XXXII. Israel

Ronen Perry

To identify the five most important Israeli tort law decisions from 2001 to 2025, I employed several criteria: novelty (of the espoused rule or the reasoning), legal complexity, breadth of applicability, demonstrable impact within the Israeli legal system, potential global appeal, and technical features of the decision (such as length, number of references, size of panel, the presence of concurring and dissenting opinions, and non-party intervention). I consulted colleagues from the other Israeli university-affiliated law schools (Ronen Avraham, Israel Gilead, and Benjamin Shmueli), yet the ultimate decisions and the ensuing responsibility for any controversial inclusion or exclusion are mine. As an academic commentary, four out of the five cases presented here (as well as a prior Supreme Court judgment on the fifth matter) involved Deputy Chief Justice Eliezer Rivlin, who served on the Supreme Court between 2000 and 2012. Rivlin's dominance in the area of tort law was preceded by the Aharon Barak era (indeed, one of the short-listed decisions was Barak's ruling on the constitutionality of tort law legislation which was eventually deemed too far-off from core tort jurisprudence to be included[1]) and followed by the rise of Yitzhak Amit (whose innovative opinions have not yet gained sufficient traction or impact[2]).

1. *Re Estate of Ettinger*[3]

In re *Estate of Ettinger*, the Supreme Court overturned a time-honoured precedent concerning the availability of damages for loss of earning capacity in the 'lost years.' Michael Ettinger, a twelve-year-old child, was playing with a friend at a playground near his house in the Jewish Quarter of the Old City of Jerusalem. He fell into an unfenced archeolog-

[1] High Court of Justice (HCJ) 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel v Minister of Defense*, 62(1) Piskei Din (PD) 1 (2006).

[2] See eg, Civ App 4486/11 *John Doe v Clalit Health Services*, 66(2) PD 682 (2013).

[3] Civ App 140/00 *Estate of Ettinger v The Company for the Reconstruction and Development of the Jewish Quarter in the Old City of Jerusalem Ltd*, 58(4) PD 486 (2004).

https://doi.org/10.1553/978OEAW51463-Israel

ical pit with a concrete flooring and died from his injuries the following day. His estate, parents, and sister brought an action against the Company for the Reconstruction and Development of the Jewish Quarter, which was responsible for the maintenance of the area, and against other parties. The main question was whether a person whose life (and employment) expectancy were reduced by wrongful conduct, or their estate in cases of death, could recover damages for the loss of earning capacity in the 'lost years.' In *Estate of Gavriel*, famously decided in 1982, the Supreme Court held by a 3:2 majority that they could not.[4] The District Court in *Estate of Ettinger* followed this precedent and denied recovery for loss of earning capacity in the lost years. The estate and the family members appealed to the Supreme Court.

Justice Rivlin wrote the decision, and the other four judges (Barak, Dorner, Matza, and Or) concurred. The Court held, first, that a surviving victim whose life was shortened should be allowed to recover for the loss of earning capacity in the lost years. This is consistent with the principle of *restitutio in integrum*, because its application entails a comparison between the pre-tort and the post-tort conditions, and the former includes the plaintiff's ability to work throughout their natural pre-tort lifespan. In this respect, there is no real difference between causing serious injury that totally prevents the plaintiff from working for several years and shortening their working life expectancy by the same number of years. Allowing an injured person to recover damages for the loss of earning capacity in the lost years also promotes efficiency. Efficient deterrence requires internalisation of the social cost of the wrongful conduct, and this includes any harm to earning capacity, whether caused by an injury that prevents work or by a reduction in life expectancy.

The fact that the victim cannot enjoy damages for the loss of earning capacity in the lost years is immaterial. First, the wrongful conduct caused the inability to enjoy earnings along with the loss of earning capacity. Second, an ability to enjoy damages is not a precondition for their award, as damages for the non-pecuniary element of loss of life expectancy and damages for the loss of earning capacity of comatose victims demonstrate. Third, a surviving victim whose life expectancy has been shortened can often use the damages to fulfill their personal priorities even after their death. Fourth, damages for the loss of earning capacity in lost years can be enjoyed after the victim's death by their legal heirs just like any other asset of the deceased.

[4] Civ App 295/81 *Estate of Gavriel v Gavriel*, 36(4) PD 533 (1982).

Recovery for the loss of earning capacity in lost years also ensures that the victim's dependants do not lose their source of income after the victim's death. In cases of wrongful death, the victim's dependants have a derivative statutory cause of action that hinges on the existence of the deceased's cause of action at the time of death. If the deceased has already litigated or settled their claim, they no longer have a cause of action at the time of death so neither do the dependants. If the victim brings an action before death (thereby blocking the dependants' derivative cause of action) but cannot recover for the loss of earning capacity in the lost years, the dependants will be left with no source of support for these years.

The Court then held that the victim's living expenses, saved by the early death, should be deducted from the damages for loss of earning capacity in the lost years. The saved costs will be assessed by dividing the total family income, including the victim's lost income, by the number of family members plus two (the additional two shares representing general household expenses and family savings). If the family status of the victim in the lost years cannot be reasonably predicted, courts can use statistical data about family size.

Finally, the Court held that even in the case of a fatal injury, when damages for loss of earning capacity in the lost years are not necessary to ensure the dependants' redress, the estate can recover damages for such loss. According to sec 19 of the Civil Wrongs Ordinance, the victim's cause of action fully survives their death. Consequently, any damages that the victim could have obtained but for their death may be awarded to their estate in a survival action. If the heirs are not also the victim's dependants, the court should deduct the amount that the victim would have allocated to support the dependants from the estate's award.

Estate of Ettinger was decided *per curiam* (despite the clear controversy in *Estate of Gavriel*) by a large five-judge panel. The sole opinion, written by Justice Rivlin, is almost 90 pages long in the official reporter, referencing over 160 cases (half of which foreign) and almost 30 books and articles (two-thirds foreign). The Court discussed fundamental questions concerning the assessment of damages for serious and fatal injuries that have occupied courts and legislatures across the world. It overruled a two-decade-old frequently applied precedent and, as the motion for rehearing was denied in late 2004,[5] solidified the law for years to come. The decision has had a tremendous impact on legal practice because it dramatically increased pecuniary damages in most cases of severe or fatal

[5] Civ Rehearing 4011/04 *Municipality of Jerusalem v Estate of Ettinger* (Supreme Court, 7.12.2004).

injury, where life expectancy is shortened. It has been cited in almost 400 subsequent cases and in approximately 150 legal publications.

2. *Migdal Insurance Co v Abu Hanna*[6]

Migdal Insurance Co v Abu Hanna laid down a groundbreaking rule concerning the assessment of damages for minors' loss of earning capacity. The respondent, Reem Abu Hanna, a five-month-old girl from an Arab village in one of the lowest socio-economic clusters, was injured in a road accident. The main question was whether damages for the respondent's loss of earning capacity, probably the most important remedial component in personal injury cases, should be assessed in accordance with the national average wage or in accordance with the average wage of Arab women in the respondent's village (and within her family), which was considerably lower.

The Supreme Court held that in assessing damages for minors' loss of earning capacity, courts must presume, in the absence of concrete evidence to the contrary, that, but for their injuries, children would have been able to earn the national average wage. This presumption applies to every child, so courts should not take into consideration the victim's gender, race, religion, ethnicity, or socio-economic background. Calculating damages based on one of these characteristics constitutes discrimination. The presumption is rebuttable only by clear evidence about the actual prospects of the particular plaintiff.

The Court found support for this proposition in considerations of corrective justice, distributive justice, and efficiency. As for corrective justice, an assessment of earning capacity based on the national average wage represents the broad spectrum of opportunities available to a minor child. As regards distributive justice, assessing earning capacity based on the victim's gender, race, etc, perpetuates social inequality. A uniform gauge respects equality. As for efficiency, assessing earning capacity based on individual affiliations might incentivise potential injurers to exercise lesser care towards underprivileged children.

The respondent was injured when she was only five months old. At such an age, it is impossible to make any assumptions about her future occupation or about the impact of her socio-economic background on her prospects. Therefore, the scope of damages for loss of earning capacity

[6] Civ App 10064/02 *Migdal Ins Co Ltd v Abu Hanna*, 60(3) PD 13 (2005), previously reported in *R Perry*, Israel, in: K Oliphant /BC Steininger (eds), European Tort Law (ETL) 2011 (2012) 715, nos 81–85.

could not be influenced by the facts that most Arab women do not work or work only until marriage, that the average income in the Arab sector is lower than the national average, and that it is even lower in the respondent's village.

The Court opined that differential damages based on disaggregated statistical data perpetuate the present, rather than reflecting the expected – brighter – future. The ruling implicitly assumed that the gap between the national average wage and the average wage in the relatively deprived rural Arab sector, particularly among women, would gradually close. However, while closing socio-economic gaps may be warranted, cumulative data show that the gap has persisted, or even widened, before and after the decision. This fact highlights the novelty of the rule and its underpinnings: awarding damages regardless of group-based statistics constitutes an exception to the fundamental and time-honoured principle of *restitutio in integrum*, and the exception to this rectificatory principle extraordinarily rests on policy concerns involving distributive and social justice.

The breadth of applicability of the *Abu Hanna* rule is notable, as it applies to most cases of personal injury to minors. In fact, the Supreme Court extended the ruling in *Abu Hanna* to the assessment of damages for loss of earning capacity of some adult victims. In *Karnit v Abdalluli*,[7] the Court held that damages for loss of earning capacity of an adult Druze victim should be based, in the absence of concrete evidence about his earning capacity prior to the accident, on the national average wage, rather than the average wage in Druze villages. The domestic impact of *Abu Hanna* on legal practice and scholarship is manifested in more than 1,000 citations in subsequent cases and about 150 in the academic and professional literature. The universal nature of the *restitutio in integrum* principle also makes the ruling and its reasoning interesting and important on a global scale.

3. *Carmel Hospital Haifa v Malul*[8]

In *Carmel Hospital Haifa v Malul,* the Supreme Court conclusively rejected the notion of proportional liability. The respondent, Eden Malul, was born completely paralyzed and mentally retarded. There were two possible causes for her condition: her preterm birth and its complications,

[7] Civ App 8380/03 *Karnit – Road Accidents Victims' Compensation Fund v Abdalluli* (Supreme Court, 8.12.2005).

[8] Civ Rehearing 4693/05 *Carmel Hospital Haifa v Malul*, 64(1) PD 533 (2010), previously reported in ETL 2011 by *Perry* (fn 6) nos 73–80.

which was a natural cause, and her mother's bleeding following placental abruption, which was caused by a negligent delay in performing a caesarean section. The respondent could not prove by a preponderance of the evidence that the negligence, rather than the natural circumstances, caused her harm. The question was whether it is possible to impose proportional liability in the case of uncertainty about the causal link between the negligence and the harm. The Supreme Court initially answered this question in the affirmative,[9] but upon rehearing, overruled its earlier decision by a slim 5:4 majority.

The decision is highly complex because the nine judges (an exceptionally large panel) expressed six different views, labelled *v*1–*v*6 below. All nine agreed that it is generally necessary to prove all elements of a cause of action by a preponderance of the evidence. The controversy revolved around the willingness to recognise an exception for cases of uncertain causality and the boundaries of this exception.

The four dissenting judges were prepared to impose proportional liability in cases of uncertain causality, based on the probability that the negligent conduct caused the harm, as established through statistical evidence or intuitive appraisal. Justice Naor opined that proportional liability can be allowed if three conditions are met: (1) negligence and physical injury can be proved by a preponderance of the evidence; (2) an 'inherent uncertainty' exists with respect to factual causation, preventing any proof of the causal chain (ie, existing knowledge and scientific research do not enable the court to determine whether the harm was caused by negligence or by a natural cause); and (3) the defendant's negligence was a significant source of risk (there is a significant probability that the negligence caused the harm) (*v*1). Justices Arbel and Rubinstein fully endorsed Justice Naor's proposition. Justice Joubran agreed in principle but opined that the term 'inherent uncertainty' was obscure and that the uncertainty must be scientific (*v*2).

The five-member majority split into two groups. Justices Grunis and Procaccia expressed strict refusal to impose liability for negligence if causation cannot be established by a preponderance of the evidence. Despite this shared view, two nuances can be discerned. Justice Grunis opined that imposing proportional liability in cases like the one at bar would be unwarranted (*v*3). Justice Procaccia argued that even if imposing liability were justified, it would entail statutory reform given its revolutionary nature (*v*4).

[9] Civ App 7375/02 *Carmel Hospital Haifa v Malul*, 60(1) PD 11 (2005).

Justice Rivlin (with whom Justices Beinisch and Levi concurred) held an intermediate position. Conceding that proportional liability based on the probability of causation in cases of uncertainty should not be generally allowed, he advocated a limited exception (which was inapplicable to the case in hand). The exception allows proportional liability in cases of a *recurrent bias*, namely where an injurer exposed a group of victims to a recurrent and common risk, and the application of the preponderance of the evidence standard creates a systematic bias in favour of one of the parties. For example, if the defendant's conduct exposed many plaintiffs to a similar risk, but the probability that the conduct caused harm to any specific plaintiff is consistently lower than 50%, then, under the preponderance of the evidence standard, all plaintiffs will lose, even though that conduct clearly caused harm to some of them. The traditional standard of proof systematically favours the defendant. By allowing proportional liability, the proposed exception overcomes this problem.

A few comments on the recurrent bias doctrine are due. First, this doctrine is much narrower than the dissent's proposal in the sense that the former only allows proportional liability in the relatively rare cases of recurring risk, whereas the latter also allows proportional liability in the vast majority of tort cases in which the risk to the plaintiff was distinct. Second, the recurrent bias doctrine, as opposed to the dissent's formulation, does not have a threshold probability of causation ('significant source of risk'). Third, the doctrine may apply when the preponderance of the evidence standard generates a systematic bias either in favour of the defendant or against them. Unlike the dissent's proposal, it can benefit defendants, not only plaintiffs. Fourth, Justice Rivlin explained that the market share liability doctrine should be recognised because it is a special case of the recurrent bias doctrine. Fifth, Justice Rivlin argued that the loss of a chance doctrine, which did not fit the recurrent bias framework, should be abolished (*v*5). Justice Levi concurred with Justice Rivlin completely, whereas Chief Justice Beinisch endorsed the recurrent bias doctrine but refused to abolish the loss of a chance doctrine (*v*6). Sixth, the recurrent bias doctrine was adopted by only three of the five majority judges (Beinisch, Levi, and Rivlin), and briefly by one of the dissenting judges (Rubinstein). Justices Grunis, Joubran, and Naor did not make a conclusive decision on this matter, while Justices Arbel and Procaccia did not discuss it at all.

Malul is the longest tort decision in Israeli legal history (nearly 300 pages in the official reporter, referencing 150 cases and almost 150 books and articles), and probably the most complex one given the unusual nine-judge panel with nine separate and nuanced opinions. It lacks a clear *ratio*

decidendi apart from the rejection, by a slim and fractured majority, of Justice Naor's generous acceptance of proportional liability in cases of uncertain causation. This leaves Israel with only one limited exception to the rule of no proportional liability: the loss of a chance doctrine (often described as proportional liability in disguise because it recognises a new type of compensable harm rather than allowing partial recovery for traditional harm). The recurrent bias doctrine was adopted by only three of the five majority judges (and one of the dissenting judges), and in subsequent cases, the Supreme Court has repeatedly left the question of its recognition undecided.[10] In rejecting a general principle of proportional liability, *Malul* essentially applies to all cases of uncertain causation. Even though this rejection has drastically curtailed litigation, *Malul* has been cited in almost 500 subsequent cases. Because of its importance, it has also been cited about 170 times in domestic legal literature.

4. *Hammer v Amit*[11]

In *Hammer v Amit*, the Supreme Court revisited *Zeitsov v Katz*,[12] its landmark decision on wrongful life and wrongful birth. In *Zeitsov*, the court held four-to-one that a severely disabled child may claim damages from the person whose negligence resulted in that child's birth, although that negligence did not cause the disability itself. The majority disagreed as to the availability of the new cause of action in cases of less severe disability and as to the assessment of damages. Justice Ben-Porat, with whom Justice Dov Levin concurred, held that only in rare cases of extremely severe disability can a court determine that a person was harmed by being born and has a cause of action. In such cases, damages cannot restore the plaintiff to the status quo ante (non-existence). Therefore, in assessing damages, the court should aim to minimise the consequences of the disability and help the child exhaust their existing potential. Justice Barak, with whom Justice Shlomo Levin concurred, held that the doctor must exercise reasonable care so that the minor's life will be unimpaired and that the minor's legally protected interest is not in non-existence but in life without impairment. Thus, the harm for which the defendant is re-

[10] See eg, Civ App 6102/13 *Atzmon v Haifa Chemicals Ltd* (Supreme Court, 24.9.2015); Civ App 7547/99 *Maccabi Health Services v Dubek Ltd*, 65(1) PD 144, 228 f (2011).

[11] Civ App 1326/07 *Hammer v Amit*, 65(2) PD 797 (2012), previously reported in *R Perry*, Israel, in: K Oliphant/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) 745, nos 19–33.

[12] Civ App 512/81 *Zeitsov v Katz*, 40(2) PD 85 (1986).

sponsible does not lie in causing life or in preventing non-existence, but in causing life with impairment. In assessing damages, the court should compare impaired life and unimpaired life. Justice Goldberg dissented, holding that recognising the child's cause of action entails statutory reform.

The controversies over the limits of the cause of action and over the assessment of damages, which originated in *Zeitsov*, remained unresolved for more than 25 years and led to inconsistencies in lower courts' decisions. *Hammer* consolidated six different wrongful life/wrongful birth cases from three districts, aiming to address the general questions of liability for wrongful life and wrongful birth and the scope of damages.

The Court in *Hammer* first abolished the child's cause of action for wrongful life, overruling *Zeitsov*. Justice Rivlin, writing for the Court, held that Justice Ben-Porat's position in *Zeitsov* cannot stand, because the possibility of being harmed by birth is a metaphysical question that is institutionally and normatively unfit for judicial decision. Put differently, courts cannot compare life with disability to non-existence and should not engage in the social and moral debate on the question of whether life may be inferior to non-life. Justice Rivlin also rejected Justice Barak's position in *Zeitsov*, holding that the defendant in wrongful life cases is not causally responsible for the disability, and therefore cannot be liable for it.

Next, Justice Rivlin confirmed (and extended) the parents' cause of action for wrongful birth. He emphasised that the parents' action is not based on a judicial determination that the child's life is inferior to non-existence but on vindication of the parents' choice concerning procreation. With respect to causation, Justice Rivlin explained that the parents must prove that: (1) a Termination of Pregnancy Committee would have authorised an abortion; and (2) the parents would have decided to undergo an abortion. The second requirement raises several difficulties. Parents who already know and love their children will be indisposed to argue that they would have avoided bringing them into the world. Moreover, this requirement discriminates against more altruistic parents who are willing to bear the burden of raising disabled children, a discrimination that might have a sectorial dimension. To overcome these problems, Justice Rivlin introduced a rebuttable presumption that the Termination of Pregnancy Committee's expected decision also reflects the parents' position regarding abortion. Put differently, had the Committee authorised an abortion, the parents would have decided to undergo an abortion, and vice versa.[13]

[13] This presumption is not useful in cases of preconception negligence.

Justice Rivlin then counteracted the financial consequences of abolishing the wrongful life action by extending the scope of damages recoverable by the parents in a wrongful birth action, in line with the recommendations of the Matza committee (see below). He held that, for the duration of the child's minority, the parents are entitled to damages for special expenses entailed by the child's disability (stating that the ordinary child-rearing expenses are offset by the joy of having a child). For the time after the child reaches adulthood, the parents are entitled to damages covering the child's normal cost of living, in addition to disability-related costs, and the cost of living is assumed to be equivalent to the average wage. The parents are also entitled to damages for non-pecuniary harm and for infringement of autonomy.

The Court held that its decision would not apply retroactively to pending cases in which a claim had been brought by the child but not by the parents. According to the statute of limitations, a civil action must be brought within seven years after the cause of action accrues. Wrongful birth claims typically expire seven years after birth. However, a minor's claim is barred only seven years after they reach majority. Prior to *Hammer*, a wrongful life claim could be brought when the corresponding wrongful birth cause of action had already expired. If an action was brought only by the child based on *Zeitsov*, or not brought at all, and seven years elapsed from the child's birth, abolishing wrongful life claims could leave the family without any redress. To avoid injustice, the court held that the abolition of wrongful life claims would not apply to cases in which a claim was brought by the child but not by the parents. Yet, this does not provide a solution to the rare cases in which no action was brought at all prior to *Hammer*.

The case resolved critical legal uncertainties that have troubled practitioners and courts for over 25 years, regarding the availability of a cause of action for wrongful life and the scope of damages therefor. Its importance is emphasised by the fact that it was decided by an exceptional seven-judge panel, and that both the Israeli Medical Association and the Israel Bar Association participated as *amici curiae*; the former endorsed Justice Ben-Porat's narrow approach in *Zeitsov*, whereas the latter endorsed Justice Barak's more inclusive approach. The Attorney General also joined the proceeding and asked the Minister of Justice to form a professional committee to provide recommendations on the subject. This committee was chaired by former Deputy Chief Justice of the Supreme Court, Eliyahu Matza, and although the Attorney General ultimately decided not to express an opinion, the Court heavily relied on the committee's report. Finally, even though the subject matter seems relatively

constrained, *Hammer* gained more than 300 citations in subsequent cases and more than 100 in the legal literature.

Lastly, Justice Rivlin employed a new type of reasoning of universal relevance: he relied on the 'global consensus' against wrongful life in support of the decision to abolish this cause of action. Notably, the Court assigned independent weight to the global consensus, adding to any other justification provided in other jurisdictions for the disinclination to recognise wrongful life claims. The willingness to comply with global consensus must be context-specific, not only because the court must weigh the advantages and disadvantages of the specific globally endorsed rule, but also because the general advantages and disadvantages of compliance with global consensus (those that are unrelated to the merits of the specific rule) are not equally relevant in all contexts. This is indeed a complicated jurisprudential issue.

5. *John Doe v Dayan-Orbach*[14]

John Doe v Dayan-Orbach is a landmark decision on journalists' liability for defamation, in which the Supreme Court recognised the responsible journalism defence. The petitioner, 'Captain R,' was a company commander in a military post near the Gaza Strip. The area was subject to terrorist activities. On the relevant day, the soldiers in the military post identified a suspicious person carrying a bag and approaching the gate. The soldiers, who expected a terrorist attack against the post, shot at and injured the person, while a siren and an intruder alert were sounded. Captain R shot the suspect from a shorter distance, reporting afterwards that it was a teenage girl who may have had an explosive belt, and may have been sent to examine the soldiers' alertness or as bait. It transpired that the suspect was a thirteen-year-old girl on her way to school. Captain R was indicted in a military court for illegal use of his weapon, perverting the course of justice, overreaching authority by ordering subordinates to deviate from the rules of engagement, and conduct unbecoming of an officer. Captain R was ultimately acquitted of all charges; the criminal court found the allegations against him unconvincing. On the day of the indictment, the respondent contended in her investigative television show that the officer repeatedly shot the girl, even after becoming aware of her age and after she had already died, to verify her death.

[14] Civ Rehearing 2121/12 *John Doe v Dayan-Orbach*, 67(1) PD 667 (2014), previously reported in *R Perry*, Israel, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 688, nos 28–42.

The District Court held that the television show presented a story in which the soldiers kept shooting even after they realised that the suspect was a young girl, demonstrating indifference and disrespect for human life, and that Captain R shot her repeatedly from a short distance to verify her death, telling his soldiers that 'anyone moving in this area must be killed.' The District Court concluded that the television show defamed Captain R by presenting him as cruel and vicious, as being responsible for an indifferent shooting by the soldiers, and as a commander who urged his soldiers to lie for him in the operational inquiry. The District Court held that neither the truth nor the good faith defences applied.

Both parties appealed to the Supreme Court.[15] This Court held in 2012 that the television show indeed defamed Captain R. However, all judges concluded that at least one of the statutory defences applied. The truth defence (Defamation Act § 14) precludes liability if two conditions are met: (1) the statement published was true, and (2) there was public interest in its publication. Under a time-honoured interpretation, known as the provisional truth rule, truthfulness is tested at the time of publication, so the defence holds even if subsequent changes and developments render the initial publication inaccurate or incomplete. Justice Rivlin, with whom Justice Amit concurred, extended this rule to a case in which the representation was consistent with the truth *known* to the defendant at the time of publication, and it later transpired that it was not objectively true at that time. In his view, although Captain R was ultimately acquitted, the reality reflected in the documentary was not substantially different from 'the truth, which was known at the time, in accordance with the fact-finding capacity of a reasonable journalist.' At the time of publication, there was sufficient basis for an indictment, and this is the truth that was available to the respondent. Consequently, the truth defence applied. Justice Vogelman opined that the truth defence may be said to apply to statements that were wholly true at the time of publication and rendered partially true at a later stage following a change in reality, not to statements that were perceived as wholly true at the time of publication but were actually inaccurate at that time.

The good faith defence (Defamation Act § 15) precludes liability if two conditions are met: (1) the defendant published the statement in good faith, and (2) one of the special circumstances enumerated in this section existed. Justice Rivlin held that the respondent did not intend to harm the petitioner and took the necessary precautions to verify the truthfulness of the publication. Thus, she acted in good faith. One of the circumstances

[15] Civ App 751/10 *John Doe v Dayan-Orbach*, 65(3) PD 369 (2012).

enumerated in sec 15 is the existence of a legal, moral, or social duty to publish (sec 15(2)). The Court recognised 'a journalistic duty to publish,' arising not only with respect to potential danger to life, health, or property, but also when there is a need for public debate on highly important matters. Justice Vogelman, with whom Justices Rivlin and Amit concurred, elaborated on the defence of good faith publication under a journalistic duty to publish.

A motion for rehearing by the Supreme Court was granted in October 2012, and a nine-judge panel convened to reexamine the initial ruling with respect to the viability of the truth defence and the journalistic duty to publish defence. The decision was released in September 2014.

Chief Justice Grunis delivered the leading majority opinion. Grunis agreed that the television show defamed Captain R, and that the question was whether one or more of the statutory defences applied. As regards the truth defence, he opined that there is only one objective legal truth, determined on the basis of the totality of the evidence available to the court at the time of its decision, even if some of the evidence surfaced after the publication. It is insufficient for the purposes of sec 14 to show that the statement appeared to be truthful at the time of the publication; rather, a defendant must establish that the statement reflected the actual truth at that time. The respondent's publication did not meet this condition. Note that Justice Rivlin, who delivered the leading opinion in the Supreme Court's 2012 decision, had already retired, and his extension of the provisional truth rule was wholly rejected by the nine-judge panel in the 2014 rehearing.

Next, Chief Justice Grunis affirmed the 'responsible journalism defence'. He held that while the truth defence is inapplicable to false factual statements, the good faith defence may be relevant. One of the circumstances enumerated in sec 15 is the existence of a legal, moral, or social duty to publish. A journalist has a duty to publish items which serve *a significant public interest*. Such interest exists if the publication facilitates the realisation of a public goal, helps people form opinions on public matters, or enables them to improve their lives. The duty is carried out 'in good faith' only if the journalist acted without malice, in accordance with the standards of responsible, prudent, and fair journalism. These standards concern: (1) the quality of the journalistic investigation, as determined by the reliability and the weight of the sources, the precautions taken to verify the facts, and the publisher's belief in the truthfulness of the factual statements; (2) the nature of the publication itself – refraining from conclusive language in cases of uncertainty, presenting a fair and balanced version of the events, avoiding defamatory statements not

serving the public interest, and publishing the victim's response. In the present case, the publication served a significant public interest, so a duty to publish existed. The respondent reasonably believed in the truthfulness of the statements when they were made, and the publication reflected responsible though imperfect journalism.

Finally, Chief Justice Grunis refused to recognise publishers' general duty to issue a correction when their factual statements subsequently transpire to be flawed. Section 17 of the Defamation Act provides that a good faith defence cannot stand if the victim demanded publication of a correction or a denial, and the publisher did not comply within a reasonable time and in a way comparable to that used in making the defamatory statements. But there should be no general duty to correct or deny in the absence of the victim's demand.

Deputy Chief Justice Naor, and Justices Amit, Arbel, Danziger, Hendel, Joubran, and Vogelman concurred, although each offered some comments or reservations. Justice Vogelman restated his previously expressed opinion that compliance with the standards of responsible journalism was necessary for the establishment of a duty to publish (the second condition of the defence) and should not be tested under the rubric of 'good faith' (the first condition) as suggested by the Chief Justice. Justice Danziger observed (correctly, in my view) that the controversy need not be decided because its practical significance is negligible.

Most judges considered the publisher's duty to issue a correction when the statement transpires to be false. Chief Justice Grunis was unwilling to recognise such a general duty. Justices Arbel and Hendel opined that the publisher may be obliged to publish a correction even without the victim's demand under the good faith requirement. Justice Danziger opined that a duty to report substantial developments derives from the standards of responsible journalism which underlie the 'duty to publish'. Justice Joubran thought it was unnecessary to decide this question, because, in the present case, the public became fully aware of the inaccuracies, making any formal correction redundant. Justice Amit implied that a court cannot order the publisher to publish a correction or a denial of a false defamatory statement if the victim's action is ultimately dismissed, but did not make a conclusive decision on this matter.

Justice Rubinstein dissented, endorsing Chief Justice Grunis's analysis of the truth defence while rejecting the responsible journalism defence altogether. In his view, sec 15(2), which deals with good faith publication under a duty to publish, does not apply to journalistic publications. Justice Rubinstein believed that recognising a broad journalistic duty to publish potentially false statements would constitute an unwarranted

encroachment on reputation, hence on the constitutional right to human dignity. Thus, the original claim should be allowed, the petitioner should be awarded damages, and the respondent should inform the viewers of the petitioner's acquittal.

The importance of the case lies in the groundbreaking recognition of the responsible journalism defence, which revolutionised defamation law. The new defence covers false factual journalistic statements, which were not previously protected – because the truth defence applies only to truthful statements of fact and the good faith defence was perceived as covering opinions rather than factual statements. In addition, the Court rejected the proposed extension of the truth defence to publications that the publisher reasonably believed to be true but turned out to be false following subsequent revelation. *Dayan-Orbach* is one of the most extensive decisions in the history of Israeli tort law, spanning more than 200 pages in the official reporter with over 250 referenced legal sources. The case involved an unusual nine-judge panel, of whom eight (one in dissent) offered independent and differing opinions. The case's impact is manifested in almost 600 citations in subsequent cases and more than 100 in legal literature.