, who had knowledge and previous experience of races of this kind, never insured himself for personal accidents. The respondents argue that the Sports Law is not relevant here since this case only concerns the sponsorship of someone who participated in a private capacity in a race that took place outside Israel. Finally the respondents argue that the appeal should be dismissed *in limine* in so far as it relates to respondents 2-4 since there is no real claim against them. With regard to the second respondent it is claimed that it is a separate company, engages in a different type of activity from the first respondent and the shareholders of the two companies are not identical. It is also argued that the claims against the second respondent were in fact abandoned by the appellants at the appeal stage and this reason in itself is sufficient reason to deny the claim in so far as the second respondent is concerned. With regard to respondents 3 and 4 it is argued that the appellants did not succeed in showing any cause of action whatsoever against them, including by virtue of lifting the veil of incorporation of the first respondent.

6. In their reply to the respondents' arguments the appellants claim, *inter alia*, that the argument that the first respondent had a duty of care towards the first appellant under the law of torts is a legal argument that may be raised at any stage and therefore it does not amount to the introduction of a new claim, and they also argue that the first and second respondents made a representation to the first appellant that the second respondent was not a separate company but a part of one corporation called 'Yaadim-Polaris,' and therefore the second respondent should be regarded as responsible jointly and severally with the

first respondent for all the damages that were caused in the circumstances of the case.

Deliberation

7. In the appeal before us, the appellants restricted their arguments to the issue of the economic damage arising from the lack of personal accident insurance and to the respondents' liability for this damage in the field of contracts and torts. The other arguments concerning the respondents' liability for the actual occurrence of the accident and the damage arising directly from it were abandoned during the proceedings in the trial court and were not raised again before us. I will begin by saying that I agree with the findings and conclusions of the District Court with regard to respondents 2-4 and I found no merit in the arguments in the appeal relating to this. The appeal is therefore denied in so far as it is directed against the findings of the District Court with regard to respondents 2-4, and the deliberations will focus on the relationship between the first respondent and the first appellant and the question of the first respondent's liability for the appellant's damage in the absence of personal accident insurance.

The nature of the relationship between the first respondent and the first appellant

8. The scope of the duties and undertakings for which the first respondent is liable to the first appellant insofar as his participation in the race is concerned, including the duty to insure him against personal accidents, necessarily derives from the nature of the relationship that existed between the parties at the relevant time. Therefore the decision on this issue is the basis and the premise for addressing all the other questions that are under consideration. The District Court held that the first appellant participated in the race as a part of a whole group of motorbike riders that was organized for this purpose on a private basis, independently of the first respondent, and that the first respondent paid for the participation of the first appellant in the race for the purpose of advertising the motorbike imported by it. The District Court also held that the relationship between the first appellant and the first respondent, in so far as it concerned his participation in the race, was one of sponsorship. After it defined the relationship between the parties as a relationship between a sponsor and an amateur race driver who took part in a race in a private capacity, the District Court went on to hold that in this relationship there was no express or implied undertaking in the contractual sphere on the part of the first respondent to insure the first appellant against personal accidents. The court was also of the opinion that in these circumstances the first respondent

should not be held liable in torts. The first appellant, who disagrees with the findings of the trial court, argues that the relationship that existed between him and the first respondent for the purpose of his participation in the race should be defined as an employment relationship, or alternatively as an agency relationship, and he seeks to derive from this that the first respondent had a duty in the contractual sphere, or alternatively in the field of torts, to insure him against personal accidents for the risks in the race.

9. How should we classify the relationship that existed between the first appellant and the first respondent in so far as the participation of the first appellant in the race is concerned? Was this, as the District Court held, a relationship between a sponsor and an amateur driver who participated in the race in a private capacity? Was this, as the appellants claim, an employment relationship or an agency relationship? Or is it perhaps possible to define the relationship that existed between the parties in this case in another way, on the basis of the evidence that was presented and the arguments that were heard?

The conclusion that there was no employment relationship between the first appellant and the first respondent, in so far as the first appellant's participation in the race is concerned, is based soundly on the evidence that was before the trial court, and there is no basis for any intervention in this regard. The trial court held that two separate contracts were made between the parties: the first contract was made orally during the month of August 1994 and it addressed the participation of the first appellant in the race on behalf of the first respondent in order to promote the product that it had begun to import at that time; the second contract was made on 30 August 1994 and it addressed the employment of the first appellant by the first respondent as a mechanic, without any connection to the race. This second contract was enshrined in a written employment agreement that was made between the kibbutz (the second appellant) and the first respondent, in which the terms of employment of the first appellant were set out as aforesaid. This finding of the trial court that the participation in the race was agreed independently, without any connection to the employment of the first appellant by the first respondent as a mechanic, is based, as I have said, on the evidence and reflects the intentions of the parties that can be seen from that evidence. Thus the first appellant confirmed in his testimony that his participation in the race on behalf of the first respondent was agreed between them approximately a month before they agreed upon his employment as a mechanic; the written employment agreement does not address the first appellant's participation in the race at all; and the first appellant even said in his statement to the National Insurance Institute of 29 June 1995 that he was not obliged to go to the race in the course of his work as

a mechanic. The trial court was therefore correct in rejecting the appellant's claim that there was an employment relationship between the first respondent and the first appellant with regard to his participation in the race. There was no such relationship between the parties when the contractual relationship concerning the participation in the race was created, nor was such a relationship created between them at a later stage when the first appellant began to be employed by the first respondent as a mechanic. Since I have seen fit to approve the findings of the trial court in this regard on their merits, I have no need to consider the arguments that the appellants raised against the trial court's finding that collateral estoppel applies in this matter by virtue of the judgment of the Regional Labour Court. It will be sufficient to say that this finding does indeed raise considerable difficulties (see LCA 11049/03 *Israeli Phoenix Insurance Co. Ltd v. Nidaf* [1]).

10. I do not agree with the additional conclusion of the trial court that we are speaking in this case merely of a sponsorship. From the evidence we see that the first appellant was involved in sports driving as a hobby and accumulated knowledge and experience in riding all-terrain motorcycles, even though he did not make this a profession or a source of income. The goal that the first appellant sought to achieve when he made the agreement concerning his participation in the race with the first respondent was to compete in a competitive sporting challenge and to acquire additional experience in this field. The first appellant did not ask the first respondent for remuneration for his participation in the race; he asked for his expenses to be paid. He even testified that 'at that time I wanted to go to every race that I could; and if the opportunity presented itself - I went.' Moreover, when he was asked whether he would have looked for another 'sponsor' if he had not made the agreement with the first respondent, he answered: 'I would have looked, but I would not necessarily have gone.' From the viewpoint of the first appellant the agreement with the first respondent with regard to his participation in the race realized his independent aspiration to take part as a motorbike rider in an international race, while the expenses required for this purpose would be paid by the first respondent. The first respondent, for its part, published an advertisement of its intention 'to send on its behalf three experienced all-terrain riders' and after the interview process it chose only one rider, who was the first appellant. In parentheses it should be pointed out that in the group of riders that was organized for the race without any connection to the first respondent, of which the first appellant was a member, there was an additional rider called Hezzy Elon who also rode a KTM motorbike that he bought from the first respondent (the other members of the group rode other types of

motorbike). But from the testimony of the third respondent we see that this rider did not go to the race on the first respondent's behalf. In any case, the advertisement that the first respondent published testifies to the initiative and the active steps that it took in order to have motorbikes that it imported be involved in the race. This initiative and also the resources that it was prepared to invest and did actually invest for this purpose definitely show that the interest that it had with regard to the participation in the race goes beyond the normal conduct of a mere sponsor and this was reflected in the testimony of the first appellant. The first appellant testified with regard to his experience of the usual types of agreement with sponsors in this field, and from his evidence, which was not contested, it appears that the agreement between him and the first respondent with regard to the participation in the race definitely went beyond the usual practice in this field in agreements concerning sponsorship of a motorbike rider in return for advertising the business of the sponsor. In the case before us the first respondent provided the first appellant with the motorbike that he rode during the race and also paid for the direct expenses involved in his participation, including the registration fee for the race, the visa and border fees for going to Egypt, spare parts for the motorbike and also compulsory insurance for the use of the motorbike in Israel and Egypt. An employee of the first respondent, a mechanic by profession, was also sent by it to accompany the group of riders to which the first appellant belonged (an additional mechanic was sent by a rival Israeli importer of motorbikes).

11. The background to the agreement between the first appellant and the first respondent and the nature of the provisions of this agreement lead in my opinion to the conclusion that the relationship that was created between the parties for the purpose of the first appellant's participation in the race was of a special kind. As I have already said, we are speaking neither of an employment relationship nor of a sports sponsorship relationship, and it appears that the most precise definition of the relationship between the parties in this case is one of a joint venture. The focus of the relationship was that the parties were interested in participating in the race in order to realize their respective interests. In order to further these interests, the first respondent and the first appellant agreed to cooperate with one another and to combine the sporting abilities of the first appellant and the economic resources of the first respondent that initiated the relationship and was prepared to be involved in the furthering of the venture in the very intensive manner described above. Support for the conclusion that we are dealing with a special agreement — a kind of joint venture — can be found in the fact that in the relationship

between the parties the first respondent was entitled to enter into agreements with various sponsors in order to advertise their products through the first appellant during the race, and it actually did this in an agreement with Delek the Israel Fuel Corporation Ltd. The first respondent also provided the necessary equipment (the motorbike, spare parts and clothing) and also dealt with making the payments that were required so that the first appellant could participate in the race. It can therefore be said that in return for the economic involvement of the first respondent in the joint venture, the first respondent expected an economic return, whereas the first appellant contributed his sporting ability to the venture in the expectation of success in terms of sporting achievement.

Now that we have defined the nature of the agreement between the first appellant and the first respondent as a joint venture, we should go on to examine, against this background, the arguments raised by the appellants in the appeal before us. As we have already said, these arguments focus on the liability of the first respondent in the fields of contracts and torts for the economic damage caused to the appellants as a result of the fact that the first appellant did not have personal accident insurance, which entitles an injured person to insurance payments for medical disability and incapacity to work in his profession or the professions stated in the policy (see chapters 2 and 3 of the Insurance Contract Law, 5741-1981).

The contractual cause of action

12. In the contractual sphere I agree with the factual finding of the trial court that there was no express agreement between the parties that the first respondent would take out insurance for the first appellant's participation in the race, as distinct from the compulsory insurances that the first respondent undertook to pay for the first appellant that, in so far as can be seen from the testimonies that were presented, did not include insurance cover for personal injury that might result from the actual participation in the race. Thus the request sent by the first appellant to the first respondent 'to obtain insurance for one month' did not refer to personal accident insurance but to the compulsory insurance for the motorbike only, as can be seen clearly from his testimony:

> 'It says [in the request] to insure the *motorbike* for a period of a month… the request for insurance was not made as a result of the organizers' document, but since the motorbike had already passed its licensing test *and in order to move it from place to place and*

> *prepare it for the race*, this was the first condition if we wanted to begin to move the project forward' (emphases supplied).

But according to the first appellant, even though it was not agreed between them expressly, it is possible to understand that the first respondent made such an undertaking from the circumstances of the agreement and from the matters that the first respondent undertook to handle with regard to the first appellant's participation in the race. This argument of the first appellant gives rise to a difficulty because it invites the court to read undertakings into the parties' agreement which they did not expressly agree to. This involves a violation of the principle of the freedom of contracts, whether they are written or oral, according to which the parties have the autonomy to determine the terms of the contract, and the content may be whatever they agree (s. 24 of the Contracts (General Part) Law, 5733-1973 (hereafter: the Contracts Law)). In the case before us no claim was raised that it is possible to supplement the terms of the agreement between the parties by virtue of s. 26 of the Contracts Law in accordance with a prevailing practice between the parties, or in accordance with the prevailing practice in contracts of this type, which is understandable in view of the fact that we are dealing with a one- time contract between the first respondent and the first appellant and with a contract that was not typical of what was customary in the racing world with regard to sponsorship, but with a type of joint venture whose terms were from the outset unique to the parties, as we have explained above. Notwithstanding, it is not denied that within the framework of the division of roles agreed upon by the parties, the first respondent undertook to take care of the expenses involved in the first appellant's participation in the race. Is it possible to understand from this by means of interpretation that there was an undertaking to ensure that the first appellant was insured against personal accidents? I think not. Taking out personal accident insurance is not included in the immediate and direct expenses required for participation in the race, which the first respondent undertook as stated above. Our concern is with an additional expense that was intended to guarantee the first appellant an insurance payment in the event of disability as a result of an accident, if it occurred during his participation in the race. Such insurance, while desirable and appropriate in the circumstances of the case (and we will discuss this later within the framework of the tortious cause of action), was not necessary as far as the actual participation in the race was concerned. Therefore the contractual undertaking of the first respondent to pay for the first appellant's participation in the race does not lead — on the basis of a purposive interpretation of that undertaking — to the conclusion that it should also include insuring him against personal accidents.

The tortious cause of action

13. An additional cause of action by virtue of which the appellants are seeking to impose liability on the first respondent for the damage caused to them because he did not have insurance against personal accidents is the tortious cause of action. The appellants argue in this context that the first respondent was negligent in that it did not take care to insure the first appellant or at least did not ascertain that the first appellant took care to insure himself against personal accidents. In this context we should emphasize that the existence of a contract between the parties does not necessarily rule out the possibility that one of them will be liable to the other in torts (see I. Englard, A. Barak and M. Cheshin, *The Law of Torts — The General Doctrine of Torts* (G. Tedeschi, ed., 1976), at p. 14; D. Friedmann and N. Cohen, *Contracts*, vol. 1, at pp. 81-82 (1991); R. Sanilevitz and D. Ronen, 'Competition between the Contractual Cause of Action and the Tortious Cause of Action in Compensation Claims — A Comparative Look,' *Shamgar Volume* (vol. 3, 2003) 93, at pp. 118-120; FH 20/82 *Adders Building Materials Ltd v. Harlow and Jones GMBH* [2], at pp. 268-269; A. Herman, *Introduction to the Law of Torts* (2006), at pp. 327-329; with regard to the various difficulties that this approach raises in the context of economic loss, see D. Ronen, 'Pure Economic Loss from a Comparative Perspective,' 44 *Ha-Praklit* 504 (1999), at pp. 506-510; T. Gidron, 'The Duty of Care in the Tort of Negligence and Pure Economic Loss,' 42 *Ha-Praklit* 126 (1995), at pp. 137, 139-144; *East River Steamship Corp. v. Transamerica Delaval Inc.* [17]). Many examples in which Israeli case law has applied the principle that the contractual cause of action and the tortious cause of action are not mutually exclusive can be found in those cases where an employment relationship or a legal representation relationship exists between the parties (see, for example, CA 37/86 *Levy v. Sherman* [3], at p. 462; CA 735/75 *Reutman v. Aderet* [4]; CA 153/04 *Robinovitz v. Rosenbaum* [5], at para. 5 of the opinion of the honourable Justice E. Rubinstein). In English law the prevalent outlook in the past was that, as a rule, the law of contracts takes precedence over the law of torts and therefore the scope of the liabilities and undertakings that the parties to the contract took upon themselves should not be extended by means of the law of torts. This outlook underwent a change as a result of the judgment of the House of Lords in *Henderson v. Merrett Syndicates Ltd* [19], which held that liability in torts would only be ruled out where it was contrary to the contents of the contract between the parties (see R.A. Buckley, *The Modern Law of Negligence* (third edition, 1999), at pp. 148, 153; J. Murphy, *Street on Torts* (eleventh edition, 2003), at pp. 210-212; W.V.H. Rogers, *Winfield and*

Jolowicz on Tort (seventeenth edition, 2006), at pp. 10-13; see also Englard, Barak and Cheshin, *The Law of Torts — The General Doctrine of Torts*, *supra*, at p. 15). In the case before us, the agreement between the parties is silent on the subject of taking out personal accident insurance to insure the first appellant against the risks involved in the race, and therefore it can be said that the tortious cause of action exists alongside the contractual cause of action, even if we adopt the reservation that was determined in this regard in *Henderson v. Merrett Syndicates Ltd* [19].

Negligence on account of not taking out insurance within the framework of a joint sporting venture

14. Before we examine the question of the first respondent's liability in torts for not taking out personal accident insurance, we should first say that there is no merit in the argument that the tortious cause of action raised by the appellants constitutes a new claim that is not permitted at the appeal stage. This cause of action was brought before the trial court and was mentioned by it in the judgment (p. 10 of the judgment), even though it did not see fit to discuss it at length. On the merits of the matter, the question is whether it is desirable to impose on someone, by virtue of the tort of negligence, a duty to take out insurance for someone else where the law does not demand this. Indeed, in a case of this kind, the alleged liability does not derive from negligence that caused the direct damage, but from negligence that resulted in there being no insurance cover for the direct damage, when it occurred. This is the position in our case, where we are speaking of activity involving inherent risks that are not necessarily the result of negligence. Sports driving, even if done with reasonable care, involves risks. In practice, most branches of sport — and especially competitive sport — involve a degree of risk even if proper precautionary measures are taken. Therefore the question in our case is whether someone, who is involved in a sporting event and derives a benefit from it, should be made liable to insure his participants even when there is no statutory duty to do so.

I will examine this question below.

15. Let us first say that when speaking of activity that involves considerable risks that cannot be negated even by taking reasonable precautions, taking out insurance may be a proper and even a required normative standard. Policy considerations that justify determining such a normative standard are based mainly on the consequences that may result from a lack of insurance for activity of this kind in the ethical, economic and social spheres. There is a real likelihood that engaging in dangerous activity may

result in significance injuries for which no one will be liable in torts within the framework of the tort of negligence, since from an overall perspective we are speaking of activity that is reasonable and even desirable. Insurance provides an important 'safety net' in this context. Indeed, it is especially when we are speaking of organized activity that involves considerable risks that the parties who derive a benefit from the activity can be expected to ascertain that insurance is taken out. It should be remembered in this context that apart from the personal cost that the injured person will be likely to pay if he is injured and pays for the damage out of his own pocket, there is also a social cost, since an injured person in such a case will almost certainly become a burden on society as a whole or on the community to which he belongs. This shows the importance of insurance, which provides a solution to these difficulties by spreading the risk inherent in the dangerous activity among the group of persons that benefit from it. Spreading the risk in this manner is just and efficient and allows the direct damage caused as a result of the dangerous activity, as well as the 'secondary' indirect damage that accompanies it, to be minimized (see Y. Elias, *Insurance Law* (vol. 1, 2002), at pp. 3-5; S. Weller, *The Insurance Contract Law, 5741-1981* (vol. 1, 2005), at pp. 43, 45-47; for a distinction between primary damage and secondary damage in the context of torts law, see I. Gilead, 'Liability and Insurance in Cases of Damage Caused by Terrorist Attacks — Economic Analysis,' in *Terrorism, Tort Law and Insurance: A Comparative Survey* (B.A. Koch, ed., 2004) 238, at pp. 241-242).

16. Insurance is an integral part of the way in which modern society contends with risks. In various contexts the legislature saw fit to enact a provision of statute that obliges the relevant parties to take out insurance in favour of a potential victim (see s. 2 of the Motor Car Insurance Ordinance [New Version], 5730-1970; s. 2 of the Immunization Victims Insurance Law, 5750-1989; r. 4(5) of the Aviation Services Licensing (Aviation Schools) Regulations, 5731-1971; Sports Diving (Imposing an Insurance Liability on Divers) Regulations, 5740-1980; and in English law see R. Lewis, *When You Must Insure — Part 1*, *New Law Journal* 8 October (2004) P1474). The law of torts for its part has chosen various legal systems to handling activities that involve considerable risks by imposing a system of strict or absolute liability. In this regard see, for example, the wording of the Restatement of the Law, Third, Torts: Liability for Physical Harm (Proposed Final Draft no. 1, April 6, 2005) §20, which is entitled 'Abnormally Dangerous Activities':

‘(a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

(b) An activity is abnormally dangerous if:

(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and

(2) the activity is not one of common usage.’

The purpose of this arrangement is to impose upon someone, whose activity creates a serious and unusual risk of physical injury to his neighbours, the liability for damage that is caused as a result of the realization of that risk, something that is not possible within the framework of the tort of negligence because the damage cannot be prevented by reasonable measures (see and cf. Restat. 2d of Torts §519-520). It should be noted that one of the exceptions to this provision concerns the choice of the injured person to be involved in the dangerous activity in return for some benefit (see Restatement of the Law, Third, Torts: Liability for Physical Harm (Proposed Final Draft No. 1, April 6, 2005) §24). An arrangement of strict or absolute liability may in turn be combined with an insurance arrangement, whether by virtue of an express provision of statute or by virtue of the incentive that such an arrangement creates, from the viewpoint of the potential tortfeasors, who face the threat of being liable even if they act carefully. It should be noted that the increased or absolute liability, together with the incentive to take out insurance, is not limited to someone who actually carries out the dangerous activity, and sometimes it will be justified to impose it on other parties, such as the promoter or funder of the activity, for various reasons such as an ability to prevent the damage.

17. The social and private interest in obligating those who benefit from dangerous activities to take out appropriate insurance exists *inter alia* with regard to sporting activity, which as we have said inherently involves considerable risks to sportsmen. Sports racing is an obvious example of this. I think that the importance of insurance that is intended to compensate for personal injuries that may be caused as a result of dangerous sporting activity cannot be overstated (T. Kevan, D. Adamson & S. Cottrell, *Sports Personal Injury: Law and Practice* (2002), at pp. 259-264; D. Pilpel, *Sports from a Legal Perspective* (1994), at pp. 272-274). The clear social interest that appropriate insurance be taken out with regard to injuries that arise from

sporting activity found expression in s. 7(a) of the Sports Law, 5748-1988, which provides:

> '(a) A sports club, sports organization, federation and union shall insure the sportsmen who take part in sporting competitions that are organized by them or on their behalf.'

On 29 December 2005 the Sports Driving Law, 5766-2005, was published. It comes into effect on 15 March 2007. This law regulates the field of sports driving in various respects and it establishes, *inter alia*, penal provisions with regard to anyone who uses or causes or allows another to use a competitive vehicle without appropriate insurance. In this regard s. 15 of the Sports Driving Law provides:

> 'Insurance obligation
>
> 15. (a) A person shall not use, *nor shall he cause or allow another person to use*, a competitive vehicle that has been given a competitive vehicle licence, unless there is a valid insurance policy for the use of that competitive vehicle by him or the other person, which was issued by an insurer, in accordance with provisions that shall be determined by the minister, after consulting the Supervisor of Insurance, which insures the owner of the competitive vehicle and its rider as follows:
>
> (1) Against liability for rescue, evacuation, medical treatment, assistance, nursing services and rehabilitation services that will be given to the driver of the competitive vehicle for personal injury that he suffers as a result of sports driving that took place in accordance with the provisions of this law;
>
> (2) Against liability for personal injury that is caused to a person by a competitive vehicle as a result of sports driving, apart from the driver of the competitive vehicle.

(b) Notwithstanding the provisions of subsection (a), the minister may, after consulting the Supervisor of Insurance, determine types of competitive vehicles, fields of sports driving and types of approved race tracks, with regard to which the duty to take out insurance under this section shall be the liability of the licence holder under sections 8 or 9, as applicable.

(c) In this section, 'insurer' — according to the meaning thereof in the Supervision of Insurance Transactions Law, 5741-1981.'

Section 23(c) of the law provides that anyone who breaches the provisions of the aforesaid s. 15 is liable to imprisonment for one year or a fine. The provisions of the Sports Driving Law do not apply in our case because the events that are the subject of the appeal took place approximately twelve years before the law came into effect. Moreover, the law relates mainly to sports driving in Israel (see s. 2(c) of the Sports Driving Law; the draft Sports Driving Law, 5765-2004, *Draft Laws* 2004, 474, at p. 476), whereas the incident in the appeal before us occurred in Egypt. Notwithstanding, this legislative development indicates that sports driving is one of those dangerous activities that we should ensure take place with insurance cover for those taking the risks, and the legislature has taken care to ensure that persons using competitive vehicles have a suitable insurance policy by imposing the duty to take care of this on whoever benefits from this activity (and not on drivers in general — see ss. 34-35 of the Sports Driving Law, which excludes sports driving from the application of the Motor Vehicle Insurance Ordinance and the Road Accident Victims Compensation Law, 5735-1975). It should be noted that s. 30(b) of the law provides that 'the driver of a competitive vehicle shall not have a cause of action under the Torts Ordinance [New Version], against another driver of a competitive vehicle, for damage that is caused to him as a result of sports driving, unless the aforesaid damage is caused to him by the other driver intentionally' — i.e., between the drivers *inter se* compulsory insurance replaces the law of torts. It is not superfluous to point out in this context that in our case the organizers of the race compelled the participants to take out Israeli and Egyptian compulsory insurance and they recommended — and it should be noted that this was only a recommendation — that they take out personal accident insurance.

18. The social and private interest in the existence of insurance will usually be furthered in the best way by means of clear provisions of statute such as those discussed above. But in the case before us it was not proved that there is a relevant statutory arrangement. In Israel, there is no strict liability provision that we can consider applying in this case. Therefore the petitioners ask us to go one step further and to impose an insurance obligation on the first respondent by virtue of the tort of negligence. This approach raises difficulties and should not be adopted. As I have already said, from a normative viewpoint it is unreasonable that a venture concerning participation in a motorbike race should be undertaken without personal accident insurance. Notwithstanding, choosing the framework of negligence as a means of creating an insurance obligation stretches the limits of the tort and raises a concern that negligence will gradually turn into a strict or absolute liability. This is because of the proximity between imposing a duty to take out insurance and imposing absolute liability which Prof. I. Englard discussed when he said 'Absolute liability is in essence a reflection of the idea of insurance' (see I. Englard, *Compensation for Road Accident Victims* (third edition, 2005), at p. 6). Indeed, determining an insurance obligation as a protected norm within the framework of the tort of negligence may blur the line that divides absolute liability from liability that is based on the principle of fault. The distinction that exists between these two regimes was discussed by this court in CA 485/60 *Berman v. Marziof* [6], at p. 1918, where it was said: '[someone with a duty of care] is not like an insurer, who is liable to compensate for the damage whatever its source' (see also CA 371/90 *Subhi v. Israel Railways* [7], at p. 349; CA 4025/91 *Zvi v. Carroll* [8], at p. 790). Justice Witkon also uttered some remarks in this vein in CA 285/73 *Lagil Israel Trampoline and Sports Equipment Ltd v. Nahmias* [9], at p. 75, where he said:

> 'It is common today to suggest to the supplier another solution to the dilemma. We ask what difference does it really make to the supplier that he is presumed to be negligent (even if he did not have a reasonable possibility of preventing the danger), since in any case he should be insured against third part risks, and thus he passes the risk on to all consumers or all taxpayers. In my opinion this is not a path that the court can follow. In this way we are in practice eliminating the concept of "negligence" (with all of its moral significance) and replacing it with absolute liability… and I am not at all sure whether this is desirable in *all* circumstances and in every case. The public's resources are not unlimited. Public money is a resource of the economy, and when there are

> insufficient resources to satisfy *all* of the desirable social purposes, an order of priorities needs to be determined. It is clear that this is a matter for the legislature (or the government) to address, after it examines thoroughly the need for the service and the scope of the risk that it involves, the cost of insuring against absolute liability and the relative importance of this social burden in comparison to the importance of other burdens… I do not mean to argue that the court is not competent to consider a question that is entirely a matter of policy, but it is clear to me that this debate requires research and that we do not have the necessary tools for this (for the position that the legislature should be left to determine arrangements that impose increased or absolute liability, see also A. Barak, 'Forty Years of Israeli Law — The Law of Torts and the Codification of Civil Law,' 19 *Hebrew Univ. L. Rev. (Mishpatim)* 631 (1990), at p. 642; CFH 7794/98 *Moshe v. Clifford* [10], at pp. 738-739).

Choosing the path of legislation in order to determine an insurance obligation has an additional advantage over the path in which such a norm is determined within the framework of the tort of negligence: it would appear that the legislative path advances the interest of spreading the risk by means of taking out insurance more effectively. Imposing a duty of care as opposed to imposing a duty in statute means that the potential tortfeasor has the choice of the possibility of taking out insurance and the possibility of taking the risk involved in not purchasing insurance (a risk whose realization will render the tortfeasor liable to compensate the injured person in the absence of insurance). It cannot be ruled out that, in the absence of a statutory duty to take out insurance, the potential tortfeasor will choose the second possibility according to which he will be liable to pay for the whole damage when it occurs, for many different reasons (see Weller, *The Insurance Contract Law, 5741-1981*, *supra*, at p. 44; G. Calabresi, *The Costs of Accidents* (1970), at pp. 55-59; also see and cf. Weller, *supra*, at pp. 126-127; D. Schwartz and R. Schlinger, *Insurance Law* (2005), at pp. 113-114, 138). With regard to the possibility of finding the tortfeasor liable for punitive damages as an incentive to take out insurance and the disadvantages of this possibility, see and cf. CA 140/00 *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter in the Old City, Jerusalem, Ltd*[11], at pp. 562-567 {180-186}).

19. But despite the difficulties inherent in the approach whereby failure to take out insurance constitutes negligent conduct that gives rise to liability

under the law of torts, I do not think it right to rule out this possibility in principle; each case should be examined on its merits and according to its circumstances. The fact that we are talking in this context of economic loss that is reflected in a pecuniary loss as a result of not receiving an insurance payment — 'pure' economic loss — also does not in my opinion rule out, always and in all circumstances, the duty of care. I agree in this regard with the opinion of Deputy President E. Rivlin in CA 3464/05 *Paz Oil Co. Ltd v. State of Israel* [12], at para. 7, where he said:

> 'It is doubtful whether the fact that we may be talking here about "pure" economic loss, i.e., pecuniary loss that is not accompanied by physical damage to the person or property of the plaintiff, is capable on its own, in the circumstances of the case, of ruling out the duty of care. Admittedly in foreign case law there has sometimes been a reluctance to impose liability for this type of damage, for various reasons that mainly arise from a concern that it will lead to an uncontrollable increase in the number of persons entitled to compensation, the concern that the courts will be flooded with cases and the difficulty of assessing the amount of the damages (see D. Ronen, 'Pure Economic Loss from a Comparative Perspective,' 44 *HaPraklit* 504 (2000)). These considerations may fall within the scope of the policy considerations that are usually examined within the framework of the duty of care. As I have said, I doubt whether the nature of the damage in our case can rule out the duty of care (and see in this regard, for example, *Jerusalem Municipality v. Gordon*, *supra*, at p. 139; and with regard to negligent misrepresentation, see App 106/54 *Weinstein v. Kadima Cooperative Society Ltd*).'

(For classification of the damage see: Buckley, *The Modern Law of Negligence*, *supra*, at pp. 149, 153-154; *Van Oppen v. Clerk to the Bedford Charity Trustees* [20]; for the characteristics of economic loss and the aforementioned doubts, see Ronen, 'Pure Economic Loss from a Comparative Perspective,' *supra*, at pp. 504, 508-509, 522; Gidron, 'The Duty of Care in the Tort of Negligence and Pure Economic Loss,' *supra*, at pp. 128-130, 136-138; N. Cohen, 'Strike Damage, Deliberate Negligence, Economic Loss and Causing Breach of Contract,' 14 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 173 (1989), at pp. 183-185; *Winfield and Jolowicz on Tort*, *supra*, at pp. 191-194).

Thus we see that each case should be examined in accordance with its characteristics and all of the factors that are relevant to the case, including considerations concerning the reasonableness of the conduct, the likelihood of the damage, the relationship between the tortfeasor and the injured party and the dependence of one on the other. The concern that the limits of the tort of negligence will be eroded should not be the determining factor in every case. This is a consideration whose relevance and weight should be considered on a case by case basis. Moreover it would appear that there are certain situations in which it will be right to recognize a cause of action of negligence as a result of not taking out insurance. Thus, for example, the considerations weighing against the imposition of liability on the grounds of negligence lose their strength where there is a statutory duty to take out insurance (see and cf. *LaClair v. Silberline Manufacturing Co., Inc*. [18]; CC (TA-DC) 2474/86 *Netzer v. Kanfonit Light Aircraft Co. Ltd* [16], at pp. 476-478; on the connection between a statutory duty and the tort of negligence see: CA 145/80 *Vaknin v. Beit Shemesh Local Council* [13], at p. 139; CA 2906/01 *Haifa Municipality v. Menora Insurance Co. Ltd* [14], at paras. 17, 23, 27). Moreover, in circumstances where there is a relationship between the tortfeasor and the injured party and a dependence of one on the other, there may be a duty of care on the part of the tortfeasor to the injured person to protect his economic interests. It is possible that in such circumstances it will be possible to regard a failure of the tortfeasor to insure the injured party as a negligent omission. The aforesaid relationship and reliance element may exist, *inter alia*, where one party expressly promised the other that he would take out insurance for him or where this is required by the custom between the parties. By contrast, where the injured party chose to become involved in dangerous activity in return for benefits that it gives him, it will be difficult to argue in the absence of an express agreement that he relied on the other party to insure him.

20. In English law the lack of a special relationship between the tortfeasor and the injured person has indeed been a main consideration in two judgments in which the claim of negligence was raised in the wake of the failure to take out insurance. In a case that concerned an employment relationship (*Reid v. Rush & Tompkins Group PLC* [21]) and in a case that concerned the sporting activity of a school pupil (*Van Oppen v. Clerk to the Bedford Charity Trustees* [20]) it was held that even where a tortfeasor has a duty of care to ensure the physical safety of the injured person, he does not necessarily have a duty of care to ensure his economic welfare. Therefore the court rejected the claim that was raised in those cases that the defendants (the employer in *Reid v. Rush*

& Tompkins Group PLC [21] and the school in *Van Oppen v. Clerk to the Bedford Charity Trustees* [20]) had a duty to take out insurance to cover economic loss arising from events for which they had no liability in torts.

In *Naylor v. Payling* [22] the English Court of Appeal considered whether a landowner had a duty to ensure that an independent contractor employed by him on the land had taken out insurance for damage to third parties that might be caused as a result of the contractor's negligence. In discussing the distinction between a freestanding duty to do this and a duty derived from the general duty of employing a competent and qualified contractor, Justices Waller and Neuberger expressed their opinion that as a rule no freestanding duty as aforesaid should be recognized apart from in special circumstances — cases where the employer is himself under a duty (whether statutory or not) to insure himself, or where the employer accepts that he should insure himself. Justice Waller went on to hold that an additional condition for the existence of such a freestanding duty is that the contractor is employed in a hazardous activity. But in that case, the court went on to hold, the circumstances justifying the imposition of such a duty did not exist. From the decision of the English Court of Appeal in *Naylor v. Payling* [22] it is possible, with the requisite caution, to infer that when the special circumstances mentioned above do indeed exist, it cannot be ruled out that there will be an independent or freestanding duty to ensure the existence of insurance as a cause of action in negligence (but see *Winfield and Jolowicz on Tort*, *supra*, at pp. 407-408). As I have already said above, I too am of the opinion that the recognition of this duty is not based on sweeping rules but on the application of policy considerations that lie at the heart of the tort of negligence, which include reasonableness, reliance expectations, the neighbour principle and avoiding excessive deterrence and overextending the limits of the tort.

From general principles to the specific case

21. Does the first respondent have a duty of care to the first appellant with regard to taking out personal accident insurance? In order to answer this question we should examine the relationship between the parties and the duties that arise from it against a background of the normative position set out above. In this case the first respondent did not have a statutory duty to take out insurance. We have also seen that the insurances that were a precondition for participating in the race were taken out, whereas the insurance that we are discussing — personal accident insurance — was a recommendation of the organizers. This recommendation was sent to the sportsmen themselves but the first appellant chose to ignore it. In the circumstances of the case there is no

basis whatsoever for the argument that a special relationship existed between the parties or that the first appellant relied on the first respondent in a way that imposes on it a duty of care to insure him. The essence of the contract between the parties (a joint sporting venture) does not in itself indicate such a relationship or reliance, since we are speaking of a contract between two parties of equal bargaining power where each of them was free to negotiate the terms of the contract or alternatively to choose to enter into a contract with another party (a sportsman or sponsor, as applicable). Moreover, in so far as the insurance is concerned, the relationship between the parties was not characterized by one party being more knowledgeable or being more able to prevent the damage that was caused, thereby giving rise to reliance on the part of the other. Even from the viewpoint of sharing the benefits, we are speaking of a venture in which both parties were expecting to derive an advantage, one in the economic sphere and the other in sporting achievements. Moreover it would appear that in the circumstances of the case and in view of the division of functions between the parties in the venture that they wished to promote, the first appellant does not have a convincing argument as to why the first respondent should be liable to take out personal accident insurance, rather than the first appellant himself. In this context it should be recalled that the first appellant participated in the past on more than one occasion in motorbike races, and he was able to make a proper assessment of the risks involved in them and the economic loss that he was likely to suffer if he was injured and did not have insurance. It should also be recalled that his argument that he asked the first respondent to ensure that he had personal accident insurance was rejected by the trial court on the facts. In these circumstances it would appear that imposing a duty of care on the first respondent to take out insurance would be going too far. Therefore the argument that the first respondent is liable for the appellant's damage by virtue of the tort of negligence because of the lack of insurance should be rejected.

Conclusion

22. For the reasons set out above I would propose to my colleagues that we deny the appeal, but because of the special circumstances of the case I would further propose not to make an order for costs.

Justice M. Naor

I agree with the opinion of my colleague Justice Hayut. The tragic incident before us in this case shows the need for parties who have a common interest in a project or a property to determine the question of insurance coverage for personal injuries or damage to property. Preplanning avoids both

underinsurance and double insurance (see and cf. CA 931/99 *Menorah Insurance Co. Ltd v. Jerusalem Candles Ilum (1987) Ltd* [15], at p. 564).

My colleague mentioned (in para. 16 of her opinion) several statutory provisions that contain a binding duty to take out insurance. Such provisions are dispersed in legislation and regulations in a sporadic and haphazard manner. I am of the opinion that the legislator should address the question of the proper scope of the duty to take out insurance and in what areas it should apply, in order to prevent situations like the one in which the appellant finds himself, where an accident has occurred and it is not covered by insurance.

Justice A. Grunis

I agree with the opinion of my colleague Justice E. Hayut and also with the remarks of my colleague Justice M. Naor.

Appeal denied.

17 Adar 5767.

7 March 2007.