Philosophical and Legal Approach to the Tort of Negligence in the Israeli Law. Medical malpractice and non-fault insurance system.

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Research Questions

> "*(…) the general principle of the tort law of negligence:* ***to make people pay*** *for the damage* ***they cause*** *when their conduct falls below an acceptable standard or level. It is this feature that makes the tort of negligence so important.*" (Kirsty Horsey & Erika Rackley, Tort Law, 2017, p. 30)

My thesis:

Any harm caused as a result of medical negligence must prompt an appropriate response.

(***FRP₁***) What is the role of the state and society when harm is inflicted, and liability cannot be proven?

(***FRP₂***) What is the justification for implementing the no-fault system in Israeli law?

(***FRP₃***) How can the legal system radically change the relationship between the basic concepts in tort law: the injured and injuring parties, harm and fault (legal responsibility/liability)?

Introduction

This doctoral thesis concerns an important and significant issue for social life in Israel and the world. We all require medical care from time to time. We frequently do not know what appropriate treatment will serve as a remedy for our medical issue. Mistakes in diagnosis and treatment in hospitals or community medical institutions that cause harm to patients are one of the challenges that health systems around the world face on a daily basis.

Negligent medical treatment can cause severe disability, the exacerbation of an existing condition, mental anguish, pain and suffering, the loss of work capacity and even the death of the patient. A physician's role does not simply entail the provision of the correct treatment. They are responsible for the correct diagnosis, choosing the most appropriate medical procedure, monitoring the treatment and tests, as well as paying attention to the procedure for recovery after the treatment, amongst many other things.

According to the report of the Ministry of Health in Israel, there has been an increase in the number of financial demands and lawsuits against the state filed with the courts for medical negligence. The rise has not necessarily been caused by an increase in the number of cases of medical negligence, but rather by the increased public awareness of negligence, and citizens' heightened awareness of their rights. In addition, compensation cases have been ruled in favour of the injured, and this has led to a dramatic multiplication of such lawsuits.

As a lawyer who handles medical malpractice cases in Israeli courts, I have encountered many victims who were harmed as a result of medical malpractice. These individuals suffered pain and suffering, as well as great physical damage, which has severely undermined their quality of life and sometimes even caused their demise.

Receiving adequate and high-quality medical treatment is a fundamental right. Every person also has the right to the integrity and wholeness of their body. Tort law aims to provide a remedy for the harm caused and to resolve situations in which individuals suffer injury as a result of medical negligence by restoring them to their original state. However, this is not simple, since it is not possible to consistently measure the damage or mental suffering of the victim and quantify these factors as the basis for a financial payment.

This doctoral thesis explores questions of tort law and its relevance to the field of medical negligence in the State of Israel. This relates to some of the central questions of modern society, such as an individual's fundamental right to autonomy over their body as well as his or her health and self-dignity. The most difficult question that arises in this context pertains to the correct way to deal with the harm caused by medical negligence and how to contend with its consequences.

The goal of tort law in the context of medical malpractice lawsuits is to restore an injured party to his or her previous state following a case of medical negligence and return him or her to the situation which existed prior to the harm caused, or as close as possible to this state. However, this is not simple, since it is very difficult to measure mental damage or suffering experienced by the victim and to quantify it as financial payment.

It is possible to claim that the current implementation of tort law does not provide an adequate solution to calculate the amount of damage caused or a formula that defines the commensurate compensation. First, there is a lack of clarity as to how compensation can be determined in a

consistent manner, as well as a lack of consensus regarding the basis of compensation rulings when the damage is not property. Second, there is difficulty in the quantification of the damage and the determination of the compensation. How are pain and suffering valuated? How is the loss of the pleasures of life estimated? Is there a market price for the pleasures of life?

There exists a notion that no money in the world can compensate for the pains of the body and mind, for the reduction of the chances of establishing a family, or for the loss of pleasures of normal life, and that it is therefore not possible to compensate a person financially who has lost a limb or who remains with a defect for the rest of their life. Even if we fill the damaged party's home with silver and gold, we cannot correct the damage caused. How is it possible to precisely, or even approximately, estimate in money or a monetary equivalent the pain and suffering or the sorrow and shame of a person whose hand or leg has been amputated, or of a person who walks on his legs but worries in their heart that their days are numbered?

Lawsuits that are filed on account of the tort of negligence allow for financial compensation in the event that it is proven that the damage was caused due to negligence and that there is a causal link between the act of negligence and the damage.

One of the arguments that is made against the extension of compensation to non-material damage is that this damage is largely subjective. This claim has led to the view that determining such damage would be subject to the discretion of the court and is very much a case of guesswork. Among the rules for evaluating damages associated with pain and suffering, the courts have therefore determined a principle stipulating that it is essential to grant to the harmed party appropriate compensation following specific consideration of each and every case. In other words, the current guidance stipulates that it is unfitting and ineffective to use a fixed measure for compensation, and that it is preferable to evaluate the appropriate compensation for each and every case, according to its circumstances, while also relying on previous rulings and attempting to ensure consistency in order to mitigate this cognitive and legal gap.

The situation of every harmed party is individual, and the question of the harm is unique to their lifestyle. According to the economic approach to law, which appears to be currently prevalent, the guiding principle in tort law is that justice should remedy the harm equally. Unfortunately, such rulings appear to be based on quite vague convictions, especially when one comprehends that there is an ongoing debate on diverse concepts of justice and, additionally, there are no well-defined

legal standards concerning the evaluation of nonpecuniary harms – those without a clear financial value. In this context, measuring and making sense of pain and suffering to estimate the compensation owed to the harmed party results in vast inconsistencies.

The courts that implement rulings pertaining to medical malpractice are constantly striving to strike a compromise between two conflicting interests. On the one hand, a claimant's demands to be protected against damages, and on the other, a defendant's interest in not being restrained; the proper administration of the law includes weighing the conflicting interests in the balance sheets of social value, in a manner that will reduce the collision between individuals, and increase the public good.

There are several problems that I explore in this research. First, the concepts of pain and suffering are analysed, as are the legal standards for evaluating nonpecuniary harm. Second, with regards to legal theory and related philosophy, a deeper reflection is provided on torts: their justification(s), their relationship with the concepts of justice and responsibility, their functions and so on. Third, the concepts of medical malpractice, the duty of care, and of a reasonable person, are rethought in the context of the above-mentioned issues. The theoretical understanding of the role of the issued ruling, including the role of a judge and the addressees of the ruling, is deepened in their relationship to torts.

A no-fault compensation system for medical injury compensation and insurance model may be the answer to the malpractice crisis everywhere in the world today. Allowing doctors to continue after an error occurs, and for them to remain connected with the patient and the hospital system, can improve the entire health network.

A no-fault system is a legal approach that has been adopted in several countries in order to regulate compensation for patients due to injuries inflicted in the course of medical treatment. However, there are often substantial differences between the mechanisms implemented in each country that has adopted the system. While common law legal systems apply the tort law approach, whereby compensation is granted to the patient that has proven that the medical provider bears responsibility for the harm caused to them, the no-fault system is different. The common denominator and shared principle of all no-fault systems that distinguishes them from common law tort methods, is that the provision of compensation is contingent not on proving the responsibility or negligence of the medical provider, but rather on showing a causal connection

between the treatment received and the injury. The driving principle behind the no-fault system is the removal of the requirement of liability. The simplification of the legal procedure reinforces the sense of distributive justice and fairness vis-à-vis the patients for whom the outcome of the medical treatment was not what had been expected.

When I analyse the "no-fault" method as adopted in other countries, but consider the tradition, religion, institutions, legislation, and political and economic reality in the State of Israel, I see the need for pragmatism and flexibility when adopting foreign concepts and norms. However, I believe that great importance is attached in Israel by both the state and citizens to solidarity and the provision of social conditions, and more generally, the concept of society's welfare. This therefore informs my belief that the no-fault concept can succeed and prevail in Israel.

Structure

This doctoral dissertation is based on philosophical approaches to medical negligence in Israel, with particular consideration given torts of medical negligence and compensation for pain and suffering.

The thesis is divided into four chapters:

1. **An Overview of the Israeli Legal System**: the legislative process in Israel; the court system; the judge's perspective; the Israeli constitution (or lack of); and the conflict between religion and state. This chapter provides the historical context in order to answer the research question.

2. **Tort Law**: analysis of tort law ordinance and its foundation in the common law; evaluation of the condition for liability of negligence, including violation of the duty of care; negligence and malpractice, with reference to the concept of the reasonable person test and the reasonable physician; as well as philosophical approaches relating to corrective justice. This chapter provides the constitutional framework for exploring the need to change the relationship between the parties and the many challenges in the existing legal system.

3. **Medical Negligence in Israel:** medical malpractice; nonpecuniary harm and intangible harm; the patient-physician relation in tort law and philosophical approaches to negligence, such as economic approaches and theories of corrective justice; as well as an analysis of

the conflict between morality and law. This chapter establishes the philosophical foundations for an in-depth analysis of the approaches and values in society and existing policies. This facilitates the discussion in the final chapter on the solution: the adoption of the no-fault legal system in Israel.

4. **No-fault Solution**: I compare countries where the judicial authorities have implemented a no-fault compensatory system. Through these case studies and their achievements in the world of jurisprudence, I present the case for changes in the Israeli legal system and the need to transition to a different compensatory system when dealing with tort law. Thus, I conduct a comparative legal study with the goal of demonstrating how legal institutions in other countries operate and thereafter highlight the differences and similarities between them and Israel. I analyse the different social, political, economic and religious goals that inform no-fault systems in these various countries, particularly how religious values influence decision-makers. I also present the no-fault solution with regard to financial compensation; I propose a no-liability option for insurance compensation for injured parties as a result of medical negligence and non-pecuniary harm. This chapter includes a comparative study of different approaches throughout the world and an exploration of the philosophy of justice in light of the 'non-fault' mechanism. This chapter outlines the solution for all the problems described in the prior chapters through a comparative study and analysis, in order to answer the research questions.

Chapter I The Legal System in Israel

The State of Israel gained its independence in 1948. Israeli law is a so-called mixed system that entails elements of common law and civil law. Its constitution is unwritten; however, the quasi-constitutional Basic Laws are widely considered to amount to constitutional laws. The Israeli Parliament (Knesset) has enacted 13 Basic Laws. All but two of these laws can be modified with a simple majority. The State of Israel is a relatively young country, with a society that is diverse in terms of its religious denominations and ethnic groups. The identity-creating and social solidarity functions of Israeli law are thus very significant.

In this chapter I present the historical context of the emergence of a new state, a state in which a system of law and institutions has been developing in a normative manner, a state that has now existed for 75 years and has developed significantly while remaining a society based on solidarity and Jewish values.

My first chapter explains the legacy of the mandatory law that existed in the country before its establishment in 1948. I write in detail about the development of the legal system and its institutions, the debate about the constitution in Israel, and opinions for and against a constitution until the Harari Compromise in 1950. This proposal stated that the basic laws would be established, and that in the future they would be converted into a constitution. This therefore underscores that, from the outset, enacting laws was at the basis of the state building and the creation of an ethos in Israel.

I explain and present the role of religion in the state, the tension that has arisen in institutions and law, the role of Jewish law, and the tension between the State of Israel as a Jewish and democratic state – something that sets it apart from other countries in the world and is a justification in my doctorate for changing the compensation system in the light of its ethos, goal, and values.

The State of Israel is not only founded on Jewish values, and certainly not on the strict observance of Jewish law. First, the laws of the state are not made by a higher power but by a majority of representatives of the people; and since they are made, they can be amended, replaced and repealed according to the need of the hour. Second, neither the government nor any other authority or person is entitled to violate a person's rights, otherwise than pursuant to law, as interpreted in a competent court ("The Rule of Law"). Third, the values of religion, all the commandments of the covenant between man and God, and all the beliefs and opinions, are subject to the conscience and free choice of each and every person.

The chief concern of Chapter I is to reveal the specific legal, political and social principles underlying Israeli law.

Chapter II Tort Law in Israel

The main concern of Chapter II is to characterize the tort of negligence in Israeli law. Thus, I address the specificity of its development and the influences from English law.

In this chapter, I provide an overview of the characteristics of Israeli tort law, based on the statutory law that was adopted during the mandate period. I define the Civil Wrongs Ordinance (CWO) and outline its development before addressing tort law and the legal and philosophical concepts of duty of care and justice, fairness and reasonableness that began to enter tort law in accordance with the needs of society. I also discuss the precedent that existed during the mandate period, which was not binding in Israeli law. I illustrate how most of the burden of tort law is in the tort of negligence, and the duty of care that the authorities are obliged to guarantee.

In this chapter, I analyse the philosophical approach of restorative justice in tort law and medical malpractice, as well as the different approaches concerning the definition of restorative justice in society and in tort law. Furthermore, I detail the goals of providing compensation to the victim, efficiency, and deterrence in society, in Israel.

The whole analysis provides a solid basis for solving my research question with the proposal to provide compensation for all victims of medical negligence by changing the compensation method. I identify the values that underline the state and, in light of these values, the need for the proposed change, which is outlined in the fourth chapter. I outline in detail how Jewish law supports this change to the legal and compensatory system and its approach to the wrong of negligence. Finally, I examine the challenges facing judges in terms of rulings.

The chapter also reviews the issue of deterrence, which often results in defensive medicine and places a heavy financial burden on the economy. The chapter answers the need to strike a balance between the interests of the state and injured people, thereby creating a robust system that leaves the victim with compensation. It also provides solutions for doctors to work without fear of lawsuits or engaging in defensive medicine, and for judges who are forced to reject compensation for lawsuits. This will ultimately create a more egalitarian society that cares for the weak population.

Chapter III: Medical Negligence and Nonpecuniary Harm: Pain and Suffering

Chapter 3 Part I (one of three parts): The Health System in Israel:

In this chapter, I present the healthcare system in Israel and its history. I elaborate on the tort of negligence and assess the rulings of the High Court, while citing the concept of the duty of care. I move on to an explanation of the conception of pain and suffering in Israel, and I provide a detailed analysis of the main problems regarding compensation for pain and suffering, the lack of pre-defined criteria, and the difficulties involved in estimating compensation for the intangible damages constituted by the victim's pain and suffering. My legal evaluation highlights that many victims are left without compensation for their injuries.

Chapter III lists and explores the most important problems concerning medical malpractice from the perspective of Israeli tort law, legal and social policy, and the practice of adjudication. The issues of pain and suffering are carefully addressed. Particular emphasis is placed on the goal of tort laws and even medical malpractice lawsuits, which is "to restore the situation to its previous state" (*restitutio in integrum*). One of the most common legal means for restoring the situation in which the harmed party was before the harm was caused is to award them compensation. In other words, all compensation awarded to the harmed party aspires to restore them to the situation before the harm was caused.

However, when the lawsuit relates to pain, suffering and mental anguish, then the use of this means raises serious problems. This is because such an estimation of the mental anguish or physical suffering that would enable the quantification of an appropriate financial payment is extremely difficult.

It is very difficult to estimate the mental anguish or physical suffering that the harmed party experienced and to quantify this as compensation in the form of a financial payment. The Court must place at the disposal of the harmed party a sum of money that can enable them to make acquisitions that will take the place of what they have lost. Therefore, if there is damage in the form of pain and suffering and awareness of the loss of the pleasures of life, then such compensation shall be awarded that would enable the harmed party to acquire other pleasures and balance out the harm inflicted.

The Theoretical Template for the Foundations of Justice (Part II)

The issue of health care in Israel occupies a very important place in public discourse, with many questions included on the agenda of the legislature and the health care services. The Israeli Health

Law opens with the statement that the law will be founded on values of justice, equality, and mutual assistance. Is the purpose of the law achieved? Are its goals fulfilled? Is the State committed to a health care system based on the principles of justice and equality, respect and assistance? Are there options in the existing healthcare system to reduce health gaps amongst different parts of the population, including underprivileged groups in society, and to reduce the increasing gaps in the provision of medical services? Is the current legal system adequate in protecting the health rights of Israeli residents?

These and other questions are discussed and analysed in this subchapter. In this section, I also present different philosophical approaches to tort law. I address the issue of justice in the healthcare system and the challenges of interests and equality between parties. I outline the various approaches to the distribution of resources in the healthcare system and proper treatment of citizens, the optimal and most efficient distribution of limited resources in the healthcare system, the physician-patient relationship, and the doctrine of informed consent.

The chapter analyses prior compensatory rulings and the rapidly changing society and political situation, which require a radical reform of the legal system.

3 Part III: Problems and Challenges in Tort Law

In this subchapter, some of the problems in tort law in general, and medical negligence in particular, are presented. There are two main theoretical approaches to tort law. The first is based on the principle of justice. In this framework, the injuring party that caused harm to the injured party in the act of wrongdoing violated the level of equality between the two. As a result, it is incumbent on the injuring party to restore the injured party to their previous state. According to this approach, the purpose of tort law is to ensure that there is justice between the two parties, without seeking to apply justice to third parties or society as a whole. The 'corrective justice' approach even mandates that the justice done between the two parties is carried out with a focus on the interactions between them that led to the damage, without relating to the wealth or intentions of the parties.

According to another approach, the purpose of tort law is to create an optimal deterrence to achieve economic efficiency or, more specifically, to reduce the social costs involved in medical accidents and thus increase economic welfare. For proponents of this school of thought, it is preferable for tort law not to focus on relations between the harming party and the harmed party, but rather on

the consequences of the legal ruling on third parties, thus primarily on other potential claimants and defendants.

These two approaches – justice-based and deterrence-based – are theories and norms, simultaneously: They both claim to describe tort law as it is, but also to justify the law. Both approaches advocate different solutions for specific cases.

However, in specific cases the deterrence approach may not impose liability on the negligent party. In other cases, the justice approach will also seek to refrain from imposing liability; for instance, in cases in which the injuring party is not at any fault, whereas the deterrence approach is liable to decree imposing liability in such cases.

The leading theorists of the deterrence approach advocate that tort law must aspire, alongside pursuing optimal deterrence, to spread the losses and even reduce the administrative costs involved in implementing tort law. Others[1] believe that tort law must contribute to the shaping of values in society. Some thinkers see tort law as a tool for achieving distributive justice. These considerations are related to the way in which goods and burdens are unjustly distributed between the various members of society. According to this approach, a legal concept that works systematically to benefit lower socio-economic groups or disadvantaged minorities is preferable to a neutral legal concept.

In this chapter, I present problems in tort law, deterrence, defensive medicine, issues in approaching the court when filing a claim regarding negligence, challenges facing the doctor-patient relationship, the conflict between the doctor's interests in treating the patient, and the need and fear of lawsuits. Furthermore, I analyse the court's rulings regarding compensation for pain and suffering according to three different approaches, each of which has advantages and disadvantages. Can these problems be solved by changing the compensation system? My research leads to the argument that a no-fault system would provide a solution to balancing the interests in the physician-patient relationship and society's attitude toward negligence claims. This is the focus of the chapter.

Chapter IV: The No-Fault System

[1] G.J. Stigler, *The Development of Utility Theory, Essays in the History of Economics* (Chicago,1965).
I. Gilead. *Bruce A. Ackerman — Reconstructing American Law*, 20 Isr. L Rev. (1985)581,582-587

This chapter attempts to solve the research questions posed by the entire study. Adopting the no-fault method for compensation for medical negligence will provide a solution for the relationship between the injured and harming parties. It provides a societal framework to ensure the well-being of all residents, and it will help to enshrine the basic rights of residents of a welfare state.

I review the no-fault compensation method used in different countries by conducting a comparative study of the systems in the following states: New Zealand, Sweden, the USA, and Israel. The comparison is in-depth and multi-layered, including an overview of the system and characteristics of the country in question; the eligibility criteria for compensation; approaches to legal proceedings; funding; financial coverage; the compensatory rights that injured parties are eligible for in the context of the no-fault method; the social and constitutional goals; and the health system in each country.

I introduce the comparison through multiple legal, political and social angles. The comparative law analysis is carried out by presenting the social and constitutional principles in which the no-fault system is implemented. Furthermore, I conduct a comprehensive analysis of the approaches to tort law and its foundations. I demonstrate that the countries that I selected for the purposes of comparison were chosen because they were facing the same challenges as Israel, even though their institutional choices were different. Furthermore, these countries have been widely researched, with ample data available to us for the purpose of comparative study. I suggest that in light of the values and social goals these countries and Israel have in common, and these countries' adoption of the no-fault system, there is a compelling argument for Israel to also implement this method.

The comparative law review that I carry out does not only relate to the constitutional perspective but also pertains to justice in the granting of compensation in the absence of liability for damage. Theories in the legal doctrine are not always connected to the "legal reality", and an analysis of court rulings does not always reflect this difficult reality. This is due to the need to work according to rigid legal regulations. Many damages involving pain and suffering are often inflicted without the injured party receiving compensation due to other considerations, such as budgetary limitations and the duration of the trial, as I described in the previous chapters.

Therefore, it is imperative to fully explore the concept of a no-fault system because the goal in tort law of restoring the situation to its original state will not always be realized. It is thus essential to measure the current situation using other tests, such as justice, efficiency, and social goals. As

explained in this chapter, the granting of compensation in the no-fault system as a social solution is also favourable for the perpetrators of damage.

CHAPTER I

THE LEGAL SYSTEM IN ISRAEL

The Legal System in Israel

Introduction

The legal system in Israel draws extensively from the Western legal tradition, sharing the defining characteristic of the rule of law; namely, that all members of a society are considered equally before the law.

At the centre of the legal perception lies the individual – both their rights and duties. Israel, being a democratic sovereign state, with a mostly secular legal system (although one inspired by certain Jewish values), and a large religious population, albeit a minority, is faced with the challenge of balancing the need to enact laws which operate according to the needs of society at large, whilst acknowledging the Jewish ethos and character of the state.

Israel is a developed, yet simultaneously evolving society. At the foundation of the legal culture lies the rational human being, as articulated by Aristotelian philosophy, according to which this agent possesses the intellect necessary to make rational decisions and define goals. The law is a means that can assist rational agents to achieve such goals.

As part of the Western legal tradition, Israeli law has been significantly influenced by English common law, yet with time has adopted its own legal institutions, traditions, and principles. All the following derive from common law: the principles of trust, precedent, evidence, and legal prevention; and the adversarial system in criminal law, defined by two advocates representing their parties' position before an impartial person or group of people, typically a jury or judge who seek to ascertain the truth based on the evidence presented before them and make a ruling accordingly. Moreover, Israel has adopted interpretative law,[2] meaning the judicial process of determining the intended meaning of a written law or document, which thus empowers judges to make rulings accordingly. In this way, Israel has recognised the judge's status in society as a figure authorised to interpret the law. Lastly, Israel has applied the principle of estoppel, according to which actors are forbidden from making statements that contradict what is implied by the previous actions or assertions made by the same individual.

Meanwhile, the pyramidal structure[3] of the Israeli legal system also derives from the common law and consists of three courts: The Supreme Court, the District Courts (compromising of five courts according to district) and 28 Magistrates' Courts. Moreover, the pyramidal framework is also reflected in the number of judges at each level. For instance, at the Supreme Court level, 15 justices are appointed by the President of Israel, upon nomination by the Judicial Selection Committee. The number of justices on the Court is determined by legislation in the *Knesset* (Israeli Parliament). At lower levels, there are significantly more judges. Lastly, the legal system includes national and regional labour courts.

[2] Interpretation and Judgement: Foundations of the Israeli doctrine of interpretation. (Hebrew Year 5745 – 1984-1985)

[3] Cohen, Y. (1989) The Supreme Court and the Development of the Law in Israel. P.287

However, above all, the *Israelization* of the common law, and the perception that a judge in Israel is not only authorised to interpret and apply law, but also empowered to create it, has derived from the common law. The uniform structure of the court system is characteristic of the Israeli common law too. Thus, even when a branch, or several branches of law, have gone through partial processes of continentalisation (for instance, the civil law has over the past few decades undergone a continuous process of codification on the basis of the British model), the Israeli legislator has nevertheless retained an approach originating from the time of the British Mandate over Palestine, which originated in England and is based on the assumption that judges are active rule makers. This idea does not correlate with the common perception of the continental system regarding a judge's function.[4]

The Application of English Law in British Colonies

The history of British Mandate law in the Land of Israel began with the British conquest of the Ottoman-controlled territory at the end of World War One. The British inherited the existing legal system that operated in the region at the time – Ottoman Law. For hundreds of years, Ottoman Law combined Islamic *Sharia* law and original legislation enacted by the Ottoman sultans – the two existed side by side. However, during the course of the 19th century, Ottoman Law underwent a process of change. In the middle of that century, the Ottoman rulers concluded that the only way to preserve the diminishing power of their empire *vis-à-vis* the Western powers was to enact sweeping reform of the Ottoman regime; as part of those reforms, the sultans also changed the legal system applied throughout the empire. They adopted a list of codes based on Western law (principally French) and repealed large swathes of the formerly applied laws - mainly the Islamic parts, which had been applied throughout the empire up until the mid-19th century.[5]

There were branches of law in which the sultans partially retained Islamic law precepts. The most important was civil law, which continued to be based on Islamic religious law—*Sharia*, also after the reforms. However, even this field of law exhibited a certain Western influence, since the Ottoman regime gathered the civil rules of *Sharia* into a Western-style code—the *Mecelle*. The *Mecelle*'s written form was partially influenced by the structure of European civil codes; but the source of its norms was Islamic religious law. Other areas of pre-reform Ottoman law, for instance family law, remained almost unchanged. As consequence of the reforms, a new legal system emerged, in which French, Islamic and Ottoman norms all intermingled. The impact exerted by the reforms on the daily life of the subjects at the periphery of the Ottoman Empire, such as Palestine, is unclear. It is possible that the impact was negligible. In the 19th century a large proportion of the population living in Palestine did not use the Ottoman regime's legal systems, but regulated their affairs through non-governmental legal systems, such as the religious tribunals or the European Consular tribunals established under the Capitulation Treaties. In any event, when

4Aharon Barak "The Israeli Legal System: Tradition and Culture" [Hebrew] Hapraklit, Mem (5752), pp. 197, 204; Yoram Shachar, "History and Sources of Israeli Law", Amos Shapira and Keren DeWitt-Arar (eds.), Introduction to the Law of Israel, The Hague: Kluwer Law International 1995, p. 1.

5 See e.g.: Moshe Ma'oz, Ottoman Reform in Syria and Palestine 1840-1861: The Impact of the Tanzimat on Politics and Society, Clarendon press, Oxford 1968.

the British conquered the Land of Israel they encountered the Ottoman legal system, which had undergone a partial process of 'westernisation'.

What did the British do with this legal system they encountered? Palestine was far from being the first place to be colonised by the British; it was rather one of the last places to join the British Empire, at a time when it was already in a process of decline. The British had therefore acquired experience of conquest and dealing with the local legal systems which existed in the occupied colonies. They never formulated a uniform policy for dealing with the legal systems in the conquered lands, but one could say that there were certain elements that characterised British legal policy throughout the empire.

British policy at the end of the 19th century and the beginning of the 20th aimed to preserve, as far as possible, the legal *status quo* in the colonies, in particular those colonies which had a developed a local legal system preceding the British conquest.[6] The British authorities had no interest in antagonising the local population, which could potentially occur following the wholesale replacement of the existing legal system with a new one. However, one cannot say that the British entirely retained the legal systems which they encountered throughout their conquests. The longer a certain colony was subject to British rule, the deeper British Law penetrated the occupied colony. This process of penetration of English law, referred to as "Anglicisation", was at times the result of concerted and planned effort on behalf of the British rulers of the colony, or that of the Colonial Office in London. The process, however, turned out to be the product of circumstance. Some local legal systems were more impervious to the penetration of English Law, and others less so.

In certain colonies, the English established a single governmental legal system, but in other parts (in particular throughout the African colonies), they created a 'Dual Legal System'. This system upheld an institutional distinction between the governmental legal system that applied Western norms, and the native legal system that applied local 'customary' norms (or at least those perceived by the British as local customary norms). All these factors mattered for the process of differentiating legal systems within the various British colonies, as well as for the extent to which the English Law penetrated the colonies. Some colonies, such as in the Caribbean Islands had legal systems very similar to the legal system at the heart of the empire – England. In other colonies, such as those in Africa, English law had very little impact, and certainly not in any practical way: the majority of disputes were adjudicated by means of custom-based courts, which received the

[6] For examples of different discussions of the British colonial legal policy in the various colonies of the Empire, see: Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*, London 1962, pp. 80-81 (hereinafter: Elias, *British Colonial Law*); H.F.Morris, 'English Law in East Africa: A Hardy Plant in an Alien Soil', in: H.F. Morris James S. Read (eds.), *Indirect Rule and the Search for Justice: Essays in East African Legal History*, Oxford 1972, p. 73 (hereinafter: Morris, 'English Law in East Africa'); KonardZweigert, Hein Kötz, *Introduction to Comparative Law*, I, trans. by Tony Weir, 2nd ed., Oxford 1987, pp. 233-245 (hereinafter: Zweigert and Kötz, *Introduction to Comparative Law*); Diane Kirkby, Catherine Coleborne (eds.), *Law, History and Colonialism: The Reach of Empire*, Manchester 2001.

blessing of the British rulers, or through the agency of extra-governmental native systems that had existed before the conquest.[7]

The degree to which English Law was imported and thereafter imposed varied not only from one colony to the next, but also varied between the various branches of law within the law of any given colony. Two fundamental legal distinctions affected the extent to which English Law replaced local law: First, the distinction between substance and procedure; and second, the distinction between the private sphere and the public sphere.

I will first address the distinction between substance and procedure. The process of replacing the procedural aspect of the law (the laws of evidence, civil and criminal procedure) took place rather than replacing the substantive aspect of local law (such as property law, family law, or contract law). Replacing local laws of evidence and procedure with British laws of evidence and procedure was significant from a practical standpoint, since the governmental legal systems in the colonies were staffed by British judges and counsel, who were trained and specialized in English procedure and English laws of evidence. Thus, one of the chief objectives standing behind the process of replacing the procedure was to exercise control over the law of a given colony, in particular, over the application of law.

The other objective behind replacing the procedure was to increase the efficacy of the colonial legal systems, at least as far as the British were concerned. Local legal systems, such as the Ottoman one, were often described by the British and other westerners as corrupt.[8] There also were British claims to the effect that their principal contribution to the law of the colonies was not in changing local substantive law, but principally in the manner in which local law was enforced. The British, according to the claim, gave the native population a legal system that enforced local norms; but, contrary to the local systems, it did so efficiently and in an incorrupt manner. Thus, in British texts, the claim is often found that the British 'civilised' the local law throughout the colonies with ideas such as 'the Rule of Law'. For example, "supremacy of law…, which embodies three concepts: the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen; the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations."[9] The notion of the rule of law was also at the heart of this judicial system. This idea can be roughly defined as "The authority and influence of law in society, especially when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes

[7] See, e.g. Elias, *ibid*., at 80-81; Morris, *ibid*., at 233-245; Terence Ranger, "The Invention of Tradition in Colonial Africa" in: Eric Hobsbawm, Terence Ranger (eds.), *The Invention of Tradition*, Cambridge 1992, pp. 211, 247-262.
[8] A similar (but not identical) example of that approach can be found in the manner in which Max Weber described Islamic law as law that cannot ensure certainty. *Cf*. Max Rheinstein (ed.), *Max Weber on Law in Economy and Society*, Cambridge, MA 1954, p. 213. For a critique of Weber's theory of Islamic law *cf*. Haim Gerber, *State, Society and Law in Islam: Ottoman Law in Comparative Perspective*, State University of New York Press, Albany 1994.

and processes."[10] This concept appeared in stark contrast to the native legal systems, where, it was claimed, judges would rule according to their discretion, which left the law susceptible to corruption and extortion, rather than operating according to hard and fast rules, where equality before the law was the chief principle.

It is difficult to ascertain to what extent the British description of local systems as corrupt was an accurate one, and how far it was a description that was intended to justify British colonialism.[11] It is even more difficult to ascertain whether the British did in fact succeed in creating more efficient legal systems in the colonies, as compared with the systems in place prior to colonialisation. In this regard, it is interesting to note a story that appeared in one of Norman Bentwich's books, suggesting that it was precisely the (alleged) lack of corruption in the British system that actually caused crime to rise. Bentwich, a Jewish British jurist, who served as the Attorney General to the British Mandatory Palestine's government[12], relates that in the early days of the British Mandate, an Arab citizen of Haifa complained to him that because British judges could not be bribed, crime in the nation actually increased. The Arab's claim (as relayed by Bentwich), was that during the Ottoman times, 'crime didn't pay', because criminals were forced to pay over all their criminal gains as bribes to the judges. Once the British conquered Palestine, the need for such bribes ended, and with it, crime began to pay off, and therefore flourished.[13]

Importing English Law was also the consequence of a lack of familiarity with local law. Thus, for instance, Anton Bertram, an English jurist who was the Attorney General of the Bahamas, a judge in Cyprus, and the Chief Justice of Ceylon, stated in 1930—drawing on his personal experience—that the "most surprising characteristic of our legal system is the diversity of legal rules which our courts apply. Judges in the various supreme courts [of the colonies] are promoted from one legal system to another, and immediately, once they arrive in the new colony, are required to operate a legal system … which is entirely foreign to them."[14]

Furthermore, it is worth noting that importing English Law into the colonies was not always an intentional process. When new legal questions arose in the legal system of a certain colony, the English lawyers and judges in the colony naturally turned to English Law to resolve the problem; in this manner, English Law was imported into the colony in an inadvertent manner.[15]

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[10]"rule of law." Oxford Reference. Date of access 22 Jan. 2023.
<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100433129>

[11] For a specific discussion of the question of bribes in the legal system during the time of the Mandate, see Nathan Baron "The Lost Dignity of the Supreme Court Justice: The Failure to appoint Justice Gad Fromkin to the Israeli Supreme Court" [Hebrew] (Part B) *Catedra* 102 (*Tevet* 5762) (hereinafter: Baron: 'The Lost Dignity'), pp. 159, 183-186. For a general discussion of comparative imaging of English law versus local law, see: Zweigert, Kötz, *Introduction to Comparative Law*, op. cit., pp. 235, 239, 241; Martin Chanock, *Law, Custom and Social Order*, Cambridge 1985, p. 5;

[12]Breitman, R. (Ed.), McDonald Stewart, B. (Ed.), Hochberg, S. (Ed.). (2007). *Advocate for the Doomed: The diaries and papers of James G. McDonald, 1932-1935*, page 144.

[13]Bentwich, N. (1961) My 77 years: An Account of My Life and Times 1883-1960, Philadelphia. p. 276.

[14]Cf: Anton Bertram, *The Colonial Service,* Cambridge 1930, p.152.

[15] See: Jorg Fisch, "Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion", in W.J. Mommsen and J.A. de Moor (eds.), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia*, Oxford 1992, p. 1.

Regardless of whether the British colonial legal system was intentional or unintentional, or whether it was more efficient and less corrupt than the local, pre-conquest legal system, there can be no doubt that the British caused a massive change of procedure and evidence laws in a significant part of the territories they conquered.

Changing the norms of substantive local law was more difficult than changing native procedure; however, here too a process of Anglicisation was witnessed. Branches of law perceived as 'private' (or 'religious')—such as family law, inheritance law, and to a certain extent property law—did not undergo a process of Anglicisation. Intermediate fields of law, such as contract and tort, were replaced by English rules, but this process took many years. Finally, the 'public' spheres of law, criminal law and commercial law, for the most part, did undergo a process of Anglicisation.[16]

Application of English Law in Mandatory Palestine

The distinction between procedure and substance, and that between the public and private spheres, also influenced the process of the Anglicisation of the law in Mandatory Palestine. The Land of Israel, or pre-Mandate Palestine, was conquered by the British in 1917-1918. According to the rules of international law, the occupying power is required to maintain the legal *status quo* in the occupied territory; and indeed, in the early years of the British rule of Palestine, the British did not impose a great deal of new legislation. However, in 1922, the League of Nations granted Great Britain a mandate over Palestine. Under the terms of the mandate, the British were required to ensure "political, administrative, and economic conditions which would ensure the establishment of a Jewish homeland [in Palestine]."[17] That provision permitted the British to effect far-reaching legal changes in the laws of Palestine. This was therefore a crucial moment in laying the groundwork for the future establishment of a Jewish state in British Mandate Palestine, as it essentially granted legal recognition from the international community and ensured that the future legal system would be based in part on the British method.

The changes to Palestine's international status caused the British to re-organise the legal system, which was reflected in the 'King's Order in Council – 1922', a constitutional document that defined the structure of the various authorities of the British Mandatory regime. The King's Order in Council foresaw the establishment of a legislative assembly that should (at least partially) represent the local populace—both Arab and Jewish. However, owing to disagreements between

[16] See Elias, *British Colonial Law*, op. cit., pp. 5, 137, 141, 147; *cf.* Zweigert,Kötz, *Introduction to Comparative Law*, op. cit., pp. 235, 241-242; Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases and Materials,* Albany 1975, p. 57; Lawrence M. Friedman, "Law and Social Change: Culture, Nationalism and Identity" in*4 Collected Courses of the Academy of European Law,* ed. by the Academy of European Law, Kluwer 1995, pp. 253-254; Yoram Shahar "The Sources of the Criminal Law Ordinance, 1936" [Hebrew] in *EyuneiMishpat*, *Zayin* (1979), p. 75 (hereinafter: Shahar "Sources"). Noted is the fact that the British conception of the 'religious' sphere was not necessarily identical to the local one. The British tended to see family law as a 'religious' field but contract law as a 'secular' one; however, such a division would likely not be accepted as is by a Jewish or Islamic jurist. Thus, for instance, the prohibition of usury is an example of a norm that is 'religious' in certain legal systems, but considered 'secular' in others. For a discussion of this (in the Indian context) see: Richard W. Lariviere "Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past", *Journal of Asian Studies,* 48 (1989), pp. 757, 758;

[17] Malachi, E. (1952), The History of the Legal System in the Land of Israel. Second Edition. Tel Aviv

Arabs and Jews concerning the composition of the assembly, it was never ultimately established, and both the legislative branch and executive authority were vested in the British High Commissioner. This was illustrative of the great challenges posed by the two communities residing in the land and the impact on the establishment of a coherent legal system.

The King's Order in Council of 1922 also dealt with the establishment of governmental courts and empowered the religious courts of the various congregations to adjudicate on certain matters of family law and inheritance law. Section 46 of the King's Order in Council laid out the rules according to which the government courts would have to adjudicate. Section 46 prescribed that the government courts would apply the Ottoman and British Mandatory legislation; but, in the event that the legislation would not provide grounds for answering the legal question facing them, the government courts would use the "principles of common law and equity" from English Law, as long as they are suitable to the conditions of the land and its inhabitants.[18]

What is evident from all this, is that the Order in Council envisaged two central mechanisms to import English Law. The first was importation by the agency of legislative pronouncements issued by the High Commissioner; the second was importing English Law through case law, under the guidance of Section 46, in cases in which the Ottoman and Mandatory legislation did not apply.

Over the course of the three decades of British Mandatory rule over Palestine, the Mandatory legislator replaced some of the Ottoman laws with the Mandatory Ordinances, which were based on the British or British-Colonial legislation. The replacement process reflected the distinctions between substantive law and procedure, and between the public and private domains, as mentioned above. The British began the process by replacing the procedural and commercial aspects of Ottoman Law, and later, turned their attention to more 'private' aspects of law. In the twenties, the British replaced the Ottoman Commercial Code, the Ottoman Criminal Procedure Code, as well as certain Ottoman rules in the laws of evidence. Over those years, a more orderly system of land registration was also put in place, and planning and building laws were enacted, as well as other laws designed to regulate the use of land by the indigenous population.[19]

The legislative processes of the twenties were presided over by Norman Bentwich. As a fervent Zionist and delegate at the annual Zionist Congress[20], Bentwich was eager to aid the Jewish settlement of the land, and it appears that for this reason he focused his efforts on generating modern legislation in the field of commercial law which (so he assumed) would assist Jewish

[18] Section 46 was based on similar legislation in other parts of the British Empire. This legislation attempted to balance conservatism and change, by declaring that the courts would apply the local law, and turn to English law only in the event of a 'lacuna' in local law; *Cf.* more generally, Gad Tadeski, "The Problem of Lacunae in the Law and Section 46 of the King's Order in Council" [Hebrew], *Research into Our Law*, 2nd edition, Jerusalem, 5719, pp. 132-188; Uri Yadin, "Reception and Rejection of English Law in Israel", 11 *International and Comparative Law Quarterly* 59, 1962, p. 61;Zweigert,Kötz, *Introduction to Comparative Law*, op. cit. pp. 221-222, 234, 237-238.

[19] See e.g.: Malhi, *Legal History*, op. cit., pp. 10-105; Kenneth W. Stein, *The Land Question in Palestine, 1917-1939,* Chapel Hill, NC 1984; Scott Atran, "Le Masha'a et la Question foncièreen Palestine, 1858-1948", *Annales* 1987, p. 1361; "The Legal System", *Israel Yearbook*, 1953, p. 85.

[20]Norman Bentwich (1962). *My Seventy Seven Years.* London: Routledge & Kegan Paul. pp. 21–23.

immigration and settlement.[21] Bentwich's interest in commercial law, and relative neglect of other legal branches, was also the result of his desire to consider the differing needs of the two national communities in the Land of Israel, namely, the Arabs and the Jews. Bentwich wrote in his papers that "similar to a circus performer who simultaneously rides two horses, one is slow [meaning the Arabs] and the other fast [meaning the Jews]."[22] The solution he found to this problem was to limit legislation to certain legal branches, while retaining the local law in others. "The principal impulse to legislate in Palestine—Bentwich wrote in 1932—was the demand for modern laws on behalf of the progressive population immigrating to Palestine … from Europe [meaning the Jews]."[23] The Arabs, on the other hand, he stated, would be "permitted" to retain the legal rules controlling "contracts and other simple transactions [of theirs]."[24] Bentwich's perception again highlighted the challenges of importing, establishing and implementing a coherent legal system in a land with two conflicting communities.

It is interesting to note that the legislation of the twenties mainly brought about a replacement of the French segments of Ottoman Law. The Ottoman Civil Code (the *Mecelle*) and Ottoman Land Law, Bentwich said, "are perceived as belonging to the Eastern and Islamic tradition" and for those reasons it was decided "to leave them generally in force."[25] However, he added, "the same cannot be said of commercial law. No sanctity of religion or tradition enshrined the Ottoman Commercial Code, which was originally based on French Law, and the provisions of that Code, imported into the empire in 1860, did not at all suit a country in which, under the auspices of British administration, the project of the people with the most developed commercial instincts [that is to say the Jews] was under development."[26]

The conscious use of legislation as a means of encouraging development of the land and promoting the Zionist enterprise seems to have disappeared in the thirties. One reason was likely Bentwich's resignation in the early thirties, as the result of pressure from both the Arab residents

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[21] See Norman Bentwich, *England in Palestine*, London 1932 pp. 273, 277 (hereinafter: Bentwich, *England in Palestine);* Bernard Wasserstein, *The British in Palestine*, London 1978, pp. 91, 148-151; The pro-Zionist character of the legislation was criticized by certain Brits within the administration. See, e.g. Charles Robert Ashbee, *A Palestine Notebook.1918-1923*, London 1923, pp.234, 269-270. For the claim that British legislation and case law basically served the interests of the Zionist movement, see also Mark Levine, "Conquest Through Town Planning: The Case of Tel Aviv, 1921-1948", *Journal of Palestine Studies*27, (1998), p. 36. A different description from Bentwich who opposed anglicisation (at least the anglicisation of the criminal law) can be found in Shahar *Sources*, op. cit., pp. 105-106. *Cf.* Yoram Shahar "Raped According to Law" [Hebrew] *EyuneiMishpat, Het*, (1982) p. 649, at 675, "The Legislator's Intention in 'Intention'", [Hebrew] *MehkareiMishpat, Bet*, (1984), p. 204, at 207-208.

[22]Bentwich, N. (1932). *England in Palestine*, London. pp 273.

[23] Bentwich, *England in Palestine*, London 1932 pp. 273, 277

[24]Roger Owen, "Defining Tradition: Some Implications of the Use of Ottoman Law in Mandatory Palestine", *Harvard Middle Eastern and Islamic Review*, 1 (1994), p. 115.

[25] Robert H. Eisenman, *Islamic Law in Palestine and Israel: A History of the Survival of Tanzimat and Shari'a in the British. Mandate and the Jewish State*, Leiden 1978, pp126-131 .

[26]Cf. Bentwich, *England in Palestine*, at 274-275. The majority of the *Mecelle* remained in force all throughout the term of the Mandate; only those portions dealing with arbitration (1926), partnerships (1930), bankruptcy (1936) and torts (1947) were abolished. See: Robert H. Eisenman, *Islamic Law in Palestine and Israel: A History of the Survival of Tanzimat and Shari'a in the British Mandate and the Jewish State,* Leiden 1978, pp. 126-131; extensive portions of the French part of Ottoman Law were abolished in the 1920s. Other segments (criminal law, civil procedure) were replaced in the 1930s. It is interesting to note that not all the British jurists in Palestine viewed the French law as 'unsuitable'—*cf.* Horace B. Samuel, "From the Palestinian Bench", *The Nineteenth Century*, 88 (1920), pp. 498, 500.

and the Colonial Office. That, however, did not signify the end of the Mandatory legislative project. The British, during the thirties, replaced the Ottoman Criminal Code, and Ottoman Civil Procedure, with legislation based on English Law. Moreover, several other laws of a commercial nature were also enacted, such as the Mandatory Bankruptcy Ordinance. However, the legislative fervour did lessen in the thirties. The majority of legislation in the late thirties and early forties was introduced to 'put out fires'—emergency legislation that responded to the 1936-1939 Great Arab Revolt as well as the operation of the Jewish Underground, or legislation in which the regime had a clear interest, such as the Mandatory Income Tax Ordinance of 1941, enacted to add sources of revenue for the operation of the Mandatory government. Only at the end of the 1940s, when British rule was nearing its end, did a new wave of legislative initiatives begin, which principally dealt with regulating branches of law which the British rulers had rather neglected until then, such as tort.[27]

Legislation was one way in which English Law penetrated Mandatory Palestine. Another was Anglicisation through case law. These measures were expressed in several ways. Some of the Mandatory ordinances had interpretation clauses that referred the judiciary expressly to English Law to interpret them; some Mandatory ordinances contained a provision that guided the judges not only to interpret the ordinance by means of English Law, but also to fill in any lacunae in the particular branch of law that was the subject of the ordinance, by reference to English Law. However, even where there was no such provision, the Mandatory judges naturally inclined towards English Law to interpret the ordinances.[28] There are several reasons for this.

The deference to English Law was a result of problems that emerged in the provision of compensation in tort law. The judges recognized that there was a problem, namely that Ottoman Law does not provide compensation for bodily harm. This is illustrated by PSAD Khoury C.A. 88/30 Municipality of Haifa v Khoury, 4 Rotenberg 1343 (1932). The case pertained to a pit that was dug by the Municipality of Haifa. The municipality did not cover the ditch or mark it with a warning sign. Mr. Khoury fell into the ditch and was injured. He sued the municipality for damages. The court ruled that Ottoman Law did not allow him to receive compensation for the bodily injuries caused to him due to the negligence of the municipality. The court refrained from making use of Section 46 of the King's Order in Council and deferring to English law and deriving from it the authority to grant the compensation to the injured party.

At the end of the 1930s, and especially in the 1940s, this trend in rulings reversed. In the ruling on the case of C.A. 29/47 London Society for Promoting Christianity Among the Jews v. Orr, 14 P.L.R. 218 (1947), which also dealt with a tort claim for negligence, the Supreme Court ruled that it was indeed possible to import English tort law into Israel by virtue of Section 46. This was also the case, for example, in the verdict in the Raphael case, C.A. 70/44 Raphael v. Rachamim, 11 P.L.R. 367 (1944). In this ruling, it was a question of the pre-emptive right given by Ottoman law to a partner to purchase his partner's assets. The court ruled that this right is an

[27] See, generally, Assaf Likhovski, "In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine", *Israel Law Review,* 24 (1995), p. 291 (hereinafter: Likhovski "In Our Image").
[28]Malhi, *Legal History*, op. cit., pp. 102-103. And *cf*. Freedman, "Foreign Law Influences in Israeli Law" (hereinafter, footnote 21) pp. 324, 326, 357.

archaic right that does not fit the conditions of the country, and that the provisions of Ottoman Law must be interpreted taking into account the social changes that had taken place in the country during the mandate period. The willingness of the Mandatory Courts to import English law was combined with their willingness to reinterpret the provisions of Ottoman law and create an independent law in the Land of Israel.[29]

In addition, English Law entered Mandatory Palestine by virtue of the abovementioned Section 46 of the King's Order in Council. This section instructed the Mandatory judges to turn to English Law when Ottoman and/or Mandatory legislation did not apply. In the early years of the British Mandate, the courts did not make much use of that section; however, from the mid-thirties onwards, the Mandatory courts started to make significant use of it to import the rules of English Law, especially in civil law, but also in other branches, such as administrative law. This happened because Ottoman law deprived the residents of the possibility of receiving compensation for bodily harm and it was necessary to resort to importing English law in order to allow the population to receive compensation for damages.

The outcome therefore was that the Mandatory judiciary, like the Mandatory legislature, actively worked to anglicise the legal system in Palestine; however, that activity did not bring about a complete replacement of local law. For that reason, when the British left Palestine in 1948, they left behind them a mixed governmental legal system—partially based on English Law, and partially still Ottoman. As mentioned above, the process of replacing Ottoman Law with English Law was partly by design, and partly the outcome of random events and special circumstances; and, in any event, it did not take place instantly, but spanned a period of more than 30 years.

Post-Mandatory Palestine and the Legacy of Mandatory Law

What happened to the English / Ottoman legal system (which could be referred to as the 'Mandatory System') which the British bequeathed to the State of Israel after its foundation?

As will be further elaborated in the next section, Israeli law in its current form is evidently not the same as the Mandatory Law from 1948. Since 1948, and mainly since the 1960s, Israeli law gradually disengaged from the Mandate's legacy, and mostly from the Ottoman part of it. However, this manifested as a part of a gradual transformation, rather than an overnight revolution. To illustrate the gradual nature of this legal change—and as will be explored in detail—Israel did not formulate a written legal constitution. Israel has a founding charter, its Declaration of Independence, which lays out the vision, character, ethos and *raison d'être* of the nascent state, yet it does not suffice to constitute a written constitution. Suzie Navot described the Declaration of Independence as a "ceremonial document…[which] purported to present the credo of the new state while establishing legal facts to suit a state created *ex nihilo.*"[30] Thus, it carries great weight, but falls short of being a constitution.

[29] . Assaf Likhovski, "In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine", *Israel Law Review,* 24 (1995), p. 291 (hereinafter: Likhovski "In Our Image").
[30]Navot, S. (2014) *Israel's Constitutional History.* Oregon: Hart Publishing. p.5.

Moreover, in the subsequent years, Israel adopted a series of Basic Laws, which have a special status, but a legal constitution which would generate an entirely new legal system did not materialise.

The legal system since 1948 has borne witness to several changes and has been subject to the influence of numerous legal cultures. In the 1960s and 1970s, there was an attempt, which was only partially successful, to transform Israeli civil law in the spirit of the Continent.[31] In the 1980s and 1990s, continental influences in Israeli Law became strongly supplemented by American legal influence, most particularly apparent in the Supreme Court's case. Indeed, since 1948, the Israeli legislature and courts have been striving, in some way or other, to create an original Israeli legal system, without foreign influence.

That being said, the legacy of the Mandate affected the shaping of many aspects of Israeli law. The Israeli legal system inherited the principle of precedent from the Mandatory system, as well as the idea that judges have an important and active role to play in shaping norms; the centrality of lawyers in conducting legal proceedings; the uniform structure of the court system; and many other characteristics. Even when a branch, or several branches, of Israeli law underwent partial codification processes (for instance, civil law has been in the thrust of a decades-long process of codification on the basis of models imported from Europe), the Israeli legislature retained the English notion from the Mandatory era, namely that judges actively create norms. However, this assumption regarding the function of the judiciary is not accepted on the Continent. The connection between Israeli law and Mandatory law is present not only on the more abstract planes of the Israeli legal system, but also in the details.

Today, a truly unique Israeli legal system has materialized, which is difficult to categorize. It is a mixed jurisdiction, a system with its own style amidst western legal traditions, based primarily on the common law. Added to these layers of complexity is the fact that the State of Israel is not a simple democracy; it is both a democratic state and a Jewish one—that is its uniqueness. Thus, alongside inheriting numerous legal traditions, which have subsequently evolved, Israel has attempted to synthesise western legal principles with Jewish values and some elements of Jewish law. This presents several challenges, which have recurred throughout the history of the State. The next section will discuss the development of Israeli Law and its foundational and evolving principles.

[31] On the issue of codification, see, e.g.: A Barak "In Anticipation of Codification of Civil Law" [Hebrew] *EyuneiMishpat, Gimel* (5733), p. 5; D. Freedman "More on Interpretation of Modern Israeli Legislation" [Hebrew] *EyuneiMishpat, Heh* (5736), p. 463; Menachem Mauntner "Rules and Standards in the New Civil Legislation" [Hebrew] *Mishpatim, Yud-Zayin* (5748) pp. 321-352; D. Barak-Erez "Israeli Codification Viewed Through Contract Law" *EyuneiMishpat, Kaf-Bet* (1999), p. 793.

The Development of Israeli Law

The Constitutional Debate

The State of Israel has no formal or written constitution, only a substantive one. Indeed, in a similar vein to the English unwritten constitution, Israel has maintained an unwritten constitution until today. A substantive constitution is an accumulation of principles and arrangements not expressly prescribed in a codified document. As defined by Suizie Navot, this means "a set of fundamental principles, coupled with a list of bodies authorised to exercise sovereign powers, and specific election procedures for them."[32]

However, the question regarding the creation of a written constitution has been ubiquitous from the state's outset. Israel's Prime Minister, David Ben-Gurion, was opposed to such a document, which, according to Navot, he viewed as a means of preventing "struggle and debates between political parties and social segments, which threatened the country's ability to establish new national institutions."[33] Thus, this opposition can be understood in very practical terms as a destabilising factor amidst the necessity of state-building. Indeed, it ensured that a fierce "ideological debate and cultural war" would not break out, which would hinder efforts to establish institutions of the state and military. In light of the very delicate balancing act in phrasing such a document, which would require the consent of the diverse groups that made up the nascent state's population, Ben Gurion likely wavered from the extremely challenging task of attempting to reach a consensus, which would have distracted from more significant challenges.

Nevertheless, despite Ben-Gurion's opposition, when the First Knesset convened, the idea of a written constitution was discussed. The idea was to wait for a few years to adopt a constitution. In the absence of a consensus on whether a constitution was needed at all, let alone regarding its content and form, the deliberations were halted. A heated debate was conducted in the Knesset as opponents[34]of the constitution, in line with the Prime Minister, gave several reasons for their persistent rejection. Firstly, the majority of the Jewish people had yet to immigrate to the young state. Secondly, as Ben-Gurion had argued, it would likely lead to a 'cultural war'. Finally, the state was still consolidating its institutions, building infrastructure and securing its extremely vulnerable borders. Meanwhile, the difficulty of reaching an agreement was underscored by the fact that religious members of the Knesset opposed the creation of a written constitution for other reasons. They claimed that formulating a constitution would undermine the supremacy of the *Torah* (Old Testament) and thus were opposed to any constitutional document.

Ben-Gurion and the religious parties were ultimately victorious in this debate. However, to appease those calling for a written constitution, a compromise was reached that again illustrated the unique nature of the new state. The compromise, known as the Harari Resolution, stated that a constitution would be introduced in stages. Accordingly, the Knesset charged the Constitution,

[32]Navot, S. (2014) *Israel's Constitutional History.* Oregon: Hart Publishing. p. 12.
[33] Navot, S. (2014) *The Constitution of Israel.* Hart Publishing: Oregon. p. 7
[34] Rot Gavision, "The Controversy over Israel's Bill of Rights"(1985)15 Israel Yearbook of Human Rights 113.

Law and Justice Committee with "the preparation of a proposed constitution for the State. The constitution will be composed of chapters, each compromising a single Basic Law unto itself."[35]

Ultimately, no written constitution has ever emerged, despite intermittent calls for it by different segments of society and stark opposition by Prime Minister Ben Gurion and Jewish religious parties.[36] Nevertheless, as a consequence of the Harari Resolution, the notion of the Basic Law was born, an idea that partially draws on the German legal tradition. With it, the debate emerged regarding the constitutional nature of the Basic Laws. While the 1995 *Bank Mizrahi* ruling by Israel's Supreme Court provided some clarification, the debate goes on. In the following sections, I will explicate and assess the components of Israel's legal system, including the place and limitations of the Basic Laws, the place for Jewish law in the Israeli legal system, and the tensions surrounding the balancing of a Jewish and democratic state. First, I will outline, in brief, the development of Israeli legal history.

Chapters in Israeli Legal History

The formation of the Israeli legal system can be divided into four phases, as follows:[37]

(i) From the establishment of the state through to the early 1960s.

(ii) From the 1960s to the 1970s.

(iii) From the 1980s to the early 1990s.

(iiii) From the 1990s to the present day.

The First Era: Establishment of the State – The Early 1960s

The first era encompasses the first decade of the state's existence. In that period, the legal infrastructure underwent far-reaching changes; legislation mainly dealt with daily life, tackling harsh economic realities and dealing with the social and security challenges facing the nascent state. During this period, several important pieces of legislation were enacted, including the Law of Return, a statute that does not have the status of a Basic Law, the first of which was enacted in 1958, but is constitutional by nature as it relates to the state's core values. The Law of Return reflects the fact that the State of Israel is the Jewish nation-state and permits any Jew who wishes to do so to make *Aliyah* [Immigrate to Israel]. The law permits every Jew to make *Aliyah* and receive Israeli citizenship without any additional conditions attached.

In 1950, the law was passed by the *Knesset* (Israeli Parliament) without opposition, although vociferous debate relating to disputes that linger to this day preceded the law's passing.

Two issues in the law caused dispute and continue to do so:

A. The definition of the term 'Jew'—the question 'Who is a Jew?'

[35]Yeoshua Segev "Why Israel Does Not Have a Constitution" (2006)5 Natanya Academic Collage Law Review 125,131

[36] https://israeled.org/harari-proposal-constitution/ URL Retrieved January 22, 2023

[37] A. Barak "Fifty Years of Adjudication in Israel" [Hebrew] *AleyMishpat, Aleph* (2000), pp. 9-17.

B. The preference for Jews over non-Jews. The Law refers only to Jews.

The most profound acts during this period were: The Woman's Equality of Rights Law - designed to ensure equal rights for women. "The purpose of the statute, as evidenced by its name, is to equalise woman to man, and to prevent and uproot any legal discrimination against women."[38] The Law was presented to the Legislative Assembly by the government [in accordance with the basic principles of the first government, which stated: "complete and full equality of women shall be maintained—equality of rights and duties, in the life of the state, society, and the economy, and in the entire system of laws."[39] While debating the Bill in the *Knesset*, David Ben-Gurion, explained: "The legislation proposed by the government seeks to establish a simple and clear principle: A woman has all the rights which a man has. There are instances in which a woman has privileges, when a woman is pregnant or giving birth, because only a woman can be pregnant or give birth, but in general, we want women to have equal rights."[40]

Nazis and Nazi Collaborators Punishment Law (1950). An Israeli statute that refers to the acts committed during the Holocaust, was enacted by the *Knesset* in 1950. The main thrust of the Israeli law enforcement and legal system's activities in this context concerned the Nazis' 'collaborators' from amongst Jews who made *Aliyah* after WW2—and most of it was conducted in the 1950s.

The law prescribes retroactive criminal application with regard to crimes committed in the time of the Holocaust, and includes crimes specific to the crimes committed by the Nazis and their collaborators, amongst which are crimes against humanity; handing people over to the Nazis; blackmailing a person in hiding who was wanted by the Nazis, or the person hiding him; membership of a 'hostile organisation' (that is to say a Nazi organisation or organisations of collaborators).

Employee Protection Laws. During this period, the foundations for extensive employee protection laws in the field of employment law were also established. At the same time, case law in the first era grounded the foundations of the common law, with increased importation of laws and legal institutions from English law. The precedents of English law were applied widely to private Ottoman law and statutory English commercial law. The foundations for Israeli public law (constitutional and administrative) were also laid down.

The basic principles of the rule of law, the separation of powers, and the independence of the judicial branch, were established. The intellectual foundation for recognition of the legal status of fundamental values as interpretative criteria and sources for recognition of human rights was also established. The principles of equality, freedom of expression, freedom of occupation, and other human rights, were established.

Israeli law very gradually disengaged from the legacy of the Mandate, yet this was certainly a slower process than may have been imagined. Assaf Likhovski writes about this process through

[38]Women's Equal Rights Law of Israel (5711-May 9,1951)
[39] Ibid.
[40] Ibid

the lens of Eliezer Malachi—a lawyer, and later judge—who proposed a "conservative" approach to preserve the status quo. Likovski explains Malachi's approach as follows:

> The conservative "desert generation" argument, supporting the legal status quo, was used with respect to the Ottoman (as well as the English) part of mandatory law. For example, in a lecture at the annual conference of the Israeli Bar Association in 1954, one of the speakers, using somewhat bizarre imagery, said that the civil (Ottoman) law that Israel had inherited from the mandatory era – the Mejelle - was not "an attractive bride that we will want to embrace in the long run," but "we cannot, of course, push her over the cliff all at once, as if she were a scapegoat;" we can only "dismember her one piece at a time." He continued: "The time has not yet come to create the perfect civil code for Israel, since as a nation we are a gathering of exiles… the moral structure of this people and the face of its culture are still being moulded… the common national identity that can serve as substantive background for a comprehensive code has not yet been forged.[41]

Thus, in the same way as Ben-Gurion prioritized the ingathering of the exiles, the building of institutions and the military over the legal question, it seems that other prominent legal figures also adopted this approach, which provides a plausible explanation for the slow process of achieving independence from the inherited legal system.

The Second Era: From the 1960s to the 1970s

In the second era—the 1960s and 1970s—an attempt was made, which only partially succeeded, to codify Israeli civil law with a continental spirit.

The main changes to Israeli law—the fruits of legislative efforts—began in the second decade of the life of the state, which is the second era of development of Israeli law—from the early 1960s to the end of the 1970s. These changes occurred on two parallel planes, one in the field of private law, and the other in the field of public law.

Moreover, the *Knesset* began the process of legislating the Basic Laws, which as previously mentioned carry quasi-constitutional status, and gradually replaced certain segments of the Declaration of Independence, and this diminished its importance.

The Basic Laws adopted from the mid-1970s until 1992 were agreed upon laws that reflected the existing rules of governance. The Basic Laws did not change the constitutional reality. However, during the 1970s, issues such as the Charter of Human Rights, judicial review, the rigidness and supremacy of the Basic Laws, and the adoption of a Basic Law: Legislation, came to the agenda.

Starting in 1973, several charters of human rights were submitted to the *Knesset*, some on behalf of the Law, Justice, and Constitution Committee, and some as private bills. These laws usually passed in the first reading, but their legislative procedures were not completed.

In the late 1980s, when Dan Meridor was appointed Minister of Justice, a decision was made to introduce a Basic Law on human rights. After many meetings of the Ministerial Committee for Legislation, this initiative was blocked due to the fierce opposition of the Ultra-Orthodox parties. Following this, the draft of the Ministry of Justice bill was taken and submitted

[41]Likovski, A. Lecture transcript based on his book Law and Identity in Mandate Palestine (Chapel Hill: University of North Carolina Press, 2006)

by Amnon Rubinstein as a private bill. Towards the end of 1989, the bill was approved in a preliminary reading, but after the threats of the ultra-Orthodox parties, it stalled in the Constitution Committee.

After it became clear that in the short term the chances of passing this Basic Law in one piece were slim, Rubinstein broke it down into its components. Some of these components evolved and became the two Basic Laws passed in 1992, in the final days of the 12th *Knesset*.

Along with the politicians' attempts to promote the adoption of additional Basic Laws, public awareness of the constitutional issue grew in the mid-1980s. The political paralysis of the unity governments, and the perception that something was wrong with the structure of governance, motivated a public struggle for the adoption of a constitution for Israel. When it became clear to the leaders of the movement that the chance of enacting a comprehensive constitution was slim, the struggle was reduced to its two components: changing the electoral system and enacting a human rights law.[42]

The legislation encompassed enactments relating to the laws of contract, sale, lease, land, guarantee, agency, pledge and many other laws, which formed chapters in a complete civil code. It was modern legislation, which encompassed all the institutions of civil law. Once it was completed, the *Mecelle* was formally repealed, and the formal ties to English common law were also severed.

Instead of the Mandatory provision that any lacuna in the law is to be filled by reference to English common law, the new rule was that a lacuna is to be filled by analogy and comparison. If the analogy does not provide the answer, it must be found in the principles of liberty, justice, equity and peace, which are central to the Jewish tradition. The codifying legislation was enacted with no shared ideological basis, reflecting an eclectic approach with no unifying force. It was enacted one chapter at a time, without any attempt to coordinate the chapters. Every statute sought to provide good, pragmatic solutions, without too much emphasis being placed on the analytical aspect.

Various different legal systems—Anglo-Saxon, Continental, and Jewish law—have an influence, yet there is no ostensible guiding hand. Despite this, the new legislation was effective. It replaced outdated law with modern law. The new law prescribed new arrangements, which gave direction to practical life, providing responses to the practical problems that arose. This new legislation adopted modern principles, such as good faith, the contract for the benefit of third parties, market overt, trust, and more. Specifically, good faith became a key component of civil law. Indeed, overall, it seems that this civil legislation fulfilled its destiny as the aforementioned principles were instilled into the rapidly developing hybrid legal system.

A proper balance was struck between the security of interpersonal relations and the law's ability to adapt to a changing life.[43]

[42]Gavison, Ruth (1998), *The Constitutional Revolution: Reality or Self-Fulfilling Prophecy*, Israeli Democracy Institute [Hebrew]
[43]Barak, A. (2000). *Fifty Years of Law in Israel* [Hebrew]

When the first era ended the constitutional chapters started to appear, concurrently with the introduction of civil codification chapters.

As was discussed in the previous section, the first Basic Law was enacted by the *Knesset* in 1958. Israel, as of 2023, has 13 Basic Laws, which form the constitution of the State of Israel. However, for a significant period, the courts and governmental authorities treated them as ordinary legislation which may be amended (explicitly or implicitly) by any (ordinary) legislation enacted by the *Knesset*. As will be discussed later, the Supreme Court's *Bank Mizrahi* ruling in 1995 granted the Basic Laws supremacy and thus clarified their constitutional status. Today, the Basic Laws constitute the foundation of Israel's constitutional make-up. They are an expression of democracy, which was perceived—following the English model—as a parliamentary democracy. Israeli case law in this second era of the 1960s and 1970s, which were the years in which changes were made to private law (codification) and public law (Basic Laws), continued to evolve.

Gradually, an 'Israeli-Style Common Law' emerged with common law as its foundation. However, it also reflected an analytical and systemic approach that characterises civil law, based on the fundamental values of the State of Israel as a Jewish and democratic state, such as the dignity and liberty of every citizen.

The first period laid the intellectual foundations for understanding the legal position of the basic values as interpretive standards. In the first period, what characterized rulings was the need to shape and stabilize the courts, which faced a difficult security reality: the War of Independence and the Sinai War. National security was the number one priority at the time.

Despite all these difficulties, it was precisely during this period that legislation of basic human rights began to be implemented and the freedom of expression, the freedom of occupation and the freedom of religion were recognised. This ruling prepared the way for the constitutional revolution in 1992 when the Fundamental Law: Freedom of Occupation and the Fundamental Law: Human Dignity and Freedom were enacted.

'Israeli-Style Common Law', is based on the principle of the precedent. The classic notion of precedent or *stare decisis* in common law is described by Shaun Pattison as being "woven into the essential fabric of the common law." Moreover, Pattison defines the doctrine of precedent as being "classically expressed as the norm that the precedents set by the appeals courts bind the lower courts." As a result, in a common law system, the rulings of the Supreme Court are binding for all courts below it.[44]

Israeli case law—the judgements of the Supreme Court, the District Court and the Magistrates' Court—fulfilled two main functions: The first, interpreting statutory provisions, Mandatory provisions, and in particular Israeli provisions, which increasingly became more and more numerous. This was likely because the state experienced an intense period of development and rapid progression, requiring suitable and updated regulations and laws. This work of interpretation was initially performed according to English rules of literal interpretation. But in time, similarly to the changes going on in England itself, it became more purposive. Purposive

[44] Pattison, S. (2014). The Human Rights Acts and the doctrine of precedent. *Legal Studies.* Vol. 35. Issue 1.

interpretation took centre stage in interpreting legislation. From there, it slowly migrated to contract interpretation and the interpretation of testamentary instruments. The second function was developing laws in those areas which lacked precedent. In many areas, a highly developed corpus of 'Israeli-style common law' was emerging. That body of law was mainly precedent based. In this era, the general theory of administrative law was developed. At that time, the theory of administrative discretion was established, and the powers and authorities of the High Court of Justice were laid down. That period also demonstrated the development of special administrative laws, such as the law of tenders. Other examples of Israeli-style common law are the laws of evidence and the laws of quantifying damages (in contract and in tort). Case law during this second era gave Israeli law stability. It reflected, in practice, the fundamental principles, which were established—mainly in public law—in the first period.

The Third Era: From the 1980s to the Early 1990s – The Development of Modern Israeli Law

The era of the development of modern Israeli law is the era that begins in the early 1980s and runs through to the early 1990s. From the point of view of legislation, this era is characterised by the end of the codification project, and later, the project of enacting the Basic Laws. For the most part, this era was a time for stabilising legislation. As for case law, this era is defined by judicial activity, which is mainly characterised by less formalism and more substantiveness; more laws on weight, and less on admissibility; more promise of adapting the law to the changing realities of life, and less preservation of what formerly existed. Thus, for instance, during a time of high inflation the courts developed flexible laws to deal with this problem; purposive interpretation was increasingly utilised at the expense of literal interpretation. In this era, the Supreme Court gave an expansive interpretation of the term "good faith" and applied it in new spheres; it developed the concept of civil negligence and recognised new duties of care. It expanded the concept of public policy and used it to connect private and public law; it developed the precept of reasonableness in administrative law, and transformed it into a central tool for securing the executive branch's adherence to the rule of law; it made the laws of status more flexible, and opened the courts' doors to petitioners who complained about any serious affront to the rule of law.

The Fourth Era: From the 1990s to the Present Day – Basic Laws

The fourth era begins in the early 1990s. It was characterised by the enactment of the Basic Law: The Government, which put in place a new parliamentary system and created a new relationship between the legislative branch and the executive branch. In this era, two central Basic Laws were enacted: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. Both these basic laws—and the interpretation given to them by the Supreme Court in the Mizrahi Bank affair—established the "Constitutional Revolution", which the Israeli legal system is undergoing.

The judgement in *Civil Appeal* 6821/93 Mizrahi United Bank Ltd. v. Migdal Cooperative Village is the first judgement of the Supreme Court that set the "Constitutional Revolution" in motion. The latter arose from the establishment of the Basic Laws regarding human dignity and liberty as well as freedom of occupation. The judgement is considered ground-breaking, and a guiding light in the field of the constitutional law of the State of Israel. The judgement discusses the clash between an ordinary statute enacted by the *Knesset* and the Basic Law: Human Dignity

and Liberty. The central legal question was whether the court had the authority to quash an amendment to the Arrangements Law that adversely affected the right to property (which is in turn protected by the Basic Law: Human Dignity and Liberty), since a Basic Law is higher in the normative hierarchy than an ordinary Law of the *Knesset*. In the judgement, the justices on the panel reviewed many constitutional questions arising from the establishment of the new Basic Laws "human dignity and liberty" and "freedom of occupation", for the first time, for instance: the *Knesset*'s authority to pass laws and establish a constitution, the normative hierarchy of legislation, the power of judicial review that the court has over ordinary legislation, and the correct path to review the constitutionality of an ordinary enactment that prejudices a right anchored in a Basic Law.

At the heart of this revolution are human rights. They were awarded a constitutional, supra-legal status. Israel had transformed from being a parliamentary democracy into being a constitutional one.

The Basic Laws in the Post-Constitutional Revolution Era

In the aftermath of the *Bank Mizrachi* ruling by the Supreme Court, a new constitutional reality emerged, with a clarification of Israel's legal hierarchy. At the top of the pyramid are the constitutional laws (the Basic Laws). The 13 Basic Laws share several characteristics. In the spirit of their quasi-constitutional nature, they are often an expression of principles and values, rather than a precise elaboration of legal details. Furthermore, a regular law passed by the *Knesset* cannot contradict the Basic Laws. When contradiction occurs, the law is unconstitutional. The court is authorised to declare the unconstitutionality of the law, and hence its nullity. With the enactment of the two human rights related basic laws, the Israeli legal system was subjected to a constitutionalisation process, having inherited the doctrine of parliamentary sovereignty from the British.

The process of constitutionalisation meant that the Basic Laws were now normatively superior to regular *Knesset* legislation. As a result, as mentioned, when regular legislation clashes with a Basic Law, the latter takes precedence, owing to its constitutional nature.

Nevertheless, the laws continue to generate profound incoherence due to the lack of uniformity between them. While linguistically all basic laws share the title 'Basic Law', other areas are hazier. For instance, some laws state that their amendment is only possible by another Basic Law and a special *Knesset* majority. Meanwhile, other Basic Laws do not require the same special majority for their amendment. Indeed, none of the Basic Laws enacted prior to 1992 was entrenched by the *Knesset*, thus requiring a special majority. This indicates that the *Knesset* did not view the Basic Laws prior to this as having a special status. This lack of clarity muddies the waters. Importantly, the ease with which most of the Basic Laws can be amended is in stark contrast with the entrenchment of most written constitutions, whose amendments typically require the approval of special majorities of the legislative as well as the executive.

Moreover, given that the Supreme Court essentially empowered the *Knesset* by labelling Basic Laws as constitutional, there is concern regarding the *Knesset*'s potential abuse of its powers and thus damage being done to the balance of powers between the legislative and the judiciary.

Thus, the categorisation of the Basic Laws as constitutional is not a simple task and the lack of clarity raises other questions.

To conclude, regardless of this debate there is no doubt that the Israeli legislator and court have replaced, since the foundation of the state, and in particular since the 1960s, a significant portion of the Mandatory legal system that existed in the land of Israel in 1948; but there is also no doubt that modern Israeli law still retains some part of the inheritance received from the Mandatory state in 1948. This was certainly so with regard to Israeli law in the 1950s and early 1960s, before the new civil legislation replaced the *Mecelle* and Ottoman land law.

The Israeli Constitution – A Collision of Values

What a "constitution" means exactly is subject to multiple conflicting interpretations that can on occasion clash. Constitutions are generally written, but as the British example notoriously demonstrates, they can be unwritten. Hans Kelsen theorized this dualism in the meaning of constitutions by distinguishing between formal constitutions, namely written documents created by a legislative act, and so-called material constitutions, i.e. "the system of formal and informal rules that regulate the political order", and which are based on, inter alia, conventions, customs and judicial interpretation.[45]

Material constitutions historically preceded formal constitutions. This is because the formal, written constitution is a somewhat modern concept. Aristotle, for example, defines a constitution (politeia) as "a way of organizing the inhabitants of a city."[46] Although ,material constitutions have sometimes been written, as shown by the fact that as early as the sixteenth century some political leaders preferred to codify their governments' fundamental principles in a written document, such written documents are different from modern formal constitutions that contain the principles of governmental organization in a single text.

The system in Israel is a parliamentary democracy, which means that the government requires the confidence of the parliament in order to serve. Under such a system, the level of the separation of powers is lower than in a democratic-presidential regime, such as the one in the United States; however, in Israel, like in many other democracies, there are three branches:

- The legislative branch – the *Knesset* (whose powers and authorities are defined in the Basic Law: The *Knesset*).
- The executive branch – the government (whose powers and authorities are defined in the Basic Law: The Government).
- The judicial branch – the system of courts (whose powers and authorities are defined in the Basic Law: The Judiciary).

The various branches are coincident and tangential to one another, and at times a collision of authorities can occur. The resulting condition is one of confusion of issues amongst the various branches, where each branch reviews, balances and supervises the others—as it should be in a

[45] Hans Kelsen, General Theory of Law and State (New York: Russell & Russell, 1961).
[46] Aristotle, Politics, trans. Ernest Barker (Oxford University Press, 1995), 1274b32.

democracy, and in doing so, circumstances are created which require the continued ongoing operation of the three branches (even if and when clashes of authorities do occur).

On the legal plane, the constitution expresses the principle of the rule of law; in this regard, the meaning of law is broad, and in fact concerns the fundamental principles of the system.

There were many arguments for and against Israel having a constitution:

In Favour

- One argument related to the constitution's function as supreme law, as the safeguard of democracy: the constitution supervises the government, limits it, and prevents it from arbitrarily violating the rights of the citizenry.
- There were those who emphasised a constitution's function in generating political stability and continuity, as well as national unity and accord.

In Opposition

- In opposition to them, the detractors, mainly from amongst the religious political parties, argued that a constitution established by the *Knesset* would, of necessity, be secular, and as such would be perceived as a replacement of the *Torah*; it would harm Israel's "Jewishness", include foreign ideas and thoughts; and it would cause division amongst the people, a cultural war, and devastation. "The Torah… regulates all the affairs of man as such; all the affairs of the nation as such, and all the affairs of the state as such… this Torah… there is nothing but it. It is the great plan for Israel, devised by God almighty the king of all. Therefore, any constitution which is man-made has no place in Israel. If it contradicts the Torah, it is rebellious, and if it identifies with the Torah – it is superfluous."[47]
- Opposition from another angle opined that the nation was not yet ready for the establishment of a constitution. The state was in its early days, its political experience was limited, and it was not solidified or consolidated. The majority of the Jewish people were still living outside of Israel, and it was embroiled in a complex of existential problems: military, political, economic, and organisational. For that reason, future generations should not be bound by an official constitution, particularly one that was hastily enacted.

"A constitution is made… not at the beginning of a revolution, but at its end. Any constitution is an attempt to freeze certain values, enshrine them for posterity… a more or less stable condition should be reached so that the ink may be cast…".[48] Others emphasised that this last argument is actually one which justifies the establishment of a constitution. By virtue of the same right that enabled us to establish an independent state and fix its borders and political character, for ourselves and for future generations, we are also entitled to establish a constitution. A constitution is especially important for a nation that is absorbing immigrants from all over the world, those who

[47]MK Meir David Levinstein, United Religious Front.
[48]MK David Bar-Rav-Hai, *Mapai*.

were persecuted and discriminated against in their countries of origin. The constitution's paramount function is to consolidate its addressees and shape a common identity.

The question of the constitution was not solely judged according to its ideological or theoretical value. The practical considerations of the time (austerity, war, ingathering of the exiles) also came into play in influencing both the supporters and detractors of establishing a constitution and cannot be ignored. The majority of those supporting a constitution were members of the opposition; the minority were political parties who viewed a constitution as a means of preventing the prejudicing of their status and rights. The most vociferous objectors were from the religious political parties, who could not accept, as mentioned above, the supremacy of a secular constitution. They were joined by *Mapai* – the ruling party – which was not enthusiastic about the prospects of establishing a constitution which would limit and curb its reign, and which in any event needed the coalition support of the parties of the religious factions.

With the conclusion of the debate about the very need for a constitution, the *Knesset* adopted a compromise resolution, the "Harari Decision", which was named after its proposer Yzhar Harari, a member of the Progressive Party. Known also as the Harari Compromise, it was a decision passed by the First *Knesset* on 13th June 1950. The resolution prescribed that the First *Knesset* would not establish a constitution for the state of Israel, and that the constitution would be written in chapters, referred to as "Basic Laws", which would be consolidated, in time, into the state's constitution. As a consequence of that decision, the state of Israel has no written constitution, and many important subjects are not regulated by a constitution.

The content can be summarised as follows: The First *Knesset* imposes the task of drafting a proposal for a constitution for the state on the Constitution, Law, and Justice Committee. The constitution will be structured from multiple chapters, so that each one of those chapters will be a Basic Law unto itself. The chapters will be put before the *Knesset*, should the Committee complete its workings, and all the chapters will be consolidated into the state's constitution. In other words, the *Knesset* wanted a constitution, but postponed the legislative task in favour of legislation in stages, which would, at the end of the day, consolidate all the legislated chapters into one complete constitution.

Both the supporters and the detractors of the constitution agreed to abide, in the interim, by the *Knesset's* decision to legislate a series of Basic Laws. These Basic Laws deal with subjects which a constitution usually deals with, but, in contrast to a constitution, they are enacted one at a time, each one stands alone, and the process for enacting them and amending them is not materially different from the legislative proceedings of ordinary legislation passed by the *Knesset* (with the exception of certain "Fortified" clauses), and they were not legally superior to other laws.

The constitution's supporters viewed the enactment of the Basic Laws as the first step towards establishing a constitution. Each Basic Law deals with a particular constitutional issue, and as such, in fact constitutes a constitutional clause. Thus, in their opinion, the totality of the Basic Laws, regulating fundamental government procedure in the state, could, for the time being, be a reasonably good alternative to a constitution.

The constitution's detractors understood that granting their consent to the enactment of Basic Laws would enable delaying, at least temporarily, the establishment of an extensive constitution. Basic Laws meet the need to regulate government procedure, but, contrary to a constitution, they are more flexible and easier to amend and adapt to the spirit of the times.

To date, the *Knesset* has enacted 13 Basic Laws, which may in the future constitute chapters in the Constitution of the State of Israel. These Laws are different from ordinary laws in status, content, and form.

The status of the Basic Laws is higher than the ordinary legislation enacted by the *Knesset*. This super-status was created by two components: Fortification clauses inserted into the statutes, designed to ensure that amending the Law would only be possible with an absolute majority (at least 61 members of *Knesset* out of 120), or a special majority (a larger majority than an absolute majority) of members of *Knesset*, and not by simple majority (a majority of those present and voting, with no limitation as to their number, as is the case with ordinary legislation). The fortification clauses were designed to strengthen the status of the Basic Laws and prevent their amendment by means of a random majority in the *Knesset*.

A second method for bestowing super-status on Basic Laws and protecting the values and principles in them from being harmed by the legislature is the limiting clause.

A limiting clause prevents the legislature from enacting a statute that conflicts with the values and principles expressed in the Basic Law, unless the statute meets three conditions: It corresponds to the values of the State of Israel as a Jewish and democratic state, it was enacted for a "worthy cause", and it impinges on the principles behind the Basic Law no more than is necessary.

As far as content goes, the Basic Laws are intended to reflect the values of the State of Israel as a Jewish and democratic state. They must prescribe the structure of the political system, define the powers and authorities of government institutions and the relationships between the branches of government, and secure human and civil rights pursuant to the two fundamental values of the state as both Jewish and democratic.

Basic Laws are different from ordinary statutes also in their form: The heading of the statute marks it as a "Basic Law". The wording of the Law must be general (details will be expressed in ordinary statutes). It does not contain the year in which it was legislated, to emphasise the fact that the timing of its enactment is of no consequence (in ordinary legislation, the date carries significance, as later legislation repeals earlier legislation on the same subject matter). Thus, it can be argued that Israel does indeed have a constitution, namely, the Basic Laws.

This notion was fortified in 1992 with the enactment of two Basic Laws on human rights that, in effect, limited the legislative power to infringe human rights. The laws became the focus of a crucial Supreme Court ruling in 1995, which Suzie Navot argues "fundamentally changed Israel's constitutional nature."[49] Indeed, the Supreme Court's unprecedented proclamation in the *Bank Mizrahi* ruling of the supremacy of the Basic Laws, triggered a 'constitutional revolution'.

[49] Navot, S. (2014) *The Constitution of Israel.* Hart Publishing: Oregon. p. 9.

As a result of this design, the Supreme Court President Aharon Barak concluded that "overnight, the basic laws became 'constitutional'[50] and all regular laws subordinate to them."

Israeli constitutional law was framed in two main legislative stages, reflecting two historical periods. Chronologically, the first stage proceeded from the decision not to adopt a written constitution and establish Israeli constitutional law based on the British model of parliamentary supremacy. The Israeli system operated on the basis of the decision for more than 40 years, until in 1992, in the absence of a written constitution, the Supreme Court stepped up and assumed the role of protector of human rights. In its capacity as the HCJ[51], the crucial role that the Supreme Court played in formulating Israel's constitutional law runs parallel to the development of the *Knesset* as the legislature. Thus, since very early on, the Israeli constitutional system relied upon constitutional principles and constitutional interpretation mainly developed by the Supreme Court.

Until 1980, Israeli courts were bound to follow English judge-made law. The British system continues to serve as the historical source of many arrangements in Israeli constitutional law. In addition, Israeli judges are obliged to follow the stare decisis principle. According to the Basic Law, the Judiciary and decisions of the Supreme Court bind all the lower courts, but not the Supreme Court itself, which may deviate from them. Still, although the Supreme Court is not obligated to adhere to its own rulings, it rarely deviates from its precedents because it upholds judicial stability as a major value.

The upshot of this significant change was that the State of Israel "underwent a constitutional metamorphosis from a state based on the British model of parliamentary sovereignty to a constitutional state."[52] Henceforth, the Supreme Court's clarification on the matter has elevated the constitutional weight of the Basic Laws and fundamentally changed Israel's character to that of a constitutional state. The Basic Laws together form the Israeli constitution, which is written but is still being shaped. Thus the Israeli constitutional arrangement is unique and incomplete project.

Today after seven decades of the State of Israel's existence, all of these are well-entrenched cornerstones of Israeli law that interplay in the structural and cultural conditions of the state.

To date, Israel has thirteen Basic Laws[53], which can be seen below in chronological order:

Number	Name of Basic Law	Year Enacted
1	The Knesset	1958
2	Israel Lands	1960

[50] Bank Haamizrahi see United Hamizrahi Bank v Migdal Coopreative Village.
[51] Acting as the High Court of justice, the Israeli Supreme Court addresses petitions by the state's citizens against the government and authorized to issue a ***mandamus*** or writ of mandate from legal public bodies.
[52] Navot, S. (2014) *The Constitution of Israel.* Hart Publishing: Oregon. p.31
[53] A full list can brief summary of the Basic Laws is available at this URL: https://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm

3	The President of the State	1964
4	The Government	1968 (Amended in 2001)
5	The State Economy	1975
6	The Army	1976
7	Jerusalem, the Capital of Israel	1980
8	The Judiciary	1984
9	The State Comptroller	1988
10	Freedom of Occupation	1994
11	Human Dignity and Liberty	1992
12	Referendum	2014
13	Israel - the Nation State of the Jewish People	2018

Next, I will assess the special place in Israel's legal system, as is reflected in the Basic Laws, for the Jewish character of the state. The constitutional channel through which Israel's Jewish ethos influences the constitutional structure is based in principle on the human rights-related Basic Laws. The prescription is that the purpose of the Basic Law is to protect human dignity and liberty—or freedom of occupation—to "anchor in a Basic Law the values of the state of Israel as a Jewish and democratic state"[54]. The State of Israel's values as a Jewish and democratic state gained constitutional force, which is an important development for Israel's democratic tradition. The limiting clause in the Basic Laws prescribes that the rights embodied in the Basic Laws cannot be impinged on otherwise than by a statute that "corresponds to the values of the State of Israel, designed for a worthy cause, and by a measure that is no more than necessary, or pursuant to a statute by force of express authority in it." This constitutional arrangement elevates the State of Israel's values as a Jewish and democratic state to a constitutional level that can be used as a justification to override a Basic Law. An ordinary statute, impinging on human rights prescribed in a Basic Law is unconstitutional unless it correlates to the values of the State of Israel as a Jewish and democratic state. This however creates an implicit tension between the Jewish and democratic values of the state, if human universal and democratic rights clash with Jewish values. Nevertheless, more broadly, the State of Israel's values as a Jewish state certainly incorporate, together with the values of Zionism, the values of the Jewish heritage at their heart, and the fundamental values of Jewish law were thus transformed into possessing constitutional force. These may not always be synonymous with the protection and preservation of universal human rights.

[54] Basic Law: Human Dignity and Liberty (1992)

Jewish Law

The term "Jewish Law" in modern Israeli legal parlance usually refers to only those areas of *Halachic* Law that mainly relate to the relationships between people, which every legal system addresses. *Halachic Law* is in fact an inclusive term for all the laws and prescriptions of Judaism; the *Halacha* is based on the Torah and the Oral Law, which, when it was feared that it may be forgotten, was put to writing, and is in fact the books of the *Mishna* and *Talmud*. Thus, we exclude from that definition the system of religious edicts and commandments that relate to the relationship between man and God. It must be noted that this distinction does not actually exist in the *Halacha*. The opposite is true: many principles run through the entire reach of *Halachic* Law, from areas of what is permitted and what is prohibited, through to fields of commerce and negotiation.

In the early days of the British Mandate, the law applied by the Jewish population in the Land of Israel, and the legal system of the Jewish State once it had been established, were based on secular national law, inspired by Jewish values and in part based on some aspects of the *Halacha* (Jewish Law). It is true that the fathers of Zionism who hailed from Central Europe, first and foremost amongst whom was Theodore Herzl, described the Jewish state as one that would adopt secular, western "enlightened" laws[55]; however, many of the Zionist activists in Eastern Europe, as well as some members of the new Jewish population in the Land of Israel, preferred the approach that they should create an independent national legal system that would be inspired by Jewish law, while incorporating Western elements[56].

The process of the "revival" of that national system began concurrently in Russia and Palestine. In 1909, a system of autonomous Jewish courts was established—the Jewish Magistrate's Court—which was designed to relieve the population of the new Jewish settlement from the need to use the Ottoman, consular or rabbinical courts. Sometime thereafter, a group of Jewish jurists in Moscow, influenced by the ideas of AhadHa'am (a leading intellectual of the Zionist movement, founder and ideologue of the faction of spiritual Zionism, and one of the most significant shapers of secular-national Jewish identity), established a company to research Jewish Law, which was called the "Jewish Law Company". According to his philosophy, the Land of Israel was not destined to solve the existential or economic problems facing Jewry; it was not supposed to be—and was not even capable of being—a physical haven against the problems of the diaspora, but its purpose was rather to solve the nation's spiritual and cultural problems. It was not enough for the Jewish state to constitute a national homeland and haven for Jews—it had to possess spiritual content that would justify its existence; to be a nation that is a "Light unto the Nations", a universal "Moral Lighthouse". In so doing, he founded the faction of spiritual Zionism. He received his pseudonym when he signed his article AhadHa'am, meaning "one of the people", an average person, like any other. AhadHa'am stood for Zionism as a spiritual centre of Judaism.

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[55] See Theodore Herzl, *The Jewish State* (Translated by Mordechai Yoeli, Ed. Haya Harel), Keshetarbut, Jerusalem 1996, p. 78.

[56] For a general discussion of Jewish legal nationalism in the times of the Mandate, see: Assaf Likhovski, 'The Invention of Hebrew Law', *American Journal of Comparative Law* 46 (1998), p. 339; Ronen Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (Cambridge Studies in Law and Society), Cambridge 2000 (hereinafter: Shamir, *Colonies of Law*).

He particularly opposed the ideology of factions close to the socialist Bund movement: the "autonomists" who believed that Jewish congregations throughout the diaspora should continue to exist with a degree of communal autonomy, and that there was no need to concentrate in one country. In opposition, he coined the phrase "We must not only deal with the problem of the Jews, but also with the problem of Judaism". Despite his religious upbringing, being a secular intellectual, he believed that the Jewish state and its populace need not hold onto religious content, but could rather create modern content, in the spirit of the times. AhadHa'am sought to ground the rehabilitation of Judaism without its religious dimension, but called for preserving an affinity and sympathy to the tradition as well as focusing on the old Jewish world and developing and expanding it slowly, so that the nation would retain its continuity.

Following the British conquest of Palestine, many members of the Jewish Law Company immigrated to it, and judicial and academic research relating to Jewish Law intensified. In the twenties, it appeared that the project of reviving Jewish Law, under a Zionist-secular guise, would be as successful as the project to revive the Hebrew language was. However, concern for the Jewish Magistrate's Court, as well as the research conducted by the Jewish Law Company, died down in the thirties. The focus of the Jewish jurists shifted to legal education—establishing a Jewish law school—the High School for Law and Economics, which opened its gates in Tel Aviv in 1935[57]. As the time of the establishment of the State of Israel approached, the idea of reviving Jewish Law received renewed attention. In 1945 Abraham Haim Freeman, a jurist of German ancestry, who was teaching at the Hebrew University in Jerusalem at the time, called for the adoption of Jewish Law (following its reform and modernisation) as the law of the Jewish state once it had been established. The jurist Haim Cohen, who was later the Attorney-General and a Supreme Court justice, called, in an article published in 1946 entitled "Caring for Tomorrow", for [the Jewish] people to prepare for the day in which the "Jewish State" would be founded, and for a revival of Jewish Law, *inter alia*, by preparing a "proposition showing that a uniform private law can be constructed which would continue our ancient traditions, and which would be unique to the Jewish people and be designed to suit its character and idiosyncrasy, and which nevertheless correlates to the progress and development of all the enlightened nations."[58]

Concern for Jewish Law increased as the power of the British regime in the Land of Israel waned, and the establishment of the Jewish state became a real possibility. In early 1947, the idea of operating autonomous Jewish courts in Tel Aviv was raised anew, and of necessity, the question of which law would be applied by those courts was addressed, and the call was made for "Zealous redeemers to restore Jewish law to the natural path of the people and the state."[59] Moshe Zilberg, another future Supreme Court judge, demanded, as early as the thirties, that Jewish law be codified, so that it could become the law of the future Jewish state. He revisited that idea in September 1947, when he reiterated that the Jewish state would be bound to adopt Jewish law, after it had undergone suitable codification, as its national law.

[57] See generally, Assaf Likhovski "Legal Education in Mandatory Palestine", *Eyunei Mishpat, Kaf-Heh* (5762), p. 291 (hereinafter: Likhovski 'Legal Education').
[58] Cohen, H. (1946). *Concern for Tomorrow.* The Prosecutor 38c.
[59]Globus, A.L. (1947) *On the Jewish Court of Law.* The Prosecutor, d.

It is significant to note that the supporters of the "Jewish Revolution" understood that it could not happen overnight. They did not demand the wholescale replacement of Mandatory law with Jewish law in one fell swoop. Several more modest (and more realistic) proposals were made, such as incorporating content from Jewish law into the new Israeli legislation, a declarative announcement of the affinity between Israeli law and Jewish law in the constitution of the new state, or enacting provisions that would direct the new Israeli judges to turn to Jewish law whenever they encountered a lacuna or "conflicting provisions" in existing law.[60]

In the first months of 1948, just prior to the establishment of the state, the cries to adopt Jewish law as the law of the State of Israel naturally intensified, both from Jewish jurists and religiously observant Jews (who in this context did not refer to this as "Jewish Law" but as the "Traditional Law" or the "Laws of Our Sacred Torah").[61] These cries did have a practical application. In December 1947, the Legal Council was established—an organisation that was supposed to coordinate all the legal activities in anticipation of the establishment of the state. Indeed, in June 1948, voices expressing preliminary doubts amongst the Jewish jurists began to be heard, starting to emphasise the length of time that would be required to complete the task of reviving Jewish law.[62]

Nevertheless, the idea that Jewish law should be used as the foundation of the law of the State of Israel also had detractors amongst the Jewish population of Palestine. Jurists who studied in Central and Western Europe identified Jewish law with the *Halacha*, and preferred to create a legal system that would be more closely connected to modern western law. The jurists were joined by politicians, such as David Ben Gurion, who served as the State of Israel's first Prime Minister and Minister of Defence and was one of the leaders of the labour movement.

This group was not interested in giving any ground to a system of law that was identified with the religious factions. However, even those detractors paid lip service to the idea of using Jewish law as the foundation of the law of the State of Israel. This was the manner, for instance, of Ben Gurion, and Moshe Zemorah, the first Chief Justice of the Israeli Supreme Court, in speeches they gave before the Council of the Bar Association in 1949. In his speech at that event

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[60]Haris, 'Historical Opportunities', p. 35. *Cf.* P. Dickstein 'No Jewish State is Possible Without Jewish Law' *HaPraklit, Daled* (1947), pp. 328, 329-330; 'Declaration of Jewish Law', *HaPraklit, Heh* Booklet *Alef* (1948) (In which Dickstein proposed to enact the following provision: 'In any event in which existing laws do not at all relate to a certain issue, or their meaning is duplicitous or contradictory, the courts and the government authorities must use the sentences of Jewish law adapted to the needs of the times'; 109). For other versions of the same idea, *cf.* Y. Karp "The Legal Council: The Beginnings of the Tales of Legislation", Aharon Barak and Tana Shpanitz (Ed.), *Uri Yadin Book: Essays in Memory of Uri Yadin*, Bet, Tel Aviv 5760, p. 238 (hereinafter: Karp "The Legal Council"), which notes Zerach Warhaftig's proposal that "Judging in the civil courts will be conducted according to the laws in force on the day before the Mandate was abolished, and pursuant to the foundations of the laws of Torah and the rules of justice and equity", 238.

[61] A. Carlin, 'Research of Jewish Law' [Hebrew] *HaPraklit, Heh* (1948), p. 80; *Samech-mem*, 'Jewish Magistrate's Law: What Shall be Its Place in the Jewish State?' [Hebrew] *HaPraklit, Heh* (1948), p. 92; M. Zilberg, 'Law in the Jewish State' [Hebrew] *HaPraklit, Heh* (1948), p. 102; P. Dickstein, 'Political Independence and Legal Independence' [Hebrew] *HaPraklit, Heh* (1948), p. 107; S. Eizenstat, 'State and Law' [Hebrew] *HaPraklit, Heh* (1948), p. 113; M. Bar Ilan, 'Law and Trial in Our State' [Hebrew], Yavne, *Gimel* (5709), reprinted in Y. Bezeq (Ed.), *Jewish Law and the State of Israel: Collection of Essays*, Jerusalem 5729, p. 20.

[62] M. Zilberg, 'Law in the Jewish State' [Hebrew] *HaPraklit, Heh* (1948), p. 102, at 103 (Codification of Jewish Law is a task for "Half a generation, if not an entire generation").

Ben Gurion stated: "We will not become that which we shall, without constantly absorbing from the sources of our ancient being, and without staying close to the roots of our past."[63]

It soon transpired that no "national revolution" was to take place in the field of law.[64] The first pieces of legislation enacted with the establishment of the state, first and foremost amongst which was the Government Procedure and Legal Procedure Ordinance, refrained from binding the newly forming Israeli law to Jewish law. The fading of the national wave of enthusiasm was also manifest in the resolutions passed by the Bar Association in the summer of 1949, which discussed the "creation of an advanced legal system" and "laws … that would be suited to the spirit of the revolution that resulted in the foundation of the state"; but Jewish law was not mentioned at all.[65] And indeed, in September 1949, Paltiel Dickstein, from the Jewish Magistrate's movement, complained about the general trend he discerned of ignoring Jewish law in the new Israeli legislation.[66] These complaints had no practical impact. Interest in legal revolutions and reviving Jewish law had waned. Every once in a while, vague promises to use this law were made;[67] however, within a decade from the establishment of the state it was clear that the fate of Jewish law was sealed. In a paper he wrote in the late fifties, Haim Cohen, who was one of the leading supporters of adopting Jewish law in the period pre-dating the foundation of Israel, stated that the conservatism of the rabbinical establishment entailed that "amongst the [secular] jurists one could, seven and six and five years ago, but cannot currently, harness people to renew the face of Jewish law". For that reason, he added, "reviving Jewish law as the law of the land is no longer on the agenda: it was the concern of yesterday…"[68]

Another attempt to connect Jewish law to the laws of the State of Israel was made in the early 1980s, with the enactment of the Legal Foundations Law 1980-5740, which formally disconnected Israeli law from English law, and included a provision ordering judges who cannot find a solution to a legal question arising in legislation and case law, or by way of analogy, to determine the matter according to the "principles of liberty, justice, equity and peace of the Jewish tradition". The Legal Foundations Law was mainly a declarative law, and any operative content in

[63] 'An Account from the 13th Convention of the Israel Bar Association' [Hebrew] *HaPraklit, Vav* (1949), p. 94, at 97 (Ben-Gurion); p. 103 (Zemora).

[64] See [*HaMa'arechet*] 'Questions of the Hour' [Hebrew] *HaPraklit, Heh* (1948), p. 161 (Essay from December 1948 stating that in the creation of the national law one "should not expect great leaps forward". *Cf.* [S. Assaf's speech] 'The speeches made at the opening ceremony of the Law Faculty of the Hebrew University in Jerusalem on 7th *Kislev* 5710, 28th November 1949', [Hebrew] *HaPraklit, Zayin* (1950), p. 247.

[65] 'Resolutions from the 13th Convention of the Israel Bar Association' [Hebrew] *HaPraklit, Vav* (1949), p. 125; [S. Assaf's speech], *ibid*, pp. 247, 249 ("there are no revolutions in the world of law' and the task of reviving Jewish law is 'a matter for a generation, and perhaps even several generations").

[66] *Pey-Daled*, 'The Methods of Legislation in Our State' [Hebrew] *HaPraklit, Vav* (1949), p. 144;

[67] See, e.g.: Uri Yadin 'Legal Planning for Our Times' [Hebrew] *HaPraklit, Zayin* (1950), p. 283 (promising that the Ministry of Justice wishes to 'bring Japheth's beauty into Shem's tent' and 'reviving the hidden treasure of Shem himself').

[68] H. Cohen 'Yesterday's Worries' [Hebrew], *Haim Cohen: Collection of Essays* (Ed. A. Barak and R. Gavizon), 5752, p. 25, 31-32, 40. Every once in a while, calls to revive Jewish law could be heard, which seemed like a relic of the spirit of 1948. See S. Eizenstat 'Modern Codification of Our National Law' [Hebrew], *Law and Economics, Heh* (1958/59), p. 162.

it was sterilised by a list of cases decided by the justices of the Supreme Court throughout the 1980s and 1990s, which made that Law a dead letter.[69]

The process of shaping the law and legal system in Israel was at the centre of debates or even arguments about the vision of Israel that should be realised in the real State of Israel.

The principles of Jewish law survived the course of Jewish history. They were tried and tested over a very long period of time (measured in thousands of years), throughout various societies, in separate geographical regions, and under different political conditions. That legal history reveals the interconnection between both the development of the system and principles that failed to prove themselves. Thus, the rules that survived were those that withstood the test of time, place, and circumstance.

Indeed, there is no other known example of a legal system that preserved its vitality for such a long a period of time. Not only does the method work, but to this day we can rely on determinations, statements, precedents and rules which appear for the first time in the *Mishna* and the *Talmud*, and which reflect an older legal state of affairs. The renowned American judge, Oliver Holmes, famously observed that law is, and must be, grounded in experience and not logic. The rules of logic tend to change frequently, whereas experience often reflects the stable and the possible.[70]

Thus far, I have examined the place occupied by Jewish Law in Israel's "ordinary" legislation, I will conclude by examining the Jewish Law's place in the constitutional makeup of the State of Israel.

As previously explained, the Basic Laws are a collection of supra-legal constitutional norms. They are superior to ordinary legislation. An ordinary statute cannot change a Basic Law. An ordinary statute cannot impinge on a Basic Law. In any clash between a Basic Law and an ordinary statute, the Basic Law will prevail because the Supreme Court has given the law constitutional status and thus it takes precedent. The ordinary statute is void, and the court is authorised to declare its nullity. The constitution of the State of Israel has an important place for Jewish Law; the constitutional vehicle through which Jewish law communicates with the constitutional structure is principally based on the provisions of the Basic Law: Human Dignity and Liberty, which states that the purpose of the Basic Law is to protect human dignity and liberty, "to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state"[71]. The second clause in the Basic Law: Freedom of Occupation (1994) prescribes that the rights under the Basic Law cannot be limited otherwise than by a statute suitable to the values of the State of Israel as a Jewish and democratic state on the constitutional level. An ordinary statute, impinging on the human rights protected under the Basic Law is unconstitutional, unless it corresponds to the values of the State of Israel as a Jewish and democratic state. This again underscores the constitutional importance attached to protecting human rights through the mechanism of the Basic Laws.

[69]*Cf. High Court of Justice Case* 1635/90 **Jarjavski v. The Prime Minister**, *pey-daledmem-heh*(1).
[70] Holmes, O.W. (1881). The Common Law. Boston.
[71]Basic Law: Freedom of Occupation (1994)

However, the State of Israel's values as a Jewish state, including the values of the Jewish tradition and Jewish law have also gained constitutional status. This is a constitutional development of the first order. It materially altered the status of the fundamental values of Jewish law, and gave them—in a secular manifestation—a constitutional aspect.

Jewish law was absorbed into Israel's law in three main ways. The first, linguistically: Israeli legislation adopts linguistic formulae from Jewish law. For instance, the Good Samaritan Law (1998), which obligates citizens to assist a person in danger and affords legal protection to such a person, is referred to in Hebrew as '*Lo Taamod al dam ra-acha'* and derives from the Torah, specifically the Book of Leviticus. The fact that the Israeli law comes in part from Jewish Law thus demonstrates a direct manifestation of the Jewish values of the state in the Israeli legal framework and a significant Jewish influence on the process of promulgating laws and enacting legislation. This Jewish obligation finds expression in the modern manifestation of the Law in linguistic terms, namely, the Israeli law mirrors Jewish law.

Second, in terms of content. The Israeli legislature at times adopts principles derived from Jewish law. For example, during the Mandate period, Article 51 of the King's Law and Council determined that personal law is the law of the community to which the person belongs, and that the jurisdiction of these matters will be the religious court, which will act according to religious law. Thus, in parallel to the Shari'a court that operates for Muslims, there is a court of Christian communities, and a Rabbinical Court for Jews.

The Israeli legislator maintained the arrangement that existed during the Mandate period, i.e. the only place where Jewish law exists in the legal system in Israel is personal law. In 1953, the Rabbinical Courts Law was passed, which granted rabbinical courts authority only in matters of marriage and divorce.[72] This power has thus been given to the Rabbinical courts by virtue of the law and does not depend on the consent of the litigant. This arrangement has been the subject of severe criticism by Israel's secular majority, since the laws of Jewish law are not necessarily compatible with either secular values or the daily reality according to which these people live. Such elements view the granting of compulsory authority to the Rabbinical system as an imposition of religious values in the legal system. Regardless of this debate, the Rabbinical jurisdiction and power bestowed upon the rabbinical leaders is a manifestation of the absorption of Jewish law into areas of daily Israeli life.

Third, in the sphere of values. Jewish law is a treasure trove of fundamental values and basic perceptions relating to human relationships. These values form part of the values of the state of Israel. They constitute, together with the state's values as a democracy, the general purpose of every piece of legislation, the residual law pursuant to which any legislative lacuna which cannot be completed by analogy is perfected; they form constitutional values against which the validity of any item of legislation is judged.

Indeed, of the three paths mentioned—language, content, and values—the third seems the most fertile and important. The first is of a technical nature; the second, by its nature, is very limited. The third is the most significant, and in it the invoking of Jewish law is the most extensive,

[72] The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953.

since all the values of the State of Israel as a Jewish state are, in the words of Justice Landau, "Our national cultural asset".[73]

In conclusion, one can say that Jewish law is a highly unique legal system, in that it succeeded in functioning for such a long time, in so many countries, and under diverse governmental systems. Thousands of years of intellectual thinking have been invested in it. Even today, the intellectual effort reflected in the various branches of the *Halacha* is several measures of magnitude larger than the academic efforts spent on the branches of law we use today.

Jewish law is an inseparable part of the State of Israel; Israel's values as a "Jewish and democratic State" stand atop it. These values possess constitutional force. Jewish law has a central part, from the perspective of legacy, in Israel's values as a Jewish state. The principal tool with which a judge fulfils their function is interpretation. In this context, their interpretation is likely to be inspired by Jewish law, which also has an impact even if the statute was not influenced by Jewish law at all. This interpretative impact is reflected in the sense that, as part of the values of our legal system, which constitutes the general purpose of every law, Jewish values must be considered in the enactment of any law.

In the State of Israel, there are many types of judges. This includes religious and secular Jews, Christian and Muslim Arabs, and many other segments of society. Each judge contributes their own wisdom and life experience, but ultimately they have the duty to pursue two central goals. One, to bridge the gap between social reality and the law, namely by adapting their rulings to the changing reality of life. Second, the protection of the Basic Laws and the values of the State of Israel as a Jewish and democratic state. For this purpose, the judge must act objectively and remain sensitive to the social consensus, as far as it exists. Above all, the judge must uphold the public's trust in their ability to rule with fairness.

In order to fulfil these two roles, the judge must implement measures that are at his or her disposal within the confines of the law (such as interpretation, developing the law, balancing interests, comparative law). The judge must not take measures that are illegitimate. It is not sufficient for the judge merely to know the end goal, the ruling. He or she must utilize legitimate tools to argue and justify that ruling. In other words, without a "legitimate ladder" you cannot reach the desired roof. In the absence of existing tools, the creation of new tools must be examined. Such an endeavour is worthwhile only if the judge is authorized to do so.[74]

The judge of the Supreme Court, Ayala Procaccia, justified several rulings on the high standards of behaviour and norms required of a judge:

"A judge in Israel is not just like any person in terms of the duties and responsibilities placed on their shoulders. Through their declaration of allegiance, and ownership of the so-called "judicial throne", they accept not only the burden, which is sometimes unbearably heavy, of professional

[73] Landau, '*Halacha* and Discretion in Making Law' [Hebrew] *MispatimAlef* 292, 305 (5729).
[74] Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy", 116 Harv. L. Rev. 16, 148 (2002)

responsibility to judge and grant justice, and to carry the heavy burden that being a judge imposes on him or her. The judge also accepts upon him or herself the obligation to strictly adhere, first and foremost, to the norms of behaviour that obligate every citizen in society in the civil and criminal spheres, and not to deviate from them. A judge is also subject to a system of ethical and disciplinary norms…and must strictly observe the rules of conduct and ethics in relation to the litigants standing before him or her."

Indeed, the judicial role obliges the judge to strictly observe the law, as is required of those who decide the fates of others day by day and determine the consequences to be applied to acts of breaking the law. At the same time, a judge must perform their judicial function while adhering to the rules of ethics at the highest level. Due to the unique norms of behaviour that apply to judges, they are subject to a strict standard of behaviour not only on the bench, but also in the rest of their lives. The judicial office and the special moral status that accompanies it in the eyes of the public reflect on the lifestyles of the holder of the position and obligate them to conduct themselves in such a way that will reflect well on their status and the status of the judicial system in the eyes of the public.

Religion and State

The separation of religion from the state is a central theme in modern democratic systems. With regard to this principle, the question is to what degree must and can we abide by the separation of religion from the state as a foundation of the system in the State of Israel?

Historically speaking, the separation of religion from the state—and in particular, the separation of religious institutions from the institutions of the state—was designed to protect freedom of religion, that is to say, freedom of faith and the ability to choose and adhere to a religious way of life without the state's interference; as well as to protect freedom *from* religion, that is to say, to permit citizens to choose and adhere to a secular way of life, without religious coercion. Furthermore, it is necessary to prevent religion from having the ability to direct the state's actions to causes that are contrary to, or exceed, the needs of the entire public.

Since freedom of faith and conscience gave rise to many and varied religious approaches and congregations of believers, as well as people of a secular persuasion, it transpired that freedom of religion creates a multiplicity that does not correlate with the desire or expectation that some shared religious faith would serve as a foundation for the unity of the body politic.

Owing to the multiplicity of faiths and opinions under conditions of freedom of faith and conscience, most democracies tend to view religion and religious life as properly belonging to the sphere of voluntary actions of the citizenry, outside the regulated boundaries of the state; in other words, as belonging to the private sphere. It is important to emphasise that just as the separation of society and state is not considered anti-social, neither is the separation of religion from state considered anti-religious.[75]

On the other hand, there is a lesser dispute relating to the question of who is authorised to define the principles and characteristics of Israel as a democracy. In this, the status of the *Knesset* and that of the Supreme Court are recognised, despite the fact that the relative weight of their respective authorities is still a matter of controversy.[76] Moreover, if the question "What is a Jewish state?" is principally one for internal Jewish and Israeli discourse, the question of whether Israel is a democracy is a legitimate subject for international examination and discussion, which Israel cannot ignore.

In 1947, Ben Gurion promised the religious parties that in the State of Israel, once established, no changes would be made to the customs practiced in Mandatory Palestine with regard to the affairs of the Jewish religion.[77] This promise was the condition laid down by *Agudat Israel*[78] for the party to refrain from opposing the establishment of the state. It should be kept in mind that the national institutions sought to present a united and uniform Jewish front *vis-à-vis* the nations of the world.

Ben Gurion kept his promise to the letter, and the first coalition agreement in 1949, which served as the first government's basic principles, stated that the Sabbath and Jewish religious holidays would be prescribed as days of rest for Jews; that every government-run kitchen for Jews would adhere to the religious dietary prescriptions; that "public religious needs" would be met by the state or the local authorities; that "however, there will be no state coercion in matters of religion";[79] that there would be no civil-secular statute for marriage and divorce; that the existing law would remain in effect; and that "the recognised educational factions would henceforth also retain their autonomous status within Israel's educational system".[80]

That was the original *status quo*, in setting and applying it the government fulfilled any duty—political or moral (since no legal duty existed as yet)—which may have been incumbent on it towards the religious parties.

The same coalition agreement also stipulated that "freedom of religion and freedom of conscience shall be ensured, that is to say that any person in the state may observe the customs of his religion in his own way, and the government will not coerce in this regard in any way. Moreover, freedom of conscience to act according to one's own internal recognition would be ensured for all, provided that the laws of the state and the rights of one's fellow man are not thereby impinged on."[81] And possibly to prevent claims that granting men and women equal rights could

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[77] Essay by Haim H Cohen 'How Does One Dance Before the Bride' [Hebrew], *MispatVeMimshal Gimel* (1995), 321-338.

[78] The ultra-orthodox religious party.

change the *status quo*, they added that "legal conditions for women in the State of Israel shall be equalised in all civilian, social, political, economic, and cultural matters, to that of men, and that equality will be binding on the religious courts when they adjudicate on matters of personal status, inheritance, alimony, etc."[82]

To keep the *status quo* means to continue to adhere to the existing conditions and not to change them. And in fact, the religious circumstances that existed when the state was founded were retained and determined to be binding on the state: the day of rest statute stands, religious dietary prescriptions are adhered to in all government kitchens, Jewish religious services are funded by the state and the local authorities, no civil statute for marriage and divorce was enacted, and the autonomous factions of education continue to flourish.

The State of Israel is bound to preserve its character as both a Jewish and a democratic state, the reality of which finds its expression in the Declaration of Independence, in the Basic Law: Human Dignity and Liberty, in the Basic Law: Freedom of Occupation, and in other pieces of legislation. Then there is the question of the meaning derived from the definition of the values of the State of Israel as arising from a dualism that joins together two normative value traditions – Judaism and democracy.

There are many instances in which religion and democracy complete one another, and this is revealed in the powerful unifying forces that originate in religion, the historical heritage, the way the nations of the world relate, and the geo-political conditions. However, one cannot ignore the in-built tensions between those two systems, which clash with each other on central themes.

These tensions repeatedly arise concerning several central themes: The place religion has in public and private life (which includes the character of the public sphere), the monopoly of the orthodox faction which excludes and discriminates against other factions of Judaism, the treatment of women, the status of Arabs (and other minorities) in the state, exemption from military conscription and other benefits for those who do not serve and do not work, settlements built contrary to law by national-religious groups, and violations of the rule of law by radical religious groups—are all expressions of the conflict between these contradictory ideas and principles.

At the heart of the relationship between religion and state are four principal disagreements:[83]

1. An argument over the proper place religion should play in public life. The principle of freedom of choice collides here with the religious commandments and the instructions issued by rabbis.

2. Arguments relating to the equality of the various denominations of Judaism, equality of the sexes, equality between Jews and gentiles, and equality of the burdens of the citizenry.

[83] Hasson, Shlomo (Ed.), 2002, *Religion, Society, and State Relations: Scrips for Israel*, [Hebrew] Jerusalem: The Floersheimer Institute for Policy Studies.

3. The struggle between the rule of law and the religious commandment to settle the Land of Israel.

4. Arguments relating to the character of the public sphere, which includes the freedom to express oneself openly by dress code, advertising, recreation, and the use of public facilities.

Attention is often called to the tensions and struggles evident in daily life; however, underneath the surface, there are deep divisions over the very character of the State of Israel, the source of its authority, and the future social and economic identity of the state. In the place occupied by religion in public life, this tension is related to the state's identity, and the proper place religion should occupy in public life. At the heart of the conflict are the political laws and understandings relating to the State of Israel's identity as a democracy and its character as a Jewish state.

On the one hand, there is the school of thought emphasising the importance of democracy, freedom of choice, the principle of equality, and pluralism; opposing it – a school of thought emphasising the importance of preserving unity of the people of Israel in the State of Israel while retaining the links to the Jewish religion. Amongst the laws that reflect the connection to the Jewish religion, one can name the following: The laws of personal status (marriage, divorce, burial, etc.), conversion according to the *Halacha*, and declaring the Jewish Sabbath (Saturday) as the official day of rest in the state. The Marriage and Divorce Law was the only statute in which the law of the state gave binding force and effect to the laws of the *Torah*. The Sabbath law is a municipal by-law and only encompasses a limited range in the field of the public domain. At the heart of the tension between religion and democracy is the issue of marriage. Some believe in the fundamental right of any person to marry freely, without religious coercion, as stated in The Universal Declaration of Human Rights adopted by the UN in 1948.

The Israeli legislator even integrated the highlights of the aforementioned arrangements. Despite a certain narrowing of the scope of marital status law, determinations relating to marriage and divorce remain in the hands of the religious communities and their courts. This mechanism of conservation, fixes, in the Jewish context, the place occupied by the orthodox rabbinical establishment as possessing the power of determination over issues granted by law to Jewish religious law. Moreover, the Population Register, originally a civilian mechanism, retains the classification of religion, in addition to the classification of nationality, wherein lies one of the clearest points of contention between the civilian definition of the individual and the religious one.

The Basic Laws enacted in 1992 present a different formal solution, reflecting a commitment to the State of Israel's identity as a "Jewish and democratic" state. However, there is no consensus regarding the nature of the definition of Israel as a Jewish state, including with regard to the question of whether that term carries religious significance. The questions debated in the framework of that discussion are: What is the status of the (rabbinical) religious authority in a normative definition of Israel as a Jewish state? To what degree should the definition be based on the *Halacha*? What weight does the national-secular definition of the term "Jewish" carry? What

weight is afforded the voluntary determination of citizens seeking to define their subscription or non-subscription to Judaism pursuant to individual cognition and individual identity criteria?[84]

This discussion re-emerged in 2018 with the passing of the Basic Law: Israel as the Nation-State of the Jewish People. The law's guiding principles are as follows:

A. The land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established.

B. The State of Israel is the national home of the Jewish people, in which it fulfils its natural, cultural, religious and historical right to self-determination.

C. The right to exercise national self-determination in the State of Israel is unique to the Jewish people.

The controversy surrounding this law derives from the disagreements surrounding the Jewish state's ultimate character and hierarchy of its values. What is at stake here is the ongoing tension between Israel's Jewish and democratic nature and the permanent balancing act that results. While the Nation-State law does not provide any conclusive answers to what *kind* of Jewish state, it ostensibly favours the Jewish nature of the state over the democratic values.

Ultimately, this conflict is anchored in two conflicting systems of belief. On the one hand, there is faith in the principles of liberal democracy, at the heart of which is the individual and his or her right to freedom of choice. According to this belief, there is a social contract between the individual and the state, which requires the state to protect that right. On the other hand, there is faith in the covenant between the people of Israel and their God, and the Jewish principles of 'mutual responsibility'. These principles necessitate caring for the individual to ensure that they do not deviate and marry someone outside the faith—a phenomenon that is said to threatens the very continued existence of the Jewish nation. It is a very difficult chasm to bridge. Adherence to the ideals of democracy obligates us to uphold the concepts of both freedom of religion and freedom *from* religion. The principle of freedom from religion in the public sphere is undermined when religion seeks to shape the identity of the people by means of legislation that grants a monopoly in the fields of marriage, divorce and conversion to the rabbinical courts. Anyone who believes that the orthodox religious monopoly is necessary to preserve the nation's unity is in deep-rooted conflict with the principles of freedom of choice and religious pluralism. According to that school of thought, the principle of the individual's freedom of choice could lead one to be 'Excluded from the People of Israel'. In opposition to that school of thought is the perception that belonging to the nation is exhibited by actually living in Israel; by contributing to the state, the state's security and economy, and the shared culture; by a command of the language; and by voting in general elections and serving in state institutions. At one end of this ideology is the position stating that the Israeli people are being formed in Israel, the sons and daughters of which feel a deep-rooted affinity to the land and its inhabitants. Opposing this position is the religious ideology that claims that national-Israeli affiliation, instead of Jewish-religious affiliation, will split the

people of Israel living in the Land of Israel from the Jewish nation living in the diaspora. This is in essence a debate about the nature of our national identity. On the one hand are those who support legislation designed to preserve the Jewish character of the State of Israel and preserving its very existence as a Jewish state, even if as a consequence these and other rights of the citizenry are somewhat violated.[85]

The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 1953-5713 imposes the authority of the laws of the *Halacha* in the fields of marriage and divorce on the entire Jewish population of the state, yet despite the existing legislation, 62% of the Jewish public believes that civil marriages should be permitted in Israel[86]. Many Jews today circumvent the statute by marrying in a civil ceremony overseas. This trend is reflected in the permanent number of marriages in the rabbinical courts in Israel, meaning that more than 20% marry outside the rabbinical establishment.

The second point of contention relates to the issue of equality: equality of the sexes, equality between Jews and non-Jewish minorities, and an equal bearing of the burdens of securing the state and contributing to its economy. Two approaches to Judaism collide here: One is based on the principles of dignity and equality, which includes equal bearing of the burdens of the state, and the other, opposing it, is the ideology that distinguishes and discriminates between the genders and between groups within the populace. This is a clash of values between the principle of universal equality and the rules of the *Halacha*, which discriminate against women. Lack of gender equality is blatant in the treatment of women in many fields, such as testifying, participation in religious councils, praying at the Western Wall as well as aesthetic and media expressions. The exclusion of women is a grave and material affront to the principle of equality. Together with discrimination against women, certain rabbis also exhibit a tendency to discriminate between Jews and non-Jews. One of the central stages in the struggle for equality is found in the relationship between the secular-Jewish population and the ultra-orthodox population, which represents a collision of two opposing value systems. In opposition to the ideology of defending the security of the state, the ultra-orthodox public presents the idea of defending spirit and heritage by those who are perceived as soldiers and the true defenders of the Jewish nation—those studying the Torah on the benches of the *Yeshiva*.

In conclusion, one can say that the State of Israel is not only founded on Jewish values; it has also introduced various changes, which can be summed up as follows. First, the laws of the state are not made by a higher power but by a majority of representatives of the people, and as they are made, they can be amended, replaced and repealed according to the needs of the hour. Second, neither the government nor any other authority or person are entitled to violate a person's rights, otherwise than pursuant to law, as interpreted in a competent court ("The Rule of Law"). Third, the values of the religion, and all the commandments of the covenant between man and God, and all the beliefs and opinions, are given to the conscience, tastes, and free choice of each and every

[86] Central Bureau of Statistics 2010.

person, but Judaism has nothing to learn from democracy in terms of humanity or morality, equality or justice, protection of life or the dignity of human beings[87].

[87]Yossef Dan 'The Liberating Ultra-Orthodoxy: A Consequence of Secular Israel'[Hebrew], *Alpayim* 15 (1997), pp. 234-253.

CHAPTER II

TORT LAW IN ISRAEL

The Character of Israeli Tort Law

Israeli Law is mixed in character, since it draws on two traditions: **statutory and common law.**

Statutory Law

As reflected in the Civil Wrongs Ordinance ("CWO") enacted by the British Mandatory Authorities in 1944, the statutory law aspect lies at the heart of Israeli tort law. The CWO defines "Civil Wrongs" (Torts) as actions which give rise to tortious liability. It also sets out the general doctrines of tort law, such as causation, remoteness of damage, and vicarious liability; enumerates defences, such as contributory negligence and ***volenti non fit injuria***; and lays down the general framework for the assessment of damages.

Despite the existence of certain important pronouncements of tort law – as well as the rules of liability – outside the scope of the CWO, as far as both the *Knesset* and the courts are concerned, the CWO applies to these external rules either directly or by analogy. Due to its singular importance, it is pertinent to ask: what exactly is the CWO?

The Civil Wrongs Ordinance (CWO)

At first glance, the CWO may seem like a tort law code. However, the CWO is actually a restatement of English tort law as it was in the 1930s and 1940s. As such, it is a compilation of *judge-made law* and certain pieces of legislation. Unlike Continental tort systems, English tort law was formed piecemeal over time from a collection of judicial decisions. The provisions of the CWO are based on those decisions and, in many respects, reflect their reasoning as well as the legal principles embodied in them.

Nevertheless, there is a major difference between English tort law and the CWO. After the enactment of the CWO, English law continued to develop as it had done before the CWO was enacted; new categories of tortious liability were established, and existing categories modified and redefined through judicial law-making, subject only to legislative amendments of defects in the system. In other words, English judge-made tort law had the necessary flexibility to adjust to changing social, economic and technological conditions.

In Israel, since tort law was founded on an enactment, judges lacked the authority to reshape and remodel the statutory formulae and definitions. They were forced to perform their tasks within the boundaries of the legislation. As a result, the CWO "froze" the dynamic process of the development of English tort law at an arbitrary moment in time, transforming it into a fixed, rigid, statutory regime.[88]

[88] Gilead, Israel. "The Evolvement of Israeli Tort Law from Its Common Law Origins." [Hebrew] In Alfredo Mordechai Rabello ed. *European Legal Traditions and Israel*. Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem (1994): 523-530.

How did Israeli tort law adjust to the unparalleled social, economic and technological changes experienced by Israeli society during its existence? One might assume that the legislature would have played a major role in the evolution of Israeli tort law; however, this was not the case. Until the 1970s, the *Knesset* was relatively quiet with respect to tort law. It was the courts, under the leadership of the Supreme Court, that were forced to cope with the needs for adjustment.[89] The courts injected new meaning into statutory definitions and formulae, even to the extent that these deviated from the original law on which the CWO was based. In other words, Israeli judges' interpretation of these rules shaped them to the changing local needs.

The CWO's definition of negligence is taken directly from Lord Atkin's formulation in the seminal case of *Donoghue v. Stevenson*.[90] This concept of liability was based on two elements: Careless behaviour on the part of the tortfeasor and a nexus – "neighbourhood"– or proximity, between the tortfeasor and the claimant. In the CWO, the concept of proximity was named "Duty of Care" and was based on the objective criterion of the "Reasonable Man".

In English law, the combination of carelessness and proximity never evolved into an independent, self-sufficient principle of liability. Instead, carelessness causing reasonably foreseeable damage to a neighbour was regarded as the "general concept" that may serve as a guide to determining the nature, scope and limits of duties of care in distinct yet recognisable circumstances. "It is not to be treated as if it were a statutory definition."[91] The requirements of "proximity" and "neighbourhood" were considered by some, even within the English judiciary, as too vague to be legally applicable, and insufficient to restrict liability for careless behaviour. In other words, the threshold for liability in Lord Atkin's formula was considered too low.

In the 1970s, an attempt was made in England to raise the threshold of liability, so that the principle of "proximity" could be applied as a general and independent source of liability.

Proximity and neighbourhood were incorporated into the CWO's statutory duty of care requirement. But, unlike the English judiciary, which was unable, or unwilling, to formulate a single general principle as a practical test applicable to every situation involving a duty of care, Israeli law recognised, from the outset, that carelessness combined with a duty of care provides such an independent yet comprehensive principle. Furthermore, the requirements of "justice, fairness, and reasonableness," added in England in the late 1980s to restrain the expanding doctrine of "proximity", had been anticipated in Israeli law as far back as 1960, when it restrained the concept of "neighbourhood" by emphasising "[I]ts moral and social element."[92]

Three supplementary rules were established to increase the use of negligence in order to make tort law responsive to the changing needs of society.[93]

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[89] *Ibid*.

[90] Heuston M.A, R. (1957). DONOGHUE v. STEVENSON IN RETROSPECT*. *The Modern Law Review*, *20*(1), 1-24. doi: 10.1111/j.1468-2230.1957.tb00421.x.

[91] Lord Rein in The Home Office v. Dorset Yacht Co. Ltd. [1970] A.C. 1004, at 1027 (HL).

[92] Attorney General v. Berkovitz 14 P.D. 206, at 215, 1960.

[93] Gilead, Israel. "The Evolvement of Israeli Tort Law from Its Common Law Origins." [Hebrew] In Alfredo Mordechai Rabello ed. *European Legal Traditions and Israel*. Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem (1994): 523-530.

1. Its application was broadened to cover intentional infliction of harm;
2. It became accepted to use negligence as a means of circumventing the restrictive requirements of other torts. For instance, while malicious prosecution requires "malice" as a mental element, the plaintiff may base a claim for non-malicious, careless use of legal proceedings on negligence;
3. For reasonably foreseeable loss or injury, a *prima facie* duty of care is presumed, which the defendant must then refute.

Does English law serve as a source of law for the purposes of Israeli tort law? This, of course, relates to those parts of English law that were not formulated in one principle or another under the Ordinance, as interpreted in accordance with the Ordinance.

The issue of importing heads of tortious damage from English law is, in fact, part of the "legacy" of the British Mandate. The CWO is a Mandatory piece of legislation (Mandatory legislation is referred to as an "Ordinance", as opposed to the enactments legislated by the *Knesset,* which are called "Law"). Over the years, the interpretations given by the courts shaped the content to the point of completely disengaging from the common law. In 1942, the Mandatory Supreme Court held – in the *Dinowitch* affair – that English tort law would not be imported into Mandatory law, notwithstanding the provisions of The King's Order in Council No. 46 (which applied English law if and when necessary). In 1944, the British legislature decided to apply English tort law via the Cypriot Tort Act, which was manifested in the creation of the Cypriot Ordinance and the enactment of the Mandatory Ordinance. In 1947, the High Commissioner decreed that the CWO would take effect, and to date, for interpretation purposes, reference must be made to English case law in light of Section 1 of the CWO: "Subject to the Interpretation Ordinance, this Ordinance will be interpreted in accordance with the principles of legal interpretation employed in England, and terms and phrases used therein – and it is presumed – to the extent that such correlates to the context and in the absence of any express provision to the contrary – that their meaning is identical to the meanings ascribed to them in English law, and they shall be interpreted thus."[94]

An initial challenge here is that the Ordinance recognises only certain combinations of actions as creating "wrongful acts" in tort law, and that every tort has been allocated its own, narrow or broad, "living space". A further problem lies in the fact that there is nothing in the Ordinance, or in any other piece of legislation in Israel, that establishes a general principle of liability in tort. This is thought to be the case on account of the following: Since our legal system entails a fundamental principle for tortious liability, we have no need for recourse to English legal methods, or to any other source of law for that matter, to recognise the heads of damages in tort for which said principle can serve. Thus, there is merit in discussing the issue of importing heads of tortious liability from English law. However, this can only be carried out on the assumption that there are to be found therein heads of damages which are not present in Israeli law, whether as independent rules, or as derivatives of the overriding principle. As such, we shall review the adaptation of

[94] Civil Wrongs (New Version) Ordinance 5728-1968.

English tort laws by Israeli courts, whether by means of interpreting the original English Ordinance, or through other means.

Part C of the Ordinance (the list of torts) restricts the right of the injured party, and only a remedy found therein can be demanded by an injured party in court.[95] The accepted precedent can be justified in the following manner: The legislator stipulated in Section 3 of the Ordinance that: "The issues listed in the Ordinance hereinafter are civil wrongs, and subject to the provisions of the Ordinance, any injured party or person damaged by [the commission of] a tort, committed in Israel, will be entitled to the remedy specified in the Ordinance, from the tortfeasor or the person responsible for the tort."[96]

"It is inconceivable," the Supreme Court stated in 1981, "that a sovereign state with its own systems and methods of law would continue to be subject to the authority of a foreign legal system and to case law innovations that, of necessity, take place in its courts, only because in the past, at a time when the two countries were closely bound, the first nation drew from the legal system of the second. That is not what the legislator meant."[97] The Supreme Court's remarks can be understood as an assertion of legal sovereignty and an affirmation of the nascent state's ideological ethos.

Even though the Ordinance was enacted against the background of English law, the legislator prescribed that it was precisely the matters enumerated in the Ordinance that would be "wrongs" – and not any other tortious heads of damage found in English law that received no mention in the Ordinance; as if the legislature had said: I drew water for you, but do not go drink from it directly. And indeed, a reading of the Ordinance indicates that the legislator did in fact deviated, with respect to some of the torts, from English law.

Accordingly, it was decided that precedent made in England after the establishment of the State of Israel, on a matter which the courts in Israel have not referred to, is not binding in Israeli law. It can be said that the reference path to English law was explicitly given upon the establishment of the State. When the court rules on a particular issue, and later the court in England rules differently, the law will be different in each of these two cases: If the law was a precedent and it was made following contemplation and attention to the substance of the case, English law will not be binding. However, if the court in Israel ruled what it did following the courts' rulings in England, the Israeli court will be entitled to deviate from the precedent established in England. As for the laws that were laid down in England before the establishment of the State, the view has been expressed that they lack binding force, and possess solely persuasive value.[98]

Nowadays, the Civil Wrongs Ordinance should be regarded as creating a normative framework that stands on its own two feet, from which tort law in Israel must be drawn.

[95] *Civil Appeal* 153/54 **Wider v. The Attorney General**, *Yud Pey-Daled* 1246.
[96] *Civil Appeal* 416/58 **Gideon v. Sliman**, *Yud-Gimel Pey-Daled* 516.
[97] *Civil Appeal* 55/81 **Kokhavi v. Beker**, *Yud-Alef Pey-Daled* 225.
[98] *Civil Appeal* 41+2/57 **I'da v. Sason**.

Most of the burden of tort law has been placed on the shoulders of the tort of negligence.[99] The tort of negligence generated the possibility of dealing with the problems created by the realities of life. New duties of care have been recognised, as the needs of time and place demanded, such as the duty of care owed by government authorities regarding use of their governmental authority,[100] doctors' duty of care regarding "wrongful birth", and the duty of care owed by strikers.[101] The clearest example is undoubtedly the judgment of Justice Agranat in *Weinstein v. Kadima*.[102] This case developed the law of negligent advice long before the parallel development in England.[103] The absence of a statutory framework on the one hand, and the absence of a jury on the other, allowed the court to develop a complex system of compensation that could deal with the main problems that life creates, and provide solutions that are generally satisfactory.

At the time of the establishment of the State, in the absence of statutory precedence, there was a distinct tendency for judges to turn to English law and to incorporate its rules into the framework of the Ordinance.[104] However, this trend has since diminished, in part, due to the Israeli judges' unwillingness to rely on English rulings and inherit the sources and foundations of such rulings. [105] This was part and parcel of a desire to establish an independent tort ordinance in Israel based on Israeli precedent. Today, reference is made to English law for comparative purposes only, without any preference given to its legal prescriptions. In light of the judges' aforementioned goal to create an independent legal system, this development is desirable. In tort law, there are many considerations that must be taken into account: physical integrity, freedom of movement, property, the contract and the family, freedom of expression, freedom of economic activity, and so on – in a list as long as the needs of Man himself. These considerations are liable to conflict with one another.

Tort law is the proper balance that a society determines for such conflicts. Why? One of the well-known rules of tort law is that the compensation the damaging party pays corresponds to the damage suffered by the injured party who won the claim. This conception is largely based on theories of corrective justice, which see in the act of harm a violation of the equality that had hitherto existed between parties, and tort law is based on the need to rectify the state of affairs that has been created and to restore it to its previous state. The first thinker to introduce this justification was the renowned Greek philosopher, Aristotle.[106] Subsequently, many other thinkers developed and enhanced Aristotle's theory of restorative/corrective justice. Some of them, such as Richard

[99] See Engelrad "The Contribution of Case Law to Developments in Tort Law" [Hebrew] Eyunei Mishpat *Yud-Alef* (5746) 67.
[100] See *Civil Appeal* 343/74 **Grobner v. Haifa Municipality**, *Pey-Daled Lamed* (1) 141.
[101] *Civil Appeal* 593/81 **Ashdod Car Factories Ltd. v. Tzizik**, *Pey-Daled Mem-Alef* (3) 169.
[102] See *Originating Summons* 106/54 **Weinstein v. Kadima**, *Pey-Daled Het* 1317.
[103] In re **Hedley Byrne Co. Ltd. v. Ileller** [1964] A.C. 465.
[104] For the historical roots of the Ordinance and its provisions regarding its interpretation contributed to this, in light of English Law and the general English influence over our country see Engelrad, Barak and Heshin, Tort Law [Hebrew] (Ed. G. Tadeski 5736) at p. 112.
[105] On the connection between our system of law and English Law, see D. Fricdmann, The Effect of Foreign Law on the Law of Israel [Hebrew] (1975).
[106] Aristotle, *Ethics*, Nikomakos Editions, 118 [Translated by Libs] (1985).

Epstein, claimed that restoring the situation to its original state by means of torts is required in every single case of harm.[107]

Others, such as Ernst Weinrib,[108] made such legal action conditional on the existence of medical negligence or liability identified in the harming party's behaviour. In any case, the vast majority of theorists agree that the best way to restore the state of affairs that has arisen due to the act of harm is to obligate the injuring party to pay to the injured party compensation equal to the damage caused.[109] According to the dominant approach, the obligation of the harming party to compensate and the right of the harmed party to compensation for damages are inseparable. They are an expression of a legal policy that balances the needs of the individual and society, on the one hand, and the needs of particular individuals, on the other.[110]

Tort law is significant from multiple perspectives and angles. These different approaches highlight the differing ideas regarding the definition of corrective justice in society and in tort law.

It is of great importance in the research analysis of tort law to explore the various approaches. While Aristotle highlighted justice, thousands of years later, Weinrib[111] stressed social goals. The two envisioned different goals in tort law, such as compensation, efficiency, and deterrence.

The development of the reciprocal relationship between the legislative and the judiciary created a fine balance between the two, with case law being combined with the statutory structure, while ensuring both stability and development.

In this instance, the remarks by the renowned American realist, Professor Roscoe Pound, that "law must be stable, but it cannot stand still"[112] can be said to be well reflected in tort law, which provides a sense of stability but is subject to modification in accordance with societal changes. In Israel, it was possible to observe modifications being made to tort law through the development of the legislation in the Knesset.[113]

These legislative changes accompanied the development of case law; indeed, it would have been impossible to introduce the new legislative arrangements solely by means of case law. Precedent in Israel would not have been able to abandon the idea of negligence and switch to strict liability in the use of motor vehicles and increased liability for manufacturers. Furthermore, the courts could not have revoked the statutory immunities prescribed by the Ordinance for the State, for spouses, or for possessors of land. On the other hand, precedent was able to create new duties of care in the context of the wrongful acts in tort, and did in fact do so.

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107. Richard A. Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151, 160-89 (1973).
108 Weinrib, E., J. (1995.)
109 Ernest J. Weinrib, Correlativity, Personality, and the Emerging Consensus on Corrective Justice, 2 THEORETICAL INQ. L. 107 (2001).)
110 *Civil Appeal* 243/83 **Jerusalem Municipality v. Gordon**, *Pey-Daled Lamed-Tet* (1) 113.
111 E. J. Weinrib, 'Legal Formalism: On Immanent Rationality of Law', The Yale Law Journal, 97 (1988).
112 R .Pound, *Interpretation of Legal History* (1923).
113 Gilead, Israel. "The Evolvement of Israeli Tort Law from Its Common Law Origins." [Hebrew] In Alfredo Mordechai Rabello ed. *European Legal Traditions and Israel*. Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem (1994): 523-530.

Case law can break through the strict framework of the Ordinance and apply its provisions to the injustices found outside it – and did, in fact, does so.[114] In this process, in addition to considerations of structure, considerations of legal policy, as mandated by the Supreme Court, which shapes the way of life,[115] are also taken into account.

At the same time, policy considerations were not imposed on the values and interests that shape the State of Israel. The balances made in the legal policy framework were fundamental and not ad hoc. The primary formation of law in Israel is legislative. The Court of Law operates as a secondary organ of law creation, but in this framework it is the entity that balances between competing societal values.

Jewish Law

Underlying the formulation of the tort of negligence is the Biblical injunction of Jewish law, which I covered in more detail in the first chapter: "Love thy neighbour as thyself" (Leviticus 19:18). As Lord Atkin put it:

> "The rule that you are to love your neighbour becomes in law: You must not injure your neighbour... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour...(i.e.) persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[116]

It can be said that a combination of justice, fairness and reasonableness are included in the definition of "duty of care" in Israel. The tort of negligence is relevant to any situation of responsibility and is not subject to any factual framework. Therefore, it is not determined by a predetermined factual situation and can be adapted to changes.

The law in Israel is characterised by several elements. First, there is the primacy of legislation, which is not a consequence of the development of the legal system, but rather its foundation.[117] It is widely accepted that in Israel legislation not only solves problems, but also constitutes a source for creating new norms by analogy and inference. Thus, legislation in Israel does not merely supplement case law, and most of the law is legislated. Meanwhile, private law is regulated by the civil code, which is a legal instrument.[118] This system encompasses extensive areas of law, while attempting to create a new normative framework that is not burdened by past experience.

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[114] *Civil Appeal* 804/80 **Sider Tanker Corporation v. The Eilat Ashkelon Pipeline Co.** *Pey-Daled Lamed-Tet* (1) 393.
[115] See: Barak, *Judicial Discretion* [Hebrew] (5747) 147.
[116] Donoghue v. Stevenson [1932] UKHL 100 (26 May 1932), Lord Atkin's opinion, 3rd para.
[117] G. Tadeski "The Problem of Defects in Law" [Hebrew] Mekhkarim Bemishpat Artzenu (2nd Expanded Ed., 5719) 132.
[118] A. Barak "Forty Years of Israeli Law – Tort Law and Codification of Civil Law" [Hebrew] Mishpatim *Yud-Tet* (5760) 6.

Second, Israeli courts are beholden to the principle of binding precedent, a clear rule adjudicated by a court and which does not need to be examined any further. A ruling issued by the Supreme Court is binding on every court except for the Supreme Court itself. A ruling guides any lower-level court but not a court of the same rank. The guidance gives discretion to the judge; nothing in guiding case law limits a judge's discretion, but it mainly provides legal authorisation for the use of discretion. In contrast to binding case law, as determined by the Supreme Court, the rulings of other courts are only a source of guidance.

The doctrine of precedent is difficult to reconcile with a theory of adjudication based on the entitlement of the litigants to the correct decision (reached by weighing their competing rights). In other words, a judge who seeks to reach the correct conclusion in a challenging case is not required to invoke any previous precedent that may or may not oblige him or her to give gravitational or enactment force to past decisions.

If the judge believes a previous ruling was right, he or she will apply its reasoning and its conclusion to the present case without being forced to do so by rules of precedent. The judge has an obligation to reach the right decision. Precedent is only rendered an important component if it is added to the fundamental duty of the judge to weigh rights.

Moreover, precedent dictates that a judge give consideration to an earlier decision due to the legal process. This means that even if the judge believes the ruling was incorrect and the conclusion flawed, the judge must explore the process by which the precedent was reached.

This raises other questions regarding *stare decisis*, the principle in law which states that rulings should be arrived at by precedent. Namely, by invoking precedent, judges may give gravitation or even enactment force[119] to previously wrong decisions. Precedent would be made redundant in a rights-based system, since that approach demands that the judge rule each case by weighing and applying competing rights. Therefore, the repetition of a wrong decision would be contrary to the principles of fairness. Thus, it seems that *stare decisis* is only of importance in the event that it ensures respect for authorities that would otherwise have been ignored.[120] [121]

With regard to Israel, the precedent enunciated by the Supreme Court is binding on all the District Courts and Magistrates' Courts. Case law ruled on by the District Courts is guiding *vis-à-*

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[119] Dworkin, p. 113 (and pp. 318-319 in " A Reply to Critics ").

[120]Radin, 33 Columia COLUMBIA? Law Review 199. The fact that precedent is redundant if it compels respect only for correct decisions explains the contempt in which precedent is often held. See Bentham's outburst (in his Constitutional Code, Book 2, Art. 49): precedent ''is acting without reason, to the declared exclusion of reason, and thereby in declared opposition to reason" (Cited in Goodhart, 50 L.Q.R. 40, 46). Similarly, in Shakespeare's The Merchant of Venice (Ad IV, Scene I) Portia declares: "'I will be recorded for a precedent, And many an error by the same example Will rush into the state. It cannot be."

[121] Dworkin, pp. 119-122.

vis the Magistrates' Court; an extensive review of the doctrine of precedent is to be found in the Supreme Court's judgement in the Buscilla affair[122]:

In the judgement, the Court extensively discussed the question: Is it proper for the Supreme Court to deviate from established precedent?

In the aforementioned judgement, the words of Justice Prof. Barak, in his book "Judicial Discretion", are quoted as follows:

> The various considerations mandate, in my opinion, the conclusion that deviating from precedent would be the exception rather than the rule and that it would be undertaken in exceptional circumstances. The Burden of Proof' on this point should properly be imposed on the party seeking to deviate from the precedent and not on the party seeking to abide by it.
>
> Therefore, when the scales are balanced, the precedent should be adhered to and not abandoned. Only when the scales tip clearly towards deviating from the precedent, should that course of action be taken.[123]

Moreover, HH The President of the Court, Justice Shamgar, holds in his judgement as follows:

> "… the custom accepted to date has been that once a precedent has been formulated in this Court, this Court does not deviate from it otherwise than in exceptional and hard cases, and mainly when the previous precedent transpires to have been erroneous. I read the words of my esteemed friend Justice Barak, who detailed the considerations that should properly accompany a review of the question, whether a precedent should be honoured and followed or should be deviated from and a new dress be chosen for the law. The reasoning is agreeable to me, but not its applicability in practice to the case before us…"[124]

HH Justice Barak held in his opinion:

"I seek to lay down my reasons why this precedent should be deviated from in the case before us:

1. Deviating from a Supreme Court precedent is a serious matter. It is true that there is nothing sacred about the precedent, and there is nothing mystical about creating it. But there is also no vision in deviation from it. The Supreme Court is entitled to deviate from its precedents (S. 20(b) of the Basic Law: The Judicature), but it will exercise this authority, in difficult cases, only in exceptional instances. All that can be said by way of generalising, is that the judge must take in each specific case, on the one hand, the range of considerations that support honouring the precedent and following it, and on the other hand, the full extent of the considerations that point to deviating from the precedent and the choice of a new option. The judge must give each of these considerations its proper weight. Once he has done so, he must place the considerations against each other, and he must choose the option that prevails. The judge must ask himself whether the damage in upholding the existing law exceeds the damage from its change in a judicial manner. The question is whether the considerations supporting the new law weigh more than the considerations that support the old law and the damage caused by the very change...

[122] Avner Buscilla – *Civil Leave to Appeal* 1287/92 **Buscilla Head of the Tiberius Religious Council v. Shaul Tzemach**.
[123] A. Barak. "Judicial Discretion" [Hebrew]. Tel Aviv University (1989)
[124] Avner Buscilla – Civil Leave to Appeal 1287/92 Buscilla Head of the Tiberius Religious Council v. Shaul Tzemach(

2. On one side of the scale, the existing law and the considerations supporting its continued existence must be placed. Among these considerations, we must mention the need to maintain stability, certainty, consistency and continuity. The Vice President of the Court, Justice Alon, rightly noted that "the need for the stability, certainty, and continuity of ruling" must be considered. Deviating from a precedent shocks and damages the normative system. The public and the government relied on the existing law and structured their plans around it. Deviating from a precedent harms the principle of reliance and the need to maintain certainty and security. A known and existing law is preferable to the uncertainties involved in changing it in order to improve ... Deviation from precedent harms consistency based on justice, fairness, and equality. It undermines the continuity of the system and the present's need to integrate with the past in order to advance the future. The judge does not weave into the existing fabric of law but breaks the fence and makes a law unto himself, and as a result, there is a concern that "in the course of time, this judicial institution will be transformed from a 'court' to a 'house of judges,' the number of opinions in which is equal to the number of its members[125]". Justice Or rightly noted that "It should not be forgotten that the rule that rulings by the Supreme Court are not binding on the Supreme Court is written in conjunction – in the same section of the law – with the rule that the Supreme Court's rulings are binding on every other court. This goes to show you that when the Supreme Court considers whether to change the law or not, whether to deviate from precedent or not, it must remember that the precedent has thus far been binding on all other courts, that presumably the latter acted based on it, and that the entire public assumes that this is the binding law.
3. Alongside the normative considerations, institutional considerations support retaining the existing law in its entirety. Proper and effective operation of "legal services" justifies standing by precedent and non-deviation from it. Judicial work would be impossible, and the efforts of generations would have been lost, had each judicial decision been re-examined all the time. But over and above this, it is often appropriate that the "deviation" from previous precedent be made by legislation, and that case law deviation be perceived as an infringement of the principle of separation of powers. Too many deviations would result in a loss of respect and trust that the people give to the courts. One judge has already noted that a precedent should not resemble a ticket valid only for the day it is used[126].
4. Against the considerations that support the existing law and negate deviation from it, there are weighty considerations that justify the change in the normative sphere. It should be noted that any normative system, in order to exist, must evolve and adapt itself to changing needs. The history of law is the history of adapting the law to the changing needs of society. Without ensuring change, there is no guarantee of stability, certainty, consistency, and continuity. Standing one's ground does not guarantee stability. Prof. Levontin noted this in his appropriate words: "Security in law, security in general, in the absolute measure that is required by the binding precedents, is a fantasy... The secret of stability lies in its seeming inverse, in flexibility, since life does not stand still, and therefore the law, which is one of the tools to direct the order of life, would deny its purpose if it fails to adopt for itself a degree of mobility and flexibility found in the material it must regulate, that is, in life.[127]"

The status of legislation also directly affects its interpretation.[128] This interpretation is not merely literal; literal interpretation is neither consistent with legislation's role within the system, nor with the function that the piece of legislation is intended to achieve. The literal meaning of the law is not its purpose; it is subject to interpretation. However, this process is also not entirely free from intervention by other key actors. Legal interpretation must also take into account the legislator. This is in order to avoid granting the judge power that is beyond their mandate within the governance system. The role of the judge is to provide optimal interpretation of the law within its legislative context, thus fulfilling the purpose of the legislation most effectively. In this way, the central status of legislation in the legal system of the State of Israel is guaranteed.

[125] Judge Silberg in *Rehearing* 23/60 **Blan v. Executors of Litvinski's Will**, *Pey-Daled Tet-Vav* 70, 75.
[126] Justice Roberts in Smith v. Allwright 649 US 321 (1944).
[127] Levontin "Musings on Precedent" [Hebrew] Chok VeMishpat 1, Vol. 17, p. 1.
[128] See: Aharon Barak "Interpretation and Judgement: Foundations of Israeli Interpretative Theory" [Hebrew] Eyunei Mishpat *Yud* (5745) 46.

As I have shown in earlier sections of this dissertation, the legal system in Israel is based on two pillars: the principle of legislation and the principle of *judge made law*, When a legislative deficit is discovered, the judge is authorised to fill the lacuna. The supplementary law exists in the Foundations of Law Act, and it is comprised of two stages. In the first stage, the judge seeks to fill in the gap in legislation by means of an analogy with existing law, whether legislated or precedent based. When no such analogy exists, reference is made to the historical and cultural Jewish principles of liberty, justice, integrity, and peace. It is reasonable to assume that when this stage is also fruitless, the judge must move on to the third stage, which is not mentioned in the Foundations of Law Act, but it is necessary owing to the essence of the legal system in Israel, where lacunae are filled by the general principles of the legal system. Second, this power to complete a lacuna is not the only authority granted to a judge to generate new norms. Rather, a judge's responsibility within the Israeli system is to create an "Israeli style common law". This is also the authority to legislate judicially, and by virtue of it, the judge in Israel creates judicial rulings that are neither interpretations of enacted law nor even the completion of lacunae in it. They are the creation of legal norms in case law, beyond existing legislation.[129] A considerable part of Israeli law has been created by virtue of this authority which derives from the common law.

Thus, the judge is granted a heavy responsibility, an extremely significant responsibility. However, importantly, they are not permitted to fulfil personal ambition, but must act objectively,[130] that is, according to external criteria. They are required to find expression of and balance between the fundamental principles and values of the legal system, according to their importance in the national context (and not according to his subjective perceptions and values).[131] However, sometimes the instruction and guidance offered by the system reach a dead-end, and the judge is limited in the options at their disposal, with nothing but their life experience and judicial philosophy as a compass to guide them. This constitutes a major dilemma and presents a challenge to the judicial system. In formulating judicial solutions, the judge has scope for discretion[132] influenced by comparative law.[133]

Tort Law

How does tort law work? And what principles guide its progress and determinations?

Modern life entails a myriad of damages to the individual due to the activities of others. The activities of people, living in one society, result in increased collisions between individuals, whether due to the possession of property, which may result in a thousand and one forms of damage to another, or to the property of others, whether in the conduct of competing businesses or other ways.

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[129] See Footnote 29 *supra*.
[130] See: Aharon Barak, *Judicial Discretion* [Hebrew] (5747) 187.
[131] *High Court of Justice Case* 428/86 **Barzilai v. State of Israel**, *Pey-Daled Mem* (3) 505.
[132] Marisa Iglesias Vila, Facing Judicial Discretion (Kluwer Academic Publishers, 2001). Hunter v. Southam [1984] 2 S.C.R. 145, p. 155 ("The judiciary is the guardian of the constitution") (per Dickson C.J.).
[133] A. Yadin "Interpreting the Laws of the *Knesset* – The Fourth Time" [Hebrew] HaPraklit *Lamed-Alef* (5737) 396.

Tort law is intended to compensate the injured person for the behaviour of their fellow man or woman.[134] The law, however, cannot compensate for all damages. Such a goal would not only be too presumptuous but would also contradict the fundamental objectives of a modern social policy.

The purpose of tort law is to compensate the injured party for harm caused to a protected interest.

One of the principles in tort law pertains to compensation. The harming party's duty to compensate the harmed party balances out, in other words, the injured party who is successful in their claim is owed the same amount of compensation as the harming party owes. This philosophical approach is based to a large extent on theories of corrective justice that sees in the wrongful action a violation of the equality that exists between the parties. Therefore, tort laws are established owing to the need to restore the situation to its previous state.[135]

According to the common approach, the obligation of the harming party to compensate, and the right of the injured party to compensation, are inseparable. The injustice that the harming party caused ought to correspond to the injustice that was caused to the injured party. The correction of this injustice should be carried out by transferring an amount of compensation from the harming party to the injured party. Weinrib bases this philosophy on the "correlative idea".[136]

In my opinion, it is necessary to explore the "deterrence approach", according to which the goal of tort law is to create an optimal deterrence to reduce the social costs involved in accidents and, in this way, expand the social benefit. This approach largely deals with the incentives that tort law generates for both the harming party and the injured party.

It seems to me that one of the obstacles this approach faces in its pursuit of obtaining optimal deterrence under the current legal system is the fact that any change in the amount of compensation that the harming party pays directly impacts the amount that the injured party receives, and vice-versa. Therefore, our attempt to improve the incentives of one of the parties by increasing or reducing the amount of compensation that applies to one of the parties will necessarily have an impact also on the incentives of the other party – and not necessarily a favourable one.

In some cases, we may be able to make the deterrence more efficient (and thus increase the social benefit) if we change the amount of compensation that one of the parties pays or receives without this impacting the opposing party. However, ultimately, the principle within tort law pertaining to the identical nature of the harming party's obligation and the injured party's eligibility to compensation presents a challenge to this goal of higher deterrence.

The balance between interests in tort law is expressed through the belief that there is a conceptual component of tort law that aims to defend the principle of equality and promote social

[134] Rite "Introduction to Tort Law" Cambridge Law Journal Vol. 8, 238.
[135] Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQ. L. 107 (2001).
Ibid.

justice.[137] In the State of Israel, equality is a fundamental democratic principle that finds some expression in the basic law of "Human Dignity and Liberty" (1992).[138]

Tort law categorically expresses the supreme legal recognition regarding the granting of rights. Furthermore, tort law serves to defend this right in the event of it being violated.

The basic legal concept that when a right is recognized then a remedy is given to protect it embodies the principle of the protection of rights in the best way possible (*ubi ius ibi remedium).*[139] This illustrates even further the importance of using tort law as a tool to recognize the idea of equality.[140]

The so-called "constitutional revolution" of 1992, led by the then Supreme Court President Aharon Barak, which contributed to the significant rise in judicial review and judicial activism, is an excellent reason to re-evaluate this situation. The essence of the principle of equality is "equal treatment of every human being irrespective of his or her differing characteristics, such as social status, family background, sex, age, religion, language, skill colour etc."[141] This principle has two implications: one procedural, and one essential. The procedural implication touches on the obligation of the courts to apply the law in an equal and impartial manner without distinguishing between the litigants. In this way, tort law can be seen as a "protective shield" against inequality in society, and as a tool to prevent the exploitation of power relations within society. In other words, it is possible to see tort law as a progressive tool to achieve equality in a state of unequal relations.[142]

As mentioned above, the connection between equality and tort law manifests in different ways. In the weaker version of this relationship, the principle of equality can be drawn upon as a value that informs tort-law ruling. A stronger version of the connection between equality and tort law is the direct use of the latter to defend the former and to prevent the exploitation of power relations in such a way that equality constitutes an independent right.

The law is intended to take into account the interests of the public. The public as a whole has an interest in transferring the damage from the injured party to the tortfeasor in order to ensure the highest standards and deter potential harming parties from one day acting negligently. That said, the process of transferring the damage from the injured party involves costs. There is, therefore, ostensibly a need for a justification of this demand, directed at the tortfeasor, to bear the damage caused to the injured party.

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[137] Gregory Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193 (2000); Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J. L. JURIS. 91 (2003).

[138]TheBasicLaw:HumanDignityandLiberty(1992). https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawLiberty.pdf

[139] Peter Birks, *Rights.Wrongs, and Remedies* 20 O.J.L.S. 1 (2000).

[140] Henry T. Terry, *Legal Duties and Rights*, 12 YALE L.J. 185, 194 (1903).

[141] Amnon Rubinstein & Aharon Barak, *The Constitutional Law of the State of Israel.* (Fifth Edition, 1995).

[142] Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal.Bargaining Power*, 41 MD. L. REV. 563, 588 (1982).

There is no general principle proclaiming that one who causes harm to another, outside the boundaries of contract law, must compensate that person, unless their action is included in the Civil Wrongs Ordinance. Section 3 of the Civil Wrongs (New Version) Ordinance explicitly states: [143]

> The issues listed in the Ordinance hereinafter are wrongful acts, and subject to the provisions of the Ordinance – any person injured or harmed by a wrongful act, committed in Israel, shall be entitled to the remedy specified in the Ordinance from the tortfeasor or the person responsible for the wrongful act.

James Fleming[144] argues that there is no easy solution or simple formula: The courts that implement tort law are constantly striving to find a compromise between two conflicting interests. On the one hand, the plaintiff's demand to be protected against damages, and on the other, the defendant's interest in not being limited in exercising his or her ambitions; the proper administration of the law includes weighing the conflicting interests in the balance sheets of social value, in a manner that will reduce the collision between individuals and increase the public good.

Section 4 of the Civil Wrongs Ordinance is intended to reconcile, to a certain extent, these conflicting interests:

> An act will not be regarded as a tort, which, had it been repeated, would not have produced a claim for a conflicting right, and a reasonable person with an ordinary temperament would not have, under the circumstances, complained of it.[145]

It is true that evaluating the parties' behaviour constitutes a legitimate consideration. The law distinguishes between causing intentional damage, which certainly requires compensation, and causing damages by accident. In the second case, the law will consider the defendant's interest in freedom of action, and his claim will be more modest.

The last aim of tort law is to reach a correct division of damages, taking into account the state of modern society. Technological, criminal and social means may not prevent many risks involved in modern life from arising.

Negligence

The development of the laws of negligence started circa the 1830s and 1840s in the English and American legal systems as a general theory of liability due to lack of care that caused damages.[146]

The original definition is that a person must be subject to liability for causing damages to another.[147] To be precise: "the necessity of a causal connection between the defendant's breach of

[143] Section 3 of the Civil Wrongs (New Version) Ordinance 5728-1968.
[144] Fleming James "Tort law in midstream" Buffalo Law Review (1959)
[145] Civil Wrongs (New Version) Ordinance 5728-1968.
[146] Owen, David G. (2007) "The Five Elements of Negligence" Hofstra Law Review: Vol. 35: Iss. 4, Article 1.
[147] *See, e.g.* James Henry **Deering,** The Law of **Negligence** § 1 (1886).

duty and the damage incurred to the claimant that was natural, probable, proximate, and not too remote."[148]

At the outset, the first courts developed and explored the laws of tort and negligence, and they divided it into elements of the defendant's failure to comply with the duty of care, and damage caused to the claimant.[149]

The laws of negligence began to develop in various ways, and most courts[150] and commentators[151] over time claimed that there are four elements to the tort of negligence: duty, breach, cause and damage.[152] And yet courts and commentators have failed to reach a uniform conclusion, and many courts have held that there are three elements to negligence, namely: duty, breach and proximately caused harm.[153]

The law in Israel imposes various types of liability on a person in society under different circumstances: Criminal liability, contractual liability, tortious liability and liability for wrongful acts.[154]

1. Criminal liability exists where a person commits an offense against "The State." The public is interested in punishing the offender as a means of protecting the entire public, which is a public interest.[155]

2. Contractual liability exists where a person gave his consent to another, or where there is an agreement between parties entering into a contract. Contract law is intended to protect the individual interest in the performance of a promise made by another, and it acts by enforcing the performance of the promise or subject of agreement, or compensating the recipient of the promise or the contractor in such a way that he is restored to the situation he would have been in if the

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[148] Law of **Negligence § 3 (1874)**); William B. **Hale**, Handbook on the Law of Torts § **19**, at 44 (**1896**).

[149] *See, e.g*., H. Gerald Chapin, Handbook on the Law of Torts § 105, at 501 (1917) ((I) Duty, (2) Breach, and (3) Resulting Injury).

[150] A review of recent state supreme court decisions reveals four elements (sometimes listed without enumeration) in Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming, for a total of nearly thirty states that currently list four elements.

[151] *See, e.g*. Kenneth S. Abraham, The Forms and Functions of Tort Law 46 (2d ed. 2002); Richard A. Epstein, Torts § 5.1, at 109 (1999); W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts § 30, at 164 (5th ed. 1984); John C.P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 VAND. L. REV. 657, 658 (2001).

[152] *See, e.g*., Winn v. Posades, 913 A.2d 407, 411 (Conn. 2007); Durham v. HTH Corp., 870 A.2d 577, 579 (Me. 2005); Brown v. Brown, 739 N.W.2d 313 (Mich. 2007); Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 3 (Miss. 2007); Barr v. Great Falls Int'l Airport Auth., 107 P.3d 471, 477 (Mont. 2005); Avery v. Diedrich, 734 N.W.2d 159, 164 (Wis. 2007).

[153] Nearly twenty jurisdictions organise negligence in a three-element construct. *See, e.g.*, Ford Motor Co. v. Rushford, 868 N.E.2d 806, 810 (Ind. 2007) ("To prevail on a claim of negligence, a plaintiff is required to prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach.") Stein v. Asheville City Bd. of Educ., 626 S.E.2d 263, 267 (N.C. 2006)("(I) a legal duty; (2) a breach thereof, and (3) injury proximately caused by the breach").

[154] Fleming *Law of Tort*.

[155] Gad Tadeski (Ed.), Aharon Barak, Mishael Heshin and Itzhak Engelrad *The Law of Torts*: The General Theory of Torts, [Hebrew] Magnes Ed. (2nd Ed.).

promise or consent had been fulfilled The modern law of negligence provides a more responsive and flexible instrument than contract for determining liability in hospital cases.[156]

3. Contractual liability exists when a person has become unjustly enriched at the expense of the plaintiff. Then the principle of social justice guides the considerations of the law.[157] Contract liability refers to liability that one party of a contract shoulders on behalf of another party. It is implemented through an indemnity agreement or a hold harmless agreement in a contract. This type of liability can be used to transfer the risk of lawsuits from one party to another.

4. Tortious liability is different from the aforementioned three types of liability.

Tortious liability actually stemmed from a source common to criminal responsibility, which was expressed in elements of revenge and deterrence. However, there is a great deal of difference, as there is punishment in criminal law, whereas in tort law the primary principle is to restore the situation to its former state.[158]

How does tort law work? And what principles guide its progress and determinations?

Modern life is fraught with numerous conflicts of individuals, whether due to possession of property belonging to others, by way of conducting competing business, or in other ways. Tort law seeks to compensate the victim for the behaviour of others. The purpose of tort law is to compensate the injured party for the harm incurred upon a protected interest.

The tort of negligence and its "sister", the wrongful act of breach of statutory duty, are the two main torts in tort law in Israel. The tort of negligence has a "royal" status and has been referred to as a "Framework Tort."[159]

As was discussed extensively in the first chapter, the State of Israel was founded on fundamental values that shape its national character. Some are enshrined in the Basic Laws, and others that are found in legislative provisions as well as additional key documents in the history of the state. For example, the Declaration of Independence states that:

"The State of Israel will be founded on the principles of liberty, justice, and peace as envisaged by the prophets of Israel." And that there will be "full equality of social and political rights for all its citizens", as well as "freedom of religion, conscience, language, education and culture". These basic values have been recognised in courts' rulings and deduced from the executive and legislative system.

What distinguishes secondary rules, based on concepts such as negligence, is that in their formulation the judicial branch is given broad discretion, in other words the option to choose

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[156] Yepremian v. Scarborough Gen. Hosp., (1980) 13 CCLT 105 (Ont. CA 174).

[157] Higginbotham. "Understanding Contractual Liability Insurance Coverage." Accessed Oct. 6, 2020

[158] Gad Tadeski (Ed.), Aharon Barak, Mishael Heshin and Itzhak Engelrad *The Law of Torts*: The General Theory of Torts, [Hebrew] Magnes Ed. (2nd Ed.) "Liability in torts is a legal liability arising from the provisions of the local Civil Wrongs Ordinance and any legal liability that requires payment of compensation for damages as a result of a breach of duty at law".

[159] Gad Tadeski (Ed.), Aharon Barak, Mishael Heshin and Itzhak Engelrad *The Law of Torts*: The General Theory of Torts, [Hebrew] Magnes Ed. (2nd Ed.).

between a number of legal modes of operation. This discretion should be aimed at bridging law and social reality. As stated by Prof. Pound:

"Law must be stable and yet it cannot stand still." [160]

It can be said that the boundaries of negligence remain in the dark and are still vaguer than ever.[161] There is no universal agreement regarding the definition of negligence.

What are the Judge's Goals in Ruling Negligence Law Cases?

Is it necessary to examine each case in a specific manner, according to the facts pertaining to it, or is it essential to see the conflicting interests and society's norms? Or can it be said that we must work together to find the balancing point in case law? Can we speak in terms of negligence law having dual goals, namely: "to provide, or deny redress to the particular but also to establish standards which the law requires and for default claimant of which it imposes its sanctions"?[162]

How should the court adapt itself to the purposes of corrective justice and distributive justice in determining liability in negligence? It is not surprising that the law of negligence tends to be in the dark, given its lack of coherence and indeterminate nature. Therefore, the law must be dynamic and changing, with the possibility of flexibility and considering new heads of damage.[163] Or, as Lord Macmillan stated in *Donoghue v. Stevenson*, "The conception of legal responsibility may develop in adaptation to altering social conditions and standards."[164]

The courts in Israel do not accept an exact definition of rules and principles; instead, the tort of negligence provides a legal framework that explains how to reach effective decisions.[165] The courts that deal with tort law and wrongful acts of negligence face a challenging task, and therefore many judges are compelled to use their legal discretion.[166]

One can say that there is no unequivocal answer as to how a judge ought to conduct him or herself, but the courts in Israel that apply tort law try to find a balance between conflicting interests, which is presumed in certain systems or branches of law. Namely, the courts must balance two specific interests: the plaintiff's demand for protection against damage on the one hand, and the defendant's interest not to be limited in realising his ambitions, on the other.

The interests must be balanced between ethical values, namely the protection of the plaintiff and their autonomy and rights as a moral agent, and the broader social values that aim to,

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[160] R .Pound, Interpterion of legal History 1(1923).
[161] More, D. (2003). The Boundaries of Negligence. Theoretical Inquiries in Law, 4 (1).
[162] Modbury Triangle Shopping Ctr Pty. Ltd., 2000 H.C.A. at 85 (per Kirby J.). For recent criticism of the instrumental goal, see Ernest J. Weinrib, The Passing of Palsgraf, 54 Vand. L. Rev. 803 (2001); Ernest J. Weinrib, Does Tort Law Have a Future?, 34 Val. U. L. Rev. 561 (2000).
[163] C.A. Wright, The Province and Function of the Law of Torts, in Studies in Canadian Tort Law 1, 1-2 (Allen M. Linden ed., 1968).
[164] 1932 A.C. 562, 598 (appeal taken from Scot.)
[165] The credit for this fine description should go to Justice Mishael Heshin, The General Law of Torts [Hebrew] 85-86 (2nd Ed. 1977).
[166] And judges sometimes deny the existence even of judge-made law, *see, e.g.*, Willis &Co v. Baddeley, 2 Q.B. 324, 326 (1892) (per Lord Esher M.R.).

in case of medical malpractice, for example, to advance science and medicine in such a way as to benefit the entire public. Thus, the legal system must seek to reduce the potential collision of interests that may arise between individuals and the public.

Tort Law seeks to compensate for the damage incurred as a result of the negligent conduct of the harming party. However, the law is not capable of guaranteeing compensation for all damages. It seems to me that such a goal would be unrealistic.

An additional principle pertinent to tort law is that of acting reasonably and in good faith. This will be relevant to this discussion later on, when referring to the notion of the "reasonable physician". Moreover, the scope of the tort of negligence is broad, and the court must engage with multiple considerations, as was illustrated in *Civil Appeal 145/80* (1982), whereby the court ruled the following:[167]

> The court considers the need to permit freedom of action on the one hand and the need to protect the property and bodily integrity on the other. It considers the type of damage and the manner in which it occurs... It weighs the financial burden that would be imposed on a particular type of tortfeasor or injured party as a result of its decision. While these and other considerations are balanced in the court's judicial perception, it weighs on the scales of justice, and accordingly, it determines the scope and limits of the conceptual duty of care, which constitutes the consideration of the parallelogram of forces.

When referring to torts of negligence, judges in Israel are required to act objectively and reasonably to find the point of balance in their rulings that reflects the needs of society and the rights of the individual.

Not all damage, however, is due to negligence and not all careless acts are based on the tort of negligence. Therefore, the legitimate rights and interests of the tortfeasor and the injured party must be considered. They must all be balanced properly.

With regard to the law of damages, no problem of adjustment and adaptation of enacted tort provisions ever existed in the State of Israel. As mentioned above, the CWO only laid down a general framework for tort law remedies, and lacunae were filled by elaborate *judge-made law*, as well as legislation tailored to the needs of Israeli society. The Israeli courts and legislature jointly transformed the "imported" set of foreign rules into a living organism — the evolving body of Israeli tort law. This has been done cautiously, step by step, thereby ensuring both stability and, at the same time – change. The changes have not, as a rule, been revolutionary but rather the calculated replacements of branches that had withered in time with new shoots of vital growth.[168]

The main contribution of the Knesset to the development and adaptation of tort law has also been in the field of strict and absolute liability. Since 1976, bodily injuries caused by road accidents have been governed by a new system of compensation, the Road Accident Victims Compensation Law, and not by the CWO. The new legislative scheme combines absolute tort liability, reinforced

[167] *Civil Appeal* 145/80 **Va'aknin v. Beit Shemesh Local Authority**, *Pey-Daled Lamed-Zayin* (1) 113 (1982).
[168] Gilead, I. (2015). On the Transformation of Economic Analysis of Tort Law. Journal of European Tort Law, 6(3).

by mandatory liability insurance and first-party insurance. Back-up support for both types of insurance is provided by a statutory fund. In the field of product liability, a system of strict liability was established in 1980 for construction defects and a rebuttable presumption of negligence for design defects. The legislature also supplemented the law of nuisance, redefined the law of defamation, gave statutory protection to rights of privacy, and increased the scope of consumer protection with respect to both products and services. The abolition of most of the privileges and the immunities of the State in tort, and the elimination of the English distinction among invitees, licensees and trespassers with regard to land-related risks, constitute another major legislative contribution.

Issues of Negligence in Israeli Law

Negligence issues are not afforded any uniqueness or independence in the fabric of Israeli legislation and are based on Sections 35 and 36 of the Ordinance, which originated in the Mandatory era.

A wrongful act consists of a number of elements that together form a chain: A duty of care; a fault (in breach of the duty of care); a causal link; damages. These elements are recognised under the traditional model in the case law and literature, but this is not the only approach to examining negligence.[169]

Negligence is the failure to exercise the degree of caution that the law mandates to be employed *vis-à-vis* another. Negligence is behaviour that falls below the standard required to protect others from unreasonable risk.[170] There are three elements of this wrongful act:

1. The existence of a legal *duty of care* which the defendant owes the plaintiff. This duty, which is recognised by law, mandates adjustment to a certain standard of conduct to protect others from unreasonable risks.
2. *Breach* of the duty to exercise the standard mandated by law.
3. *Causing* damages owing to the breach.[171]

In this regard, it is possible to point out the following two factors:

1. A causal link between the defendant's conduct and the damages;
2. Lack of previous conduct on behalf of the plaintiff, which may derogate from his right. This component includes the sub-topics of consent to the damage, on the one hand, and contributory negligence, on the other.

[169] J.G Fleming; The Law of Tort (Sundey,6th ed 1985).
[170] D. Giesen, International Medical Malpractice Law 31 (1988).
[171] I. Gilead "On the Foundations of the Tort of Negligence in Israeli Tort Law" [Hebrew] Eyunei Mishpat Yud-Deled (5749) 319.

The Duty of Care

The first element of a wrongful act relates to the legal duty of care. The Civil Wrongs Ordinance states in Section 35 that "a person who by their own negligence causes damages, commits a wrongful act" and the negligence is perceived as negligence "in relation to another person with respect to whom he has, under those circumstances, a duty not to act as he did". Namely, there is reference to both the element of the duty, and the element of negligence. What is the element of legal duty? The duty is defined in Section 36 of the Civil Wrongs Ordinance as follows:

> "The obligation set out in Section 35, applies to every person and to the owner of any asset, whenever a reasonable person should have, in the circumstances, foreseen in advance that they could, in the ordinary course of things, be harmed by an act or omission specified in that Section."

The duty one man owes another has been discussed from time immemorial in social, philosophical, and religious contexts, and it serves as a cohesive force that binds one person to another in society. In the specific legal context, the concept of duty reflects the deontological basis for judging the proper conduct of one person towards another.

The duty of care is a legal obligation that is imposed on an individual, which requires adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. It is the first element that must be established to proceed with an action of negligence. The claimant must be able to show a duty of care imposed by law that the defendant has breached. In turn, breaching a duty may subject an individual to liability. The duty of care may be imposed by the operation of law between individuals who have no current direct relationship (familial, contractual or otherwise) but eventually become related in some manner, as defined by common law (meaning case law).

Duty of care may be considered a formalisation of the social contract, the implicit responsibilities individuals hold towards others within society. It is not a requirement that a duty of care be defined by law, though it will often develop through the jurisprudence of common law.[172]

A condition for imposing liability on the tortfeasor is that the tortfeasor owes a legal duty of care to the injured party; in the absence of a duty of care, no liability will be established in tort. The duty of care is a sort of "strainer" that falls outside the framework of tortious liability in those cases where the imposition of legal liability on the negligent person does not properly serve the purposes underlying tort law or disrupts the way it works.[173]

The rulings of the Israeli courts in the wake of English case law show that this duty requires undertaking two different tests, which include within their scope two different duties.

The element of the duty of care consists of two cumulative elements:

[172] David G. Owen, Duty Rules, 54 VAND. L. REV. 767, 767-79 (2001).
[173] I. Gilead "On the Foundations of the Tort of Negligence in Israeli Tort Law" [Hebrew] Eyunei Mishpat *Yud-Deled* (5749) 319, 328, 319.

One – *a conceptual obligation*. The intention here is the duty incumbent on a person in principle, according to which, from a normative perspective, it is proper to recognise the duty to act with care towards another,[174] while examining *four variables* – the type of tortfeasor, the type of injured party, the type of activity, and the type of damage.

The second – is *a concrete duty*. If the conceptual duty is recognised, as stated, then the existence of the duty in the concrete circumstances must be further examined in the context of the *four variables*, namely – with respect to the particular tortfeasor, the particular injured party, the specific damage, and the specific behaviour.

Underlying the concrete duty of care, Section 36 of the Ordinance indicates that one needs to examine what the tortfeasor, as a reasonable person, could have expected his reckless behaviour to result in. It is customary to mention that the test of expectations has two dimensions:[175] The first dimension consists of the "normative expectations". They are related to the most fundamental question: Does society require that that tortfeasor should foresee risks of damages of the kind that occurred from his behaviour? The second dimension consists of "technical expectations". They are related to the decisive question: Does the tortfeasor have the ability to foresee such risks? In any case, it seems that there is an overlap between the value questions of the test of conceptual duty of care, and the questions of the normative expectations test, which are within the boundaries of the concrete duty.

The "presumption of duty" to anticipate the type of damage seeks[176] to establish a social approach under which imposing liability is desirable where the negligence occurred, and the negligent party had the technical ability to foresee this, unless special considerations arise for its negation. Imputing the ability to anticipate the harm to the potential tortfeasor is a normative filter given to the considerations of legal policy, that is to say – whether it is appropriate to impose liability or not. And on closer examination of the matter: "Where damage is foreseeable, as a technical matter, there is a conceptual duty of care, unless there are considerations of legal policy that negate the duty."[177]

The element of fault, or blame, means a breach of the duty of care by a person who is subject to said duty *vis-à-vis* some other person, as well as from each person who also has relevant legal relations, such as a corporation, an employer, etc. The element of blame deals with negligence that is not malicious on behalf of the tortfeasor, though the tort of negligence may also encompass deliberate behaviour and actions.[178]

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[174] *Civil Appeal* 145/80 **Va'aknin v. Beit Shemesh Local Authority**, *Pey-Daled Lamed-Zayin* (1) 113 (1982).
[175] *Civil Appeal* 243/83 **Jerusalem Municipality v. Gordon**, *Pey-Daled Lamed-Tet* (1) 113, 128-129 (1985).
[176] *Civil Appeal* 4486/11 **John Do v. John Do** (para. 12, handed down on 15th July 2013.
[177] *Ibid*. p. 131; *cf*. In re Va'aknin *supra*. Footnote 48, p. 123.
[178] *E.g. Civil Appeal* 2034/98 **Amin v. Amin**, *Pey-Daled Nun-Gimel* (5) 69, 81 (1991); *cf. Civil Action* (Tel Aviv) 1702/07 **Azor v. CanWest Global Communications Crop**, pages 30-32 and the citations therein, handed down on 20th June 2012; also *cf*. Section 386(b) of the Property Relations Between Spouses Law 5771-2011, Codex 712.

How Can the Court Determine who a Reasonable Person is?

An examination of the basic condition of the ability to foresee, with its various interpretations, is actually the examination of the condition of who the reasonable man is, from a legal perspective.

Everything, that the "reasonable person" is considered to have been able to foresee, is considered foreseeable for the tort of negligence. Considering the ability to foresee is determined by the reasonable man's:

> "Attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence and judgement".[179]

What are the nature and characteristics of a reasonable person? A reasonable person is a creature of the courts, which determines the standard of behaviour required of people.[180]

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[181]

The ability to foresee is determined not by the defendant's characteristics,[182] and not by the characteristics of the "man off the street,"[183] but by the characteristics of a fictional creature conjured up by the courts.

Does the nature of the test of foreseeability contradict the characterisation of this test as a factual test? If the court determines the ability to foresee, where is the factual test? Is this a normative test like the "need to foresee"? No, it is true that the foreseeability changes with the characteristics of the "reasonable person", and it is further true that the determination of these characteristics is within the discretion of the court, but this discretion is not unlimited. The foreseeability requirement is a factual requirement because the reasonable person's ability to foresee is also derived from factual reality and relies on it. The standard is high, but it is still a standard that relates to the long-discussed question of "objective human ability" and subject to his or her being mortal. There are four rules that will explain the connection between the reasonable person and objective reality:

1. The law does not attribute super-human qualities to a reasonable person, nor make demands of him that an ordinary person cannot meet.[184] The law does not skyrocket to the unreal and impossible, especially in this field of law, from what is reasonably acceptable to people.[185]

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[179] Restatement, *supra*. Footnote 5, at p. 41, sec. 289; *ibid*, at p. 47, sec. 290.
[180] *Criminal Appeal* 478/72 **Pinhas v. State of Israel**, *Pey-Daled Caf-Zayin* (2) 617, 622.
[181] Winfield and Jolowicz on Tort (London),12th,1984.
[182] "The standard is objective and impersonal in the sense that it eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question." Winfield, *ibid*.
[183] *Criminal Appeal* 196/64 **Attorney General v. Mordechai Bash** [1956], *Pey-Daled Yud-Het* (4) 568.
[184] "He has not the courage of Achilles, the wisdom of Ulysses, or the strength of Hercules, nor has he 'the prophetic vision of a clairvoyant' ...he is neither a perfect citizen, nor a 'paragon of circumspection'." Winfield, *supra*. Footnote 7, at p. 47.
[185] *Civil Appeal* 456/72 **Jeris v. Shakir**, *Pey-Daled Caf-Het* (1) 356, 358-359.

2. The “reasonable person” is one who belongs to the same group in the population to which the defendant belongs, with all the implications thereof.[186]
3. The “reasonable person” enters the defendant’s shoes, as far as the circumstances of the event are concerned[187].
4. Some of the defendant’s personal characteristics are attributed to the “reasonable person”.[188]

Lord Wright pointed to the spirit of the reasonable person in the following ruling:

> Causation is to be understood **as the man in the street**, and not as either the scientist or the metaphysician, would understand it. Cause here means what a... man would take to be the cause without too microscopic analysis but on broad view.[189]

The Notion of the Reasonable Person in Israel

In Israel, a reasonable person can be male or female, and there are no requirements regarding the person's identity, gender, sexual orientation or religion. The view of the courts is that of a hypothetical person. The reasonable person that the judges see before them is typically one who possesses a fair amount of insight, the ability to diagnose a problem, and foresight. The test is whether or not the reasonable person would have foreseen the incident that occurred and the way in which it occurred.[190]

The important characteristics of the reasonable person in this regard, in accordance with the manner in which he or she is described, are his or her personality, cognitive abilities and intellectual capacity. It is a measure of the individual's analytical skills and ability to foresee incidents in the future and evaluate the chance of their materialization. The reasonable person is not examined only in terms of his or her rationality or capacity to foresee but also with regard to the non-intellectual aspects of their personality.

The test of the reasonable person is justified and fitting as long it truthfully represents the "regular person", if there is such a person in the society in which he or she is active. This is based on two reasons: firstly, that the person must be understood within the reality that most of the members of society live in; and secondly, that the concept used must not impose on society a different standard of conduct from that which is in place in reality.

If persons are indeed punished, it is because they did not utilize the insights, knowledge or self-control that they inherently possess. In a society in which there is a "regular person", the number of those who are not considered "regular" will necessarily be reduced, and the punishment for the wrongdoing that was caused due to their failure to exercise their potential will also be reduced.

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[186] Winfield, *ibid*, *ibid*.
[187] Restatement, *supra* Footnote 5, at p. 13; *ibid*, at pp. 97-98.
[188] I. Gilead “On the Relationship Between the Physical Aspect and the Normative Aspect of the Tort of Negligence” [Hebrew] Mishpatim *Tet-Vav* (5745) 44, 448-449. See in particular notes 9 – 12 and the citations therein.
[189] Yorkshire Dale S.S. Co. v. Minister of War Transport, [1942] A.C. 691, 70.
[190] Civil Appeal 248/86. *Estate of the late Lily Hanenshuili vs. Rotem Insurance Company ltd.* Court Ruling 529,559 (2) (1991) .

In the Israeli context, this begs the question of whether the "typical Israeli", who serves to fulfil the role of the reasonable person, is more than a mere concept and truly exists. The courts do not tend to demonstrate a tendency to conduct empirical research, and it is understood that they do not have the tools for such research, since this requires the evaluation and professional opinion of policymakers, both legislators and judges.

The reasonable person is a "'dummy' that was established by the law" by the Supreme Court.[191] The reasonable person in the Israeli legal context can be found in the case of *Vaknin vs Beit Shemesh Municipal Council.* [192] This case discussed a head injury to a 15-year-old youth that was sustained when he jumped headfirst into a shallow pool that was under the supervision of the defendant. There was no dispute because neither the defendant nor the claimant could possibly have foreseen the danger as a result of the jump. Especially as, from testimony given at the court, it emerged that "regular people" in Israel were not aware of the dangers of such a jump. Indeed, local residents, both young people and adults, had for many years jumped into the water at this locale. Despite this, Judge Barak ruled that the defendant could and should have been cognizant of the danger, stating as follows:

> The test in this regard is the reasonable man test, and in the context before us, it is the test of the reasonable youth and whether a "regular youth" of the claimant's age would have been more careful than he was? I believe that the answer to this question is affirmative. We must demand from a 15-year-old youth, with the capacity for normal insight and knowledge to behave appropriately and intelligently. (P. 150)

Similarly, it can also be said that the law is willing to examine the responsibility of professionals according to the standards of their profession, both in criminal and tort law.[193] This is not only based on the distinction between professional and regular people, but also on a more detailed classification of the professional's role and specialization.

In my view, there are no negative connotations attached to such distinctions. The negligence of a person ought to be measured according to the norm that corresponds to his or her true ability. When physicians are required to act according to the average standard that is accepted among doctors in his or her field, they are likely to be expected to possess higher capabilities than those of people who are not physicians at all, and it is fitting that such physicians have the opportunity to acquire this ability. [194]

Regarding the comparison of the tortfeasor to a reasonable person, I consider the judgement of the President of the Court in the *Osama and Ibrahim Khamed v. State of Israel* to be pertinent:

> He is also the righteous, decent and moral person. He is the person who takes care of himself, of his fellow man, and of the public; and yet all of the foregoing fails to reflect his full complexity. However, the reasonable person is not the perfect person. It is the person who reflects the complexity of our lives, their virtues as well as their shortcomings. Reasonableness expresses therefore society's conceptions as to social blame, that underlies the negligence.[195]

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[191]Supreme Court. (Criminal Appeal 478/72) *Phoenix vs. The State of Israel.* Court Ruling 617 (2).
[192] Civil Appeal 145/90. *Vaknin vs. Beit Shemesh Municipality.* Court Ruling 113 (1).

[193] Clause 35 of the Tort Order (new version) (1968).
[194] Yoram Shachar, *The Reasonable Person and Criminal Law.* The Prosecutor. (1989).
[195] *Civil Appeal* 5604/94 **Osama and Ibrahim Khamed v. State of Israel**, *Pey-Daled Nun-Het* (2) 498, para. 16 of the judgement of the President of the Court (at the time) A. Barak (2004).

Breach of the duty of care is insufficient, and it is examined against the reasonableness of the tortfeasor's behaviour as the person generating the cause for the occurrence of the specific damage to the particular injured party. The reasonableness of the behaviour is measured in light of the level of care which the tortfeasor employed, or should have employed but failed to, and accordingly, between the characteristics of the specific tortfeasor and a reasonable person with similar characteristics, to foresee, as stated, at the time of the conduct. Put simply, this is the double causal relationship – the factual one, and the legal one.

The duty of care is framed on a balancing of interests undertaken by the court, taking into consideration the needs of society and the values it deems appropriate, as opposed to the freedom of the individual and the desire of the individual to do as he pleases.[196] There are categories of tortfeasors and injured parties with respect to which precedent has already established that they usually entail "neighbourly relations"[197], *i.e.*, that a conceptual duty of care exists. For instance: A physician's duty to a patient, a driver's duty to pedestrians, and a teacher's duty to a student.

This duty balances the interests of potential "victims" on one side, with the interests of parties, and their freedom of action, on the other; this balance of interests dominates the court's rulings. Sometimes this balancing act gives rise to circumstances in which the courts must decide borderline claims, and therefore may not always fall within the scope of the tort of negligence; there is not always liability for damage caused, and the component of duty/lack of duty constitutes an important filter for entry into the tort of negligence.

Among the categories in which negligent behaviour is not always included under the auspices of being subject to liability for damages, there are cases of negligence which may be limited, such as harm to third parties that may result from the negligence of various tortfeasors, such as manufacturers, professionals, employers, social hosts; probation officers; harm to unborn children and damages from negligence that can be caused to non-physical interests, particularly emotional damage and purely economic damages. In such situations of normal principles of negligence, which depend on conflicting interests and policy, the courts serve as the gatekeepers.[198]

A different model supports[199] transferring the tests of duty of care from the beginning to the end of the process, and at the beginning asking a question of legal policy regarding the existence of "negligence first". With regard to the complexity of the tools of foreseeability in the tort of negligence, as noted above, it was found that the normative expectations test, together with the examination of the conceptual duty of care, provide a utilitarian advantage for the litigants

[196] *Civil Appeal* 119/93 **Laurence**, *Pey-Daled Mem-Het* (4) 1, 1994.
[197] Lord Atkin's defining achievement in Donoghue v. Stevenson (Donoghue v. Stevenson, [1932] AC 562 at 579.) was to elucidate the 'neighbour principle'. Essentially, the 'neighbour principle' stipulates that in every circumstance in which the courts have held that the claimant had owed the defendant a duty to take reasonable care, there existed a 'close and direct' relation between the litigating parties.
[198] Owen, David G. (2007) "The Five Elements of Negligence" Hofstra Law Review: Vol. 35: Iss. 4, Article 1.
[199] Israel Gilead The Law of Torts – The Limits of Liability [Hebrew], 438-460 (2012).

themselves and for the courts. The combination of these two raises the issue of examining legal policy considerations that override imputing liability.[200]

The component we call "duty", which draws upon the principles of fairness, justice, and social policy, provides the appropriate judicial tool.

Breach

The second element is breach of the duty of care. What is breach? It is the misconduct itself, the defendant's improper act or omission. This element is basically concerned with the requisite level of care. The second element deals with the question of the means which the tortfeasor should have employed to protect the injured party.

This element implies the pre-existence of a standard of acceptable conduct that is necessary to avoid imposing unwarranted risk of harm on other persons or their property, which reverts to the issue of duty. The laws of negligence have developed standards to define and evaluate proper behaviour in a "crowded" world where everyone needs to act, and thus collisions are inevitable.

Modern negligence law imposes a duty on most people, in most circumstances, to act with reasonable care, often referred to as "due care", to protect the safety of others and themselves. A person who acts carelessly/unreasonably, without "due care" – thereby breaches the duty of care, and such conduct is characterised as "negligent."

To assess reasonableness in specific circumstances, tort law reviews the "reasonable person" standard of conduct. The question is how would the reasonable person have objectively behaved in a given situation to avoid harming others in the process?[201] But how is the standard of the reasonable man's behaviour defined? The law does not define the objective standard for measuring the defendant's behaviour. The question is unrelated to the defendant's behaviour and his being careful, which is a subjective question. Instead, the question of a breach in negligence usually compares the defendant's conduct to the level of "objective" or "normal" behaviour, which is measured by the notion of reasonableness: How can a reasonable person act, in the circumstances, and avoid imposing risks on another[202]?

What can be done when there are no norms for proper behaviour based on social utility?

A person may choose, for instance, to walk quickly on a crowded sidewalk to reach an important meeting; the issue is whether it involves a risk of hurting other people, such as through a possible collision, which is balanced against the person's goal of arriving at the meeting on time. There is a clash between, on the one hand, the likelihood of colliding with another person and the consequent potential injury to others, and, on the other, the person's legitimate goal. If the action is likely to benefit others more than the harm done, it embodies social utility (economic efficiency).

[200] Amnon Carmi, Medical Experimentation, Turtledove,1973
[201] Henry T. Terry, Negligence, 29 HARV. L. REV. 40, 41 (1915) ("[N]egligence is doing what a reasonable and prudent man would not have done, or not doing what such a man would have done.").
[202] Oliver **Wendell Holmes**, Jr., The **Common** Law 108-10 (1881).

In the field of medical malpractice, doctors sometimes consider society's economic benefit and the available budget, for example, when deciding whether to carry out tests. On the other hand, it often comes at the expense of the patient, who does not receive a high-cost examination due to financial constraints. These circumstances, in effect, determine the norms of social policy. In evaluating responsibility and liability for actions, we are, in fact, assessing the "quality of the act" pursuant to the overall welfare of everyone in society. This is a balancing of interests that ultimately enshrines the autonomy of the individual. This has its roots in the Kantian ideal of equal freedom, whereby Kant stated the notion that it is each individual's autonomous right to pursue and evaluate happiness independently, from which it follows that the state cannot impose, for instance, a necessary medical test. Kant also argued that, "there is only one innate right… Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law"[203][204]

This element reflects the idea that responsibility and liability are not absolute but are based on blameworthiness. In the framework of this element, the following questions are examined: What is the probability that the damage will occur? What are the costs of preventing the damage? Who is in the best position to prevent the damage? What is the level of care that others employ in similar circumstances? And finally, why did the tortfeasor deviate from the required level of care?[205]

The plaintiff must demonstrate that the defendant's unreasonable behaviour also created an unreasonable and foreseeable risk to the former. In other words, the plaintiff must demonstrate not only the overall risk but also that the risk *in personam* is tainted by foreseeable unreasonableness; he must also demonstrate that there is blame on the part of the defendant towards the plaintiff.[206]

Does not the unreasonableness *in personam* result from the unreasonableness of the overall risk? Not necessarily. The defendant's behaviour creates a "risk zone". Some risks may be unreasonable, but others may be necessary to undertake or even desirable. Hence, the plaintiff's duty is to demonstrate the type of unreasonable and foreseeable risks for which the conduct was judged to be unreasonable.

There are therefore two cumulative requirements: The reasonability of undertaking the risk and the ability to foresee it. The classic example of the applicability of the second demand is found in the Palsqraf judgment,[207] which stated that there is no liability for unforeseen risk, even

[203] David G. Owen, Philosophical Foundations of Fault in Tort Law, in Philosophical Foundations of Tort Law (David G. Owen ed., 1995) The Philosophical Foundations of Tort Law.David G. Owen (ed.) - 1995 - Oxford University Press UK.
[204] https://plato.stanford.edu/entries/kant-social-political/
[205] *Civil Appeal* 358/56 **Degani v. Solel Bone Ltd.**, *Pey-Daled Yud-Alef* 871, 876.
[206] "Nowhere is the common law's individualistic bias more clearly revealed than in the axiom that the plaintiff must bottom his claim to redress on breach of a personal duty to himself as a particular individual. As a matter of policy, it will not allow him to claim as a vicarious beneficiary of a duty owed to others;" Fleming, The Law of Torts (Oxford,2nd,1985).
[207] Palsqraf v. island Railroad 162N.E. 99(1928)

if it stems from unreasonable behaviour. This precedent is known as the unforeseeable plaintiff's precedent.

The first requirement is that the court determines that fault has been found in the plaintiff's defective behaviour (Section 37 of the Civil Wrongs Ordinance). Another example of examining the reasonableness and foreseeability of the risk against the particular plaintiff (*in personam*) is the Pritzker affair.[208] In the Pritzker case, the particular injured party is warned against the risk of reversing a vehicle; driving a vehicle backwards under conditions of poor visibility in an inhabited area, constitutes unreasonable conduct; however, it is possible that the risk is reasonable or unforeseen *vis-à-vis* the injured person.

At times, there is no clear separation between the aforementioned conditions, and we face a corollary of circumstances, and the particular circumstances of the matter determine the "risk zone", namely the extent to which the defendant's behaviour affects the welfare of others. There may be situations where only the plaintiff or the defendant will be in the risk zone, in which case the second condition will be subsumed within the first condition.

It should be emphasised that a ruling on the question of the reasonableness of the particular risk is made according to a pool of policy considerations that served as the basis for the previous decision on the question of the reasonableness of the behaviour.

Causation – Causing the Damages

The third element is causing damage. To impose liability under the tort of negligence, unreasonable behaviour that creates an unreasonable and foreseeable risk to the defendant is insufficient.

Causality is difficult to define, both scientifically and philosophically:

> Much ink has been spilt, and many a quill broken, on this problem, and the fog surrounding the coins minted as "proximate cause", "remote" cause, "substantial" cause, "effective" cause, or an "entangling" cause, etc., has as yet not faded.[209]

The causal link is the relationship between cause and effect, between two events. The cause is the totality of factors that themselves create the event. General experience shows that there are things we cannot influence, but the nature of which affects and influences their manner of conduct, such as the elements, wind, fire, rain, etc., and they will continue in their condition or manufacture changes different from those we affect.

The recognition that the cause is something that interferes with events that would otherwise develop, without it, in a normal way, is essential to the perception of the "cause."[210]. In the field of law, the problem of the causal link is reduced to the question: When is a person's behaviour

[208] *Civil Appeal* 224/51 **Pritzker v. Friedman**, *Pey-Daled Zayin* 674.
[209] *Criminal Appeal* 42/56 **Malka v. The Attorney General**, *Pey-Daled Yud* 1543, 1546.
[210] Hart and Honore: Causation in the Law of Tort 26-30.

regarded as the cause responsible for the damage?[211] The term cause, used in the tort of negligence, contains two elements within it, one of which is the factual, scientific element, while the other is of a legal nature.

The first element exists when it is proven that negligent behaviour was, physically, a necessary cause – in the words of Justice Silberberg, "the cause but for which there is no harmful outcome, but this basic element is not enough, and we require a second element – that a factual relationship exists between the behaviour and the detrimental result, which will be considered, in the eyes of the law, sufficient to hold the tortfeasor liable for the other person's damages."[212] The question is never whose actions caused the wrong, but whose actions caused the wrong *legally speaking*.

Another necessary condition is the actual realisation of this risk – that it causes damages.

The additional requirement is that the damage is caused by unreasonable and foreseeable risk. If the damage was caused otherwise than by the realisation of this risk, but by the realisation of another risk, the third condition is not satisfied. Compared with its two predecessors, it is therefore assessed at the time of examining the risks. In the first two conditions, risks are examined *ex-ante*, prospectively, while in the setting of the third condition the tests are *ex post facto*. The question is whether the *ex-ante* risk actually materialised *ex post facto*.

In the Russo affair,[213] an operation to repair a strabismus (squint) ended with the death of a three-and-a-half-year-old girl. The anaesthetist deliberately went to sleep during surgery and was convicted of manslaughter, while the surgeon was convicted of recklessness and negligence in not listening to the sounds the monitor was making. Proving the causal link to such damages is very complex, owing to the need to examine after the fact the occurrence of a hypothetical.[214] A distinction must be drawn between a causal link in a factual and actual occurrence in the past, and a causal link in a past hypothetical factual series of events, *i.e.* events that did not occur at all, and the consequences of which, had they in fact occurred, would also be hypothetical. The court is supposed to examine the causal link by examining the forward-looking behaviour when the tort was being committed and facing the past at the time of the legal inquiry.[215]

On a philosophical level, causation is the relationship that exists between successive events wherein the prior event, namely the cause, causes the other, i.e. the effect. According to the renowned Scottish philosopher, David Hume, the idea that the event *x* causes event *y* indicates that there is a necessary connection between the two events, wherein *y* cannot have occurred as it did without *x*. However, this connection is often of a subjective nature as it derives from events that

[211] Gad Tadeski (Ed.), Aharon Barak, Mishael Heshin and Itzhak Engelrad, The Law of Torts: The General Theory of Torts [Hebrew], Magnes Ed. (5747) (2nd Ed.)
[212] Fleming: The Law of Tort, Chapter 9; Hart and Honore 58-64.
[213] *Criminal Appeal* 4512/09 **Russo Loppo v. State of Israel**.
[214] Salis v. United States, 522 F.Supp.1004 (1981); Arndt v. Smith,126 D.L.R.705 (1995).
[215] M. Powers & N. Harris, Medical Negligence par. 16.48/50 (1994). H. Hart & T. Honore, Causation In The Law 62 (1985). D. Giesen, International Medical Law.

are experienced in a certain order rather than being observed. This represents the classic problem of induction.

The third condition, the causal link test, is derived directly from the earlier conditions of liability[216]. It is a complementary expression of the rationale underlying the tort of negligence. The third condition expresses the dual nature of the tort of negligence as a misdeed of conduct and as resultant malice. There is no liability without wrongful behaviour, but there is also no liability without unreasonable and foreseeable risk that this behaviour created.

The general test of legal causality in tort is the risk test. According to this test, the causal link requirement is satisfied whenever the risk, from which the tort is intended to protect, arises. Since the purpose of the tort of negligence is to protect against unreasonable and foreseeable risk, only the realisation of this risk meets the causal requirement.[217]

While many cases are attributed to the negligence of one or more individuals, many others simply result from bad luck or negligent behaviour on behalf of the victims themselves. Practical policy dictates the need to somehow qualify legal liability, because the results of each action, theoretically, span to infinity.

We must choose the factors that seem important enough to hold one liable. The court must be left with wide discretion guided by legal policy, and it must be empowered to decide between a claim of full compensation for damages caused to an innocent victim by the negligent activity of others, and the severe burden that may be imposed on human activity if a tortfeasor is found liable[218] for all the consequences of his actions. This is a practical policy, which is perhaps not based on pure logic, but is motivated by factors of public interest, convenience, and a certain sense of justice.

[216] Restatement, *supra*. Footnote 5, at p.8(h) Salmond, *supra.* Footnote 4, at pp. 217-218; Winfield, *supra*. Footnote 7, ap. 74; Fleming, *supra.* Footnote 11, at pp 20-21.
[217] I. Gilead "Causation in Israeli Tort Law – A Re-examination" [Hebrew] Mishpatim *Yud-Daled* (5744-5) 15, at pp. 30-31. "The appellant was negligent in that he created circumstances fraught with risk. The crystallisation of the consequence was formed and realised in the background of this dangerous state of affairs; it is true that by a foreign agent – the puncture to the wheel. But this was merely the realisation of the danger, on account of which the appellant was subject to the duty of care. *Criminal Appeal* 84/85 **Lichtenstein v. State of Israel**, *Pey-Daled Mem* (1) 141, 157 (hereinafter: "**In re Lichtenstein**")
[218] Fleming: The Law of Tort, Chapter 9.

Chapter III

Medical Negligence and Nonpecuniary Harm: Pain and Suffering

Chapter 3 Part I: The Health System in Israel

Introduction to the Israeli Healthcare System[219]

Life in pre-state Israel was characterised by collectivism, particularly in the sphere of social welfare, in which the collective acted for the benefit of its individuals, who in turn acted for the benefit of the collective. One of the most important pre-state institutions was that of public medicine, the apparatus of which was installed before the State was established. Over the years, the institution of medicine has changed beyond recognition, and its mission has evolved to include a more private aspect, characterised by modern notions of liberalism and the sanctification of individualism. As a result, the Israeli health system has seen multiple historic milestones in its development.

Pre-state

Israel's health funds (*kupot cholim*) were established before the founding of the state. "Clalit", the first of several funds that exist today, was founded in 1911 in response to the need to provide medical services to workers from the second wave of immigration to the Land of Israel/Mandate Palestine from Eastern Europe. "Clalit" was the leading body in the provision of health care services to the Jewish pre-state communities and operated according to the principles of the Bismarck model.[220] The founders of "Clalit" established the fund on the principles of equality and mutual assistance. These principles left their imprint on the Israeli health care system for many years.

The medical provision that "Clalilt" provided to its members was based on a uniform tax collection, which included workers' union fees and membership fees of the health fund. This, in turn, created a sense of dependency on the "Histadrut" (General Workers Trade Union) and on the health fund. Over the years, including during the period of transition to statehood, other healthcare funds emerged that expressed the same political ideology and constituted alternative forms of

[219] This chapter is based on my two published articles: "**Torts in Israeli Law. Medical Malpractice and Nonpecuniary Harm"**, published in *Studies in Law & Economics* in 2017, and **"Medical Malpractice in Israel and the Financial and Non-financial Damage to the Victim**", published in *Sociology and Anthropology*, also in 2017.

[220] The Bismarck model – named after the German Chancellor, Bismarck, who initiated in 1881 the first health insurance law in the world. The law obligated workers who earn below a certain wage to be insured by mandatory health insurance. Subsequently, this insurance was extended to other layers of the population. According to this model, health services are provided by Health Maintenance Organizations.

medical insurance, but which did not require affiliation with a specific political party. Another active figure during this period was the National Council of Jewish settlement, which established the Department of Health. This department coordinated the actions of various healthcare bodies operating in the pre-state community.

Establishment of the State (1948) Until the Modern Era

By the time the state had been established in 1948, there were already several healthcare funds in existence. They were regulated by the newly formed Ministry of Health, which was responsible for enacting public health provisions. Within four years of the establishment of the state, Israel's population had doubled because of large waves of immigration, and many of the immigrants suffered from diseases. Half of the immigrants to Israel were Holocaust survivors from Eastern Europe and the Balkan states, while the other half arrived from Iraq, Yemen, Turkey, and the countries of Northern Africa. This population included a significant proportion of children and the elderly, and many of these people, who had been the victim of persecution, suffered from mental and physical health problems. These included high rates of tuberculosis, dysentery, ringworm, and malnutrition, especially amongst children and the elderly.

Moreover, the population consisted of many disabled people and individuals with mental health issues. According to a report by the "Joint" organisation, approximately ten percent of the immigrants in the early years of the state required immediate hospitalisation. However, the nascent state had few medical resources or beds at its disposal. Thus, this severe socio-economic situation, which was exacerbated by extremely difficult conditions in absorption camps, contributed to significant levels of morbidity and death.[221]

This created a deficiency in the health system, which left the Health Ministry in a precarious situation. Against this background, the "Clalit" Health Fund offered its healthcare services for new immigrants and thus became the most dominant player in the supply of healthcare.

The Establishment of Israel's Public Health System

The medical insurance system in Israel was founded primarily on the activity of healthcare funds similar to "Clalit". The health funds were member-based organizations aimed at providing medical insurance on the basis of mutual responsibility between members of the fund. Their modus

[221] Doron, H., Shwartz, Vinker, S. (2014) Family medicine in Israel: its origins, history and significance in the Israeli health care system. Beer Sheva: University of Beer Sheva

operandi has largely dictated the character of the health system in Israel that endures to this day. The members paid a membership fee to the fund, often via membership fees to trade unions, and in exchange received health services in various arrangements that were determined by the regulations of each health fund.[222] This system laid the foundations for the modern Israeli public health system. However, there have been numerous legislative reforms over the past decades since Israel's establishment in 1948. Legislators have enacted these reforms in order to resolve the two biggest challenges facing the health system in Israel and, indeed, the entire world. The first of these is the significant pace at which medicine has developed, along with the significant increase to the accompanying costs. The second is the substantial increase in the demand for health services, in part due to an aging population that is dying far later in life.[223]

In 1973, the "Parallel Tax Law" was legislated by the Israeli Knesset (Parliament). This law obligated employers in Israel to contribute to the cost of the medical insurance for their employees via a direct payment to the health fund of which they are members. Until the middle of the 1990s, prior to the introduction of the "National Health Insurance Law", four healthcare funds operated in Israel, providing medical services and health insurance.

These health funds acted as competitive insurance companies and focused their efforts on attracting "profitable" customers, namely young people who were healthy and therefore would not "exploit" the fund's services, as well as wealthy citizens. This situation was exacerbated at the start of the 1980s, when the "Maccabi" and "Meuhedet" funds even started to demand that individuals met certain criteria for joining the insurance. This included the barring of customers over the age of 65, and a medical assessment that evaluated the level of risk of an individual prior to his or her acceptance.

As a result of this situation, the comparative distribution of insured individuals with regard to age and financial status in the four healthcare funds was inconsistent and created an imbalance between the funds. For instance, in the "Clalit" healthcare fund, which had the highest number of members, the percentage of customers over the age of 65 was higher than in the other three. Moreover, the financial status of the members of the "Maccabi" and "Meuhedet" funds was higher than that of the "Clalit" and "Leumit" funds.

The governmental support that healthcare funds received also created a problem. This was because

[222] Carmel, S. (2003). *Health, Law, and Human Rights*. Tel Aviv University Press [Hebrew]
[223] Cf. For instance, State Health Regulations (1995)

this support was based, amongst other things, on the number of insurance holders that each fund held. This figure was inaccurate and did not correctly reflect the medical needs of the individuals. The relevant variables, such as the age and socio-economic status of the policyholders, which indirectly influenced the expenditure of the health fund, were not included in the governmental support.

These factors worsened the financial state of the "Leumit" and "Clalit" funds and created an increasing gap in their economic status in comparison with "Maccabi" and "Meuhedet". Meanwhile, the "Clalit" fund accumulated frequent budget deficits, which increased with time, until the mid-1990s, when the accumulative debt of the fund reached 2.5 billion NIS. This situation made it increasingly difficult for "Clalit" to provide the services that it had pledged to its policyholders, which resulted in many dissatisfied customers and further aggravated the crisis.

The deficit that "Clalit" had accumulated compelled the state to intervene with various recovery plans. While the objective of these plans was to resolve the budgetary problems of "Clalit", they did not deal with the root problem that had created the crisis – the policy implemented by health funds that allowed them to select whom to insure. This policy, as well as being problematic, enabled the discriminatory funds to increase the level of their healthcare provision and expand the number of customers, many of whom had transferred from "Clalit". The financial status of "Clalit" deteriorated to the point that there was concern that the fund would not even be able to provide healthcare to its policyholders.[224] The end of the 1980s thus constituted a crisis point in the Israeli health system, which accelerated the need to devise a solution, despite the disagreements and the controversy. The crisis also resulted in strikes, long queues for medical treatments, accumulative debts at hospitals and health fund clinics, and general dissatisfaction amongst the population.[225]

Against this background, in 1988, the government established the "State Committee of Inquiry Examine the Functioning and Effectiveness of the Health System in Israel". The report that the committee produced became known as the "Netanyahu Committee" report, since a Supreme Court judge, Shoshana Netanyahu, was appointed to head the committee. The report was considered a constitutive document for the healthcare system in Israel. The chief recommendation in the report was to legislate the "State Health Insurance" law in Israel.

[224] Ambulatory medical care; including mental health, both clinical and community; including at care home residences, as is specified in the Law on the Supervision of Care Homes (1965)

[225] Asiskovitch, S. (2011). *There's a Price to Life. The Political Economy of Legal Reforms to State Medical Insurance in Israel.* Magnes Press, Jerusalem.

"National Health Insurance" Law (1994)

The Knesset approved the "National Health Insurance" Law in June 1994 and it came into effect in January 1995. This made health insurance in Israel mandatory, and obligated every resident of the state to be insured by one of the four existing healthcare providers, according to the individual's choice. In the first clause of the law, it was stated that "the health insurance will be based on the principles of justice, equality, and mutual assistance."

The following changes were implemented in the healthcare system as a result of the legislation:

- **Obligatory Insurance:** Prior to this legislation, health insurance was voluntary, and five percent of the population (approximately 250,000 residents) were not insured. The highest rate of uninsured individuals was among the poorest socio-economic groups, young people, and the Arab population. When the law came into effect, in January 1995, health insurance became mandatory. This law applied to all citizens and permanent residents. Furthermore, the healthcare funds were obligated to accept as a member any residents who desired to join the fund, and the funds were not able to restrict the membership of any particular demographic group.
- **Freedom of Choice:** The health insurance law granted residents of Israel the freedom of choice to move from fund to fund, and forbade the funds from conditioning their acceptance of certain individuals. This arrangement was aimed at reducing the undesired phenomenon of funds filtering their customers, and sought to promote efficiency, while diminishing the level of competition between funds.
- **Expansion of Medical Services:** Prior to this legislation, the range of medical services that was given to policyholders was determined independently by each health fund. This was considered to be inconsistent and enabled each healthcare fund the discretion and flexibility to determine the rights of its customers and their eligibility for certain medical services. The legislation modified this situation, such as by safeguarding eligibility for medical services and medication in the law.
- **Health Insurance Fees:** Prior to the introduction of this law, healthcare membership fees were taken directly from the insured customers, or through payments to the relevant trade unions. Within this framework, the funds had the discretion to grant discounts and exemptions to specific individuals. With the introduction of this legislation, the body that was responsible for collecting health insurance taxes was the national social security

agency. This led to an expansion in the volume of payments and created a more progressive tax collection. Indeed, today, the amount of income for healthcare has increased alongside pay rises. Moreover, the connection between the income of the policyholder and the income of the healthcare funds was rendered no longer relevant.

- **Allocation of Resources between Healthcare Funds:** Before the legislation in 1995, the healthcare funds' primary source of income was from the membership fees that insurance holders paid and was supplemented by a parallel tax contribution that was paid by businesses and self-employed individuals. As a result, healthcare funds with a significant number of insured individuals with high incomes were able to benefit from these individuals' higher salaries. The new legislation modified this arrangement and determined that the allocation of resources between the healthcare funds would be carried out according to the "capitation formula", which factors in the number of insured individuals in each healthcare provider according to age and enables a more efficient distribution of the budget, as well as a reduction in the number of incentives to "filter" customers. [226]
- **State responsibility for supplementing the funding of medical services fixed in the law:** Prior to the law, the state contribution to the budgets of the healthcare providers was not anchored in the law; it was determined by negotiations between the government and the healthcare funds, and it was influenced by various factors, including political considerations and macro-economic developments. As a result of this, the state budgetary support for the healthcare funds was characterized by volatility and instability, which affected the stability of the entire healthcare system. The new law reduced the uncertainty regarding resources that were available for healthcare funds in the short term. In the longer term, the law helped to determine the "cost of the healthcare package" (the level of known expenditure that healthcare providers were required to spend to provide the services that were fixed in law). The law now stated the sources of funding to pay for the "package" included the insurance tax that was collected by the social security agency, as well as the amount that the policyholders themselves contributed to receive various services. The state funding made up the difference between the cost of the "package" and the aforementioned two sources of funding. This mechanism was aimed at ensuring, by law, that the state would

[226] For further elaboration, cf. Research Paper by Levy, S. (2011, December 19), Knesset Center for Research and Information, The Geographical Variable in the Formulation of the Capitation that was Amended in 2010, and its Impact on the Budget for Policyholders in the Negev Region

contribute to funding those medical services that were guaranteed by law and to fix an expenditure ceiling that healthcare providers were compelled to comply with. [227]

Meanwhile, during this period, the discourse surrounding human rights and justice changed significantly, and the health insurance law regulated the healthcare system and ensured that healthcare funds granted patients their rights. As a result of this law, the State of Israel changed the foundations of the legal and political culture and legislated the Basic Law: Human Dignity and Liberty. In 1996, the rights of the patient were also legislated, which gave expression to the protection of the rights of the individuals in the context of healthcare. [228]

The "National Health Insurance" law is the most important legislation that has been passed in the healthcare field in Israel.[229] The law reshaped the Israeli healthcare system, brought substantial change to the healthcare structure, increased the level of solidarity, and enabled hundreds of thousands of uninsured citizens and residents to benefit from the broad range of medical services. The law defined the obligations of the state in funding the rights of residents to broad, quality healthcare services, and created a leading and substantial infrastructure for the medical system. The law was not only unique from the perspective of the healthcare system, but it also constitutes one of the most social laws that has ever been legislated in the State of Israel. The law also resulted in balancing out the level of treatment in hospitals with the level of treatment in the community. The law advanced the vision that the healthcare system in Israel, as well as being of high quality, ought to be based on the principles of justice, equality, and mutual assistance.

The current health care system consists of several bodies: The Ministry of Health, the various health funds (Clalit, Maccabi, Meuhedet, and Leumit), and private sector organizations. The healthcare system has faced, and continues to face, multiple challenges – financial distress, a shortage of workers, a deficiency of hospital beds, as well as immense bureaucracy and constant social and political change, all of which have led to a situation in which medical malpractice has become a recurrent issue in Israel over the past decades. The legal landscape has also changed dramatically due to the significant increase in the number of cases of medical malpractice. Between 2005 and 2015, there was a 30 percent rise in the number of medical malpractice lawsuits filed in

[227] Ben-Nun, G., Berlovitz, Y., Shani, M. (2010), *The Legal System in Israel.* Am Oved, Tel Aviv [Hebrew]
[228] Law on the Patient's Rights (1996)
[229] State Medical Insurance Law (1994)

Israel, coupled with a doubling of the amount granted in compensation by the court to claimants. This has also led to a situation in which medical institutions in the country have paid out approximately 570 billion USD in claims between 2005 and 2018.[230] The increase in the number of lawsuits against the medical institution on the part of the individual claimant has created multiple challenges for the legal and healthcare systems. The issue of medical malpractice in Israel will be explored in the next subchapter.

Medical Negligence in Israeli Law

The establishment of the State of Israel in the year 1948 coincided with serious economic challenges which confronted the leadership of the nascent state. At the beginning, for ideological reasons and as a means to tackle these challenges, the socialist approach was central to all elements of Israeli policy and manifested in the healthcare system by the aforementioned healthcare funds, chiefly "Clalit". At that time, the sense of Jewish collectivism was at its zenith, since the State of Israel was developing, which required contribution to the common goal.[231] Consequently, the state worked closely with the *Histadrut*, the General Organization of Workers in Israel, which represented workers collectively in numerous areas of state policy. As state building progressed, the legislature created a medical system that pertained to the relationship between the caregiver and the care receiver, which was outlined in the Patient's Rights Law.[232]

Today, in light of the changes to the healthcare system following the previously mentioned National Health Insurance Law, enacted in January 1995, the health authorities have implemented a privatization approach to parts of the healthcare system. This does not necessarily mean that the government intervenes less in the supply of services, but rather that it is able to intervene sporadically, thus allowing the state to maintain control while creating a division between it and the recipients of the services. The result is that the state reduces its obligation to be accountable to its citizens, concurrent with the strengthening of the individual's autonomy.

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[230] Ido, E. (2018, March 13) "Medical Malpractice Suits Rise in Israel, but Is There More Negligence?" In *Ha'aretz*. See:https://www.haaretz.com/israel-news/medical-malpractice-suits-rise-but-is-there-more-negligence-1.5896248

[231] **M. Shalev**, *Political Economics*, in: **N. Berkovitz**, **U. Ram** (eds.), *Inequality Lexicon*, Beer Sheva: Ben-Gurion University Press 2006, pp. 204–211.

[232] Patient's Rights Law of 1966, pp. 68, 327.

Medical Negligence Models in Israel

Matters of medical malpractice are rooted in Articles 35 and 36 of an Ordinance that originated from the period of the British Mandate in pre-state Israel.[233] These articles establish the tort of negligent behaviour related to causing harm. The wrong is composed of a number of elements, which together form a chain: duty of care, fault in violating the duty of care, a causal relationship, and harm. These are familiar factors according to the traditional model of rulings, but this is not the only approach to the examination of negligence.

Conceptual and Concrete Duty

The element of the duty of care is composed of two elements. The first is the **conceptual duty** assigned to the person in the aspect of principle, i.e. whether it is normatively appropriate to recognize the existence of the duty to act with care[234] towards another, with the examination of four variables – type of harming party, type of harmed party, type of activity, and type of harm. The second element is a **concrete duty**. If the conceptual duty has been recognized, then it is necessary to continue examining the existence of the duty under concrete circumstances in view of the four variables. Under the concrete duty of care, Article 36 of the Ordinance stipulates that it is necessary to examine what the harming party, as a reasonable person, could have expected his or her behaviour to cause.

Furthermore, the test of expectations has two dimensions.[235] The first is **'normative expectations'**: Does society require the harming party to anticipate the risks of harm of the type that occurred as a consequence of his or her behaviour? The second dimension is **'technical expectations'**: Does the harming party have the ability to expect risks as aforementioned? Either way, it appears that there is an overlap between testing the conceptual, ethical question of the duty of care and, on the other hand, normative expectations, which fall within the scope of a concrete obligation.

The 'presumption of an obligation' to foresee the type of harms seeks[236] to establish the social

[233] See: section 50 in general and subsection (3) in particular of the Civil Wrongs Ordinance, 1380, 1 (93) (A) 129.

[234] Civil Appeal 145/80 Vaknin v. Beit Shemesh Local Council, Court Ruling 37 (1) 113 (1982).

[235] Civil Appeal 243/83 Municipality of Jerusalem v. Gordon, Court Ruling 39 (1) 113, 128–129 (1985).

[236] Civil Appeal 4486/11 Anonymous v. Anonymous, Paragraph 12, Handed down on July 15, 2003.

approach, according to which the assignment of responsibility is a desired issue where there is a case of negligence and the negligent individual has the technical ability to foresee the incident, unless there are special considerations of legal policy to negate it. The ability to anticipate the potential harm is a normative filter applied to considerations of legal policy, i.e., whether it is appropriate or not to impose responsibility. It should be noted, for instance, that as in the 2003 case *Anonymous vs Anonymous*, "where damage is expected, as a technical matter, there is the conceptual duty of care, unless there are considerations of legal policy that negate the duty".[237]

The element of guilt indicates that a violation of the duty of care has occurred on the part of the person obligated to fulfil it, along with every person who has relevant legal relations, for example, the corporation, the employer, and so on. The element of fault includes carelessness, which is not an issue of malice on the part of the harming party, but the tort of negligence can also bear intentional behaviour and acts.[238]

The violation of the duty of care, however, is not sufficient, and it is assessed within the context of the likelihood of the behaviour of the harming party causing the specific harm to the specific harmed party. The likelihood of the behaviour is measured in light of the duty of care that the harmed party undertook or was obliged to undertake and failed to do so, and accordingly between the characteristics of the specific harming party and the reasonable person with similar characteristics who would have expected such harm at the time of the behaviour. It is evident that there is a double causal relationship at play here – the **factual** and the **legal.**

A cause-in-fact causation is a test of circumstances in which a certain act is the material cause of an injury or wrongdoing, best known as the 'but-for' test (i.e., had it not been for the occurrence of the specific act, the injury would not have happened). This constitutes a preliminary condition of the legal causal relationship. Regarding the latter, the rulings[239] include three cumulative tests:

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[237] Civil Appeal 4486/11 Anonymous v. Anonymous, Paragraph 12, Handed down on July 15, 2003, P. 131. Also see: Civil Appeal 145/80 Vaknin v. Beit Shemesh Local Council, Court Ruling 37 (1), 113 (1982).

[238] For instance: Civil Appeal *Amin v. Amin*, Court Ruling 53(5) 69, 81 (1999). In addition, for example: Civil Case 1702/07, Ozri v. CanWest Global Communications *Corp.*, pp. 3032, and the introductions, handed down June 20, 2012, section 386 (2) Civil Law of 2011, section 712.

[239] See: Civil Appeal 145/80 Vaknin v. Beit Shemesh Local Council, Court Ruling 37 (1), 113 (1982). Civil Appeal 542/87 Credit and Savings Fund of Reciprocal Association Ltd. V. Mustafa Aoud, Court Ruling 44 (1) 422, 437 (1990), Civil Appeal 2028/99 Peer v. Silovt Building Company (1964) Ltd, Court Ruling 55(3) 493 (2001), Civil Appeal 610/94, Buchinder v. Official Receiver, Court Ruling 57 (4), 289, 311 (2003).

1. The test of 'reasonable expectations': could the harming party, as a reasonable person, have expected that his or her carelessness would cause harm?

2. Does the damage that was caused fall within the (potential) range of risks that the reckless behaviour of the accused causes?

3. The 'common sense' test: did carelessness contribute in actuality to the harm results?

In relation to the comparison of the harming party to a reasonable person, one ruling noted that:

> This is also the just, fair, and moral person. This is the person who cares for himself, for others, and for the public, and all of these do not reflect the utmost of his complexity. However, the reasonable person is not the perfect person. This is the person who reflects the complexity of our life, with our qualities and shortcomings, the likelihood therefore expresses the appropriate response of society. This response is always related to the circumstances of the event and it expresses the perception of society regarding social fault, which is found at the basis of carelessness.[240]

There are no differing standards of reasonable behaviour; on the contrary, the directive cited above determines a single, uniform level of care. This determining level of care is the concept of a reasonable person, which takes the form of nothing other than a personification of the concept of reasonableness. In this way, the criterion aptly reflects the appropriate balance between the various values and interests that must always be taken into account. Reasonableness is thus not a physical or metaphysical concept, but a normative one. In actual fact, it is an evaluative and subjective process rather than a theoretical-static criterion. Importantly, reasonableness is not limited by deductive logic. It is determined by identifying the relevant considerations and balancing between them according to their importance.

As we have seen thus far, the test of expectations presides over a number of elements, including the tort of negligence, and it is possible that uncertainty[241] will arise in light of its complexity and its influence on the results of the trial, since the test presides over the process of causation and over the process of harm and its scope encompasses the entire tort: with regard to the process of

[240] Civil Appeal 5604/94, Osama and Ibrahim Hemed v. the State of Israel, Court Ruling 58 (2) 498, Paragraph 16, Court ruling of former President A. Barak (2004).

[241] **G. Shani**, **A. Shmueli**, *The Servant of Two Masters? The Test of Expectations in the Tort of Negligence*, Studies in Law 2011/34, pp. 141, 142.

causation, the expectations are not required to be precise, but general, and the mere possibility is enough to predict the occurrence.[242]

Regarding the harm and its compensation, Article 76(1) of the Ordinance reduces expectations by means of the principle known as 'distancing the harm'. According to this principle, the harmed party is entitled to payment that is naturally expressed in a regular process of tort behaviour. In other words, the harmed party is not responsible and does not bear secondary harms that develop from the primary harms but only 'natural' ones. [243]

Pain and Suffering in the Israeli Legal System

Consistent rulings in Israel over numerous years[244] indicate that for the directly harmed party it could be that only independent damages in the form of nonpecuniary harm, deriving from pecuniary harm, are awarded compensation. Pain and suffering, as nonpecuniary harm, are recognised if they are an outcome of the harmed party being under the harming party's care, or if the harming party is liable towards the harmed party due to an obligation to take care of their wellbeing or welfare. Thus, the feeling of pain and suffering is linked to physical harm and if the former derives from the existence of the latter, then the liability extends to the prevention of the pain and suffering. Before delving into the distinction between pecuniary and non-pecuniary harm in the Israeli legal system, it is worth examining the philosophical roots of the notions of pleasure, pain, and suffering.

The teachings of the philosopher, jurist, and utilitarian Jeremy Bentham, are relevant here. In order to measure the rightness of an action, Bentham asserted that every act must be measured by the amount of pleasure or pain it generates and the number of people who are affected by the action. The pleasure or pain are measured through scientific, accurate tools that gauge the strength of the

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[242] **Y. Gilad**, *The Causality in Israeli Tort Law – Re-examination*, Law 1984/14, pp. 15, 26. Also see: Civil Appeal 576/81 Ben Shimon v. Bardeh, Court Ruling 38 (3) 1, 8–9 (1984).

[243] **Y. Gilad**, *The Causality in Israeli Tort Law – Re-examination*, Law 1984/14&15, pp. 29–33. Further Civil Appeal 7794/98 Moshe v. Cifford, Court Ruling 57 (4) 721. **Y. Gilad**, **E. Gotel**, *On the Broadening of the Responsibility in Torts in the Causal Aspect – A Critical Look*, Law 2004/34, p. 385.

[244] See for example: Civil Appeal 4/57 Nadir v. Cahanovitz, Court Ruling 11 1464, 1469 (1957), Civil Appeal 243/83 Jerusalem Municipality v. Gordon *Court* Ruling 39 (1) 113, 138–142 (1985), Civil Appeal 2034/98 Amin v. Amin Court Ruling 53(5) 69 (1999), Civil Appeal 2299/03 State of Israel v. Yafa Terlovsky (Published in Nevo), handed down on January 23, 2007.

pain or pleasure according to certain criteria – The Hedonic Calculus. These criteria include: intensity, duration, certainty, proximity, fecundity (the chance that pleasure is followed by more pleasure, pain by further pain), purity (the chance that pleasure is followed by pain and vice versa), and extent (the number of people affected). The consequence of using this measure for creating a guiding principle of conduct is simple: every action should aim to cause the greatest amount of happiness for the greatest number of people and prevent suffering and pain.[245] By way of comparison, Aristotle's principle of *Eudaimonia*, meaning self-flourishing, was a self-realization theory that makes happiness or personal well-being, and the perfection of certain virtues, the chief good for man.[246]

The impact of these theories is relevant when measuring non-pecuniary harm. From the utilitarian perspective, if our main priority is the greatest good (understood as the pursuit of pleasure and avoidance of pain), for the greatest number of people, then the pain and suffering felt by the harmed party could be measured against the Hedonic Calculus as a means of guiding us when it comes to compensating the harmed party. Equally, in the Aristotelian paradigm, if a person cannot perfect their virtues or 'flourish', and thus realize their full potential due to the damage incurred by the harming party, this prevents them from achieving true happiness and flourishing. This would likely require a person to be awarded compensation in the event of an act of medical negligence that prevents them from realizing their full potential or flourishing. These philosophical theories provide further insight into the complexity of the debate.

Jewish philosophy also provides some insight into notions of non-pecuniary harm, and is particularly pertinent to the Israeli legal system given that Jewish law contributes to the foundations of the legal method. Within Judaism, there is a reference – specifically within the *Mishnah*, the Oral Law – to harm caused by doctors and mention is even made of their responsibility when the damage exceeds that which is deemed reasonable: "A qualified physician who treated a patient with the authority of the court and caused damage, is exempt. However, the doctor who harms a patient more than is appropriate, behold, he is obligated [to compensate the harmed party]"[247]. In other words, when a doctor acts with the authority bestowed on him and acts

[245] Kelly, Paul J. (1990). *Utilitarianism and distributive justice: Jeremy Bentham and the civil law*. Oxford University Press.
[246] 2011, *Eudemian Ethics*, (Oxford World's Classics), Anthony Kenny (ed./trans.), Oxford: Oxford University Press.
[247] **Mishnah**, *Seder Nezikin*, Tractate Bava Kamma, Ch. 9, End of verse 3.

with reason, Judaism moves to protect the physician and his actions. However, if the doctor is careless or violates the duty of care imposed upon them, Judaism insists that the medical personnel must compensate the harmed party.

In Jewish Law another distinction is made between intentional and unintentional damage. Namely, a physician who treated a patient with the authority of the court and accidentally caused damage is exempt from fault, but a doctor that caused harm intentionally is obligated to compensate the harmed party. Consequently, those laws in Judaism which absolve the doctor from responsibility relate to damage which is caused as a result of providing reasonable medical treatment. Conversely, laws in Judaism impose tort liability on a physician who provides unreasonable treatment. Overall, it can be stated that the Jewish law seeks to protect both physicians and patients. Physicians are protected by the courts to act professionally, and in the interests of medicine. However, simultaneously, they are obligated to do the utmost to prevent harm to their patients.

The great Jewish thinker and physician Maimonides (The Rambam) addressed the question of the authority of a doctor to treat a person in danger. The Rambam stated that people ought to be encouraged to practice medicine and he thus sought to mitigate the physician's fear that perhaps they will make an error and be found at fault for causing medical harm, or even worse, killing a person. The weight of the distinction between a mistake and negligence places a burden on the very practice of medicine. Indeed, this debate relates to the fine line between protecting physicians and allowing physicians to operate without fear of causing inadvertent harm. As Rabbi Chaim stated, there is a requirement to allow a physician to treat – "Lest the doctor shall say 'what do I need this worry for, lest I make a mistake and find myself unintentionally killing a person'"[248].

Thus, the regulations that err on the side of caution when dealing with cases of medical malpractice within Judaism clearly seek to protect the physician and mitigate the potential harm to the overall development and practice of medicine by employing excessive caution. Nevertheless, the tension between preventing negligence and inhibiting medical development constitutes a significant a challenge and balancing act.

The Legal Framework

In order to bring these theories and doctrines from philosophy and religion into the context of the legal framework, one must consider a solution to the pain and suffering experienced by the harmed

[248] **R. Y. Chaim**, *Book of Responsa – The Accomplished Person*, Light of Life.

party. The primary goal and justification of tort law is to restore the harmed party to their original state. Only when it is not possible to return the harmed party to their pre-harm state (in property, in body, and in mind), then financial values must compensate for the discrepancy between the harmed individual's post-harm state, following attempts to rectify the harm done, and their pre-harm state. Tort law also considers the moral duty to bring about justice and honour the rights of the injured party as a wronged moral agent. However, the primary focus is the restoration of the harmed party to their original state.

The appropriate rationale[249]for restoring the harmed party to their original state is to put the harmed party in the same financial, physical and mental situation in which they would have been in had the harm not been caused, through awarding 'damages'. However, when this is an estimate of the value of the physical harm in the form of pain and suffering, i.e. non-pecuniary, a real difficulty arises regarding the evaluation of the sum of the damages. As was stated in the ruling *Grossman vs. Rot Court*, this presents a supreme challenge:

> How is it possible to evaluate, precisely or even approximately, in money or in monetary equivalent the pain and suffering or sorrow and shame of a person whose hand or foot has been amputated or who walks on his legs, but concern eats away at his heart since his days on this earth are numbered?[250]

In order to determine the damages for tangible torts, the court has at its disposal legal tools – statistics and evidence about the lifestyle of the harmed party, for instance: livelihood, age, family status, and so on. Thus, in calculating the monetary value of the harm, when the damages are of a nonpecuniary type, the figure is in many ways speculative and inconsistent, as *Anonymous vs State of Israel* stated: "and the substance remains true much like in the past (then) to this day as fine wine".[251] In other words, the ability of judges to accurately compensate a harmed individual is largely subjective, both in terms of the judgement of the ruling authority, and the harmed

[249] **A. Barak**, *Evaluation of Compensation in Body Harm: Torts, Desired Situation and Existing Situation*, Studies in Law 1983/2, pp. 243, 250. See also: Civil Appeal 357/80 *Yeuda Naim v. Moshe Brade Court Ruling* 36 (3) 672, 772 (1982).

[250] Civil Appeal 70/52 Grossman v. Rot Court Ruling 1242, 1254 (1952).

[251] Civil Appeal 9927/06 Anonymous v. State of Israel (Published in Takdin), Paragraph 3 of the ruling of Honorable Judge E. Rubinstein, handed down January 18, 2015.

individual's way of life.

Moreover, this raises questions of morality concerning the compensatory system, even if a harmed individual is compensated in accordance with their lifestyle and needs. Namely, while a harmed athlete will ostensibly be more affected by a leg amputation than would a librarian, it seems morally problematic to pay the former a more significant amount, when the suffering of the latter may be equally severe.

Thus, it seems that the range of possibilities and situations in which the person might feel pain and suffering because of a wrong are infinite. This results in a problematic situation wherein the nonpecuniary harm is treated as a form of pecuniary loss, absence, or expense that takes multiple forms that are bound up with the lifestyle of the specific harmed party, including their ability to earn a livelihood, potential future earnings, medical treatments, assistance to function normally, and so on.

In a paper, Eliezer Rivlin, an Israeli Supreme Court judge, said that the factors that the Israeli court considers when estimating the head of tort of pain and suffering are as follows:[252]

(1) The nature of the harm;

(2) The intensity of the harm, and;

(3) The duration of time in which the harmed party felt or continues to feel the harm.

These three considerations pertain to the dimension of the result of this unique harm.

Goal: An Objective Result

To bring about an objective result regarding the estimate of the damage of the physical pain and suffering, the path to which is uniform between the courts and ends in a fair trial, it is important to return to the first principles. Section 2 in the Ordinance of the British Mandate defines 'harm' as the unlawful infringement of a legal right, about which it is said 'where there is a right there is a remedy'[253] (*ubi jus ibi remedium*).

Section 1 in the Ordinance presents the Hebrew interpretations of the English terms. In this context, there is a value-based difference in the Ordinance: first, the meaning of **injury** is different from

[252] **E. Rivlin**, *Damages for Non-concrete harm and for nonpecuniary harm – trends of extension*, Shamgar Book, Part 3, Tel Aviv, The Israel Bar Publishing House 2003, pp. 21, 61.

[253] Civil Appeal Authority 6339/97 Roker v. Salomon, Court Ruling 55 (1) 199, 268, statements of Judge M. Heshin (1999).

the meaning of **damage**; and second, **relief** is different from **remedy**.

Since there is injury in the violation of the duty of care in medical treatment and, for this, liability is assigned based on the type of tort of medical malpractice, the damages of the pain and suffering experienced by the patient's body are such that they naturally lead to negligent care. As previously described, this is nonpecuniary harm, the existence of which is independent from pecuniary harm, but derives from the occurrence of the latter and according to the Ordinance, injury to the body is what constitutes the damage.

However, the injury itself is not the harm done; rather the harm is the subsequent damage because of the injury under the **test of expectations**, which is primarily technical: Can the given damage be caused by the given injury? The three considerations – the nature of the injury, the intensity of the injury, and the duration of time that the harmed party felt it – must be measured against the harmed party's physical situation for the non-pecuniary damage.

To illustrate matters, I will provide an example from a case that happened,[254] as follows: A school student in twelfth grade cut his hands and shards of glass remained under his skin. He went to a clinic to have the glass removed, had stitches, was bandaged, and was released. For five months he felt pain and eventually returned to the clinic. An X-ray was made and a shard of glass was found in his palm. The student was afraid of an immediate operation, so the surgery was held a month later. In the operation to remove the glass, an incurable, life-threatening infection was discovered. The damage was injury to the nerves in the palm, expressed as physical pain. In the end, it was decided that medical malpractice had contributed to exacerbation of the harm, including the duration of time during which the student felt pain. The amount of damages estimated for the persistence of the pain was 70,000 shekels, which was divided among the litigants according to their degree of liability.

The problem is – from what point in time does the damage of the pain begin? The range of possibilities that can be expected from a technical perspective are as follows. First, if the glass shard had been found on the day of the initial treatment, then the damage of the pain would not have been extended. Second, the date of the removal of the shard is not relevant to the damage of the pain since this was caused only because of the penetration of the shard into the palm of the

[254] Civil Case (Shalom Haifa) 18408/02 Erez Arbel v. Ort Israel City Technological High School (published in Nevo), handed down on July 25, 2005.

hand. However, the court came to an unfair conclusion according to which the medical malpractice extended the time in which the harmed party felt the pain, which contributed to the existing injury. To put it simply, if the harm of the pain was caused because the glass shard was left in the palm of the hand and the intensity is what worsened over time, then this is full medical malpractice. Conversely, if the harm of the pain derived from the penetration of the glass, which injured the nerve, then the physician's actions were not causally related to the pain and the physician was fully exempt from the liability for this element. Since it is not possible to go back in time and to discover whether it was possible to prevent the pain with correct medical treatment, the technical expectations necessitate the decisions of a binary outcome, as difficult as it will be,[255] namely: either to assign full liability for all of the damage of the pain or to exempt the physician fully from it.

However, the test of technical expectations does not require and does not obligate accurate expectations which provide factual certainty with regard to the type of negligent act and the type of damage, thus if the physician is unable to make a reasonable examination, such as a simple X-ray, it is likely that, for example, a shard of glass would remain in the body, and could cause the damage of pain and suffering to the patient.

It has already been determined more than once[256] that the duty of care is increased when the undertaking of measures for the prevention of possible harm is simple. This example illustrates the further challenges for the courts when seeking to ascertain liability for a certain harm, and provides insight into the multiple expectations, technical or otherwise, that are incumbent on the physician to remove any doubt that medical malpractice has occurred.

The Appropriate Legal Approach to the Harm of Pain and Suffering

The mechanism of the forecast brings about an undesired result of inequality between the harmed parties, which leads to judicial uncertainty. The estimate of the consequences of the harm to the claimant depends on the judicial evaluation of the specific judge in the case, and they have two

[255] Another Civil Hearing 4693/05 Carmel Hospital Haifa v. Malul (published in Nebo) paragraph 16 for the ruling of the honorable judge E. Gronis, handed down on August 29, 2010.

[256] See: Civil Appeal 5604/94 Hemed v. State of Israel Court Ruling 58 (2) 893, paragraph 14 (2004), Civil Appeal 10083/04 Goder v. Modiin Regional Council (published in Takdin) paragraph 12, handed down on September 15, 2005.

tools at their disposal: an actuarial-statistical estimate, evidence on the harmed party's lifestyle, and a global estimate and general data for society. However, even if the actuarial tool maintains the individual purpose of compensating the harmed party, the statistical data cannot predict everything.[257]

According to the theory of the philosopher Ronald Dworkin, the process of arriving at a decision does not only consider legal rulings, but also principles of an abstract nature that complete the act of sentencing. Even in an instance in which there are no rules, these principles are legally binding and therefore the judge should assume that they prevail above all. A judge must always take into account that there will always be a principle that governs and regulates. The rule has first priority but, in its absence, it is essential to search for a governing principle.

Although Dworkin writes about the principles of political justice, with regard to the example under consideration it is rather social justice should be taken into account. According to Dworkin, the difference between the legal field and other fields is somewhat blurred. Dworkin claims that considerations of social justice all have a legal status.[258] In this case, he blurs the lines between law and morality, and between society and politics. This is potentially problematic, however, because if the court brings into its consideration a range of non-legal principles (such as social and political notions of justice), the legal framework will lack a sense of clarity and structure.

Nevertheless, it appears that even if we follow the legal approach, the alignment of values and interests under judicial review requires the court to reach the same result: an unequivocal ruling issued to both the harming and harmed parties, which will allow them to continue their previous lifestyle. This is a tension between law and reality, and the judge obligates us to reach a decisive and certain solution, while maintaining a place for agreements between the sides themselves.

Indeed, when illustrating the power of judgement at the disposal of the judge, it is useful to refer to Neil MacCormick's work. The considerations of morality, here in the context of the judge's moral framework, lean on the power of judgement, whose "locus is intersubjective", in other words

[257] See: Civil Appeal 10064/02 Migdal Insurance Company v. Rim Abu Hana, Court Ruling 60 (3) 13, Ruling 28 (2005).

[258] **R. Dworkin**, *Justice for Hedgehogs*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts 2011.

it is shared by multiple moral agents and conscious minds.[259] This inter-subjectivity might suggest that it is possible to depend on the judge's beliefs and values for sound reasoning due to society's shared moral considerations. However, according to MacCormick, as this moral-based ruling is not yet a public judgement, it cannot be seen as a direct source of legitimation of the law.[260] This generates a challenge when attempting to create a uniform, objective, and universal measure for the compensation of non-pecuniary harm when a precedent is lacking in the law.

[259] **N. MacCormick**, *Practical Reason in Law and Morality*, Oxford University Press, Oxford, New York 2008, p. 29.

[260] **N. MacCormick**, *Institutions of Law. An Essay in Legal Theory*, Oxford University Press, Oxford, New York 2008.

Chapter 3 Part II: The Theoretical Template for the Foundations of Justice

Introduction

The issue of healthcare in Israel occupies a very important place in public discourse, with many questions included on the agenda of the legislature and the healthcare services. The Israeli Health Law opens with the statement that the law will be founded on values of justice, equality, and mutual assistance. Is the purpose of the law achieved? Are its goals fulfilled? Is the State committed to a health care system based on principle of justice and equality, respect and assistance? Are there options in the existing health care system to reduce gaps in healthcare amongst different parts of the population, including underprivileged groups in society, and to reduce the increasing gaps in the provision of medical services? Is the current legal system adequate for protecting the health rights of Israeli residents?

These and other questions will be discussed and analysed in this subchapter.

The Foundations of Justice

Justice is a value that philosophers and jurists have discussed since ancient times. In the legal context, justice generally pertains to rules that ensure a fair trial and equality before the law. However, it is a far more profound philosophical and religious notion, the foundations of which we are obliged to understand. The notion of justice has always occupied a central place in Jewish sources.[261] The Old Testament states "do not pervert justice; do not show partiality to the poor or favouritism to the great, but judge your neighbour fairly."[262] Maimonides (considered one of the greatest Jewish scholars of all time, one of the greatest philosophers of the Middle Ages, and a spiritual and political leader of his generation),[263] asks and replies: "What is the justice of the law? It is being equal to two litigants in all things."[264] Nevertheless, being impartial between litigants is achieved by displaying sensitivity to the plight of the weak – the miserable, the poor, the orphans and widows, as well as the immigrant who lives within our gates.[265]

[261] See: Haim H. Cohen *The Law* (Bialik Publication, Jerusalem 1996, P. 19 and thereafter & P. 83 and thereafter).
[262] Leviticus 19, 15 (NIV translation).
[263] Maimonides, in "Jewish Encyclopaedia" on the "DAAT" Website.
[264] Maimonides' "*Mishneh Torah*", Book 14, Book of Judges, *Sanhedrin* Tractate, Chapter 21, A.
[265] Deuteronomy 10, 18. *Cf*. Psalms 82, 3 "Defend the poor and fatherless: do justice to the afflicted and needy" (KJV); and Proverbs 31, 9: "Open thy mouth, judge righteously, and plead the cause of the poor and needy" (KJV).

The State of Israel's Declaration of Independence also proclaims a commitment to justice in light of the vision of the prophets of Israel, which manifests in the form of complete social equality for all its citizens. Justice has many facets, but the main one is the application of the principle of equality before the law. According to Aristotle,[266] equal justice is formal, an eye-for-an-eye justice, and its main rule is that equality of equals is to be pursued. However, formal justice sometimes produces unjust results, and so it is accompanied by corrective justice.

Corrective justice amends the application of any law in order to prevent injustice that would have been caused by its implementation. The issue of a judge ruling according to their perception of justice, rather than the law, has prompted significant debate among jurists and legal scholars.

The German professor and politician Gustav Radbruch is well known for a "formula" that addresses the conflict between positive law and justice[267] in the event that statutory law clashes with the principle of what the judge perceives to be justice, and if the legal concept on which the statute is predicated is deemed "unbearably unjust"[268] or if there is "deliberate disregard" for the principle of human equality, the judge is obliged to act in accordance with their conception of justice, rather than the law.[269] Since its formulation in post-war Germany, this principle has been applied by the federal court in Germany in a range of cases. This is likely also due to the historical context, as the legal positivist tradition of the German legal system has been in part cited as contributing significantly to the fact that Adolf Hitler was able to seize control through "legal" means.

English law used principles of equity to support justice. Alongside the common law system and the system of the King's courts in England, a complementary system of Equity developed, which was designed to provide corrective justice when common law rules produced results that seemed arbitrary and unfair in a given case. Justice, as a principle of action by which equal people should be treated equally, presents a fundamental difficulty, since humans cannot be measured equally,

[266] Aristotle, *Ethics*, Nicomachean Edition (Translated from the Greek by Joseph G. Libes, Shoken, Jerusalem and Tel Aviv, 5733-1973).
[267] Alexy subtitles one of his books, An Argument from Injustice, Oxford 2002, "A Reply to Legal Positivism." In his later work, Radbruch dismissed legal positivism as a position that "rendered the German legal profession defenceless against statutes that are arbitrary and criminal" and one "incapable of establishing the validity of statutes," G. Radbruch, Statutory Lawlessness and Supra-Statutory Law (1946), in: The Oxford Journal of Legal Studies (OJLS) 2006, pp. 1-11, 6;
[268] An Argument from Injustice, Oxford 2002, "A Reply to Legal Positivism."
[269] Robert Alexy's Radbruch Formula, and the Nature of Legal Theory*Rechtstheorie, Vol. 37, pp. 139-149, 2006*

and differences will always be found. The question then becomes: How does one determine that humans are substantively equal? Or when do their differences justify deviating from the principle of formal equality? What differences is it permissible to take account of? Which should not be ignored? It is an injustice to ignore relevant differences in a particular matter, just as it is unjust to consider irrelevant differences which are not pertinent to the matter in question. Disagreements arise concerning the importance or insignificance of the differences.[270]

During the twentieth century, a legal doctrine of equality developed in democratic nations that stated there are distinctions between human beings, which, as a rule, cannot be taken into account, including race, gender, or disability, and other traits that are innate or not within the scope of an individual's control. This was reflected in the Universal Declaration of Human Rights of 1948, which stated that man, as such, was born equal and free. Article 1 of the Declaration states: "All human beings are born free and equal in dignity and rights." The principal field in which this approach was expressed was the prohibition of discrimination against people with respect to civil rights. Thus, the Declaration of Human Rights further states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind."[271]

Justice and Rights

The question of the criteria according to which we should act to achieve equitable distribution has received different answers: To each the same; to each according to his right or merit; to each according to his actions; to each according to his needs; to each according to his status; and to each according to what the law assigns him.[272]

John Rawls' book on this issue, *A Theory of Justice* (1971),[273] was a major innovation in the distributive justice debate. Rawls' theory defines "justice as fairness", but it also has a component of procedural justice. In order to arrive at a theory of the fair distribution of goods, Rawls developed a conceptual exercise to obtain universal consensus on the principles of distribution in the spirit of the social contract that was part of the theory of the liberal state. He tried to imagine an original state of moderate deprivation, in which humans operate behind a veil of ignorance, so that they have no idea what their social status is – they may be rich or poor, healthy or sick, white

[270] Chaim Perlman on Justice – *Essays on Morality and Law* [Hebrew] (Magnes, Jerusalem, 5741), p. 81.
[271] Universal Declaration of Human Rights – Article 2.
[272] Haim Perlman on Justice – *Essays on Morality and Law* [Hebrew] (Magnes, Jerusalem, 5741) P. 5.
[273] John Rawls *A Theory of Justice* (Cambridge, Mass., Belknap Press of Harvard University Press, 1971) 1921.

or black, young or old.

The "veil of ignorance" is a tool of due process that enabled humans to overcome personal interests and to consider the public good. In this situation, Rawls argued, there would be agreement on the principles of distribution. Rawls distinguished two types of primary social goods. The first is the fundamental freedoms of the individual. With respect to these, the principle of equitable distribution is the principle of equality. Every person has an equal right to all fundamental freedoms as long as that right does not conflict with the freedoms of others. The only permissible limitation on individual liberty would be connected with protecting the liberty of others.

The second type of primary social goods includes wealth, class, and social opportunity. With respect to these, the principle of equitable distribution is the principle of justice, which imposes limitations on considerations of efficiency and utility and justifies an unequal distribution of resources in order to benefit the weakest members of society. The strong may also benefit from the distribution of resources, but only when that also improves the condition of the weak. Economic or social inequality must work for the benefit of those at the lowest ranks in the social order. According to Rawls, the rights derived from these principles are not open to political negotiation, or to the calculation of social interests.

Rawls believes that the distribution of healthcare, and access to it, is a type of primary commodity that needs to be considered within the framework of the public interest to receive equal healthcare, in order to enable citizens to maximize their health and lives.

The ethical considerations underlying the maximization of the population's health (or at least increasing it) lie in the significance of good health as a condition for people to lead a flourishing life. We can all imagine individuals suffering from poor health who nevertheless flourish, but these, as persuasive contrary examples, are lacking. Such people command admiration but are viewed as the exception that proves the rule. In general, flourishing ought to be considered an ultimate good, and that good health is, for the most part, a necessary condition for that. Health is needed both in the sense that it is necessary, and in the sense that it also serves an ethically desirable end. This gives an otherwise purely technical relationship between means (health care) and ends (health), an ethically persuasive quality, and raises the need for good health care to the level of

commanding an ethical value.[274]

Health care is a necessary condition to realising better health, but it is not always a sufficient one. Therefore, health care is needed (that is, it is necessary if better health is to be achieved) and it too derives its ethically mandatory quality from the ethical principle that flourishing is the ultimate good, as per Aristotle's view.[275] Hence, it is not only reasonable to assume that individuals want health care, rather they actually need it; with all the moral weight that the word 'need' carries in the context of social policy.[276] If the forgoing is accepted, 'efficiency' is a thing to aspire to, in the sense that resources spent on health care should be employed to maximise health outcomes and thus provide as many individuals as possible with a flourishing life, as per the utilitarian approach.

Distributive justice, or equity, also gains a high priority for the same reasons. If we accept that health is a necessary condition for humans to flourish, health care is too important a resource for it to be accessed and used in an unfair manner. However, precisely what does it mean to be 'equitable'? Moreover, how do we integrate considerations of equity and efficiency?

Employing health care resources, like the health care work force (human knowledge and understanding, human skills), capital goods (buildings, equipment), is the right thing to do. Thus inefficiency, such as when more people than necessary are employed to achieve a certain goal, or more expensive medicine is prescribed when a less expensive alternative would do just as well, or a highly skilled person is used when a less trained individuals would be just as good, might be questioned. The main reason for taking this view is rooted in the rationale that health care is instrumental to health and health is instrumental to flourishing, which equally applies to efficiency in producing health care results. Being inefficient implies that the health of the population is less than it could be with the same amounts of resources. Given the ethical significance of good health, to accept such a state of affairs would require a powerful counter argument.

Justice and Health Services

Rawls does not deal specifically with health issues. His teachings assess the condition of individuals in society according to criteria of wealth and income, and do not take into account the

[274] Culyer, A.J, (2015) "Efficiency, equity and equality in health and health care", (Editorial) University of York. Centre for Health Economics.
[275]2011, *Eudemian Ethics*, (Oxford World's Classics), Anthony Kenny (ed./trans.), Oxford: Oxford University Press
[276] Culyer, A.J, (1995) "Need: The idea won't do – but we still need it", (Editorial) Social Science and Medicine, 40: 727-730. Culyer, A.J. (1998) "Need – is a consensus possible?" Journal of Medical Ethics, 1998, 24: 77-80.

different needs of individuals in receiving health care services. At the same time, his general teachings can also be applied to health, as Norman Daniels[277] sought to do. Daniels argued that health, similarly to education, is of paramount strategic importance to an individual's social opportunities and is not inherently equally distributed. If it is important to utilize resources to correct situations of unequal opportunities due to economic factors, it is equally important to utilize them to rectify situations of inequality due to morbidity factors. Therefore, certain principles of justice must apply restrictions on political and economic considerations when it comes to the distribution of resources for the purposes of health. Individual health rights are derived from these principles of justice.

Daniels bases his theory on the argument that the purpose of health care is to ensure a level of human functioning that will allow a person to realise him or herself. He assumes a hypothetical state of ignorance, behind which people function normally throughout life. In these circumstances, he argues, there will be a consensus on measures of justice related to the scope of, and access to, health care services.

The question of the scope of health care services is a classic question of resource distribution. Daniels points out that there is a bias toward intensive medical care with sophisticated technologies, as compared with the tendency to repress social support services that can improve the functional status of a disabled person, even if their disability has no medical solution. He claims that the principles of justice require three tiers of health care to ensure a reasonable level of functioning, in this order:

1) Preventive services (including public health, environmental health, nutritional education, and teaching a healthy lifestyle);
2) Curative and rehabilitative medical services; and
3) Supporting social services.

As for those people who cannot be brought closer to the ideal of reasonable human functioning – the elderly and infirm, people living with severe physical or mental disabilities – Daniels proposes to adopt another principle of benefit or kindness (beneficence). With respect to access to health care services, Daniels argues that it is incumbent on society to provide these services on an as-needed basis. That is, the principle of equality is applied according to the individual's medical

[277] Norman Daniels *Just Health Care* (Cambridge University Press, 1985).

needs, and people with equal medical needs must be treated equally.

Non-medical factors, such as ethnicity and gender, should not be taken into account. The state's duty also includes the obligation to remove other barriers to access to health care services, such as information barriers, or geographic remoteness. The ability to pay should also not be taken into account. Indeed, out of a sense of social justice, Daniels warns against the formation of a dual system: Medicine for the rich, who can afford to buy high-quality private medical services, and medicine for the poor, who only have access to public health care services. In public medicine, charges may also apply for services that can be a barrier to low-income people, such as co-pays relating to the cost of medication or a doctor's visit.

Equal Access to Healthcare

Access to health care services is also a matter of fair and equitable distribution and thus has several objective criteria. The first criterion is population morbidity. For example, a particular group may be characterized by a relatively short life expectancy, or a relatively high level of maternal and infant mortality, this being the situation of the Arab citizens of Israel. Patterns of the extent of service use among different populations can also be compared. One group may use a particular service at a low rate compared to the general population.[278]

The Israeli courts have issued a number of judgments concerning the allocation of resources in the field of health care equality, and the allocation of budgets to cultivate and finance public action amongst the Arab population, for instance, in order to reduce the extent of discrimination that exists in the field.[279]

Another benchmark for equality of access is the length of waiting lists to receive services – to schedule an appointment for surgery, or visit a specialist, as well as the length of waiting time in the waiting room when visiting a clinic. There are also criteria of the quality of health care, in terms of its scientific and technological levels.

There may be two treatments that are alternatives in terms of their outcome, but differ in quality, and people from a low socioeconomic group receive the less sophisticated treatment, such as the prescription of medication for the mentally ill who are poor, compared to psychological therapy

[278] Carmel Shalev *Health, Law and Human Rights* [Hebrew] (2003).
[279] *High Court of Justice* Case No. 1113/99 **Adala v. Minister for Religious Affairs**; *High Court of Justice* Case No. 6924/98 **The Association for Civil Rights in Israel v. The Israeli Government** *pey-daled nun-heh*(5) 15.

for the rich. The quality of care can also be measured in terms of patient treatment, and the level of respect for the patients' right to dignity, autonomy, privacy, informed consent, and information.[280]

Data from Israel's Central Bureau of Statistics (CBS)[281] found that 19 percent of residents in Israel's socio-economic periphery reported that they have given up on medical treatment due to financial reasons. This is three times the number of similar cases in the socio-economic centre of Israel, where only 6 percent of residents were forced to turn down medical treatment for similar reasons. The gaps between the centre and the periphery are also seen in the number of households at risk of falling below the poverty line, namely, 37 percent in the periphery, compared with 22 percent in the centre. Households that are at risk of poverty are defined as those whose income per capita is 60 percent less than the median income per capita in Israel.

Moreover, 86 percent of those residing in the socio-economic centre stated that their state of health was "good" or "very good", compared with 81 percent in the periphery. In addition, citizens in the centre are less likely to have disabilities, as illustrated by data indicating that 13 percent of those aged 20 and above are likely to be disabled, compared with 18 percent in the periphery. Residents of the periphery are also more likely to smoke – 26.3 percent to 20.5 percent, while in the periphery, 52.8 percent of people are overweight or obese, compared with 46.3 percent in the centre. Finally, there is a higher probability of casualties in accidents in the periphery than the centre.

In all these instances, the causes of the disparities between the different population groups should be ascertained, and measures taken to reduce them. There may be geographical barriers that prevent equitable access to health care services, such as the need to drive long distance to treatment centres. Cultural barriers may also exist, such as an inability to communicate in the same language as the service providers. Therefore, the state must act to remove the barriers. It is also possible that the reason for the disparities may be discrimination in the organisation of health care services. Such inequality is not measured by motive, but by outcome. In many cases in Western society, discrimination in many state institutions, including the health system, has become systemic, to the point that acts of positive discrimination may be needed to rectify this state of inequality. Indeed, often there is no intention to discriminate, but it is the unintentional neglect of a vulnerable group,

[280] Norman Daniels. *Just Health Care*. (Cambridge University Press, 1985).
[281] Gaps between Center and Periphery (2019): Selected Data from the Society in Israel Report No. 11, Jerusalem

or the result of unconscious biases that have conditioned society to think in a certain way over several decades.

Ethics and Failures – The Market Model

A market model in health care serves to create a medical system that is far more efficient and maximises the limited resources available in the most effective way possible. It seeks to do this by encouraging competition over the provision of health care, which may lead to both a reduction in costs and greater capacity. However, this system generates several problems. First, it risks creating a situation wherein the inalienable rights of citizens to health care are beholden to private entities that prioritize profit above a duty of care to patients. Second, markets are vulnerable to spontaneous and unexpected changes, which may potentially lead to a dramatic increase in medical costs. This could lead to a situation in which comprehensive health care is too expensive for some citizens, such as the system that prevails in the United States. There exists, therefore, a tension between, on the one hand, maintaining a publicly-funded, universal, and free at the point of delivery healthcare system that may become inefficient and, on the other, offering a private system wherein the rights of citizens to health care are violated by private entities' interests and financial motives.

Market models assume a contractual relationship between an individual physician and an individual patient, akin to a contract with the view of purchasing a commodity. This contradicts the claim that health care services are not a "commodity" at all, but rather "social goods", and undermines the principles of medical ethics, the main thrust of which is the physician's duty to heal. The contractual engagement between a physician and a patient is characterised by an unequal power relationship, since the very need for treatment makes the patient dependent on a physician who has professional knowledge and abilities. Furthermore, the doctrine of informed consent in health care is intended to correct the information gaps with regard to therapeutic alternatives but does not address the problems associated with choosing between the economic alternatives of purchasing health care services from other providers.

In choosing these alternatives, one should take into account factors of cost, benefit, and quality, and these are difficult for the individual consumer to calculate. Sometimes, the alternatives are between different insurers, offering different packages of services that are difficult to compare, especially when it comes to assessing future needs.

In addition, there are demand and supply distortions in the health care market. It is commonly

accepted that, in the medical technology field, supply creates demand, and not vice versa, to the extent that overuse of technology does not add any medical benefit and may even cause harm. The market also does not behave in a rational manner with respect to public health care services that prevent morbidity, such as sewage systems, clean water, and children's vaccines. Such measures have significant consequences for the health of the general population at relatively low cost, but do not result in profit for private entities competing in the marketplace. Health care system economists propose to resolve resource allocation questions by using utilitarian formulas that quantify cost-benefit analyses. Before exploring the utilitarian approach, however, it is important to address the libertarian ideology that is the basis of the market model.

Libertarianism: A Political & Economic Ideology

According to Will Kymlicka, libertarianism is a defence of market freedom and rejection of the use of redistributive programs, such as that of Rawls. Indeed, libertarianism not only rejects theories of justice similar to that which Rawls advocates, but they also claim that such taxation is "inherently wrong…[and] a violation of people's rights".[282] According to libertarians, individuals possess inalienable rights that the government has no right to interfere with on any grounds. Robert Nozick, a libertarian economist and philosopher, stated, "individuals have rights, and there are things which no person or group may do to them…so strong and far-reaching are these rights that they raise them question of what, if anything, the state and its officials may do."[283]

Nozick thus formulated the 'entitlement theory', which focuses on the following: Assuming that everyone is entitled to the goods ("holdings") that they currently possess, the only just distribution of resources pertains to that which is the result of free exchanges between people. Thus, the government cannot coerce any change in the distribution of goods against the citizen's will. The only exception to this rule – and thus the only legitimate form of taxation – is for the state to tax citizens to raise the necessary revenue to fund the institutions that will allow the state to have a monopoly over force and thus protect the system of free exchanges. In other words, law enforcement and the justice system are the only legitimate bodies that can be publicly funded in a way that preserves people's free choices. According to Kymlicka, Nozick's theory has three primary principles: 1) the principle of transfer – that which is justly acquired can be freely

[282] Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, p. 103
[283] Nozick, R. (1974, p.ix) cited in Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, p. 103

transferred 2) just acquisition – an account of how people initially come to own the holdings which can be transferred; and 3) rectification of justice – how to deal with things people owned that were unjustly acquired.[284]

Nozick explains this by stating that "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified."[285] The potential impact of this worldview on society is immense – there is no room for public education, transportation, or healthcare.

Pertinent to this research, and central to Nozick's theory, is the principle of self-ownership. This is rooted in Immanuel Kant's maxim of treating people as "ends in themselves", meaning that because people have rights and there is nothing that any individual or group can do to those rights, society must respect these rights in order to treat people as ends in themselves, and not means. Nozick holds that a true libertarian society treats individuals not as "instruments or resources", but as "persons [who] have individual rights with the dignity this constitutes". He adds that by treating humans with respect and dignity, we allow humans to choose life as they seek it and as per their conception of it.[286]

Thus, while Rawls and Nozick ostensibly have similar foundations i.e. the assumption that humans are equal and should be treated as such, their paths to achieving their objectives are immensely different. Nozick believes that Rawls' redistribution plan, or any other government intervention in market systems for that matter, is incompatible with humans' essential core being as ends, not instruments or means. He also holds that only by recognizing people as self-owners, rather than treating them as objects of society, can we relate to them as equals.[287] Nozick's libertarianism is useful to examine in the healthcare context. Its salience lies in the relevance of the theory to the distribution of resources in the healthcare system. The theory removes the distinction between private and public medicine due to the emphasis on self-ownership and on each individual's right to their own body. For this reason, Nozick is a pertinent contributor to this discussion.

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[284] Nozick, R. (1974, p.ix) cited in Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, pp. 103-4

[285] *Ibid.*

[286] Nozick (1974, p.334) cited in Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, p.108

[287] Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, Pp. 109-110

Libertarianism in the Healthcare Sector

The notion of self-ownership when exploring the healthcare sector is especially relevant. If Nozick's libertarian principles were to be applied, the notion of medical negligence would look extremely different. In the total absence of a publicly funded healthcare system, every act of medical treatment would be the result of two parties, either a patient and a physician or a patient and an insurance company, entering into a transaction. Indeed, in accordance with the supreme emphasis placed on self-ownership, patients would be entirely free and autonomous to decide which treatments they seek to receive or not receive, and all would be the result of a private transaction between two consenting parties.

The patient would have absolute autonomy over their body. The physician, on the other hand, would be free from any significant state interference, as this would be deemed illegitimate under such a system. The physician (or a representative company) and the patient would enter a mutually agreed transaction of their own volition, which would presumably outline the terms for potential medical negligence. However, with a significantly weakened state, even one that is permitted to maintain a monopoly on questions of justice, the physician would be less inclined to freely include such terms to cover potentially high-risk procedures or patients.

There are other moral issues with such a system. As a result of the aforementioned lowered motivation for the physician to include such clauses, and potential for the two parties to enter into transactions that remove liability from the physician due to the absence of regulation, there would be significantly less accountability. Moreover, the extent to which my self-ownership can be practically implemented seems dubious. Does my freedom and self-ownership over my own body render it moral and feasible to sell my own lungs, kidneys, or liver freely? Is the existence of such a free market of bodily organs an object of moral desire? In other words, where is the line between free self-ownership and the moral value of human integrity and bodily worth? Furthermore, since Nozick believes taxation for state-funded healthcare is a violation of citizens' rights, all medical treatment would be exclusively limited to those with the resources to fund their treatment. Indeed, while Nozick holds that the state has no right to interfere in citizens' lives by imposing taxation laws on them, as this constitutes a violation of their inalienable rights, the question arises as to where the state also has a role to play in defending these rights. Namely, if citizens have a right to be healthy, this begs the question of whether the state must also act as a provider to enable the fulfilment of this right. Nozick's theory is thus ostensibly morally problematic, even if libertarians

would likely argue that the cost of medical treatment would be lowered due to the power of the market forces. There would still be no way to ensure that all members of society received the basic level of medical insurance because no such concept would exist. Overall, it is likely that under Nozick's vision, medical negligence cases would decrease because the patient-physician relationship would be completely privatized and be contingent on the transaction agreed upon.

Overall, in the system that Nozick is proposing, in which there is an absence of taxation that facilitates the provision of medical treatment for the entire population, health care ultimately becomes a private relationship between the physician and the patient. This creates inequality in society wherein only those with the adequate resources can access medical treatment while other members of society are exposed to illnesses and potential death. Thus, while medical negligence cases would be reduced, the absence of any taxation would result in a society based on the "survival of the fittest." This is the antithesis of a welfare state that places supreme value on access to healthcare for all its citizens.

Utilitarianism: Problems in Measuring Utility

Utilitarianism is a philosophical theory that claims that the "morally right act or policy is that which produces the greatest happiness for the members of society."[288] The utilitarian philosophy was formulated by Jeremy Bentham and thereafter developed by John Stuart Mill, who widely disseminated the term "utilitarianism".[289] Bentham adopted the 'principle of utility', according to which nature has "placed mankind under the governance of two sovereign masters, pain and pleasure". The "principle is unity… approves or disapproves of every action… according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question."[290]

According to Will Kymlicka, these utilitarian principles are applicable to what John Rawls would call "the basic structure" of society, rather than merely the personal conduct of individuals.[291]

Its central objective is to maximize happiness or utility and a defining characteristic of utilitarianism is consequentialism, namely, to measure the merit of a said action "only if it makes

[288] Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, P.11
[289] Habibi, Don (2001). "Chapter 3, Mill's Moral Philosophy". *John Stuart Mill and the Ethic of Human Growth. Dordrecht:* Springer Netherlands. pp. 89–90, 112.
[290] Bentham, J. (1780) "Of The Principle of Utility." Pp. 1–6 in *An Introduction to the Principles of Morals and Legislation*. London: T. Payne and Sons.
[291] *Kymlicka, W. (2002), Contemporary Political Philosophy: An Introduction (2nd ed.). Oxford: Oxford University Press, P.11.*

someone's life better off", as opposed to a dogmatic set of rules that do not necessarily increase the net happiness of the individuals involved or affected. Thus, utilitarianism, as a consequentialist and quite progressive school of thought, measures changes and the moral good according to human welfare, in contrast to a doctrine that requires approval from spiritual or potentially archaic traditions.

Moreover, as Kymlicka explicates in his examination of utilitarianism,[292] in addition to its account of human welfare, a fundamental component of the philosophy is the importance of granting equal weight to each individual's utility. The theory, at the point of its formulation in the eighteenth and nineteenth centuries, when slavery and inequality remained fundamental features of society, was emancipatory in nature. In some ways, theories such as utilitarianism, which are consequentialist in nature and stood in opposition to the deontologist spirit of the time, gave birth to radical legal traditions. For example, H.L.A. Hart, the famous twentieth-century British legal philosopher, saw a direct link between the utilitarian tradition and positivist jurisprudence.[293] Hart, a legal positivist, believed in two different types of rules: primary and secondary rules. [294] The former relates to those laws that impose duties upon citizens to act in a certain manner, lest they be subjected to punitive measures. Examples include speeding in a vehicle, trespassing, theft, and murder. The secondary rules pertain to the manner in which primary rules are recognised and formulated, i.e. "rules about primary rules", thus the structures of society that enable a primary rule to be recognised, changed, and adjudicated on. In his ground-breaking book, the *Concept of Law*, Hart states that the two are interrelated: "law may most illuminatingly be characterised as a union of primary rules of obligation with such secondary rules",[295] while referring to this union as the "heart" of the legal system. Importantly in the context of utilitarianism, Hart opines that it is not a "necessary truth" that laws satisfy certain conditions of morality, even though some have. This illustrates the link between his version of positivism and utilitarianism, which is not contingent on any form of morality for the fulfilment of its conditions, namely, the maximising of pleasure and the minimising of pain for every single moral agent.

Indeed, John Stuart Mill, who developed utilitarianism further, stresses the importance of the equal consideration of every human being's preferences and utility. Invoking Christianity, he states "in

[292] Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, p.12.
[293] Schofield, P. (2010). Jeremy Bentham and HLA Hart's 'Utilitarian Tradition in Jurisprudence. *Jurisprudence.* 1(2), pp.147-167
[294] Starr, W., C. (1984). Law and Morality in H.L.A Hart's Legal Philosophy. *Marquette Law Review.* 4(8), pp. 673-689
[295] Hart, H.L.A. (1961). *The Concept of Law*, p.151.

the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as you would be done by, and to love your neighbour as yourself, constitute the ideal perfection of utilitarian morality."[296] In other words, the ideal utilitarian system is one where the desires or preferences of all members of society are equally considered and their accumulative happiness is maximised.

The utilitarian tradition has developed significantly since the original formulation of the hedonic calculus by Jeremy Bentham. Kymlicka sets out various versions of the philosophy, which include 'welfare hedonism' i.e. the view that pleasure is the ultimate human good; non-hedonistic mental-state utility – the notion that utilitarianism ought to relate to all "valuable experiences", whatever form they take; preference satisfaction – the idea that increasing utility manifests in the form of satisfying preferences; and finally, informed preferences, which states that welfare ought to be considered the satisfaction of "rational" or "informed preferences".[297]

The most prominent modern day utilitarian is in all likelihood the Australian philosopher Peter Singer. In his book, *Practical Ethics*, Singer refers to his version of utilitarianism as one that "differs from classical utilitarianism in that 'best consequences' is understood as meaning what, on balance, furthers the interests of those affected, rather than merely what increases pleasure and reduces pain".[298] In other words, in Singer's utilitarianism, which has notoriously been extended to include animals, rather than simply constituting a hedonistic framework in which all humans aim to maximise their pleasure and mitigate their pain, humans seek to satisfy their overarching interests, which may not necessarily equate with simple pleasure and pain. In *Practical Ethics*,[299] Singer adopts a two-level utilitarianism that specifies that, in addition to making decisions based on what we perceive to bring about the happiest or most preferential consequences, it is periodically incumbent upon us to elevate our thinking to a more "critical" level of reflection in order to reach the right decision.

Utilitarianism poses multiple challenges in each of its aforementioned versions. On a national or regional scale, there are limited resources to satisfy all preferences or fulfil all individuals' desire for pleasure or other forms of happiness. The question then arises – whose preferences or pursuits

[296] Mill, J.S. (1968, 16) cited in Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, p. 33.
[297] Kymlicka, W. (2002), *Contemporary Political Philosophy: An Introduction* (2nd ed.). Oxford: Oxford University Press, pp. 13-16.
[298] P. Singer, Practical Ethics, Cambridge: Cambridge University Press, 1993 (2nd edition), p. 14.
[299] *Ibid*.

are more valuable? As is pertinent to this thesis with relation to the healthcare sector, as well as other sectors such as education, there are often infinite demands and finite resources. Indeed, some people's desire or preferences may be disregarded if they clash with what is considered by society to maximize overall utility. This is liable to have an adverse impact on minority or vulnerable groups in society. Thus, while, *prima facie*, utilitarianism accepts the egalitarian principle according to which all people are treated equality, the maxim of the greatest good for the greatest number is likely to lead to a situation in which some individuals are not in fact treated as equals, in terms of the ultimate outcome.

In other words, as a society, we strive to fulfil multiple preferences and desires while using finite resources. To do this, we prioritize different medical activities and procedures, according to their urgency and necessity, with the goal of maximizing society's net utility. The next section will examine how utility can be applied in the health sector.

Utility in Healthcare

Measuring utility in the healthcare context is not straightforward. According to one method explicated by the American behavioural scientist Peter A. Ubel, the utility of a medical service is measured in terms of the quality of life throughout the span of years the patient is expected to live after receiving the service (Quality Adjusted Life Years – QALY).[300] However, how can we quantify and compare quality of life? Moreover, is this measure not inherently comprised of prejudices against the elderly, the chronically ill, and people with disabilities?

Additionally, utilitarian approaches are known to sacrifice the individual's welfare on the altar of community welfare, but it is difficult for us to ignore the needs of a particular and identified individual whose life is at stake. Indeed, the theory of liberal freedom restrains utilitarian policy, in the sense that it protects the individual's fundamental rights from being infringed on by society. Meaning that while economic cost-benefit analysis may contribute very important information to the decision-making process regarding the distribution of resources to finance various health care services, there will always be value aspects that do not have a formal mathematical solution, such as the value of individual rights, equality, and social justice.

A difficult dilemma arises, for example, if the value of equality collides with utility calculations.

[300] Peter A. Ubel et al. "Cost-Effectiveness Analysis in a Setting of Budget Constraints - is It Equitable?" 334 *The New England Journal of Medicine* (1996) 1 174-1177.

Suppose we have at our disposal a budget of $200,000 to survey a population's predisposition to cancer. There are two possible tests. The first test costs the entire population $200,000 and will prevent 1,000 deaths. The second test costs $400,000 for the entire population but will prevent 2,200 deaths. However, within the budget it can only be carried out on half the population. In the case of testing a half the population, we can prevent 1,100 deaths, that is, an additional 100 people will be saved as compared with the first test. Under utilitarian cost-benefit analysis, the second test, administered to half the population, should be prioritized, as it saves more lives. However, that fact notwithstanding, because of the value of equality, we may prefer the first test, rather than deal with questions of how to divide the population, and by what criteria we will decide who will undergo the test and who will not.[301]

The discussion of a just distribution of resources with respect to health care places a restriction on resources. In developing countries around the world, as in many African nations, national health spending is far lower than that in more developed countries, such as Israel. According to the World Health Organisation (WHO), in 2015 average health expenditure per capita was only $114 for the African region.[302] By comparison, in Israel the health expenditure per capita was $2,780, per an Organisation for Economic Co-operation and Development (OECD) report from November 2019 cited by Israel's Central Bureau of Statistics (CBS).[303]

For less economically developed countries, the question of justice in resource allocation and healthcare rationing is a question that requires discussion at the global economy level. However, in the State of Israel this is a question for internal discussion. The cost of available medical technologies is very high, forcing Israel to deal with rationing issues. Nevertheless, these questions raise moral dilemmas in difficult cases, which by their nature do not always have a single right answer. If it is not possible to reach a clear result that will be fair or just in the circumstances when weighing the interests, we are forced to turn to the principles of a fair decision-making process.

A classic example in this regard is the famous Vincent ruling.[304] A ship owner docked near a private dock, knowing that if he did not do so, the damage to his ship would be very great, but he

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[301] Peter A. Ubel et al. "Cost-Effectiveness Analysis in a Setting of Budget Constraints – Is It Equitable?" 334 N. Engl. J. Med. (1996) 1174-1177.

[302] WHO Global Health Expenditure Database (2017), African Regional Health Expenditure Dashboard, Retrieved from: https://www.who.int/health_financing/topics/resource-tracking/African-Regional-Health-Expenditure-Dashboard.pdf?ua=1

[303] Israeli Central Bureau of Statistics (2019). New OECD Report - Health at a Glance 2019: Health spending expected to outpace GDP growth in the next 15 years Retrieved from: https://www.cbs.gov.il/he/mediarelease/DocLib/2019/337/05_19_337e.pdf .

[304] **Vincent v. Lake Erie Transp. Co.**, 124 N.W. 221 (Minn. 1910) (hereinafter: the "**Vincent Affair**")

also knew that docking the ship would most likely damage the dock, although it would be less than the damage to the ship. A tort-based analysis, conducted solely from the perspective of negligence and reasonableness criteria, would lead to the conclusion that the tortfeasor's conduct was reasonable and that he had acted properly in the application of the principle found in the Learned Hand (LH) formula.

The LH formula is rooted in the ruling *United States vs. Carroll Towing (1947)*, in which the American justice and judicial philosopher Billings Learned Hand adopted a formula for determining economic liability in cases of negligence, which later became known as the "Hand Formula". This formula determines a standard in algebraic terms to measure the actions of the harming party:

- **P for Probability** – the probability that the incident would occur
- **L for Injury [Loss]** – the severity of the resulting injury, should it occur
- **PL** – PxL the probability that the incident would occur multiplied by the gravity of the injury incurred
- **B for Burden** – the burden of taking sufficient precautions to avoid the damages

The "Hand Formula" considers the social cost of the actions of the injuring party and the likelihood of causing the injury, and then weighs it up against the burden involved in preventing the damage. In the framework of the cost of preventing the damage, it is possible to take into account the cost of the necessary precautionary measures i.e. what Hand referred to as the "burden of adequate precautions", while also considering alternatives to modify the actions that cause the damage or their complete suspension in order to prevent the damage.

However, in the example case, the court nevertheless held the tortfeasor liable for the damages caused to the pier in the docking of his ship. Here, the court chose a regime of increased liability. Examining the situation according to the tort of negligence would have limited the dock owner's right, as it would have permitted damages done reasonably. Corrective justice advocates explain that the court's ruling was justified, in part because this situation characterises the core of the "closed" relationship between the tortfeasor and injured party, and in such cases the tortfeasor must compensate the injured party for the intentional harm to the right. The Vincent Affair is a good place to transition to an examination of the situation also from an economic analysis.

Economic Analysis

The Vincent Affair ruling has been widely referred to and extensively examined by students of tort law on both sides of the discussion on the merits of the instrumental approach versus the non-instrumental approach. It thus appears frequently in the literature.[305] The factual underpinnings of the judgment are helpful in showing that an economic analysis of the particular torts would produce a different result than the "normal" analysis of the tort of negligence, or some different absolute liability regime such as the no-fault scheme operating in Israel in the context of traffic accidents.

The Vincent Affair places a dilemma on legal economic analysis. If the ship owner acted reasonably, why should he be held liable? If it is considered that the role of tort law is to direct behaviour, and cause people to act more cautiously when it is economically proper to do so, then the tortfeasor's conduct in this case was not at fault. Are these the cases where tort law wants to impose liability, or change behaviour? Is there a will or need to incentivise the tortfeasor to act differently? It could be argued that imposing liability in cases such as the Vincent Affair, where the tortfeasor acted reasonably, could actually cause a tortfeasor to do the wrong thing, from a social perspective, thus increasing the number of events causing damages, and reducing the aggregate general welfare.

Economic analysts will therefore argue that a liability programme which is not dependent on fault does not necessarily lead to inefficient behaviour. Imposing this type of liability in the event of an accident will produce desirable no-fault results, even if tortfeasors always have to pay, as they will decide whether the damages expected from the accident are greater than the cost of the precautionary measures. If the tortfeasor had known he would have to pay for the damage done anyway, even if he had acted reasonably, he would still have had the right incentives, because if the tortfeasor had estimated that the extent of the damages to his ship would have been greater than the damage he would have caused by tying his ship to the dock, he would have willingly incurred the liability to compensate. He would have tied his ship to the dock and paid the compensation even under a no-fault regime, as this would have minimised his damages.[306]

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[305] Cf, for instance: Oren Bar – Gill & Ariel Porat, Harm-Benefit Interactions, 16 AM. L. & ECON. REV. 86 (2014); Robert E. Keeton, Conditional Fault in the Law of Torts, 72 HARV. L. REV. 401 (1959).

[306] This deterrence is based on Accidents: A Legal and Economic Analysis 68 – 94 (1970), the idea that the tortfeasor will always bear the sum of all the damages of his actions and the costs of preventing them. In these circumstances, the tortfeasor will always try to minimise potential damages, since he is expected to internalise them in full. This type of deterrence will cause him to consider the total expected benefits to him from the action as compared with the total sum of damages which is expected to bear, and find the optimal point from his perspective.

A liability regime that reflects the relative capability of the tortfeasor to reduce the damages – especially if contributory negligence on behalf of an injured party is incorporated into the defence, and that reduces the compensation that the injured party will receive if they have not realised this capacity, is efficient; and some would say it is even cheaper to operate. It will also lead the tortfeasor to reduce their activity to the optimum level, thereby reducing the total social costs and accidents.[307]

So, why is this analysis problematic given the facts of the Vincent Affair? The reason is that this analysis is true for accidents, where increased liability serves as a proper substitute for a regime of negligence. The idea underlying the regulation of damages caused by accidents is that, in principle, the relevant activity is socially useful, and should be continued as long as efforts are made to minimise the damages caused, and the utility of the activity is more significant than its damages.[308] Torts of intent belong to a different category of situations partly covered also by criminal law.

Economic analysis explains that in these cases, due to the importance of the injured party's rights, and the manner of injuring them, there is a desire for action within the "market framework". The paradigmatic cases regulated in this category are those where the parties can communicate before the damages occur. The approach is that the injured person should be allowed to express his subjective will regarding the activity instead of setting external standards that do not necessarily reflect the will of the injured person, and often are only a guess made with the benefit of hindsight[309].

Thus, regulating the situation in which someone decides to trespass (regardless of the question of their wanting to harm or hurt me) is different from regulating a situation where a person falls off his bike and into a plot of land that I own. Similarly, surgery a doctor performs on my body is different from a situation in which the surgeon's knife slipped out of their hands and cut my limb that did not require treatment. The difference is between an accident and situations in which the parties can reach an agreement, or in which prior arrangement of the activity lies in the ability of the tortfeasor and the injured party to reach an agreement that would reflect their subjective preferences, which by definition are not reasonable, as they do not reflect any average.

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[307] Richard A. Posner, Economic Analysis of Law (7th Ed., 2007) 178-182. (Hereinafter: Posner).
[308] Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972) (Hereinafter: "**Calabresi & Melamed**").
[309] Ariel Porat, Torts, Vol. A. 2013, pp. 118 - 122. (Hereinafter: "**Porat Torts**").

In these cases, tort law seeks to promote a transaction within the marketplace that reflects the subject's true will and not their estimated will, as is the case under accident laws. The protection of the right is individual and does not reflect, nor is it supposed to reflect, any average of social risks or harm. In this sense, the compensation *ex post facto* does not nullify the injury.[310] With torts of intention, the desire to deter plays a more prominent role, as does the tendency to employ within them an increased use of punitive compensation. The use of punitive damages is measured not only in terms of the amount of compensation awarded, but also with regard to more lenient use of the tools of causality and the quantum of damages.

The courts have agreed to view results that were not necessarily foreseeable or direct as part of the wrongful act, due to the desire to prevent it through deterring the tortfeasor. Moreover, within the punitive trend customarily applied in torts of intent, one can identify in the case law a tendency to recognise a wider range of types of damage in addition to the recognition given to them as part of the tort of negligence, for similar reasons to these. Moreover, in these cases there was also a greater willingness on the part of the courts to assess the abovementioned damage in terms of the benefit that the harm caused by the wrongful act actually generated for the tortfeasor, and not necessarily in terms of the estimate of the damages caused to the injured party. That is to say, in appropriate cases there is a willingness to assess the damage in terms of unjust enrichment, also considering that it could promote transactions on the market that would otherwise not have been possible. The private transfer of property from one owner to another that only reflects the damage in a narrow sense, will encourage the tortfeasor to act. Unlike in the market in cases where the damage to the inured party is less than the profit gained by the tortfeasor from the activity[311] it is obvious that this way of compensation is not suitable for all cases, and it is not enough, for example, in situations where the damage causes harm that does not reflect the benefit that the tortfeasor derives from the act.

Another point raised by the economic analysis of the differences between the tort of negligence and intentional wrongdoing, concerns the incentives for the tortfeasor and the injured party to be careful. Customary analysis of the tort of negligence assumes that a person is negligent if he did not invest in effective precautionary measures to prevent the damages, while under intentional wrongdoing, not only does the tortfeasor not invest in precautions to prevent it, but rather actively

[310] Jules L. Coleman, Risks and Wrongs (1992), pp. 330-331. (Hereinafter: "**Coleman**").
[311] Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV.

invests in the means to bring it about. Such an investment makes the tortfeasor, almost by definition, the best preventer of damages, since it is enough for him not to invest resources to promote the realisation[312] of the harm, to prevent its occurrence. This positioning as a better preventer of damages targets most of the deterrence arrows at the tortfeasor. It also influences the way in which causality laws will be interpreted and opens up the path for a liberal interpretation that also applies to more remote damages. Moreover, this positioning also has a direct impact on the tortfeasor's ability to raise claims – which may not necessarily be expected – of contributory negligence on behalf of the injured party. Common law, as described above, has refused to recognise, in the classic cases of intentional wrongdoing, a defence of contributory negligence, and many times ruled out the option of employing the defence of *volenti non fit injuria*. That refusal makes sense. When the tortfeasor takes measures to bring about the damages, they are the one that needs to be incentivised to stop this activity. Imposing some of the damages on the injured party will cause the latter to invest in unnecessary precautions, and would thus be unwelcome.

Another explanation offered by Posner[313] (a judge of the United States Court of Appeals for the Seventh Circuit) of the difference between the analysis of intentional wrongdoing, which overlap with criminal acts, and the analysis of the tort of negligence and the accident paradigm, is that the aim of intentional torts is to provide a mechanism. This mechanism is reflected through granting[314] a convenient and effective tort enforcement to back up the criminal law; the civil cause of an action is "reinforced" by a desire to increase the compensation award, to encourage filing legal actions. This encouragement is made, *inter alia*, through the instrument of punitive compensation, but also in easing the demands placed on the claimant. This consideration does not apply when it comes to the tort of negligence, where excessive deterrence as a result of increased compensation would result in loss of social utility that would prevent desired action.[315]

[312] Avihay Dorfman & Assaf Jacob, *The Fault of Trespass*, 65 U. TORONTO L.J.
[313] See *supra*, footnote 30.
[314] Richard A. Posner, *Economic Analysis of Law*, p. 207 (7th Ed. 2007); (hereinafter: "**Posner**").
[315] While under a negligence liability regime, and in an ideal world where the cautionary standard is set optimally by the courts, the tortfeasor can avoid paying the increased compensation by acting reasonably, and taking proper precautions. However, there is a general consensus that in reality this is not the case, and that imposing punitive damages will lead to over-deterrence. This reservation would also be inaccurate where not everyone takes legal action, for various reasons (recoiled by court costs, not identifying the tortfeasor, etc.).

Procedural Justice

The main purpose of human rights is to curb the powers of government or any oppressive power vis-à-vis the individual. Human rights are designed to balance the power gaps between organized society and the individual.[316] They protect minorities from the tyranny of the majority. The aspiration is to empower the individual so that they can live in circumstances that allow their personal development and enjoy autonomy in shaping their life. A central idea relating to autonomy is the ability to make choices and decisions without external intervention. However, another facet of autonomy is the ability to take an active part in the social, economic, and political life of the society of which the individual is a member. The starting point is the freedom of the individual and their fundamental rights, but this is also accompanied by responsibility for the results of their choices. Recognition of individual rights is empowerment, in the sense that the individual now has the power of a rights holder.

Individual rights end where the rights of others are infringed upon. Moreover, it is the individual's responsibility to use the power given to them in a way that promotes the rights of others. According to liberal state theory, and in the Israeli legal system, human rights have so far served to protect the individual from abuse by the power of others. The central meaning of freedom is a lack of a right for others to infringe it.[317] In this sense, rights are essentially negative, ordering the powerful to avoid using them in a manner that harms the individual. Nevertheless, the evolution of social rights discourse has broadened the field of debate. A discussion of rights of a positive nature has emerged, in the sense that they impose a duty upon others or make a demand for action by the powerful. The basic conception of civil rights is individualistic, whereas in the field of social rights the person is examined in his community context. We are concerned with the violations of individual rights that result from belonging to an economically, socially, or culturally vulnerable population group.

From the principle of social justice, we can derive a community responsibility to benefit disadvantaged groups and renew a commitment to social solidarity and concern for the weak, decrepit, and the poor who live amongst us. However, the theory of justice also has an element of procedural justice, and social rights discourse has a motif of due process that requires the public

[316] Horan, "*Contemporary Constitutionalism and the Legal Relationship Between Individuals*" 13 25 Int. Comp. L.Q. (1976) 848: Formulated as it was, during the 17th and 18th centuries when statist absolutism was perceived as the primal threat to individual liberty, modern constitutional theory at heart concerns limitations on government.
[317] Aharon Barak, *Interpretation in Law* [Hebrew] (3rd Vol., Nevo, Jerusalem, 362).

to participate in democratic processes of decision making on issues that have broad social implications. Principles of social justice and human rights require new ways of bringing the weakest groups into the decision-making process, in order to realize their full, active, and equitable participation in the life of society; for this we need to turn to the community itself, and not to settle for the opinions of experts.

Explicit constitutional recognition of "social rights" – and, more specifically, the duty imposed on the state to provide for each resident's "basic needs" for the sake of "living with human dignity" – imposes on decision-makers the burden of pointing out serious justifications, which have to be met in order for the state to be absolved of fulfilling it duty.

This, of course, is not an absolute obligation, since alongside the recognition of rights, legitimate interests are recognised that limit the extent of their realisation, including the limited resources available to the state. In Israel, for example, in a Basic Law Bill: Social Rights, it was proposed that "every citizen's right... to satisfy his basic need for human dignity... shall be realised or regulated by the governing authorities by law, or in accordance with law, and in accordance with the state's economic capabilities as determined by the government."[318]

Imposing an obligation to provide for basic needs, including the obligation to care for health, does not require consideration of a wide range of interests and priorities. There are three main reasons for this trend of judicial restraint:

1) For both sides of the argument there are interests that are recognised, or at least can be recognised, as "social" rights on the one hand, and property rights on the other.[319] The recognition in principle of a duty imposed on the state to protect social rights and to satisfy various public needs is not a sufficient guideline on which to base judicial review. As well as setting budgetary priorities that do not derive from the constitutional recognition of social rights.
2) Judicial restraint is the recognition that the state has a given budget and, therefore, a duty to provide public financing for a particular product will necessarily come at the expense of providing public funding for other products or services. That is, imposing a duty to provide public funding for a particular product means changing the national priorities, a result the

[318] Section 3 of the Basic Law Bill: Social Rights 2002-5762.
[319] G.S. Alexander "*Property as Fundamental Right? The German Example*" 73 Cornell L. Rev. (233) 733.

court seeks to avoid.[320]

3) The difficulty of applying judicial review to the fulfilment of the state's duty to satisfy the basic needs of each resident stems from the recognition that it is difficult to assess general policy with the aid of legal criteria, and it is even more difficult to shape such policy by way of judicial review. This difficulty is the result of limitations arising from the very nature of the court as an institution: The regulation of general policy may, in many cases, require the establishment of comprehensive arrangements to compensate and offset the harm caused to certain interests, and the establishment of social institutions. The court does not have the tools to do this.

Social Justice and Vulnerable Groups

The social justice perspective argues that principles of justice, such as those of John Rawls, will be used to restrain not only government power, but also market forces, and they prioritise the distribution of limited resources aimed at benefiting disadvantaged populations with sensitivity to their health needs. Attention should therefore be paid to particularly vulnerable population groups due to the accumulation of economic, social, and cultural factors. First and foremost, amongst the especially vulnerable groups in terms of health rights, one can name the cultural minority groups, including the population of foreign workers. Cultural barriers can be found within the family, religion, tradition, or custom. Cultural barriers are not a prominent factor in the Israeli reality, but although Israeli residents do not die or suffer irreparable damage due to inaccessibility to services or their poor distribution, there are manifestations of human rights violations of members of minority groups.

For instance, statistical data points to a noticeable gap in healthcare levels between the Jewish and Arab populations in Israel.[321] This is clear when comparing life expectancy or infant mortality rates. However, efforts have been made to correct this disparity. The State Health Insurance Law entails a significant reform in the access of the Arab demographic group in Israel to medical services. Prior to the law's enactment, approximately five percent of Israeli citizens were not members of healthcare providers, likely due to economic reasons. The majority of these individuals

[320] See, e.g. *High Court of Justice* Case No. 92/3472 **Bernard v. Minister for Communications**, *pey-daled mem-zayin* 152, 143 "Our legislation, as a rule, does not prescribed manpower standards for the level of public service to which the citizen is entitled. This is left to the discretion of the authority, which sets priorities, and preferences amongst them, as part of budgetary constraints."
[321] Khattab, N., Kagiya, S. (2011), *Inequality in Health between Jews and Arabs in Israel.*

were Arab citizens.[322]

The research indicates that one of the main effects of this legislation was the improvement in the scope of health care for the Arab sector. This is due to both the requirement for all residents of the state to enrol with a healthcare provider and the expansion of the healthcare funds' services to more peripheral areas, such as Arab population centres.[323] Clause 3(d) of the State Healthcare Law determines that healthcare services will be provided "within a reasonable time and within a reasonable distance". This has posed a challenge for the state to implement in some Arab communities, particularly the Bedouin society in southern Israel, some of whom reside in unrecognized villages that are located a significant distance from healthcare providers. Thus, there remain challenges in addressing this issue.

In addition, there are groups of patients whose vulnerability is due to the health condition that characterises them. Therefore, the Netanyahu Commission recommended, *inter alia*, to favour the underprivileged groups of the elderly and chronically ill, including patients suffering from mental illness.[324]

Women also constitute a vulnerable population group within the field of healthcare,[325] not because there is an overt intention to discriminate against them, but because deep cultural patterns influence various factors at work in the healthcare system. Until the last decade, for example, attention with respect to women's health was focused on the area of fertility and procreation, due to the prevailing worldview that a woman's social role is restricted to motherhood. Only recently has attention been paid to issues of women's health throughout life, and the differences between men and women in morbidity patterns and morbidity symptoms.

Another vulnerable group is the poor, whose vulnerability is the result of economic and social conditions. Cultural minority groups are also socially and economically weak; they often suffer from a relatively low level of income and education, as well as other causes of poverty. However, poverty is not the exclusive property of minorities, and the poorest population worldwide suffers from high rates of morbidity and mortality compared to the general population.

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[322] Introduction to Explanation of the State Healthcare Law (1993), p.204. [Hebrew]

[323] Adler, Lotan, M. (1998), *Influence of the State Healthcare Law in the Arab Sector of Israel*. Annual Research Report 1996-97. The National Institute for Healthcare Services and Medical Policy. [Hebrew]

[324] Netanyahu Committee Report, at pp. 100 – 101.

[325] Cherniovsky, D., Shirom, A. (1996), *Equality in the Israel Medical System – The Allocation of Resources to Social Services.* The Centre for Social Policy Research in Israel: Jerusalem, pp. 157-169

In Israel, too, as previously stated, there is a higher mortality rate among the uneducated population as compared with the educated population, and among low-income versus high-income populations,[326] hence there is a correlation between poor health and poor socio-economic conditions. Health care services are often available to groups from the higher socioeconomic ranks, even though the lower classes are often more in need of them. Poor population centres are often characterised by services that are inferior to those of rich population centres. The ratio between the size of the population and the number of community service providers is high in zones characterized by poverty, and hospitals have a smaller work force, less equipment and poorer infrastructure when compared with other areas. Thus there is an inverse relationship between the health needs of the population, and the scope of services available to it, as well as its quality.[327] An important question is how to identify a population group that can be considered vulnerable.

Conclusion

The State of Israel regards equality as a basic principle enshrined in the Basic Law: Human Dignity and Liberty. The tort of medical malpractice, as analysed in Israel, is not discussed from a perspective of justice. The main discourse points concern deterrence, which is associated with economic efficiency. However, consideration should be given to the correct distribution of resources amongst different interests. A discourse of social rights and the principle of justice must be taken into account. Just as the principle of liberty is restrained by utilitarian considerations, so the principle of justice restrains government discretion in the distribution of public resources.

In my opinion, when rendering medical malpractice judgements the courts are forever seeking to balance two conflicting interests: On the one hand, the claimant's desire to be protected from injury, and on the other, the defendant's interest in the proper management of the law and the economic resources and social interests that he faces, in a manner that will reduce the conflict between individuals and increase public welfare.

I hold that the patient's primary interest is not only to receive compensation for medical malpractice, but their main desire is to secure the most suitable medical treatment. In this sense, the fear of defensive medicine is a factor that adversely affects the general interests of society.

[326] Dov Chernovski and Arie Shirom "*Equality in the Israeli Health Care System*" Allocation of Resources to Social Services 1996 [Hebrew] (The Centre for Social Policy Research in Israel, Jerusalem, 1996) 157, 169.
[327] Julian Tudor Hart "*The Inverse Care Law*" Lancet, February 27, 1971, p. 7696.

Chapter 3 Part III: Problems and Challenges in Tort Law

In this subchapter, some of the problems in tort law in general, and medical negligence in particular, will be presented. There are two main theoretical approaches to tort law. One of the approaches is based on the principle of justice. In this framework, the injuring party that caused harm to the injured party in the act of wrongdoing violated the level of equality between the two. As a result, it is incumbent on the injuring party to restore the injured party to his or her previous state. According to this approach, the purpose of tort law is to achieve justice between the two parties, without seeking to apply justice to third parties or society as a whole. The 'corrective justice' approach even recommends that the justice that is achieved between the two parties should be arrived at with a focus on the interactions between them that led to the damage, without relating to the wealth or intentions of the parties.[328]

According to another approach, the purpose of tort law is to create the optimal deterrence in order to achieve economic efficiency or, more specifically, to reduce the social costs involved in medical accidents and thus increase economic welfare. For proponents of this school of thought, tort law ought not to focus on relations between the harming party and the harmed party, but rather on the consequences of the legal ruling on third parties; thus primarily on other potential claimants and defendants.

These two approaches – justice-based and deterrence-based – are theories and norms, simultaneously: They both claim to describe tort law as it is, but also to justify the law. The two approaches will arrive at different solutions for a specific case. For instance, the justice approach is likely to justify imposing liability on a negligent individual that caused harm, arguing that this is the just course of action in the relationship between the harming party and the injured party. However, the deterrence approach will probably not impose liability on the negligent party in specific cases. In other cases, the justice approach will in fact seek to refrain from imposing liability; for instance, in cases wherein the injuring party is not at any fault, whereas the deterrence approach will probably impose liability in such cases.

The leading theorists[329] of the deterrence approach argue that tort law must aspire, alongside

[328] Ernest J.Weinrib,The Idea of Private Law (1995).
[329] Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 160-89 (1973).

pursuing optimal deterrence, to spread the losses and even reduce the administrative costs involved in implementing tort law. Others[330] believe that tort law must contribute to the shaping of values in society. Some thinkers see in tort law a tool to achieve distributive justice. These considerations are related to the way in which the just distribution of goods and burdens is different between various members of society. According to this approach, a legal concept that works systematically to benefit lower socio-economic groups or disadvantaged minorities is preferable to a neutral legal concept.[331] It is also possible to find in tort law the foundations of remunerative justice. These considerations focus on the moral severity of the conduct of the harming party. For instance, a remunerative justice approach would support punitive compensation when the harming party's wrongful conduct is malicious.[332] The ability of tort law to obtain optimal deterrence and thus reduce the social costs involved in medical negligence will now be analysed.

Deterrence and Defensive Medicine

In ancient times, a doctor who was negligent in his actions was expected to receive various punishments, such as the amputation of his right arm, if he performed surgery that caused the death of the patient. In Persian law, for instance, a surgeon was punished for the death of a patient, having been charged by law with the crime of intentional murder. This was unless the physician had previously carried out successful operations on three non-believers.[333] In several European countries, there were severe punishments for physicians that caused the death of their patients, including cases where the doctor who completed the operation was sent to the family of the deceased individual for them to do as they desired to him.[334]

Meanwhile, physicians in Ancient Greece enjoyed full immunity and faced no legal responsibility or liability, even if the death of the patient was due to their actions. The philosopher Plato,

Ernest J. Weinrib, The Idea of Private Law (1995); Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 Theoretical Inq. L. 107 (2001).

[330] G.J. Stigler, "The Development of Utility Theory, Essays in the History of Economics (Chicago,1965);

I, Gilead. Bruce A. Ackerman — "Reconstructing American Law" 20 Isr. L Rev. (1985)581,582-587

[331] Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (2007).

[332] Perry R., (2006), The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory, *Tennnesee Law Review*, 73, pp. 177-236.

[333] Rabbi Immanuel Jakobovits, (1975), *Jewish Medical Ethics* [Hebrew Version, translated by Geula Ben-Yehuda], Mosad Ha Rav Kook: Jerusalem, p. 266.

[334] *Ibid.*

however, made an exception for physicians who caused intentional death to patients.[335] Roman physicians also enjoyed almost complete immunity, although in very specific cases it was possible to accuse a doctor of dangerous negligence, and he may have been subject to imprisonment.[336]

It is possible to identify a number of goals when punishing negligent wrongdoing:

- Deterrence, as well as increased levels of vigilance and verification of information in the conduct of all stakeholders, including and most importantly, physicians.
- The "spreading the losses" approach.
- The generally accepted view that the harming party bears the consequences of his or her actions as a principle of morality, fairness, and justice.[337]

In the past, there were almost no claims against physicians, for several reasons: humans viewed medicine as a form of science that was limited in its capabilities. When the expectations for a likely cure were lower, patients and their families accepted that complications in treatments as a given. Moreover, as a result of the paternalistic relationship between the patient and the physician, patients and their families did not even consider demanding explanations from doctors for their failures. There was also a prolonged period in which doctors managed a sort of "relationship of silence" and refused to testify in courts as experts on the negligence of their colleagues.

In recent years, medical negligence claims against physicians have significantly increased, for many reasons: In light of the vast developments in medical science, the expectations of patients and their families have become elevated with regards to available treatments. Meanwhile, there has been a simultaneous fall in the status of the physician in society. A largely autonomous relationship has developed between the patient and the physician, while a general atmosphere of initiating legal claims has prevailed.[338] Taken together, these phenomena have led to an overwhelming increase in the number of legal claims arising from medical negligence, which is illustrated by the fact that these lawsuits constitute the most common cause for court rulings in the field of medicine and law.

[335] J. Preuss, Biblical and Talmudic Medicine (translated from German by F. Rosner), Sanhedrin Press, New York, 1978, pp. 29-30.
[336] Rabbi Immanuel Jakobovits, (1975), Jewish Medical Ethics [Hebrew Version, translated by Geula Ben-Yehuda], Mosad Ha Rav Kook: Jerusalem, p. 266.
[337] Barak, A. (1989), *Legal Discretion*. Papirus [Translated from Hebrew].
[338] Freeman JM & Freeman AD, Am J Dis Child 146:725, 1992.

Social Considerations

From a socio-economic point of view, there is great importance attached to legal supervision of the conduct and actions of doctors, and this includes legal negligence claims. The primary goals of this legal oversight and involvement in medicine are as follows:

- Deterrence from negligent conduct.
- Appropriate medical education, resulting in a reduction in preventable damages, and, in turn, enhanced medical treatment.
- Compensation for harmed parties, which is needed for their rehabilitation and ability to deal with the harm that was caused to them.
- Identification of negligent physicians, with the aim of preventing the reoccurrence of prior errors and negligence.

The exponential increase in medical negligence claims and the courts' strict enforcement of the excessive demands placed on doctors for them to be vigilant has largely missed the point of improving medical education, and in turn, healthcare. Various studies[339] have shown that legal claims do not necessarily achieve the goal of improving the quality of medical treatment. Even more so, in one piece of research[340] it was found that those physicians who were sued in the past for negligence but who were subsequently examined with regards to their technical and scientific knowledge were found to be of the required level and capabilities. Therefore, it is likely that they were sued not because of professional flaws or deficiencies, but rather due to a communication breakdown.[341]

Moreover, a high percentage of the same physicians have repeatedly been the subject of lawsuits, which suggests that a prior claim against a doctor increases the risk of an additional case. Furthermore, the probability of a repeat claim is higher if the previous lawsuit resulted in significant compensation, compared with situations where relatively low amounts of compensation were paid out, or where no compensation at all was awarded. Furthermore, multiple previous claims increase the chances of additional cases, compared with a solitary previous case.[342]

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[339] Entman SS, et al, *JAMA* 272:1588, 1994.

[340] Bovbjerg RR & Petronis KR, *JAMA* 272:1421, 1994.

[341] Entman SS, et al, *JAMA* 272:1588, 1994.

[342] Bovbjerg RR & Petronis KR, *JAMA* 272:1421, 1994; Kessler DP, McClellan MB. The Effects of Medical Malpractice Pressure and Liability Reforms on Physicians' Perceptions of Medical Care. 60 Law and Contemp. Prob. 81, 83 (1997).

In light of this, it frequently happens that sued physicians are defensive and angered by the claims, rather than utilizing the process to improve the quality of their treatments. Their assumption is that negligence claims are random and unscientific, and that they are aimed at harming them and compelling them to conduct themselves according to legal criteria, rather than medical criteria. Therefore, the educational value for the doctor is minimal, or worse still, counter-productive.[343]

Indeed, not only do the positive goals of medical negligence claims sometimes result in failure, but a significant portion of claims of this type also have negative aspects. One of the results of the proliferation of excessive negligence claims is the development of the phenomenon of **"defensive medicine"** among physicians. The legal concept that imposes on doctors absolute and wide-ranging responsibility for their actions and medical errors, results in a situation in which physicians are more concerned with themselves and their efforts to avoid lawsuits than they are with their patients. It creates a reality wherein physicians are compelled to prepare themselves in advance against a potential claim by the patient.[344]

Thus, the increasing trend of medical negligence claims against doctors ultimately causes harm to patients themselves. In order to avoid future claims, and to avoid a clash between "reasonableness" (the reasonable physician test), as a doctor understands the concept in real time, and the notion of "reasonableness" as the court may define it after the event in theoretical circumstances, many doctors conduct multiple tests that are unnecessary from a medical perspective and sometimes even cause damage to the patient's mental and physical state. Within this context, caesarean sections, for which there is often no need, are often carried out to avoid negligence lawsuits.[345]

An additional effect of "defensive medicine" is that many physicians refer their patients to specialists in order to avoid taking responsibility. This leads to significant waiting times for specialist physicians and, in part, transfers the burden of decisions to the patients themselves and aggravates their mental state. Moreover, there is a concern that medical students and young doctors will avoid practising medicine in fields that have a high percentage of medical negligence claims, such as childbirth. In the US in the 1980s, 62 percent of gynaecologists ceased working in childbirth before the age of 55, 31 percent stopped working before the age of 45 and a significant portion of doctors in hospital preferred to convert their expertise in midwifery to another field.[346]

[343] Bovbjerg RR, *Ann Intern Med* 117:788, 1992.
[344] Tancredi LR & Barondess JA, *Science* 200:879, 1978
[345] Localio AR, et al, JAMA 269:366, 1993.
[346] Ward CJ, Am J Obstet Gynecol 165:298, 1991.

Some doctors preferred an early retirement, while others warned their children against working in this field of medicine.

An additional negative aspect is the economic burden on society, which arises from the granting of large sums of compensation to injured parties and the need for physicians to protect themselves through insurance against legal claims on one hand, and the costs of defensive medicine, on the other. These trends have led to a significant exacerbation of the problem of already limited medical resources.

Defensive Medicine in Israel and Other Countries

Is one of the side effects of deterrence reflected in the phenomenon of defensive medicine in Israel? One of the most popular definitions of defensive medicine[347] is, on the one hand, avoiding taking risk due to the threat of legal action against the doctor, and on the other, a reduction of risk taking. In extreme cases, avoiding risk-taking means not providing medical treatments to specific high-risk groups, while a reduction in risk-taking is manifested in a multiplication of tests, treatments, and referrals to experts. Defensive medicine is regressive medicine which fails to develop and wastes precious resources.

Physicians who fear a potential lawsuit will send the patient for repeated examinations, not necessarily because they are convinced that this is the necessary medical treatment, but because they want to protect themselves from future possible legal actions. Thus, for instance, when we compare a country where there is no doubt that defensive medicine is practiced, such as the United States, with other countries, we see dramatic gaps in procedures such as caesarean sections, CTs, MRIs, etc.[348] Another study,[349] conducted amongst approximately 4,600 doctors in the US, found that 90 percent of family doctors, 81 percent of surgeons, 71 percent of internal physicians, and about 90% of neurosurgeons, refused to treat patients considered to be at high risk.

However, during an examination of the UK's National Health Service (NHS) the Wilson Committee[350] concluded that defensive medicine did not exist in the healthcare system, because its members did not receive any positive substantive proof of the occurrence of the phenomenon.

[347] Taken from the *Israeli Medical Association* website: URL: https://www.ima.org.il/MainSiteNew/Default.aspx, accessed on 1st July 2020.
[348] *The Changing Economist of Medical Technology* (Medical Innovation at The Crossroads, Vol.2). Washington D.C., National Academy Press, 1992. Edited by Annetine C. Gelijns and Etean A. Halm.
[349] Wagner L. *Defensive Medicine: Is Legal Protection the Only Motive*. Modern Healthcare, Sep 10, 1990.
[350] Department of Health. Being Heard: The Report of a Review Committee on National Health Service Complaints procedures. London: DoH, 1994. (Wilson report.)

In a study involving hundreds of doctors published in the *British Medical Journal* (BMJ),[351] 30 percent of the general practitioners in the sample were found to fear legal action; about 98 percent said they adopted different work patterns in response to the possibility of being sued; in England, nearly 64 percent of family doctors noted that the rate of referrals to specialist physicians and emergency rooms increased markedly; and about 25 percent stated that they would not accept patients who were a risk. A 2008 survey showed that 60 percent of doctors in Israel sent patients for unnecessary tests, that a quarter of the doctors in Israel had already been sued by patients, and that 40 percent saw every patient as a potential plaintiff.[352]

It is worth noting that it is difficult to provide positive evidence that proves the existence of the phenomenon. Defensive medicine is defined by doctors choosing treatment options from a desire to protect themselves from possible future legal action, which is liable to increase the number of treatments and actions. It is, nevertheless, difficult to prove the unique causal relationship demonstrating that the increase is due to defensive medicine, although it is very reasonable to assume that this is the case. In this regard, the atmosphere and the position of the doctors themselves must be trusted. In the event that there is indeed an atmosphere of medical defensiveness, attention needs to be given to the empirical cases we encounter, such as avoiding individual decision-making without the backing of an array of senior consultants and physicians.

The courts have shown that they understand the negative consequences of defensive medicine, and have often held that the system should not create circumstances that would encourage defensive medicine.[353] The courts have also laid down specific precedents on the matter, such as that medical treatment should not be reviewed with the benefit of hindsight. With this in mind, the court ruled in the *Mizrahi* case in Israel that:

"There are usually no free meals in cases like this. Every treatment has a price and there is a risk, from a simple injection, when the needle puncture can in rare cases lead to serious reactions; through simple medication, that may cause very severe side-effects, all the way to invasive tests and treatment, which anyone with any sense can realise might be dangerous."[354]

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[351] Summerton N. *Positive and Negative Factors in Defensive Medicine: A Questionnaire Study of General Practitioners*. BMJ. 310, 27-29, 1995.
[352] Linder-Ganz, R. (2008). Defensive medicine: 3 out of 5 doctors send patients for unnecessary tests. Haaretz, 10 December 2008. Retrieved from https://www.haaretz.com/1.5071866
[353] *Civil Action* 605/94 **Mizrahi et al. v. State of Israel and the Ministry of Health** (Unpublished).
[354] Civil Action 605/94 Mizrahi et al. v. State of Israel and the Ministry of Health (Unpublished).

However, careful examination of the case law shows that, in practice, the courts tend to extend doctors' liability. This development inevitably leads to the practice of defensive medicine. Here, the words of Lord Denning, which have been quoted in several judgments[355], are pertinent:

"But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled, and confidence shaken. But we must not condemn as negligence that … which is only a misadventure."[356]

For example, in the *Bernstein v. Attia*[357] case, the court examined the explanations the physician gave to the patient, stating that he did not follow all the rules that he should have. Here, the case concerned a doctor who explained to a patient about the seriousness of smoking but failed to present the risks of not quitting smoking in relation to the specific illness from which the patient was suffering.

In the *Peled* case,[358] the majority opinion was that the doctor was negligent in failing to prove that he was aware of three articles published in the context of the illness that was the subject matter of the case. It should be noted that the nature of the disease was understood about two years after the relevant treatment. During that period the subject was comprehensively addressed, but until then there were only three articles published on the matter.

Justice Strasberg-Cohen, in a minority opinion, ruled that holding doctors liable at law (as was the majority's opinion) is -

"The fruit of wisdom of hindsight, and the threshold set to assert their responsibility, was placed at such a high level, that not only could the reasonable physician not reach it, but even the distinguished specialist physician would fail to."[359]

On this point, we must return to mentioning Judge Zeiler's remarks in the *Mizrahi* case that:

> "The medical profession deals with our most precious human treasure, and when the hopeful result is not realised, the temptation we face to blame and even convict those we suspect of it, because his actions have resulted in the worst outcome, is understandable."[360]

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[355] *Civil Appeal* 552/66 **Levintal v. The General Federation of Labour's Central Sick Fund** *kaf-bet* (2) 480; *Cf. Civil Appeal* 612/78 **Pe'er v. Kooper** *lamed-het* (1) 720, and more.
[356] **Roe v. Minister of Health** (1954) 2 Q.B. 66, 86-87.
[357] *Civil Appeal* 2245/91, *mem-tet* (3), 709.
[358] *Civil Appeal* 3264/96 ***Clalit* Sick Fund et al. v. Yaffa Peled et al.**; Where it was held that the doctor must keep abreast of updates and be aware of studies in the field of medicine, even if there were only few of them and from many years previously.
[359] Civil Appeal 3264/96 Clalit Sick Fund et al. v. Yaffa Peled et al.
[360] *Ibid*., Footnote 34.

Defensive medicine inevitably causes an increase in expenses, usually unnecessarily. In this context, one can point to a multitude of medical actions, laboratory tests, various forms of imaging, invasive tests, hospitalisations, and medication, whose usefulness and effectiveness are not always clear, and there is doubt whether they constitute a good and efficient utilization of the system's finances.

The cost of defensive medicine in the United States has been estimated to reach up to 30 billion USD per year,[361] including surplus tests, treatments and diagnostic procedures. Surveys in Canada demonstrate that there was an increase in the number of legal actions filed against physicians between 1940 and 1989.

The indirect costs of the current system based on negligence – that is, the "costs" of defensive medicine – are even greater than the direct costs of litigation (attorneys' fees, court fees, etc.). Despite the difficulty in accurately determining how many and which treatments are performed as a result of pressure from lawsuits, it undoubtedly has an impact.

A study in the United States has shown that in states that enacted professional liability reform, the number of medical malpractice claims has dropped, as have insurance premiums. Doctors in these states also testified to a decreased level of pressure.[362] The decisions that will be taken cannot be divorced from the realities of the healthcare system, which has budget deficits, and faces limited resources. Therefore, we must make maximum use of the financial resources at our disposal, when it is clear that we must find methods that will reduce the economic burden.

For medical malpractice in Israel, there is insurance that covers negligence; this is public insurance, and not private policies that are performed by doctors privately. Occasionally, the insurance policy makes investing in the prevention of uninsured loss economically unviable for the insured, even if there is a large gap between the rate of risk and the cost of prevention. Furthermore, insurance may render the insured indifferent to risk prevention even in those situations where the cost of prevention is negligible (locking a door when leaving the house). This phenomenon of indifference to risk or intentionally causing it, known as "moral hazard", results in welfare losses.[363]

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[361] Taken from the Israeli Medical Association website: URL: https://www.ima.org.il/MainSiteNew/Default.aspx, accessed on 1st July 2020.

[362] Kessler DP, McClellan MB. *The Effects of Medical Malpractice Pressure and Liability Reforms on Physicians' Perceptions of Medical Care*. 60 Law and Contemp. Prob. 81, 83 (1997).

[363] G.T. Schwarts "*The Ethics and the Economics of Tort Liability Insurance*" 75 Cornell L. Rev.

The well-known judge, Lord Denning, in *Roe v. Minister of Health* called legal action "a knife in the doctor's back."[364] The judge noted that it would be a disservice to the community if all doctors were to be held liable whenever something went wrong. In Hatcher v. Black[365] the judge pointed out the dangers of exaggerating doctors' liability by saying:

> "A doctor examining a patient, or a surgeon at the operating table, instead of continuing with their work, will constantly be looking to see if someone is not stealthy approaching with a dagger – since a claim of negligence against a doctor for him is like a knife in his back."[366]

Lord Ding's argument is that society has a vested interest in intervening as little as possible in the medical profession. He does not find an important social interest in regulating compensation for the injured party, in the event of damages as a result of medical treatment.[367] This approach was not adopted in England, and at the same time the distinction between negligence and error of judgement was rejected. The customary approach in most of the Western world is that the injured party's damages should be compensated for when the damage is caused by fault.

I am entirely convinced that this research clearly demonstrates that it is necessary to change this approach, and replace it with a no-fault liability regime, at least in Israel. The latter solution would provide a more just basis for awarding compensation in the absence of a fault mechanism. Such a regime would bestow compensation from a social perspective position taken by a welfare state concerned with the welfare of all its citizens[368]. The current fault system is overly complicated and drawn out for both patients and healthcare providers, which ultimately results in far higher costs for both parties as well as a loss of trust in the system. Moreover, in a no-fault system, wherein patients and physicians do not become embroiled in a burdensome and stress-inducing legal battle, patients will feel more secure and informed when making medical decisions pertaining to their own bodies, in the knowledge that should there be any complications, there will be a due process of redress. Physicians will also be empowered to carry out their work without the fear of years-long medical investigations, and this will ultimately be better for medical advancements and thus society as a whole. To this end, in the next Chapter, however, I will provide a comparative legal analysis of the no-fault system in chosen countries to further hone my argument in favour of

[364] **Roe v. Minister of Health** [1954].
[365] **Hatcher v. Black (1954)** The Times, 2 July 1954.
[366] Ibid.
[367] Kennedy & Grubb, *Medical Law: Text and Materials*, Butterworths, London, 1989. p. 398.
[368] Compare: Hoffman, *Tort: Legal Medicine*, American College of Legal Med. "Mosby", St. Louis 1988 p. 37.

introducing fundamental changes to the healthcare principles and appropriate public policy in Israel.

I will provide a comparative legal analysis of the no-fault system in chosen countries to further hone my argument in favour of the necessary shift toward the healthcare principles and appropriate public policy in Israel.

The Laws and Regulations of Medical Malpractice Lawsuits in Israel

The main approach to judicial rulings in Israel is the "middle way", which allows for an appropriate balance between a conflict of interests: on one hand, the interest in avoiding claims that will lead to excessive deterrence and subsequent fears of over-protective medicine; on the other hand, the importance of imposing tort liability for the provision of negligent treatment, thus recognizing the importance of the duty and interest in protecting the patient's rights. One can evidently see that there are numerous considerations from both sides of the argument regarding the imposition of tort liability on doctors.

However, while this is the general approach, there is no specific law discussing medical malpractice lawsuits in Israel. There are laws referring to the tort of negligence, medical assault, breach of statutory duty, and breach of the provisions of the Patient's Rights Law.

The tort of negligence, which appears in Articles 35 and 36 of the Tort Ordinance [369][1], states that:

> 35. Where a person carries out an act which under the same circumstances a reasonable careful person would not do, or fails to do an act which under the circumstances such a person would do, or fails to use such skill or take such care when exercising any occupation as a reasonable careful person qualified to exercise such occupation would use or take under the same circumstances, then such act or failure constitutes carelessness and a person's carelessness as aforesaid in relation to another person to whom he owes a duty under the circumstances not to act that way, constitutes negligence. Any person who causes damage to any person by his negligence commits a civil wrong.
>
> 36. For the purpose of Article 35, every person owes a duty to all persons, and the owner of any property to which, a reasonable person ought, under the same circumstances, to have contemplated as likely in the usual course of things to be affected by an act, or failure to do an act envisaged by that Article.

The tort of negligence as determined in the Torts Ordinance is a tort permitting the legislature to determine criteria of damaging and damaged parties, when there is a duty of care in the relations between them. The analysis of the grounds of negligence, considers the elements of the duty of care, carelessness (breach of the duty of care), and damage.

[369] Torts Ordinance [New Version], 1968.

Reasonable Physician Test

In medical malpractice lawsuits, the test that should be applied is the test of the **'reasonable physician'**. Are the decisions and actions of the physician reasonable and accepted in medicine? The physician must consider his or her actions according to the most recent developments in medicine and according to the treatments accepted globally. A reasonable physician needs to exert his judgment and keep up to date with contemporary medicine.

The examination of negligence examines the time of the case and not the time of the lawsuit. In other words, if medicine has advanced and found solutions over the years to the medical case discussed, then the examination of the physician's negligence is examined at the time of the event.

It is possible to establish a claim for medical treatment without informed consent on basis of the tort of assault found in the Torts Ordinance, Article 23:

> 23. Assault consists of intentionally applying force of any kind, whether by way of striking, touching, moving or otherwise, to the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or attempting or threatening by any act or gesture to apply such force to the person or another if the person making the attempt or threat causes the other to believe upon reasonable grounds that he has the present intention and ability to effect his purpose.

(b) "**Applying force**" - for the purposes of this section, includes applying heat, light, electrical force, gas, odor or any other substance or matter whatever if applied in such a degree as to cause damage.

The cause of the assault is established on the foundations of every contact of the damaged party without his consent, therefore medical assault meets the criteria specified in the law, despite medical assault being a physician's action normally performed with good intentions.

Article 24 of the Torts Ordinance lists the defense of the tort of assault. Section 8 of Article 24 states:

> (8) [If the defendant] acted in good faith for what he had reason to believe to be for the benefit of the claimant, but was unable before doing such an act, to obtain the consent of the claimant there to, as the circumstances were such that it was impossible for the claimant to signify his consent or for some person in lawful charge of the claimant to consent on behalf of the claimant, and the defendant had reason to believe that it was for the benefit of the claimant that he should not delay in doing such act.

Patient Rights

The doctrine of informed consent obtained from the patient for treatment is based on the fundamental concepts of autonomy, freedom, and privacy. The patient has the right to be informed about the process and condition of their illness and to participate in the decisions regarding the

treatment they will undergo.[370]

Consent

Informed consent is the patient's right to make decisions, freely, about the medical treatment he or she receives. This decision-making process can only occur once the patient has received relevant medical information. The patient's decision may be to consent to, or to refuse, medical attention. Informed consent also imposes a corresponding obligation on the part of the medical personnel not to commence treatment before receiving the patient's consent. This, as mentioned above, only occurs after the patient has been provided with relevant treatment information as well as an opportunity to understand the medical information and express his or her reservations or concerns regarding the treatment. In Israel, a breach of the process of consent awards the harmed party with compensation for harming their autonomy.[371]

Thus, in the context of the present research, the failure to obtain informed consent in accordance with the requirements of the law constitutes further grounds for supporting the tort of negligence. The duty is to provide the patient with information, before the medical treatment, as noted in Article 13 of the Patient's Rights Law. It is possible to file a lawsuit for damage to the patient's autonomy if the risks of the medical treatment are not explained to the patient.

The Patient's Rights Law (1996) expressly determined the duty to obtain the patient's informed consent before providing medical treatment. The intention of the law is not only for the patient to consent to the treatment, but also for the patient to express their consent after they have been informed about the treatment, namely, about the risks involved in this type of treatment, as well as notifying them of all other treatment options, including alternative treatment methods. The scope of disclosure to the patient is that there is the obligation to provide an explanation according to the needs of the **'reasonable patient'**. In other words, it is deemed necessary for the medical explanation to be in the patient's language, i.e. comprehensible and in layman's terms, conveyed professionally and according to the patient's equivalent capacity.

Article 13 of the Patient's Rights Law states: [372]

(a) Medical treatment will not be given to a patient without the patient's informed consent, in accordance

[370] J. A. Martinez, J. M. Lyons, & J. P. O'Leary (2009). Medical Malpractice Matters: Informed Consent, Journal of Surgical Education, May-June, 66 (3), 174-175.
[371] RA 3108/91 Reevy v. Weigl, PD MN (2) 497 (1993)
[372]Patient's Rights Law, 1996.

with the provisions of this chapter.

(b) In order to receive the informed consent of a patient, the treatment provider will provide the patient with all medical information reasonably required by him, to enable him to decide whether to agree to the proposed medical treatment.

Caregiver-Care Receiver Relations in Israel

The very existence of a normative outline is reflected in internal tensions that often necessitate difficult decisions, when the need arises to choose between the interests of the litigating individual and the interests of the state medical system, which is ultimately supported by the state and the sum of its citizens. Indeed, this tension is not the exclusive province of medical law and it exists in all branches of law in the conflict between the individual's needs and the resources of the public system.[373]

In Israel, the current approach regarding legal proceedings for medical malpractice is that this type of claim is desirable and even encouraged. The significant increase in the number of medical negligence claims does not necessarily point to a decline in the quality of the medical treatment, but rather to a change in the approach of both the physicians and the rulings of the courts. In recent years, medical negligence lawsuits have been encouraged in many places throughout the world. This is according to the perception that doctors are not immune from criticism, that self-criticism is not effective, and thus that the only objective, qualified actor fit to review the actions of doctors is the court. As a result, the court's rulings in this field have, and will continue to have, a decisive impact on the medical system. In many regards, the court even shapes the relationship between the medical establishment, the healthcare providers, the physician, and the patient. Moreover, all insurance laws and the medical insurance system are directly influenced by the decisions of the court.[374]

However, there are objections to the approach that prevailed in the past, which saw in such claims an obstacle to the daily management of medicine and an impediment to the development of medicine. These objections are reflected in the ruling of an English Judge, Lord Denning,[375] who stated that society has an interest in there being as much transparent intervention as possible in the medical profession. Namely, he recognized an important social interest in regulating compensation to the victim in the case of damage as a result of medical negligence.

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[373] E. Rubinstein, *On Medicine and the World of Law in Israel*, The Law 8/2013, pp. 645, 658.

[374] Nuremberg, A., Azar, A. (2000) *Medical Negligence*. Pearlstein-Ginosar: Tel Aviv.

[375] *Hatcher v Black* (1954) Times 2/7/54, Denning, J.

This approach, which pursues redress for injured parties as a primary social interest for the advancement of medicine, was not accepted in England and, furthermore, the distinction between negligence and error of judgement was rejected. According to Israeli tort law, the harming party that caused the damage must compensate the injured party. However, over the years, the law has developed with regards to concepts of modern justice, prompting demands for the existence of fault as a prerequisite for imposing liability.

In Israeli society, the existence of an effective, objective monitoring mechanism enshrined in the Civil Wrongs Ordinance is essential. This relies on the Tort Ordinance and is provided under the supervision of the Public Courts. The legislator maintains the quality of the medical treatment provided to the patients and ensures that treatments for which there is a high chance of complication are performed by professional physicians under supervision.

This is also the case in the context of the development of medical devices and innovative treatments on the human body, for which the outcomes are unknown, and in connection with which it is possible that the treatment will be ineffective or may even cause harm to the patient. To determine the appropriate way for the performance of innovative treatments and to prevent the filing of unnecessary medical malpractice lawsuits against the interests of the promotion of the science of medicine, the Public Health Regulations (Medical Experiments on People)[376] were amended to emphasize the detailed explanations provided to the patient for the experimental treatment and the patient's informed consent. This is likely to protect the interests of pharmaceutical companies and state-funded research projects and thus allow for the development of medical breakthroughs. Certain rulings in Israeli courts[377] have dealt extensively with cases of medical malpractice in which full information was not provided to the patient, and consequently the principle of informed consent was undermined.

In the next Chapter, however, I will provide a comparative legal analysis of the no-fault system in chosen countries to further hone my argument in favour of the paramount change of the health-care principle and appropriate public policy in Israel. This right, in turn, categorically forbids any medical experiences, or indeed, the conducting of any action that is liable to harm an individual's

[376] Public Health Regulations (*Experiments on People*) 1980, p. 4189.

[377] See for instance: Civil Appeal 560/84 Nachman v. Histadrut Medical Clinic, Court Ruling 40 (2) 384 (1986); Civil Appeal Miasa Ali Daka v. Carmel Hospital *Haifa*, Court Ruling 53 (4) 526 (1999).

health or physical integrity. The only exception to this rule are those experiments that meet the primary condition of experimental laws, namely consent. Meeting these conditions, which are stipulated in legislation, clears the party carrying out the experiments of any liability for violating these fundamental rights.

Most medical knowledge – including data on the human body and the way it functions, and concerning diseases, diagnoses, treatments and cures, as well as preventive medicine – derives from research, which, for the most part, is supported by conducting experiments with human beings. On the one hand, significant importance is attached to research involving human beings for the benefit of humanity and society. These findings enable us to improve healthcare and discover medical solutions for diseases. However, on the other hand, there is a duty to protect the wholeness and autonomy of the healthy or sick individual who must be the subject of the research, and may incur injuries as a result of experiments, which may fail to yield any benefit for science.

Therefore, it is imperative to find the right balance between these needs. This ultimately presents an ethical and moral dilemma. Society must strike a balance between the need, on the one hand, to advance medicine for the benefit of all, and on the other hand, the need to protect the liberty and wholeness of every single human being. There is also a need to balance the duty of individuals to contribute to this effort with society's duty to prevent harm to individuals. In general, countries and cultures that emphasise the supremacy of society and peoplehood are more inclined to prefer conducting research on humans, despite the risk to subjects of experiments. Meanwhile, cultures and countries that emphasise the importance of the individual will tend towards restricting medical research, even at the cost of delaying medical progress.

The primary question is, therefore, when is it permitted for society as a whole, and researchers in particular, to potentially expose human beings to harm in order to pursue benefits for others? Moreover, what is the moral justification used in order to exploit individual citizens for the benefit of others? The moral issues that arise with the issue of experiments involving human beings also include: the use and exploitation of a small group of people for others; the potential violation of the individual's liberty, mainly in research on healthy volunteers; the potential harm to healthy or sick individuals, and, in turn, the harm caused in principle to certain individuals in order to prevent injury to others; and the harm caused to the balance between the physician's duty to his or her individual patient and that which they owe as a researcher to the whole of society to improve scientific knowledge, diagnoses and treatments, although the chief concern and duty of a doctor to

their patients is to ensure their welfare.

Positions of the Judge on Compensation for Non-Pecuniary Damage

The former Israeli Supreme Court President Aharon Barak outlined three approaches on non-pecuniary damage, for pain and suffering, and for the shortening of the life span.

1. The Functional Approach

According to this approach, the sum is calculated with reference to substitutes. For a person whose life has been shortened, the sum of the compensation will enable the damaged party to acquire enjoyment from the remaining years of life. The compensation will include the "pleasures of life". In the case of loss of consciousness, compensation will not be given for non-property damage, since in this approach it is not possible to give alternative pleasures. According to this approach, the damaged party is entitled to compensation for "the pleasures of life" where it is possible to purchase alternative pleasures with the compensation money. Hence, there is no room for recognizing the loss of pleasures of life as a separate category of tort, in its own right, but it should be seen as a part of the wider range of pain and suffering. Hence, the damaged party that permanently lost consciousness and does not return to it by the time he dies and does not feel what is around him will not receive compensation for the non-property damage, since there is no possibility of giving him alternative pleasures.[378]

2. The Personal Approach

According to this approach, it is necessary to focus on the damaged party and on his or her happiness. In this framework, compensation for non-property damage seeks to compensate for the loss of happiness and enjoyment of the damaged party following the tort. This means that a pianist who lost his or her hand will receive greater compensation than a singer who does not use his or her hand. The compensation for pain and suffering and loss of pleasures in life is based, therefore, on the subjective damage to the enjoyment of the life. Even compensation for loss of life span is based on loss of "the chance for a life with an advantage for happiness". If the nature of the damage changes and the person is not aware of it, and from a subjective perspective their life is improved, then the damaged party cannot obtain compensation for this damage.

[378] Teubner v. Humble (1962) 108 C. L. R. 491, 506; Skeleton v. Collins, supranote 136; A. Ogus, "Damages for Lost Amenities: For a foot, a feeling or a function" 35 M. L. R. (1972).

3. The Property Approach

According to this approach, the life of the damaged party, the integrity of their body in autonomous and psychological terms, their ability to enjoy their life, pain and suffering – all these are personal 'assets' of value. To negate an asset of this type is to negate a property right. Every asset has an objective value, for which compensation can be awarded in the case of damage. The damage to this 'asset' even grants compensation in the non-property dimension. Hence, when the 'asset' is damaged, the damaged party is entitled to compensation.

Assessment Discussion

All three approaches – functional, personal, and property, have advantages and disadvantages. Some argue against the personal approach, suggesting that since it is based on the damaged party's happiness, and since it is not possible to know what his happiness is, it cannot be evaluated. In essence, the Court can evaluate the person's happiness and what was taken from them by the damage, but the judge must evaluate the scope of one person's loss on the basis of the loss of happiness, when moreover this is the future and not the past. [379]

Regarding the property approach, the following question has been raised: How can we evaluate the value of an 'asset' and how can we evaluate the damage to it? Justice Barak, according to his approach, supports granting compensation for all intangible damage, even if the damaged party does not feel their suffering. At the head of the tort, where it is necessary to recognize the "loss of the enjoyments of life", it is necessary to determine according to the personal approach that suits the damage of the damaged party and it is necessary to prefer the functional approach if this is possible.[380]

Over the years, the courts have attempted to formulate standards regarding compensation for non-pecuniary damage, and therefore it was determined that the test is not that of a border but of an essence. Compensation needs to reflect the damage to the individual damaged party and the implications for them.

It is possible to say that there is no "correct" solution,[381] and, therefore, courts in different countries have reached different solutions.[382] In the same legal system, it is possible to witness

[379]Civil Appeal 15/66 Shinar v. Hassan, Court Ruling 20(2), 455, 460 (1966).
[380] D. Katzir (2003). Compensations for Bodily Injury, Fifth Edition. (Hebrew).
[381] **Lim Poh Choo v** Camden & Islington **HA** [1980] AC 174.
[382] H. Mcgregor, "Personal injury and Death, Torts", International Encyclopedia of Comparative Law Vol. XI Ch-9, p-6.

inconsistencies and discrepancies. For instance, the English court recognises the damage of "pain and suffering", based on the personal, functional approach. Alongside this form of damage, there is recognition of additional non-material damage, namely, the loss of the "enjoyment of life". This damage is based on the proprietary approach. The third type of damage – the loss of life or shortening of life expectancy – is a hybrid damage.[383] It is based partly on the proprietary approach, i.e. the English court recognises that a person has the right to his or her life and this right is taken from him or her. Upon taking this right, there is compensation whether the injured party is aware of it or not. When evaluating compensation, it is essential to consider individual and subjective criteria, such as that an advantageous life is one with happiness, which varies from person to person.

This lack of consistency also exists in Israel. Like in England, in Israel, pain and suffering is a damage based on the personal approach. However, by way of comparison, and in contrast to England, the damage of the loss of life or shortening of life expectancy, is not based on the hybrid approach, but rather, the proprietary approach. It was therefore ruled that the compensation for this damage should be substantial,[384] without any connection to the sense of subjectivity or awareness of the act of damage. Against this background, the question is posed: What is the preferred approach? This is a question of legal policy and is based on the following assumptions – primarily, that the non-material damage is damage that justifies compensation, similar to the way in which material damage itself does. This approach is not by any means obvious.[385] Other legal systems consider this type of compensation as extremely rare and allow it only in very specific cases, such as very unusual types of damages. Secondly, it is not possible to determine *numerus clausus*, i.e. to limit the number of people affected, in cases of non-material damage. The compensation needs to extend to all non-material damage arising naturally during the act of wrongdoing. Therefore, the loss of "the enjoyment of life" is harm caused to the harmed party, even if subjectively the individual is not aware of it and it is therefore necessary to grant compensation for such damage.

However, it is simultaneously the case that non-material damage cannot be granted within the framework of regular damages. The compensation must be granted on an individual basis,

[383] Gerke V. Parity Ins. Co. Ltd. (1996)3 S.A.L.R.484,494.

[385] H. Mcgregor, "Personal injury and Death, Torts", International Encyclopedia of Comparative Law Vol. XI Ch-9, p-6.

according to the damage caused to the specific party. Thus, if it is possible to adopt the functional approach, this method must be implemented.[386] In the event that this approach is not possible, for whatever reason, it is necessary to award the same amount of compensation that the court determines, while considering what society considers acceptable in the given circumstances.

The Ministries of Finance and Health on Compensation for Pain and Suffering

The Israeli Ministry of Finance and the Ministry of Health hold[387] that it is justified to limit the compensation for pain and suffering. In their opinion, medical malpractice has unique characteristics that can indicate the trend of an increasing number of claims and the scope of the compensation ruled, and this justifies the unique arrangement in legislation. In the end, the rise in the cost of medical malpractice for the public and private medical activity reduces the scope of the resources that the health system can allocate to other medical services. Hence, there is a public interest in reducing the scope of the compensation so as to reduce the costs of the professional insurance. Thus, the scope of the resources that can be utilized to supply medical services for the benefit of the public at large will increase.

The Ministry of Health and the Ministry of Finance emphasize the need for certainty, so that the insurers can more precisely evaluate their risk and the sums that they may need to pay. In their opinion, the certainty will be achieved, in that precise sums and the way to calculate them will be determined. (In other words, there will be a formula according to which the compensation will be calculated in the framework of the ceiling that will be set.) The Ministry of Health and the Ministry of Finance further hold that even if it is said that the rise in the costs of the lawsuits for bodily damage exists in other areas, and thus is not unique to the field of medical malpractice, in light of the uniqueness of the structure of the public medical system in Israel and how it is funded, the rise in the field of medical malpractice has significant implications for the public purse, which necessitate and justify unique treatment.[388]

[386] J.G. Fleming, The Law of Torts, (Sydney, 5th ed., 1977) 271.
[387] The Ministry of Health of Israel (2005). Position Paper for the Examination of Ways to Reduce the Public Expenditure for Medical Malpractice Suits. Jerusalem, November.
[388] The Ministry of Health of Israel (2005). Position Paper for the Examination of Ways to Reduce the Public Expenditure for Medical Malpractice Suits. Jerusalem, November.

Conclusion: Pecuniary and Non-Pecuniary Damage

As mentioned previously, the goal of tort law and medical malpractice lawsuits is to restore the situation to its previous state (*restitutio in integrum*). In other words, the compensation awarded to the damaged party aspires to return him or her to the situation before the damage was caused. However, the situation is not that simple. It is very difficult to estimate the mental damage or great suffering that the damaged party experienced and to quantify it in a financial payment.

The Court must place at the disposal of the damaged party a sum of money that can enable them to make acquisitions that will take the place of what they have lost. Thus, if the damage is measured in pain and suffering and awareness of the loss of the pleasures of life, then compensation is awarded that will enable the damaged party to acquire other pleasures that will balance out with the damage inflicted.[389]

In a medical malpractice lawsuit, there is a precise definition of financial damage provided in Article 2 of the Torts Ordinance,[390] as follows: "Damage – loss of life, or loss of, or damage to, any property, comfort, bodily welfare, reputation or other similar loss or damage." This definition is broad, referring both to the matter of the types of damage mentioned in the first part, and to the matter of those mentioned in the second part. It includes all types of damage, including physical and non-physical, pecuniary and non-pecuniary.

There is a concrete reality at the basis of this definition. It encompasses both physical damage and pecuniary damage, both damage to physical feelings and comfort, which will have physical expression, and damage to physical feelings and comfort, which does not have a physical expression.

The Torts Ordinance does not provide an adequate response regarding the way in which the damage is calculated, or a formula that defines the compensation and its calculation. First, there is lack of clarity in determining compensation in a consistent manner as well as lack of agreement regarding the intellectual basis of the ruling of compensation when the damage is not property. When we lack a justified normative framework and an appropriate conceptual toolkit, it is naturally difficult to provide a solution to specific questions. Second, there is difficulty in the quantification of the damage and the determination of the compensation. How is pain and suffering evaluated?

[389] A. Barak, Evaluation of Compensations in Bodily Injuries", Studies in Law, 9 (9) 263, 1983.
[390] Article 2, Torts Ordinance, 1968.

How is the loss of the pleasures of life appraised? Is there a market price for the pleasures of life? The idea is that "no money in the world can compensate for the pains of the body and mind, for the reduction of the chances of establishing a family, or for the loss of pleasures of normal life"[391], and that it is not possible to compensate with money a person who has lost a limb or who remains with a defect for the rest of their life. Even if we fill the damaged party's home with silver and gold, we cannot correct the damage caused.[392] How is it possible to precisely, or even approximately, estimate in terms of money, or a monetary equivalent, the pain and suffering or the sorrow and shame of a person whose hand or leg has been amputated, or of a person who walks on his legs and worries in his heart that his days are numbered?

One of the arguments that is made against the extension of compensation to non-material damage is that this damage is largely subjective. This claim has led to the view that determining such damage would be subject to the discretion of the opinion of the court and is very much a case of guesswork.[393] Among the rules for evaluating damages due to pain and suffering, the courts have therefore determined a key and important principle, stipulating that it is essential to award the harmed party the appropriate compensation in accordance with each and every case. That is to say, it is unfitting and ineffective to use a fixed measure for compensation, but it rather necessary to evaluate the appropriate compensation for each and every case, according to its circumstances, while also relying on previous rulings and attempts to ensure consistency.[394]

Meanwhile, Israeli courts heavily rely on material damage as the primary basis to award compensation.[395] This, *prima facie*, strengthens the notion that in the absence of a strict tangible measure, it is not possible to assess non-pecuniary damage in a similar way. However, it shows that, in general, the courts are trying to create a mechanism by which to allow themselves perspective and proportion regarding the standard of compensation for intangible damages. An excellent example of this can be found in the *Sharf vs "General Consultancy Services"* (1976) ruling, which determined that harm to reputation ought to be seen as damage to the body of the person, and thus that it is necessary to maintain a correlation between the rate of compensation

[391] Civil Appeal 541/63 Reches and Others v. Herzenberg, Court Ruling 18 (2) 120, 126, Judge Branzon.
[392] 140/50 Yoni v. Fink, Court 11 35, 37, Judge Etzioni.
[393] Cf. The Committee for the Simplification and Improvement of Tort Procedures (Berenzon Commission, 1972) [Hebrew]
[394] Civil Appeal (1997) 180/88 *Ozeri vs. Shrofi* (unpublished) and Kaztir, D. *Compensation for bodily damage*. Dekel. 613-614. [Hebrew]
[395] International Persona l Injury compensation, Dennis Campbell, Sweet & Maxwell, 1996 p. 463.

awarded for reputational damage and compensation awarded due to bodily pain and suffering.[396]

Among the measures for assessing the amount of compensation due to pain and suffering, and the one that has the most influence on the threshold of compensation, is the impact that the physical harm has on the way in which the injured party perceives themselves as a person. This was illustrated, for instance, in the ruling *[Unknown] vs Rabbi Ze'ev*[397] (2001), in which the negligence of the circumciser (*"mohel")* led to the loss of two-thirds of the claimant's sexual organ. In this case, the court appealed to the future harm to the self-confidence and body image of the harmed party, as well as the need to deal with his social status, in ruling how much compensation he deserves. Indeed, the Supreme Court repeated these arguments in the subsequent ruling in which the justices decided to double the amount of compensation to the claimant, which reached $166,666. In a different case, but similar context, the court ruled that the physical damage harmed her "femininity" as a woman, and was compensated $133,000.[398] These figures illustrate that if the physical harm caused the claimants humiliation and shame, as well as damage to their self-confidence, the likelihood increases that they will be compensated with a larger sum than they would have been awarded had the compensation pertained merely to the physical damage alone.

However, the accepted approach is that, despite all the difficulties, it is necessary to evaluate and determine the compensation. The reason is that it would be paradoxical if the law were to refuse to award any compensation since no compensation is equivalent to the damage. [399]

In pecuniary damage there are types of torts that are included with regard to earnings: loss of salary as in the past, caused in actuality to the victim until the day of the court ruling, damage to the ability to earn in the future, loss of pension, damages including for healthcare provided by a third party in the past and in the future, mobility assistance in the past and in the future, and other medical expenditures (travel, etc.) in the past and in the future.

The law in Israel does not determine a method to calculate compensation for pain and suffering, and the judge must take into consideration the medical opinion and calculate the scope of the suffering. The court ruling determined criteria that influence the sum of the compensation. However, this remains far from conclusive and an enhanced procedure to ensure equality and

[396] Civil Appeal 354/76 Sharf vs "General Consultancy Services" (1976).
[397] Civil Appeal 2055/99 Unknown vs. Rabbi Ze'ev, 241 (5) (2001).
[398] Civil Case 1169/97 *Khoran vs Yanun Production and Marketing of Food Products Ltd.* (2004).
[399] A. Barak, Evaluation of Compensations in Bodily Injuries", Studies in Law, 9, 1983, 263.

consistency is required. The next chapter will explore potential ways to compensate appropriately for harm of the non-pecuniary type.

The guiding principle for proposals for introducing change to the current legal and social reality is to find the right balance between multiple interests: the need to compensate injured parties; the need for public supervision and quality control of healthcare; the need to remove from the health system reckless medical personnel, on the one hand, and to prevent "defensive medicine" on the other; the need to prevent unnecessary harm to doctors whose intentions are good, thus allowing them to focus on treating their patients; and finally, the necessity of reducing the excessive burden on limited medical resources through often excessive and wholly unnecessary medical claims.

Can these problems be solved by changing the compensation system? This research argues that a system of no-fault would provide a solution both to balancing the interests in the physician-patient relationship and to society's attitude toward negligence claims. This will be the focus of the chapter.

Chapter IV

The No-Fault System

Introduction

In this chapter, I will review the no-fault compensation method used in different countries by conducting a comparative study of the systems in the following states: New Zealand, Sweden, the USA, and Israel. The comparison will be in-depth and multi-layered, including an overview of the system and characteristics of the country in question; the eligibility criteria for compensation; approaches to legal proceedings; funding; financial coverage; the compensatory rights that injured parties are eligible for in the context of the no-fault method; the social and constitutional goals; and the health system in each country.

I will introduce the comparison through the consideration of multiple legal, political, social perspectives. The comparative law analysis will be carried out by presenting the social and constitutional principles through which the no-fault system is implemented. Furthermore, a comprehensive analysis of the approaches to tort law and its foundations will be carried out. I will demonstrate that the countries that I selected for the purposes of comparison were chosen because they were facing the same challenges as Israel, even though their institutional choices were different. Furthermore, these countries have been widely researched with ample data available to us for the purpose of comparative study. I will suggest that in light of the values and social goals these countries and Israel have in common, and these countries' adoption of the no-fault system, there is a compelling argument for Israel to also implement this method.

The comparative law review that I will carry out will not always be from the constitutional perspective but will also pertain to justice in the granting of compensation in the absence of liability for damage. Theories in the legal doctrine are not always connected to the "legal reality" and an analysis of court rulings does not always reflect this difficult reality. This is due to the need to work according to rigid legal regulations. Many damages associated with pain and suffering are often not compensated, for various reasons, including the budgetary limitations and the duration of the trial, as I described in the prior chapters.

Therefore, it is imperative to fully explore the concept of a no-fault system because the goal in tort law of restoring the situation to its original state will not always be realized. It is thus essential to measure the current situation using other tests, such as justice, efficiency and social goals. As will be explained in this chapter, the granting of compensation in the no-fault system as a social solution is also favourable for the perpetrators of damage.

Methodology of Comparative Law

What is Comparative Law?

Comparative law is a field of study that compares research methods and laws from different places and periods of time. Among its aims are the historical documentation and best practice of legal precedence (such as: common law) in order to find the most effective methods. Traditional research in the comparative legal field is characterized scholarly work that focused on the comparison between legal methods or between doctrinal solutions that are relevant for a given method.[400]

Jaap Hage provides a useful definition of comparative law in his paper:

> "[Comparative law] is assumed to be the comparison of the law of different jurisdictions, legal families, or legal traditions, with a special eye for the similarities and the differences."[401]

The proposed starting point for the debate pertaining to comparative law in academic research, and in practice, is the widespread recognition in many countries of both the need for legal reform, as well as the necessity for the interpretation of existing legal regulations. Against this background, it is possible to claim that comparative law is a specific approach of the study that sees scholarly value in analysing legal methods as a purpose in and of itself.

In comparison with this, the aspect of the approach that states that the objective of comparative law is to learn from other legal methods for the sake of the development of the legal system or to gain a greater understanding of one's own system is arguably flourishing today.[402] Turning to other legal systems always served jurists as a basis for developing their own legal systems, especially in significant periods of political or economic change.[403]

In the context of the current research, comparative law will aid in the understanding of the effectiveness of no-fault compensation methods. I will conduct a comparison between countries where the judicial authorities have successfully implemented a no-fault compensatory system. Through these case studies and an analysis of their achievements in the world of jurisprudence, I will present the case for reform in the Israeli legal system and the need to transition to a different compensatory system when dealing with tort law. I will thus conduct a comparative legal study with the goal of demonstrating how legal institutions in other countries operate and thereafter highlighting the differences and similarities between them and Israel. I aim to conduct an analysis

[400] John Henry Merryman, David S. Clark, and John O. Haley, The Civil Law Tradition: Europe, Latin America and East Asia, Charlottesville: Michie, 1994.

[401] Hage, J. (2014), *Comparative Law as Method and the Method of Comparative Law*, 1-2, Maastricht European Private Law Institute, Working Paper no. 2014/11

[402] Cf. Mordechai A. Ravillo, Pablo Lerner, "On the Place of Comparative Law in Israel," Law Studies (2004), 89, p. 114

[403] Alan Watson, Legal Transplants: An Approach to Comparative Law (2nd.ed,1993).

of the different measures, including social, political, economic and religious goals, and particularly of how religious values influence decision-makers.

Comparative law compares a number of different institutions because it is important to remember that, despite the fact that a certain institution has an identical name, and looks the same, this does not mean that the action that it performs in different places is manifested in an identical fashion. It is possible to conduct a comparison of the law on a number of different levels. For instance, if there is a problem with a legal question on the legislative level, this can be examined across different countries. Thus, for example, in my research, I seek to explore the problem of medical negligence through considering the non-fault compensatory model with a view to proposing a change in legislation. Therefore, I compared different legal systems that implement the model. Another way is to compare legal methods – for example, the comparison between the common law and the continental law. Such a comparison would focus on values, society and the law on a number of levels, and for a number of aims, in order to explore a certain topic or legal question. As a lawyer who deals with tort law and medical negligence cases on a practical level, I will carry out research on medical negligence by analysing rulings and comparing their resolutions to those in other countries.

In general, comparative law offers relevant information to legal practitioners.[404] This is especially the case in Europe, where it has yielded results that demonstrate the potential of best practices and mutual learning in various countries. This extends to the legal-medical sector and the comparison of no-fault compensatory systems that are the goal of the current research. Comparative research has attained results. All over Europe (but also outside of it) scholars and other lawyers are involved in comparative research projects, in harmonisation initiatives, and even in the drafting of 'European codes'.

Civil officers from various countries prepare European directives, which should as much as possible fit with the legal concepts and structures of the Member States, at least to the extent that it should be practically possible to implement them into domestic law. Judges in European and other international courts (and the advocates, référendaires, etc) have to face divergences in legal cultures and need to bridge them in one way or another, on a daily basis. Law students attending programmes abroad, through schemes such as Erasmus/Socrates or otherwise, also have to integrate the new 'foreign' information into their domestic legal knowledge and culture. 'European' textbooks and casebooks are published and used in legal education and legal practice.

Until as early as 2004, comparative legal history was largely unexplored within the literature, even as it was "undergoing something of a renaissance" due to calls for the harmonisation of private law within the EU.[405] However, it has an important role to play in understanding the relationship and dynamics at play between law and societal change.[406]

[404] Van Hoecke, M. (2004). Deep level comparative law. In M. Van Hoecke (Ed.), *Epistemology and methodology of comparative law* (pp. 165–195). Oxford, UK: Hart Publishing. pp. 172-173.
[405] Samuel, G. (2004). Epistemology and Comparative Law: Contributions for the Sciences and Social Sciences. In In M.V. Hoecke (Ed.). *Epistemology and Methodology of Comparative Law*. London: Hart Publishing. p. 35.
[406] Watson, A. (2004). Legal Culture v Legal Tradition. In M.V. Hoecke (Ed.). *Epistemology and Methodology of Comparative Law* (pp. 1–6). London: Hart Publishing.

Comparative law is rooted specifically in private law. The reason for this is the acknowledged common assumption that, in the field of public law, there is no practical or theoretical need to look for solutions that a comparative study would have been able to bring to attention. In practice, since the 19th century, local and national governance systems have been perceived as reflecting a unique and specific choice made by the national state, which is tailored to the political, cultural, economic, and social circumstances, rather than being a result of supreme values or profound concerns. Traditional approaches to administrative law serve to emphasize the uniqueness of the national political system and thus do not facilitate a simple comparison or "transplantation" from one system to another one. Traditionally, the form of administration and administrative law were considered an integral part of the system of political institutions and were derived from the local form of regime. The administrative institutions could not, therefore, be analyzed separately (their functions were connected to the local context). This is the main difference with comparative civil law.

Nowadays, there are some attempts at comparing administrative institutions as well. Such comparisons, since they are rooted in the country's form of governance and the democratic will of its citizens, are nuanced and complex. A simple comparison will not suffice; it must be informed by theories of political philosophy that add a layer of sophistication to the debate.

In this context, private law, at least in its commercial aspects, was traditionally more conducive to comparative study and international convergence. This is the result of the private economic interests that are at stake and the need to ease increasing cross-border private transactions. Furthermore, private law does not hold the same intimate connection with the identity, fundamental values, and public institutions of the state, in contrast to the case with local administrative law. **[407]**

The field of comparative study is contingent on other disciplines that enable the expansion of the legal debate, both through new knowledge and by increasing the framework of concepts which explore additional information. Familiarity with the ways in which interesting questions of law are discussed and conceptualized in other fields generates new insights that enable the critical study of common assumptions in the legal world.**[408]** Indeed, when considering comparative methods and interdisciplinary approaches, not only is the answer important, but the question itself is too.[409] Comparative study is especially noteworthy in its scope and scale in fields such as law, literature, culture, philosophy of law, and feminist analysis of law.**[410]** The world is made up of a significant number of legal systems, with each country having its own systems of laws for its own fields of jurisdiction.

Comparative law is frequently used in Israel to learn from the experiences of other countries – both for the purposes of legal reform and to serve as an interpretation of existing legal regulations.

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[407] Bermann, George A. (1996), 'Comparative Law in Administrative Law', in L'État de droit. Mélanges en l'honneur de Guy Braibant, Paris: Dalloz, pp 30-31

[408] Douglas W. Vick," Interdisciplinary and the Discipline of Law &Society (2004) 163 pp. 181-182.

[409] Hage, J. (2014), *Comparative Law as Method and the Method of Comparative Law*, 1-2, Maastricht European Private Law Institute, Working Paper no. 2014/11.

[410] Richard A. Posner, "The Decline of Law as an Autonomous Discipline 1962-1987",100 Harv. L. Rev. (1987).

In general, turning to the jurisprudence of other countries is influenced not only by legal considerations but also by aspects related to the cultural similarities between Israel and countries that serve as a model for inspiration. The reference to jurists and legal systems in other countries has always served as a basis for legal development, among other reasons, and in many cases this has occurred during significant periods of political or economic transformation.[411]

1. The Israeli Supreme Court often refers to comparative law. This practice extends to the entire legal community, in that it encourages legal arguments based on a comparative review of the law. This strengthens the legitimacy of the use of this method. Indeed, major legislative reforms that have been implemented in Israel have been based on comparative arguments.[412] A very salient example of this is the civil codification enterprise.
2. Members of Israel's academic legal community seek to study the legal systems of other countries due to their desire to participate in the legal discourse that takes place in various international fora. To participate in an international conference or to publish an article in a journal published abroad, it is generally important to demonstrate the theoretical claims presented by the researcher using examples from a legal system that is of interest to the participants in the debate. Thus, Israeli jurists acquire knowledge regarding other methods and then make use of this knowledge when they discuss questions that arise in the local legal arena.

I consider the cultural aspect of practising comparative law to be important on two levels: that of the legal culture and that of the general societal culture. First, referring to other legal methods for inspiration is possible when there is sufficient proximity between Israel and the country that serves as a source of inspiration – in terms of social values and other broader similarities. Second, it is easier to learn from the methods from which Israeli law has already drawn legal concepts or adopted similar fundamental principles.

In Israel, the Jewish religion and tradition are very important. Therefore, in order to practice comparative law from this perspective, it is necessary to find a country that has the same perception of the importance of religion as there is in Israel. For example, in Israel, there is a ban on raising pigs and trading their meat.[413] It is possible to find a similar restriction on the prohibition of cow slaughter in India, based on the important symbolic status of the cow in the Hindu culture.[414]

In my opinion, from a practical point of view, comparative law can be a very important tool for the development of the law (alongside other theoretical and practical tools). That said, it cannot be denied that some of the uses of the comparative tool are problematic – namely, cultural

[411] Alan Watson, Legal Transplants: An Approach to Comparative Law (2nd.ed., 1993).
[412] Yoram Shachar, Ron Harris & Meron Gross, "Citation Practices of Israel's Supreme Court, Quantitative Analysis", Mishpatim, Hebrew University Law Review, Vol. 27, No. 1, 119-217 (1996). (in Hebrew).
[413] Daphne Barak-Erez, Outlawe d Pigs (2007); 403.
[414] Clause 48 in the Indian Constitution states: "The State shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milk and draught cattle'.

biases, limited knowledge, and other circumstances. However, I believe that the advantages outweigh the disadvantages and the use of comparative law in Israel is especially critical at a time when the flow of information between countries, and the level of economic cooperation between them, is increasing.

The challenge in this field is to refine the use of comparative law, while taking into account its traditional limitations. Awareness of the cultural biases of the use of comparative law and the limitations of knowledge about other methods is an important first step in this direction. Therefore, in the current chapter, I will conduct comparative legal research in the field of the no-fault method and its application in Israel.

Goals and Drawbacks of Comparative Analysis

Law operates, or should operate, on the basis of social reality, but it is the product of human imagination. Often reality and imagination do not coincide.[415] However, ultimately law must possess a certain authority over society. As Hans Kelsen states, "if law is totally ignored in practice, it scarcely deserves the name of law".[416] Continuing this theme, the next issue is what makes law authoritative at all – a large part of "borrowing law from elsewhere", namely the practice of comparative law, has to take into consideration the need to ensure that the law maintains a certain authority over the subjects of society.[417]

Foreign legal systems can educate us and inform our decisions regarding the feasibility and desirability of adopting certain rules and methods in our own legal systems. Empirical evidence, especially from systems that have emerged in similar legal and political cultures, can be very helpful in evaluating these rules and procedures in a domestic legal system.[418]

Understanding legal history and the emergence of various legal systems is essential to comparative law. Alan Watson refers to the art of borrowing from other legal systems as the "conjunction of legal culture and legal tradition". He adds, however, that it is at the heart of justifying one's own legal system.[419] Roger Cotterell[420] provides a helpful overview of the various possible justifications found in the literature for the endeavour of comparative law. These include the following:

1. To clarify one's own legal system.
2. To facilitate communication between lawyers practising in different legal systems.

[415] Alan Watson, Authority and Law (Stockholm, 2003).
[416] Hans Kelsen, *The Pure Theory of Law* (Berkeley, University of California Press 1934) pp. 10, 30.
[417] M. Van Hoecke (Ed.), *Epistemology and methodology of comparative law*.
[418] Hage, J. (2014), *Comparative Law as Method and the Method of Comparative Law*, 1-2, Maastricht European Private Law Institute, Working Paper no. 2014/11.
[419] Watson, A. (2004). Legal Culture v Legal Tradition. In M.V. Hoecke (Ed.). *Epistemology and Methodology of Comparative Law* (pp. 1–6). London: Hart Publishing, p. 3.
[420] Cotterrell R. (2006), *Law, Culture and Society*. Legal ideas in the mirror of Social Theory, Ch. 8 Sociology and Comparative Law. Ashgate: Aldershot, p.130.

3. To explicate the development of the law in certain legal methods by tracing lines of legal borrowing and influence (particularly useful in the Israeli context).
4. To harmonise or unify areas of law in order to promote trade or cross-border economic activity (the European context).
5. To pursue legal solutions for international conflicts, thus answering the needs mentioned above of the political dimension.
6. To assist law students and scholars of jurisprudence in their understanding of other legal systems and thus challenge their assumptions and legal perceptions – "appreciation of the difference".
7. To help scholars understand the power of legal cultures.
8. To support the "awakening of an international legal consciousness".
9. To contribute towards the spreading and disseminating knowledge of the social world through the legal aspects.

In the research that I will carry out, great significance is attached to resolving medical negligence in tort law through comparison with other countries across the world and the different means of providing compensation for the harmed parties. Differing legal methods can provide alternative perspectives, and I will subject these to analysis by comparing various aspects.

In accordance with Patrick Glenn's theory[421], the aims of comparative law as a discipline can be formulated as follows:

a. Learning and gathering knowledge about different legal systems and legal institutions.

b. Creating taxonomies and classifications of laws and legal institutions.

c. Ascertaining knowledge in the evolutionary context (the development of legal institutions).

d. Utilitarian aims (helping the legislators and lawyers in their practice).

The study of comparative law also presents certain drawbacks and pitfalls that the scholar ought to be cognizant of when engaging in the process of comparison and evaluation.[422] Comparatists who consider it feasible to compare and even harmonise legal systems, and who find value in the endeavour, are liable to simplify legal knowledge. This is especially the case when harmonisation is possibly advanced via codification. Secondly, those who are sceptical about a harmonisation or comparative process, are at risk of slipping via a sort of "culturalism" [423]from epistemology towards, …, psychological explanations that end up as incomparable with the institutional structures identified as being central to civilian rationality. This can therefore imperil the process as a comparison will fall hostage to ideology rather than epistemology.

[421] In the Elgar Encyclopedia of Comparative Law (Glenn 2006). Compare the 'purposes of comparative law research' as listed by Esin Örücü (2007, p. 57-65).
[422] Samuel, G. (2004). Epistemology and Comparative Law: Contributions for the Sciences and Social Sciences. In In M.V. Hoecke (Ed.). *Epistemology and Methodology of Comparative Law*. London: Hart Publishing. P. 77.
[423] Samuel, *Epistemology and Method in Law*, (2003).

Some have even questioned whether the study of comparative law with the process of comparative research can even be considered a method.[424]According to this view, comparative law can be considered as the collection of an "amount of data" by conducting comparative legal research, which leads to a certain conclusion or various findings. However, Jaap Hage argues that this process of gathering data and putting forward conclusions does not amount to a method. This will have implications for the use of comparative legal research in terms of its application and implementation. No doubt legal comparisons can help to support the legal system in other countries. For instance, Sebastian McEvoy makes a list of purposes that comparative law can support.[425] This relates to the European context, which is important for understanding later on in this chapter given my argument that only countries with similar systems of governance and concepts of the rule of law can engage in effective comparative law. McEvoy states the purpose of comparative research is to ascertain whether: 1) European law can be harmonised; 2) if a corpus of laws can become a system; 3) whether the human mind is universal within the broader context of cultural groups; and 4) whether law *should* be humanised. It is therefore not clear if this amounts to a method in itself or simply the pursuit of answering certain questions that perhaps cannot be answered. Indeed, Christian von Bar[426] suggests that the courts rarely base their rulings on comparative law, and that this discipline has more frequently been used by legislators to justify political decisions. This, therefore, shows us that comparative law also has a political dimension, which could undermine its legitimacy for some jurists.

Methods of Comparative Law

There are a number of research methods that are employed in comparative law because of the differences between the various legal systems. It is possible to distinguish between two types of research in comparative law. The key is "micro-comparison", which analyses the laws belonging to the same legal family. By observing and analysing the differences between legal systems from the same family, the researcher is in a position to answer the question of which ideas and specific institutional solutions could be applied in their legal system, and under what conditions. The researcher will explore the various differing systems in order to gain insight into foreign legal institutions and thought processes.

The situation differs greatly when it comes to macro-comparison. Here no comparison is possible without previously identifying and thoroughly mastering the fundamentals of the law systems as they differ from place to place. The jurist must, as it were, forget his or her training and begin to reason according to new criteria. In the comparative study that I will carry out, there is not one singular method to compare the law. Rather, it requires a more holistic comparison and analysis of multiple layers, including legal, social and political analysis. Following this comparison, I will present the no-fault system as it may pertain to Israel.

[424] *Ibid.*
[425]McEvoy S. (2012). Descriptive and purpose categories of comparative law in Monateri, P.G. (ed). In *Methods of Comparative Law.*Elgar: Cheltneham.
[426] Von Bar, C. (2004), Comparative Law of Obligations: Methodology and Epistemology in V.H., Mark (ed.) *Epistemology and Methodology of Comparative Law*. Hart: Oxford.

Naive epistemological optimism assumes that comparative law can do very well without any method, or that 'comparing' is just a natural activity: you look and listen, and automatically you 'see' the divergences and commonalities; you compare different legal solutions[427] and automatically you 'see' the 'better solution'.[428] The implicit, unconsciously followed methodology, the ideological assumptions, in terms of their influence on the description and interpretation of the foreign law and on the choice of the 'better solution', thus remain completely out of view. For instance, as rightly noted by Jonathan Hill, "the approach adopted by 'better solution' comparatists fails to consider a more fundamental question, namely whether the function which the rule or institution serves is a worthwhile one."[429] In other words, something comes out of comparative research, but we do not know whether it is the right thing, neither at the descriptive level (what is the foreign law and how does it differ or not from our law?) nor at the normative level (which is the best rule or legal solution?).

The specialist of macro-comparison also picks out the structural differences existing between certain systems. Accordingly, the Anglo-American lawyer must be aware of the importance of the distinction between public and private law—between law involving the state, and law involving only individuals. The jurist in a Roman-law country must, conversely, appreciate the significance of the concepts of common law (unwritten customary law of various kinds) and equity (the use of injunctions and other equitable remedies), neither of which have counterparts in his or her own system. Lawyers in Israel primarily follow cases in the US and take precedents from them. The lawyers from a centralized country must familiarize themselves with the distinction between federal law and the laws of secondary jurisdictions (states, provinces, cantons, and so forth)—a distinction that is of fundamental importance in many countries. If the lawyers are from a country like England or France that acknowledges the sovereignty of the national parliament, they must give due weight to the prominence of constitutional law in countries that permit courts to review the constitutional validity of legislative acts—especially in countries such as the United States and Germany.[430]

It can even be argued that there is intrinsic worth to the very asking of research questions themselves. Indeed, the questions will lay out the research process and method. As discussed by Hage, this can be illustrated by means of a legal example. Even if one assumes that the content of the law is determined by the sources that underlie a legal system, it still makes a difference for the method that is to be used whether the research question is descriptive, explanatory, or evaluative. The method to consult the law in handbooks, in case law, or in legislation, is better suited to answer

[427] Van Hoecke, M. (2004). Deep level comparative law. In M. Van Hoecke (Ed.), *Epistemology and methodology of comparative law* (pp. 165–195). Oxford, UK: Hart Publishing. pp. 191.

[428] Otto Pfersmann has rightly criticised the naive epistemological and ontological assumptions underlying such a view: 'Elle lie implicitement une thèse épistémologique (un cognitivisme juridique: l'expert des règles positives sait ce que sont les règles idéales) à une thèse ontologique (ce savoir produit des règles). Elle constitue une variante du sophisme naturaliste induisant l'habituel fantasme du juriste de se croire producteur de règles idéales dans la mesure où il est expert de règles positives.' (O Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', Revue Internationale de droit comparé 2001, 275–88, at 279).

[429] 5 J Hill, 'Comparative Law, Law Reform and Legal Theory', Oxford Journal of Legal Studies, 1989, 101–15, at 104.

[430] The International Encyclopaedia of Comparative Law, proposed 16 vol. (1971).

questions concerning the content of the law than to explain or evaluate this content. The law may be explained by means of historical data, by political developments, or by legal-economic considerations. And law may be evaluated by predicting the consequences of rules and measuring them against a certain standard.[431] We can therefore contemplate various "levels of comparison" between legal systems and the political and social contexts of which they form a part, rather than just a simple linear comparative model between methods of law.

"Levels of comparison" may be distinguished in various ways, when comparing law from different perspectives. The levels on which the law is made and practised geographically (e.g., international, European, state, sub-state) will as such also influence the possible, or at least most evident, levels of comparison.

A peculiar case is the comparison of EU law with national laws. As the structure of both types of legal systems, and also their underlying objectives, are different, this will influence the methods used for comparison. Renaud Dehousse gave as an example the disintegrative impact of EU law on national insurance policies, caused mainly by the diverging regulatory objectives pursued at each level: market integration for the EU, and regulation of the insurance market at the national level[432]. This implies that the functional, structural and analytical methods should be employed at a deeper level, where those more fundamental differences between the compared legal systems and regulations would be taken into account. Also, the structural interdependence of both legal systems prevents the researcher from comparing them as if they were separate and independent units.

There is a need to compare between the legal cultures that underpin the diverse legal systems in question. These comparisons relate to legal culture[433], legal argumentation[434], judicial decision-making[435], styles of legal writing, divergent approaches to legal sources[436] and to statutory interpretation, the role of legal doctrine, the respective role of the legal professions,[437] and the role of form in law in relation to substance[438]. Such comparative research has a strong theoretical dimension and tries to draw the background against which legal systems are understood and applied by those working in those legal cultures. The methods used for comparison at this level will mainly be analytical and historical, often revealing hidden worldviews, which strongly orientate the attitude towards the law. Even if such underlying legal cultures and worldviews are

[431] Hage, J. (2014), *Comparative Law as Method and the Method of Comparative Law*, 1-2, Maastricht European Private Law Institute, Working Paper no. 2014/11.
[432] R. Dehousse, 'Comparing National EU Law: The Problem of Level of Analysis', Am.Jo. Comp. L. 1994, p. 761-781.
[433] Legal culture' is used in a broad sense, encompassing tradition, usages, world view, paradigmatical legal frameworks and anything which is not 'law' in the strict sense but influences legal thinking.
[434] J. Bomhoff, 'Comparing Legal Argument', in: M. Adams & J. Bomhoff (eds.), Practice and Theory in Comparative Law, Cambridge: Cambridge University Press 2012, p. 74-95.
[435] M. Lasser, Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy, Oxford: Oxford University Press 2004.
[436] N.D. MacCormick & R.S. Summers (eds.), Interpreting Precedents: A Comparative Study, Brookfield, VT: Aldershot/Dartmouth: Ashgate 1997.
[437] R. van Caenegem, Judges, Legislators and Professors, Cambridge: Cambridge University Press 1987.
[438] P.S. Atiyah & R.S. Summers, Form and Substance in Anglo-American Law, Oxford: Clarendon Press 1987.

not part of the positive law as such, they mostly have a decisive influence on the final content of the law as applied in practice.[439]

Law in action may be (quite) different from the law in books. That is why a comparison at the level of rules has to be complemented by, or in some cases started with, a comparison of judicial decisions. In some cases, such as very recent legislation or the unavailability of sources in a language that one has the necessary competence to conduct research in, comparison will be limited to the level of legislation. However, in any substantive research in comparative law, both legislation and case law will have to be studied because these components are of decisive importance – in all legal systems, whether common law or civil law – for knowing the law.[440] Such investigations can show how diverging rules and doctrinal constructions may lead to similar decisions, or how similar rules and/or doctrinal constructions may lead to diverging practical solutions. This is especially important in hard cases.

Differences between diverse systems are not always of the same order: some are considerable, while others are so closely related that specialists in one branch of a legal "family" may often easily extend their studies to another branch of that family.[441] Therefore, the comparative study that I have chosen for this research is between the following countries: New Zealand, Sweden, and the USA and Israel. I chose these countries in order to compare their legal institutions and state characteristics to those of Israel. In particular, the no-fault system has succeeded in New Zealand and Sweden and has proven itself to be effective. In my opinion, the broader social goals and values of these countries share certain similarities with the State of Israel. Consequently, I will demonstrate both the advantages and disadvantages of the no-fault system.

The research aspires to consider legal phenomena and analyse legal questions from a number of points of view, both internally and externally, and from the present time as well as from other periods of time. Resolving legal questions entails applying a combination of methodologies and different perspectives to the legal phenomena, which will enable us to comprehend them holistically – similar to the Asian parable about elephants and the blind people. A group of blind people try to understand what the elephant is, and in order to do so, each member of the group touches a part of the elephant's body. The person who touches the elephant's leg claims that it's like a tree; the one who touches the elephant's tusk is of the opinion that the elephant is similar to a spear, while the one who touches the elephant's trunk thought that it was similar to a snake, and so forth. Through this action, the blind people believed they would acquire a full understanding of the essence and form of the elephant. Scholars who support the combination of different methodologies and points of reference tend to reach the conclusion that such an integration is

[439] See, e.g., for explaining a diverging application of the same European rules in England and Italy by the influence of tradition Nebbia 2000.

[440] When, a century ago, Roscoe Pound published his famous paper 'Law in Books and Law in Action' (1910) he mainly commented – sometimes approvingly, sometimes disapprovingly – on the way judges, public prosecutors and the police deliberately did not follow the written law. He considered it the work of lawyers "to make law in the books such that the law in action can conform to it" (p. 86).

[441] The International Encyclopedia of Comparative Law, proposed 16 vol. (1971).

capable, in theory, of yielding a more integrated and complex understanding, or at least a balance, between the components of different theories and points of view.[442]

In the field of tort, there are many similarities in approaches between civil law and common law jurisdictions, particularly in the requirement of a certain standard of care which must be exercised in order to find liability for unintentional harm.

On the question of intentional harm, the common law has proceeded by establishing specific torts, while continental legal systems categorise particular groups of cases utilising a general clause.

If any appreciable harmonisation of legal systems ever takes place, the legal categories of tort and contract will arguably be one of the most easily adaptable aspects. If the law's clear policy is to provide a remedy in those cases where a breach of a legal rule or norm has occurred, this could be done far more simply by adopting this principle as an explicit policy and using the contract/tort dichotomy purely as a means of identifying the source of the legal obligation. In this way, particularly in common law, the ghosts of the past will be exorcised forever, and this will enable claimants to obtain legal redress or compensation more expeditiously and more frequently.[443]

In this research, I will conduct a comparative study of the influence of the no-fault system on the various countries in which they were implemented. The countries that were subject to comparison are presented in the table attached below in the next subsection. I will also analyse different theoretical approaches, which I will implement, as well as rulings and legal questions. I will make a comparison between the selected national systems and that of the State of Israel, not only at the legislative or adjudicative level. Since the social reality may vary from country to country, I will therefore examine the degree of practical implementation of existing legal regulations in these countries. For example, I will also make a comparison, from the practical point of view of my profession as a lawyer, of the figures for legal rulings and their implementation.

When comparing the law in radically different legal cultures, it is obvious that meaningful comparison will only be possible at the deeper level of the underlying cultures and not at the surface level of rules and concepts. Here, surface-level comparative law inevitably turns into deep-level comparative law and becomes mainly legal anthropology.

During my research, I have applied the "intermediary approach". Therefore, I need to analyse the context of the laws, the tradition and religion that play a paramount role in the state, and the influence of new laws and the changes of the legislator that will have an impact on resolving medical negligence cases by means of a no-fault system.

[442] Harnold J. Berman, "Toward and Integrative Jurisprudence: Politics, Morality, History",76 Cal. L. Rev.(1988),779. Winfried Brugger," Legal Interpretation, Schools of Jurisprudence and Anthropology", (1994)395.
[444] David M. Zlotnick, "The Buddhas Parable and Legal Rhetoric" 58 Wash & Lee L. Rev L. (2001) 957, pp. 961-965.

Methods of The Research

According to an alternative interpretation of the aforementioned parable of the blind elephant, normative truth or legal reality exist, like the elephant, in an objective reality that is not dependent on partial attempts to discover and truly understand what they look like. The same applies to the appropriate legal ruling or legal reality. There is, however, another interpretation of the parable. According to its original significance in the Buddhist tradition, no perspective or combination or perspectives makes it possible to know or describe the elephant, or to find the correct legal ruling or describe the legal reality as it is. This is due to the fact that the reality or correct legal answer do not exist at all, in the sense that it is not possible to understand and describe it in human terms.Comparative study adopts the approach that one should not be satisfied with exploring only one of the elephant's limbs, or with one perspective of the law, but that one should instead try and combine several examinations and points of view.[444]

The comparative research of my thesis aims to demonstrate that it is possible to learn, through comparison, from other countries in order to import suitable ideas and integrate them into the Israeli system. That said, it would be myopic to ignore the fact that the State of Israel is a Jewish country with a somewhat unique societal structure. Israeli society is characterized by a long-standing tradition and religion, diverse demographic groups, and a myriad of security and budgetary challenges. Thus the state's strategic planning and budgetary decisions must be taken into consideration when attempting to shift to a no-fault system in medical negligence cases. Nevertheless, we ought to learn and try to advance this concept, as the system has arguably been a success in the countries with which I have made a comparison; countries whose values and social goals are similar to those of the State of Israel.

Therefore, with the above borne in mind, I consider the comparative study of one topic insufficient and unsatisfactory. Instead, I have conducted comparative in-depth research at numerous layers with regard to the following topics and angles:

Comparison of Institutions	• Courts - analysis of rulings • The legislative authority - basic laws • Health budget considerations • National Insurance institutions and the health system • Religion - religious considerations
Comparison of Philosophical Approaches	• Access to justice • Human rights - basic laws • Access to the courts • Social approach and state goals • Distribution of resources - distributive justice
Comparison of Problems of Tort Law	• Comparison of rulings and analysis in different countries • Analysis of different approaches to compensation for victims of medical negligence • The deterrence approach – considerations for and against

[444] David M. Zlotnick, "The Buddhas Parable and Legal Rhetoric" 58 Wash & Lee L. Rev L. (2001) 957, pp. 961-965.

	• Analysis of defensive medicine • The goals and ambitions of the state in providing compensation without proof of damage
Laws and Regulations in Tort Law	• Comparing laws and regulations for approaches to providing compensation in different countries • The approach of the court and the ruling for providing compensation for immaterial damage, according to different approaches • Pain and suffering in the analysis of the goals of countries that have adopted the no-fault method for providing compensation
No-fault System	• Analysis of the no-fault systems in New Zealand, Sweden, and the USA • Advantages and disadvantages of the system • Social goals • Payment systems and the criteria for compensation

Upon completing my research for this comparative study, I have concluded that there is no one truth or one solution that can be duplicated by comparison with another country. Therefore, the "middle-way approach" ought to be adopted and implemented as a concept. When I analyze the "no-fault" method as adopted in other countries, but consider the tradition, religion, institutions, legislation, and political and economic reality in the State of Israel, I see the need for pragmatism and flexibility when adopting foreign concepts and norms. However, I believe that great importance is attached in Israel, by both the state and citizens, to solidarity and the provision of social conditions, and more generally, a concept of a "well-being". This, therefore, informs my belief that the no-fault concept can succeed and prevail in Israel.

Comparing No-Fault Systems Internationally: Introduction to the No-Fault System

Medical diagnosis and treatment errors that cause damage or injury to patients, occurring in both hospitals and community health facilities, are currently one of the biggest challenges for healthcare systems around the world.[445]

For the tort system, the most common system of compensation for injury in the world, there are multiple problems in granting compensation to all individuals who are injured as a result of medical complications. This is partly because the tort system rests on the principle of proving fault, while a no-fault system is based on the idea that proof of fault is not required.

Currently, the system for compensating those injured by medical errors in Israel is based primarily on tort law. However, the courts are increasingly unable to effectively cope with the challenges posed by the medical system arising from accidents and medical negligence. Both the number and scope of claims are rapidly growing, and the legal system is forced to deal on a daily

[445] G. Bin Nun, Y. Berlovitz, M. Shani, , ***The Health Care System in Israe ,***m Oved Publishers Ltd. (2010) (Second edition, 572 Pages, Hebrew)

basis with legal cases that require special medical expertise. The courts are neither the ideal arena to deal with complex medical cases nor the place to learn and gather new understanding and insights. Not only does the judicial process fail to contribute to creating mutual trust between patients, medical personnel and healthcare institutions, but many of the approaches and results are, in their very essence, largely irrational. They often lead to a sense of unease and thus cause a further deterioration of the compensation system for medical injuries.

In fact, the existing tort-based system is characterised by multiple flaws and deficiencies, including:

- Ineffectiveness of the legal system.
- Conflicts of interest between physicians and patients in the health system; between insurance firms and the injured parties; between the weaker parties and the financial imbalance in the management of the legal procedures
- The lack of consistency in compensatory ruling
- A lack of understanding on the part of the judges with respect to the professional material.
- A fault system that encourages 'defensive medicine'.
- Dissatisfaction and grievances are harboured by both physicians and patients during the legal process.
- Substantial costs are imposed on both the medical system and patients, which could be avoided.
- A lack of transparency between the parties; insurance firms protect the healthcare system and their own financial interests, and thus do not provide transparency to the injured party.
- Inconsistency in the rulings of different cases.

  Ultimately, the above factors can lead to the following situations:
- The money does not reach the claimants.
- The legal process is long and drawn out (often lasting several years), the costs of which are in the initial stages imposed on the claimant of the lawsuit.
- The parties shirk responsibility and cast blame on one another, when in fact there are several actors involved in the treatment.
- There is no doubt that the claimant is the most harmed party.

In light of all the flaws of the existing tort-based system and the growing calls to create a system that places the patient at the heart of the proceedings, it is widely understood in Israel that reforms to the legal system are needed; in my view, this requires the introduction of the no-fault method. I suggest that implementing such a system will lead to a significant change in the treatment of the victims of medical negligence and will constitute a fundamental legal, economic and social reform.

The driving principle behind the no-fault system is the removal of the requirement of liability. The simplification of the legal procedure reinforces the sense of distributive justice and

fairness vis-à-vis the patients, for whom the outcome of the medical treatment was not as expected. Therefore, a no-fault compensation scheme should rank at the very top of a list of long-term solutions to the crisis in medical malpractice.[446]

The advantage of a no-fault system is its simplicity in attaining the goal of compensating the injured party for the harm caused in strict accordance with certain rules and guidelines that each country determines. This provides a comprehensive solution to the state's responsibility to its citizens that derives from social solidarity.

Various European legal systems have tried to put into place more effective schemes for compensating patients for the injuries they have sustained.[447] According to one of the concepts guiding these systems, not only should compensation for the undesirable effects of medical procedures on the patient be funded by the state, but the related obligation to compensate damages due to these procedures should also be imposed on the state. Another principle emphasises the need to introduce liability based on risk or equity principles. Contemporary no-fault compensation systems are based on the assumption that if the specific harming party is held responsible, there is no need to prove fault on their part.

Another feature of the no-fault compensation system can be seen in the simplification of the procedures, the aim of which is to compensate the injured party and restore him or her to the state prior to the incident by transferring responsibility for the proceedings and/or opinions about the claim raised by the claimant to independent bodies. The model of the proceedings carried out differs, depending on the particular country's policy.

The most common form of no-fault system is one providing automatic compensation, not for all injuries, but for a limited set of 'designated compensable events'. Such a compensation system is closely integrated with the day-to-day activities of healthcare providers, individual practitioners, and health maintenance organizations (HMOs). This system makes a clear link between the amount of compensation and the outcomes of the medical intervention. In addition to providing quick and equitable compensation for a wide range of injuries, a properly designed system includes strong incentives for modifying the conduct of healthcare providers, and can, therefore, dramatically improve the quality of healthcare.[448]

In this chapter, I will present the no-fault system in three sections. The first will focus on a comparison between some of the most common no-fault systems that currently exist in the world. The second will present the core social, legal and moral arguments for the implementation of a no-fault compensation system in the State of Israel and explain why it will be adaptable to the Israeli method, which currently works according to a fault-based compensation system. The third and final sub-chapter will explore the potential implementation of the no-fault system in Israel.

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[446] Tancredi, L., 1986. Designing a No-Fault Alternative. *Law and Contemporary Problems*, 49(2), p. 277.
[447] R. Elgie, T. Caulfield, M. Christie, Medical Injures and Malpractice, *Health Law Journal* 1993, No. 1, p. 97.

[448] Havighurst, 'Medical Adversity Insurance'– Has Its Time Come, 1975 DUKE L.J. 1233, 1241–49; Havighurst & Tancredi, 'Medical Adversity Insurance' – A No-Fault Approach to Medical Malpractice and Quality Assurance, 51 HEALTH & SOCY 125, 128–30, 160 (1973).

A Comparison of No-Fault Systems

A Review of No-Fault Systems

The no-fault system of compensation for medical injury is a legal approach that has been adopted in several countries throughout the world in order to regulate compensation for patients due to injuries inflicted in the course of medical treatment. However, there are often substantial differences between the mechanisms implemented in each country that has adopted the system. While common law legal systems apply the tort law approach, whereby compensation is granted to the patient that has proven that the medical provider bears responsibility for the harm caused to him or her, the no-fault system is different. The common denominator and shared principle of all no-fault systems, and that which distinguishes them from common tort law methods, is that the provision of compensation is contingent not on proving the responsibility or negligence of the medical provider, but rather on showing a causal connection between the treatment received and the injury. The driving principle behind the no-fault system is the removal of the requirement of liability. The simplification of the legal procedure reinforces the sense of distributive justice and fairness vis-à-vis the patients for whom the outcome of the medical treatment resulted in harm an suffering.[449]

Different No-Fault Systems

While reviewing the no-fault systems instituted in New Zealand, Sweden, France, parts of the United States, the major comparison is between the New Zealand, Swedish and U.S. models. The New Zealand model is of particular importance, as this country was the first Western nation to make the dramatic shift away from a tort-based approach to medical and accident compensation to a no-fault accident compensation law in 1974. Long part of the common law tradition practiced in the United Kingdom and the United States, New Zealand was the first to act on a long-acknowledged need to reform the tort-based system. Indeed, already at the end of the 1960s, New Zealand established the Woodhouse Commission to find alternatives to the tort-based approach to accident compensation, recognizing all the problems mentioned above, and being motivated to introduce a reasonable, fair and economical system. In contrast to the United States, which had a fundamental mistrust of government and was devoted to defending individual freedoms against institutional and government abuses, New Zealand had a much stronger tradition of trusting and working with the government to ensure fairness and social welfare for all its citizens.[450] Following the Woodhouse report, New Zealand created a government-administered comprehensive no-fault compensation scheme to compensate those who had suffered accidental injuries, even from medical malpractice.[451] In moving away from the tort system, which applies a complex, time-consuming, expensive and unpredictable process to try to determine the justice of an injured party's claim against an alleged injurer, New Zealand's new system provided a process of

[449] World Bank, Medical Malpractice Systems around the Globe: Examples from the US Tort Liability System and the Sweden No-Fault System. Washington, DC: World Bank, 2004.

[450] W. Bradley Wendel, Political Culture and the Rule of Law: Comparing the United States and New Zealand, Otago Law Review 3, 4.

[451] Ibid., p. 26.

automatically providing financial assistance to an injured party, even if blame could not be determined, thereby representing a dramatic departure from the traditional tort approach. As Melanie Nolan has written, the five principles underlying the New Zealand no-fault compensation scheme, as set for in the Woodhouse report, were based on the unique factors of "community, responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency".[452] New Zealand, then, presents a unique case of citizens and the government collaborating in full trust to provide fair and timely compensation to accident victims.

Sweden also provides an interesting point of comparison, as the underlying political and legal traditions there differ significantly from those in New Zealand and the United States. Sweden has long provided comprehensive general welfare and public healthcare systems, which already covered a large percentage of the costs incurred by parties injured by medical malpractice, including sick leave and medical expenses.[453] Unlike in the United States, the Swedish citizenry and political tradition did not seek to limit government powers; instead, the focus was on maximizing government intervention as rationally as possible to ensure equality and the general welfare of all its citizens. A few years after New Zealand's program was instituted, and recognising the need to more quickly, thoroughly and efficiently compensate victims of medical malpractice, Sweden instituted a hybrid system, whereby injured parties can either request a capped amount of compensation from the government, or try to receive higher compensation by going through the court system. While the tort-based court system remains in place to an extent, the demands placed on it are greatly reduced due to the presence of the government scheme. Again, Sweden presents an example of the people and the government working together to provide a fair and reasonable solution for injured parties.

Finally, of the fifty jurisdictions in the United States, each with its own medical regulations, notwithstanding the enactment of the 2010 Affordable Care Act, this study looks at two states, Florida and Virginia, which have taken very small steps to move away from the traditional tort-based judicial process for granting compensation to medical malpractice victims by instituting no-fault compensation schemes for injuries suffered by children during childbirth. While these represent very small exceptions to the general tort-based judicial process for medical malpractice compensation in the United States, they do indicate some movement in response to decades of criticism of a legal system and political culture "characterized by polarization, fragmentation, mistrust of government power, and a highly individualistic, us-against-them orientation toward both adjudication and policy-making".[454] These examples provide some insight into future directions that can be taken in the United States to move towards a no-fault system for medical malpractice compensation.

[452] Melanie Nolan, Inequality of Luck: Accident Compensation in New Zealand and Australia, Labour History, no.104 (2013), pp. 199–200.
[453] Jocelyn Bogdan, Medical Malpractice in Sweden and New Zealand: Should Their Systems Be Replicated Here? Center for Justice and Democracy, White Paper, 2011.
[454] Wendell, Political Culture, p. 4.

Features of the No-Fault System in Various Countries

New Zealand was the first country that established a no-fault system in the medical negligence field in 1974. After NZ, additional countries developed their own versions of the system. These included: Sweden (1975), Finland (1987), Norway (1988), Denmark (1992), and France (2002). Beyond the advanced shared principle of severing the connection between compensation and liability, there are several common characteristics of the various no-fault systems in the world:

- All systems have determined restrictions and specific criteria of eligibility and coverage for compensation.
- There is a limit to the scale of coverage that is provided, such as a cap for compensation granted in certain categories and even an absence of compensation for non-pecuniary harm such as pain and suffering.
- The amount of compensation tends to be less in comparison to similar cases that are debated in tort law in the traditional legal system.
- Higher efficiency – the cost is less, and there is a ruling within a short period compared with tort law.
- In the majority of countries that have adopted this no-fault method, there is a generous social welfare system.

The way in which countries meet the cost of injuries varies according to country. These personal injury compensation systems form part of broader systems in developed countries, including the social welfare system. The development and operation of both the personal injury compensation and broader systems are typically the result of numerous factors, including culture, population changes, and other societal trends. Some general characteristics of compensation systems globally are outlined. The following comments can be made about Table 2 below:

- Coverage for an injured **employee** (including occupational disease) is provided on a no-fault basis in all countries, except the United Kingdom.
- Injured individuals in road and transport accidents are generally covered by fault-based third-party liability schemes.
- Injuries occurring to patients as a result of medical diagnosis or treatment typically have coverage through tort liability. In many countries, this requires proof of the causal link between the negligence of the health practitioner and the injury incurred by the injured party, proof that the healthcare provider had a duty of care towards the injured party, and other various criteria.
- Other injuries, such as those caused during sports or recreational activities, at home or in other public places, generally do not have any specific coverage. Coverage may be available via tort liability, or social welfare/public health, depending on the circumstances.
- Illness is almost universally covered by social welfare/public health and/or private insurance.

In **New Zealand,** the Accident Compensation Corporation (ACC) provides compulsory insurance coverage for personal injury for everyone in New Zealand, whether a citizen, resident or visitor. The ACC also operates a universal no-fault coverage of injury, which contrasts with the coverage

provided in other countries. It is, therefore, a particularly useful starting point in comparing no-fault systems that are already in place.

Selected Countries for the Purposes of Comparing No-Fault Systems

New Zealand – New Zealand is the flagship country and pioneer in the field of no-fault. New Zealand very successfully employs the no-fault method through the implementation of the Accident Compensation Act in accordance with the recommendations of a special committee that explored the issue. The aims of the program are to strengthen the public interest and to reinforce the principles of social solidarity and reciprocity in the country by granting fair compensation to the injured parties in accidents, including injuries caused by medical treatment. In exchange for this, a patient who files a lawsuit through the scheme surrenders the right to the involvement of the court, with the exception of special cases. It is important to note that the public's trust in and satisfaction with the programme are beyond even the highest expectations. Many countries throughout the world are learning about the no-fault method via New Zealand.

Sweden – Many Scandinavian countries have adopted the no-fault system, and the first to do so was Sweden. The country is a case study for its neighbours and the wider EU[455]. The goals of the Swedish no-fault system are:

- To determine if the compensation lawsuits are covered by the scheme and to verify eligibility when necessary.
- To pay out compensation.
- To purchase health services and support for disabled individuals as well as rehabilitation for injured parties.
- To advise the government.

Unlike New Zealand, the Swedish no-fault scheme was established on a voluntary basis, and only became mandatory in 1996 when it was anchored in the law (Patient Injury Act). Following this reform, all healthcare providers in Sweden are obligated to provide an insurance programme that covers injury following medical treatment. The insuring bodies belong to a government authority (Patient Insurance Association), which is responsible for managing the programme and is financed by a regional government budget. Each region is the owner and manager of the insurance companies for injuries inflicted due to medical treatment. The region determines the policy terms, fixes the costs, and runs the community clinics and hospitals.

Instead of proof of negligence or liability, the no-fault system in Sweden is based on the principle of 'avoidability' – the programme compensates patients whose injury it was possible to prevent under the optimal circumstances, i.e., under the care and treatment of the 'best possible' physician, as it were, or the 'perfect' healthcare system. It is worth noting that, in this way, the Swedish model advances a very high standard of quality. The Swedish system also covers non-

[455] Jaap Hage discusses the idea of comparative law being popularized due to efforts to "harmonise the law of the members states of the EU" in Hage, J. (2014), *Comparative Law as Method and the Method of Comparative Law*, 1-2, Maastricht European Private Law Institute, Working Paper no. 2014/11.

pecuniary damages, such as suffering, pain and discomfort. The amount of compensation is determined in accordance with the type of injury, its severity, and its duration.[456]

United States – In the United States, the discussion on reforms to compensation as a result of medical treatment has been ongoing since the 1960s. The debate is only intensifying due to the crisis whereby the insurance market has made physicians professionally responsible. Various proposals have been raised and discussed, both at the federal level and at the state level, such as a cap on claims, adopting the no-fault system, and establishing a body to examine health cases. At the current time, only the states of Virginia and Florida have adopted the no-fault system for neurological coverage.

Aspects of No-Fault Mechanisms in the World

Key components	**United States† (since 1990)**	**France (since 2002)**	**Sweden†† (since 1975)**	**New Zealand (since 2005)**
Eligibility criteria for compensation	**No-fault: Proof that the neurological birth injury occurred as a result of the birth process**	**No-fault standard: Serious and unpredictable injuries, without relation to their previous state of health and foreseeable evolution** **Fault standard: Failure to act in accordance with current scientific data or 'gross or intentional misconduct'**	**Avoidability standard:** **Injuries could have been avoided if the care provided had been of optimal quality** **Unavoidable injuries (Denmark): Rare and severe consequences of treatment that exceed what a patient should 'reasonably be expected to endure'**	**Unexpected treatment injury – for those of employable age**
Continued access to courts	**No**	**Yes**	**Yes**	**No**
How schemes are funded	**Annual financial contribution made by participating doctors and hospitals**	**No-fault: ONIAM (A tax-based, government-funded administrative body)** **Fault: Providers/insurers**	**Patient insurance schemes funded by a range of public and private healthcare providers**	**Government via tax revenue and employer financial premiums**
Financial cap	**Yes**	**No**	**Yes**	**Yes**
Financial entitlements	**Economic and non-economic** **Damages**	**Economic and non-economic damages**	**Economic and non- economic damages**	**Economic damages**

Dickson et al. 2016[457]

* Schemes operating in Australia are omitted as they report non-medical compensation schemes
†Drawing on two no-fault birth injury schemes available in Florida and Virginia

[456] Kachalia, A. B., Mello M. M., Brennan, T. A. and Studdert D. M. 'Beyond negligence: Avoidability and medical injury compensation'. *Social Science & Medicine* 2008 (66) 387–402).
[457] Dickson, K., Hinds, K., Burchett, H., Brunton, G., Stansfield, C, and Thomas, J. No-Fault Compensation Schemes – A rapid realist review to develop a context, mechanism, outcomes framework. Department of Health Reviews Facility, 2016.

New Zealand

Introduction

In 1974, New Zealand jettisoned its tort-based system for compensating medical injuries in favour of a government-funded compensation system. Although the system retained some residual fault elements, it essentially barred medical malpractice litigation. Reforms in 2005 expanded eligibility for compensation to all 'treatment injuries', creating a true no-fault compensation system. Compared with a medical malpractice system, the New Zealand system offers more timely compensation to a greater number of injured patients and more effective processes for complaint resolution and provider accountability. The unfinished business lies in realising its full potential for improving patient safety.[458]

New Zealand's compensation system arose not in response to concerns about medical malpractice but through farsighted workers' compensation reforms. A Royal Commission, established in 1967, concluded that accident victims needed a secure source of financial support when deprived of their capacity to work. Sceptical of the ability of a liability-based system to provide such support, the commission recommended no-fault compensation for personal injury.[459] At around the same time, the United States, Australia, and the United Kingdom also debated the merits of no-fault compensation, but the idea of a comprehensive approach to injury by accident failed to gain traction.[460] In the New Zealand system, injured patients receive government-funded compensation through the ACC. In exchange, they give up the right to sue for damages arising from any personal injury covered by the accident compensation legislation. This prohibition applies even when a person chooses not to lodge a claim or is not entitled to compensation.[461] It remains possible to bring actions for exemplary damages, but the courts have found that not even gross negligence warrants such damages unless there is some element of conscious or reckless conduct.[462]

The U.S.-based birth injury schemes insist that, to be eligible, the birth injury has to be the result of the birth process. They exclude injuries caused by genetic or congenital abnormalities. France has implemented two systems: a no-fault standard for serious and unforeseen medical injuries; and a fault standard for the remainder of injuries. This is the only country where access to the courts remains fully available. Sweden operates according to an 'avoidability' standard, compensating patients who have experienced injuries that could have been avoided under optimum conditions, for example, where the injury would not have occurred under the care of the best health practitioner/system. In these countries, this is referred to as the 'experienced specialist' rule. Access to the courts is available for claimants who wish to appeal against a decision, but is not available at the initial point of making a claim. New Zealand has put in place the broadest eligibility

[458] Health Affairs 25, no. 1 (2006): 278–28.
[459] O. Woodhouse, Royal Commission on Compensation for Personal Injury in New Zealand (Wellington: Government of New Zealand, 1967).
[460] R. Gaskins, 'The Fate of "No-Fault" in America', Victoria University of Wellington Law Review 2, no. 2 (2003): 213–237.
[461] 'Green v. Matheson', New Zealand Law Review 3 (1989): 564.
[462] Ibid.

criteria, with a no-fault standard applicable to any unexpected treatment injury. The only scheme to operate without a financial cap is in France, and all but the New Zealand schemes aim to cover both economic and non-economic costs. As stated, this review aims to develop preliminary theoretical frameworks of the mechanisms influencing engagement in NFCSs

Legal and Social Goals

The legal and social goals of the no-fault compensation scheme in New Zealand are intended to enhance the public good and reinforce the social contract underpinning New Zealand's society by providing for a fair and sustainable scheme for managing personal injury that aims, in its overriding goals, to minimize both the overall incidence of injury in the community and the impact of injury on the community. The key goals of the scheme are injury prevention, complete and timely rehabilitation, fair compensation, and to establish a Code of ACC claimants' rights. As part of realizing these goals, the scheme operates on the basis that individuals forgo the right to sue for personal injury in the courts, with the exception of the right to sue for exemplary/punitive damages remains. Public trust and client satisfaction in the scheme is high. Public trust and confidence in the scheme currently stand at 65%, and client satisfaction at 74% (ACC Annual Report 2020).[463]

Funding

The scheme covers personal injury generally and is not limited to injuries arising from medical treatment. Funding, therefore, comes from a variety of sources, and the ACC retains a number of different accounts for managing compensation paid in respect of various types of injuries. The accounts are as follows:

- Workers' account: premiums are paid by all employers; this is to cover work-related personal injuries;
- Earners' account: non-work injuries suffered by individuals in paid employment, excluding motor vehicle accidents;
- Self-employed workers' account: work-related injuries to self-employed people and private domestic workers.
- Non-earners' account: injuries to people who are not in paid employment, including students, beneficiaries, retired people and children;
- Motor vehicle account: injuries involving motor vehicle accidents on public roads;
- Treatment injury account: covers injuries resulting from medical treatment. The funds in this account are drawn from the Earner and the Non-Earners' Accounts.
- Residual claims account: This Account covers claims for work injuries that occurred before 1 July 1999, and non-work injuries from prior to 1 July 1992 that are still being managed.

Treatment injury is intended to cover injuries suffered in the treatment process. All adverse medical events, preventable and unpreventable, are potentially included. There is no requirement

[463] https://www.acc.co.nz/assets/corporate-documents/annual-report-2020-acc8234.pdf

that the injury must be suffered when the treatment is administered or during the treatment process.[464] It also includes a personal injury suffered by a person as a result of treatment given as part of a clinical trial in certain circumstances, including where the claimant did not agree in writing to participate in the trial. If a person suffers an infection that is a treatment injury, then coverage extends to third parties who catch the infection from the patient or the patient's spouse/partner.

Treatment includes administering treatment; diagnosis of a medical condition; a decision to treat or not to treat; a failure to treat or treat in a timely manner; obtaining or failing to obtain informed consent to treatment and the provision of prophylaxis; application of any support systems including policies, processes, practices and administrative systems which are used by the treatment provider and directly support the treatment. It also includes failure of equipment, devices or tools used during the treatment process, whether at the time of treatment or subsequently. Failure of implants and prostheses are included (e.g., design of products), except where it is caused by general wear and tear. This was designed to close a potential loophole for civil claims against manufacturers of implants/prostheses in relation to defective products, due to negligent design.[465]

Exclusions

There are a number of treatment injury exclusions:

- A treatment injury does not include a personal injury that is wholly or substantially caused by a person's underlying health condition. The fact that the treatment did not achieve a desired result does not, in and of itself, constitute a treatment injury. It is only in circumstances where the condition progresses, or a fresh injury is caused because of the treatment given (or non-treatment) that there will be coverage under the scheme. Therefore, there must be a direct causal link between treatment and personal injury. Where the injury is caused partly by the person's underlying condition or disease, and partly by treatment, it is necessary to determine which of the two is the substantial causational element. When it comes to managing complex claims, the TIC has a specific protocol for dealing with what are described as high-cost or high-risk claims which may, for example, involve birth-related neurological injury claims or media- or politically-sensitive claims. A complex claims panel meets weekly and comprises a range of TIC staff with clinical, quality assurance, medical and team management expertise. There are also observers on the panel (without decision-making powers) who have legal, policy and actuarial expertise. The clinical advisors for this category of claims prepares a brief for the members of the panel which, along with relevant reports, advice and opinions, is distributed before the meeting. The claim is then discussed by the panel and a decision is taken on whether cover will be accepted or whether further information or work is required before any decision can be made.[466]

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[464] Manning, J. (2006) 'Treatment injury and medical misadventure' in P.D.G. Skegg and R. Paterson (eds) Wellington: Thomson Brookers, pp. 698–699

[465]Manning, J. (2006) ''Treatment injury and medical misadventure'', in P.D.G. Skegg and R. Paterson (eds) *Medical Law in New Zealand '*. Wellington: Thomson Brookers, pp. 708

It falls to the claimant to establish causation on the balance of probabilities.[467]

A treatment injury does not include a personal injury resulting from a person unreasonably withholding or delaying their consent to undergo treatment. It is acknowledged under New Zealand law that a competent patient (a patient who has the mental capacity to consent to medical treatment)[468] has an absolute right to refuse to consent to medical treatment, no matter how unreasonable this may seem. The underlying policy reason behind this exclusion appears to be that while there is respect for this pre-existing legal right, the financial or other consequences of any resulting treatment injury will be borne by the patient, rather than by the scheme.[469]

Mental Injury Unaccompanied by Physical Injury

The ACC does not provide coverage for mental injuries per se. In order for coverage to be provided by the ACC, then one of the following conditions needs to be met: (1) the mental injury needs to be caused, or a material cause of physical injuries; or (2) it was caused by certain criminal acts, provided that the claimant was ordinarily resident in New Zealand at the time and treatment is being sought in New Zealand, or (3) it is an offence listed in Schedule 3, IPRCA 2001 (this covers mostly sexual offences). In addition, the claimant would also need to show that the mental injury arising from the physical injury resulted in clinically significant behavioural, cognitive or psychological dysfunction due to the physical injury.

Where a mental injury is not linked to physical injury, there is no personal injury within the meaning of the IPRCA 2001, and therefore the person has no coverage under the scheme. The person is, therefore, free to pursue legal action in the courts for compensatory damages, usually grounded in a claim of negligence for psychiatric injury.

Physical Injuries Suffered Before Birth

A foetus which dies in utero is not covered under the IPRCA 2001. The term 'person' is used in the governing legislation, and it does not include a foetus, unless and until it is born alive. However, the mother is considered to have suffered a physical injury and may be entitled to coverage under the scheme if the death of an unborn child occurred in utero. This is notwithstanding the fact that she may have suffered no other injuries to herself other than the loss of the unborn child.[470] (Manning 2006: 763).

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[466] No-fault Compensation Schemes for Medical Injury: A Review**.** Farrell, Anne-Maree; Devaney, Sarah; Dar, Amber. UK: Scottish Government Social Research, 2010).

[467] Manning, J. (2006) 'Treatment injury and medical misadventure', in P.D.G. Skegg and R. Paterson (eds) *Medical Law in New Zealand*. Wellington: Thomson Brookers, p. 7.

[468] A Dictionary of Law (7 ed.) Jonathan Law and Elizabeth A. Martin
Publisher: Oxford University PressPublished online: 2009Current Online Version: 2014

[469] Manning, J. (2006) 'Treatment injury and medical misadventure', in P.D.G. Skegg and R. Paterson (eds) *Medical Law in New Zealand*. Wellington: Thomson Brookers, p. 715.

[470] Manning, J. (2006) 'Treatment injury and medical misadventure', in P.D.G. Skegg and R. Paterson (eds) *Medical Law in New Zealand*. Wellington: Thomson Brookers, p. 763.

Health System

New Zealand's health care system is primarily a centrally-funded, tax-based system. The legislative framework for the system is established under the New Zealand Public Health and Disability Act 2000. Publicly-funded healthcare is funded through public taxation and levies collected by the Accident Compensation Corporation (ACC), the Crown entity responsible for the management of the no-fault compensation scheme for personal injuries. Hospital care, community mental health care, and public health services have traditionally been provided to 'eligible persons' (including New Zealand citizens and persons ordinarily resident in New Zealand) free of charge. Government subsidies partially fund primary health care and pharmaceuticals, with co-payments made by patients unless they are eligible for a full subsidy. Resources constraints are recognised in the governing legislation. Most public funding of the health care system is devolved through Crown funding agreements, which are made by the Minister of Health or the Ministry of Health as an agent, whereby there is an agreement to provide or fund health services within specified districts. Public health and disability services are funded directly through the Ministry of Health.[471]

The Swedish No-Fault Insurance Model

The Swedish model of medical malpractice injury liability is not based on a modification (expansion) of the rules of liability in question. Instead, it is based on obligatory insurance that the medical facilities must provide for patients (No Fault Patient Insurance – NFPI or first-party insurance).[472] This insurance was created in the 1970s, on the basis of an agreement made within the National Association of the County Councils, which is responsible for the organization and provision of medical service within the Swedish territory, involving a consortium of the four largest insurance companies. At first, the insurance was obligatory solely in the case of so-called public healthcare. Doctors who ran their practices privately, as well as non-public therapeutic agents, could be involved in the program at their own discretion, which led to differing patient situations, depending on the party carrying out the therapeutic activities. Since 1 January 1997, the insurance has also covered the injuries caused to patients due to provisions of health care at private and public hospitals, which are administered by the county councils. This means that, according to the new legal regulations, insurance for patients has become obligatory insurance for all those offering health services within the Swedish territory. In addition, a patient who is not a party to an insurance agreement and has received treatment at a private entity has a right to submit a direct claim to the insurance company with which the private entity has an agreement. The injured person, in order to receive benefits from the NFPI insurance company, does not need to prove the fault of the individuals in the medical profession or the medical facility. If the injury has been incurred as a result of wilful misconduct or gross negligence of those subjects, the insurer that has paid the benefit to the patient may submit a recourse claim for the direct originator of the damage.

[471] Paterson, R. (2006a) 'Regulation of health care' in P.D.G. Skegg and R. Paterson (eds) *Medical Law in New Zealand*. Wellington: Thomson Brookers, pp. 3-22. Paterson, R. (2006b) 'Assessment and investigation of complaints', in P.D.G. Skegg and R. Paterson (eds) *Medical Law in New Zealand*. Wellington: Thomson Brookers pp. 593–612.

[472] More information on this issue: No Fault Compensation in the Health Care Sector, Vienna – New York 2004 and related references.

The NFPI insurance scheme includes, according to its regulations, injuries that occurred during patients' therapy and hospitalization and resulted from individuals performing a medical profession (doctors, nurses, midwives, physical therapists, laboratory diagnosticians). The issue of therapy is quite broadly understood and includes not only procedures which are strictly medical, but also prevention diagnostics, palliative and hospice care, medical experiments, as well as the use of drugs and pharmaceutical materials and ambulance services. The responsibility of the insuring party within the scope of NFPI, while much wider than in cases of classic civil liability insurance, is not absolute.[473] In order to render an insurer liable for paying the benefits, the injury, health problems, or death of the patient must take place according to the conditions defined by the Act. Damages will be granted for:

• injuries that occurred throughout the therapeutic process, which could have been avoided, had the doctor used another method of therapy or conducted it in other way;
• injuries resulting from using defective or ineffective equipment or medical products;
• injuries related to incorrect diagnosis;
• injuries resulting from hospital infections;
• injuries resulting from wrongfully administered or prescribed medication;
• injuries caused by so-called hospital accidents.

Of the above categories, hospital accidents seem to be the most interesting. This category includes cases when the person was injured as a result of sudden and unforeseen circumstances, which are beyond the scope of the undertaken medical actions and are unrelated to the patient's health status and/or individual health characteristics. Such cases usually include falling out of the bed or down the stairs, when the patient is being transported between two different health facilities. In the case of the Swedish model, injuries caused by defective medical products, equipment and medical devices have been included in a separate category. Bodily injury, as well as the patient's health deterioration, may be caused by defective medical or hospital equipment, or by improper use of that equipment during a medical examination or the provision of care, or while conducting therapy. The Swedish system also provides for exceptions – circumstances which are excluded from the scope of insurance protection. This means that NEFPI does not include injuries resulting from the breach of the patient's rights, including, particularly, the events in which the patient did not receive the information related to his or her health status and within the scope of provided benefits, lack of the patient's consent for potential therapy, or breach of the medical privilege. Additionally, a specific case of a psychological health disorder resulting from therapy or hospital treatment has been excluded here, even when it has emerged that the assumed treatment method was ineffective, such as chemotherapy in the case of neoplastic processes. Situations in which given actions should have been taken immediately, or when the patient's life could have been endangered, or if the patient may have been seriously injured, give rise to yet another situation, which can be qualified as one in which actions should have been aimed at saving the patient's life. Receiving

[473] Merry, A. McCall Smith, Errors, *Medicine and the Law*, Cambridge University 2004; *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation and Compensation*, Report of the Harvard Medical Practice Study, 1990.

compensation for such injuries can be realized through a civil prosecution. At the moment when the injury occurs, the patient has the option to select the compensation system to be used in claiming damages. The patient may use the judicial process, showing the prerequisites of the civil liability of the originator of the injury, or use the NFPI system. Only the patient can make a claim for direct damages under the NFPI system. If the patient died, the family members who have been injured as a result may claim indirect damages. These persons may require reimbursement of the incurred costs related to therapy and burial, within the scope corresponding to local conventions, along with a one-time damages payment. The Fund is established on the basis of the assets transferred by the Association of Patient's Insurance Companies, created by all of the insurance companies which offer this type of insurance policy. The Swedish NFPI model has become a model for similar compensation systems used in the Scandinavian countries: Denmark (1992), Norway (1988) and Finland (1987).

Funding

Under the provisions of the Patient Injury Act (PIA 1996), healthcare providers are required to obtain insurance that covers claims being made for medical injuries. Insurers that provide such insurance belong to the Patient Insurance Association. While many provisions of this act are based on the existing Swedish voluntary scheme, the legislation includes important changes governing the right to compensation as a result of medical injury, and regarding the obligation of public and private health providers to carry what is termed 'patient insurance' to provide for such compensation.[474] There are 21 regions in Sweden, each with its own directly-elected parliaments, and each region is responsible for the provision of healthcare within its boundaries. Health care is financed by regional income tax, which represents 10% of the income of those resident within regions. A small proportion of health care (1–2%) is financed by private means or through private health insurance. Doctors are employed by regional hospitals. GPs are either employed by regions or operate as independent contractors paid by regions[475]

The regions mutually own and operate a medical injury insurance company (LOF). The insurance policy for medical injury is held by regions rather than by doctors or hospitals. The LOF covers medical injuries in regional hospitals and primary care centres, as well as for all private care (through contracts signed by private health providers). The premiums paid to LOF by the regions are drawn from regional income tax. They are not risk-based and are, instead, based on the number of inhabitants per region. It is estimated that LOF covers 90% of health care provision in Sweden. The remaining 10% is covered by private insurance companies, which provide coverage for doctors and dentists operating in private practice, chiropractors, physiotherapists and nursing homes.

[474] Espersson C. (2000a) *Comments on the Patient Injury Act* (www.patientforsakring .se/international/english/articles.asp).
[475] Essinger, K. (2006) Medical Liability in the Land of the Midnight Sun (www.patientforsakring.se/international/english/articles.asp). Essinger, K. (2009) Report on the Swedish Medical Injury Insurance (www.patient forsakring.se/international/english/articles.asp).

Eligibility

The avoidability rule: the scheme does not require proof of fault or malpractice in order to compensate a claim against a health practitioner. The avoidability rule is used instead of negligence to determine which injuries are eligible for compensation. This alternative standard is situated between negligence and strict liability. The scheme compensates patients who have experienced injuries that could have been avoided under optimal circumstances, in that the injury would not have occurred in the hands of the best health practitioner or health system, known as the 'experienced specialist' rule. This higher standard, setting the benchmark at excellent care as opposed to acceptable care, is used in other Nordic countries, although Sweden pioneered the approach.[476]

The experienced specialist rule: There are a number of aspects pertaining to the application of this rule. Consideration is given to the risks and benefits of treatment options other than the one adopted, and a retrospective approach is taken in some cases to evaluate whether the injury was avoidable. In such circumstances, it is necessary to consider whether previously unknown clinical information was potentially discoverable at the time of the treatment and, therefore, whether the injury could have been avoided. Categories of medical injury covered: eligibility is determined by reference to a number of categories of medical injury under the scheme set out below. Specific requirements on eligibility must be met in relation to injuries other than treatment or diagnostic injuries. Treatment and diagnostic injuries account for approximately 85% of all claims.[477]

- Treatment injury – 'avoidable' injury; experienced specialist rule; consideration of alternative and retrospective aspects of treatment provided.
- Diagnostic injury – 'avoidable' injury; experienced specialist rule (no retrospective element).
- Material-related injury – 'unavoidable' injury, but there are special circumstances; injury due to a defect in, or improper use of, medical products or hospital equipment.
- Infection injury – 'unavoidable' injury, but there are special circumstances; infectious agent transmitted from an external source during the delivery of care, and the infection's severity and rarity outweigh the seriousness of the patient's underlying disease and the need for the treatment that caused the infection.
- Accident-related injury – 'unavoidable' injury but with special circumstances; injury from accident or fire that occurs on the health care provider's premises where a patient is receiving treatment.

It is important to note that in the case of what could be termed drug-related injuries, only those that occur due to the incorrect prescription or administration of incorrect medication are covered under the scheme. Compensation for other drug-related injuries is covered under a separate scheme.

[476] Espersson, C. (2000a) Comments on the Patient Injury Act (www.patientforsakring .se/international/english/articles.asp).
[477] Hellbacher, U., Espersson, C. and Johansson, H. (2007) Patient injury compensation for healthcare-related injuries in Sweden.

It is estimated that just under 50% of claims are rejected on a per annum basis under the scheme, on the grounds that they do not satisfy eligibility based on avoidability.

Processing claims

A claim must be filed within three years from the time that the patient becomes aware of the injury and within 10 years from the time the injury occurred.

The PFF employs claims processors to manage the claims, who typically have clinical or legal backgrounds.[478]

Entitlements

Entitlements to compensation under the scheme are determined by reference to the personal injury compensation rules set out in the Tort Liability Act 1972. The overall guiding principle behind this legislation is that an injured person is entitled to be compensated fully for their loss. Compensation payments consist of two general components – pecuniary and non-pecuniary damages. Pecuniary damages cover loss of income and medical expenses incurred due to the injury but not covered by other insurance. Non-pecuniary damages compensate for pain and suffering, disability and disfigurement, and inconvenience. Levels are set according to schedules based on injury type, severity and duration.[479]

When a patient has died, the family may be entitled to funeral costs, compensation for the loss of financial support from the deceased's livelihood, and psychological support.

A claimant may also be eligible for a lump sum payment due to permanent impairment. Once it is determined that any disability a claimant has suffered is now permanent, a medical assessment takes place confirming the degree of disability. The disability compensation is then paid as a lump sum in accordance with tables produced and distributed by the Association of Traffic Insurance Companies setting out the percentage of disability for each type of injury and the amount to be paid as a result.[480]

Compensation for the loss of ability to work is paid in accordance with the individual patient's employment situation. Compensation for loss of income and future loss of pension entitlements due to the medical injury are paid as annuities.

Tort-Based Claims for Medical Injury

Under the Patient Torts Act 1996, a claimant is entitled to bring tort-based claims arising from medical injury in the courts. Healthcare providers are required to carry liability insurance to cover

[478] Kachalia, A., Mello, M.M., Brennan, T.A., et al. (2008) 'Beyond negligence: Availability and medical injury compensation', *Social Science and Medicine*, 66(2), 387–402.
[479] Hellbacher, U., Espersson, C. and Johansson, H. (2007) Patient injury compensation for healthcare-related injuries in Sweden (www.patientforsakring.se/ international/english).
[480] Essinger, K. (2009) Report on the Swedish Medical Injury Insurance (www.patient forsakring.se/international/english/articles.asp).

such claims. The claimant must show with reasonable certainty that the healthcare provider's conduct caused the alleged injury.

Where a claimant has sustained an injury due to the alleged negligent failure to provide information or obtain consent in relation to the provision of medical treatment, then a claim must be brought under tort law principles in the courts.[481]

Review and Appeal Mechanisms

If a claimant is unsatisfied with the decision made by the PFF regarding their eligibility and/or entitlements under the scheme, they may apply to the Patient Claims Panel. The Panel consists of a chairperson who is or has served as a judge, as well as six other members who are appointed for three-year terms. The members bring differing medico-legal and other areas of relevant expertise to the work of the Panel, which is tasked with promoting fair and consistent application of the PIA 1996 and issues opinions at the request of claimants, health care providers, insurers or the courts. The Panel is an advisory body, and therefore its opinions operate as recommendations only; nonetheless, there is a high level of compliance. It is estimated that in 10% of claims brought before the Panel, the ensuring recommendation was that coverage be granted by the PFF.

Bringing a claim before the Panel, which consists of a judge, as well as six other expert members who are appointed for periods of three years, is free of charge for the claimant, who benefits from being able to have the matter heard by experts in the field before deciding whether to bring their claim before the Panel or to proceed directly to court with a tort-based claim.[482]

The Complaints Process and Professional Accountability

Independent Patients' Advisory Committees operate in every region in Sweden. The Committee assists patients who experience difficulties in their relationship with health practitioners. The Committee does not have any decision-making powers, but seeks to take a practical approach to resolving complaints.

The Medical Responsibility Board (HSAN) deals with complaints where patients allege incompetence on the part of health practitioners. HSAN has the power to issue 'soft' warnings (reprimands) to health practitioners, as well as bring disciplinary proceedings, which are kept entirely separate from the no-fault scheme.[483]

Medical Error and Patient Safety

The analysis of medical error with a view to enhancing patient safety is encouraged in Sweden through the use of root cause analysis of the events which led to claims for medical injury under the no-fault scheme. This is economically incentivised by the National Medical Injury Insurance

[481] Espersson, C. (2000a) Comments on the Patient Injury Act (www.patientforsakring .se/international/english/articles.asp) Essinger, K. (2009) Report on the Swedish Medical Injury Insurance (www.patient forsakring.se/international/english/articles.asp).

[482] Espersson, C. (2000a) Comments on the Patient Injury Act (www.patientforsakring .se/international/english/articles.asp).

[483] Espersson, C. (2000a) Comments on the Patient Injury Act (www.patientforsakring .se/international/english/articles.asp).

Company (LOF). Senior medical figures at regional hospitals receive regular updates providing details on all claims for medical injury under the no-fault scheme that originated in their hospitals. The reasons for such claims are followed on a regular basis through visits by LOF representatives to the hospitals. Discussions are held on the data, as well as on what can be done to avoid such medical injuries in the future. National Patient Safety conferences are also held on a regular basis and are attended by representatives from the Hospital Federation, the National Board of Health and Welfare, and the medical profession.

United States

Introduction

In the United States, reform to legal and administrative arrangements for obtaining compensation for (negligent) medical injury – which is commonly known as medical malpractice reform in the American context – has been the subject of ongoing academic, policy, and political debates since at least the 1960s. The intensity of such debates appears to increase during periods when there are insurance crises, which make it difficult for health practitioners, obstetricians, in particular, to obtain liability insurance. In addition, concerns have been raised over the years regarding access to justice by individuals who have been harmed as a result of: the (negligent) provision of medical treatment; the time taken to resolve claims; the extent to which frivolous or vexatious claims are brought by disgruntled patients; the spiralling number of claims, as well as the costs associated with bringing these claims in the courts in circumstances where contingency fee arrangements apply; and the effect on the morale of those working in the medical profession.[484]

Various proposals for medical malpractice reform at both state and federal levels have been put forward over the years, some of which have been implemented. Suggested reforms in some state jurisdictions have involved placing caps on the categories of damages that can be claimed, the creation of health courts, and the establishment of no-fault schemes.[485] There has also been an increased focus in recent years on learning from medical error in order to improve quality and safety in health care, as well as on the links to be made between medical malpractice claims and

[484] Weiler, P.C. (1991) *Medical Malpractice on Trial*, Cambridge, MA, Harvard University Press. Hyman, D. A. (2002) 'Medical malpractice: what do we know and what (if anything) should we do about it?' *Texas Law Review,* 80, 1639–55. Studdert, D.M., Mello, M.M. and Brennan, T.A. (2004) 'Medical malpractice', *New England Journal of Medicine,* 350, 283-92. Baker, T. (2005*) The Medical Malpractice Myth*, Chicago, Chicago University Press. Sage, W.M. and Kersh, R. (eds) (2006) *Medical Malpractice and the U.S. HealthCare System*, Cambridge, Cambridge University Press. Sage, W.M. and Kersh, R. (eds) (2006) *Medical Malpractice and the U.S. Health Care System*, Cambridge, Cambridge University Press. Sloan, F.A. and Chepke, L.M. (2008) 'No fault for medical injuries' in F.A. Sloan and L.M. *Chepke Medical Malpractice*. Boston: MIT Press, pp. 277–308.

[485] Johnson, K.B., Phillips, C.G., Orentlicher, D., et al. (1989) 'A fault-based administrative alternative for resolving medical malpractice claims', *Vanderbilt Law Review,* 42, 1365–406. Weiler, P.C. (1993) 'The case for no-fault medical liability', *Maryland Law Review,*52, 908–50. Petersen, S.K. (1995) 'No-fault and enterprise liability: the view from Utah', *Annals of Internal Medicine,* 122, 46–-63. Studdert, D.M., Thomas, E.J., Zbar, B.I., et al. (1997) 'Can the United States afford a no-fault system of compensation for medical injury?' *Law and Contemporary Problems,* 60, 1–34. Studdert, D.M. and Brennan, T.A. (2001b) 'Toward a workable model of "no-fault" compensation for medical injury in the United States', *American Journal of Law and Medicine*, 27, 225–52.

learning from medical error.[486] In states such as Virginia and Florida, no-fault schemes have been introduced which are limited to coverage of birth-related neurological injury. The political impetus for the adoption of such schemes in both jurisdictions in the late 1980s had its origins in political and professional concerns about the growing cost of compensation in such cases, as well as difficulties experienced by obstetricians in relation to the growing cost of insurance premiums and in obtaining liability insurance. This following sections examine these two schemes in detail.

Virginia

Legal and Social Goals

The goals of the scheme are to ensure that children who have suffered birth-related neurological injuries receive the required care and reduction of the financial burden on parents and on the health system. In addition, it was hoped that malpractice insurance would become more readily available, thus increasing the likelihood that obstetricians would continue to practice.

Funding

The Program is financed by the Virginia Birth-Related Neurological Compensation Fund. Participation in the Program is optional for both physicians and hospitals, although participation is high. Participating physicians and hospitals receive the benefit of the exclusive remedy provision, and physicians and hospitals that participate are eligible for lower premiums for malpractice insurance. In addition, the Virginia State Corporation Commission is empowered to assess liability insurers in Virginia up to one-quarter of one percent of net direct liability premiums written in Virginia, as there is a need to maintain the Fund on an actuarially sound basis. When the program was first established, participating physicians paid an annual assessment of US $5,000. Participating hospitals paid an annual assessment equal to US $50 per live birth, subject to a maximum assessment of US $150,000. From 1995 onwards, fixed fee schedules were changed to sliding scale fee schedules under which the fees decreased the longer the participant was in the program. Beginning with the 2001 program year, assessments of participating physicians and hospitals were restored to their original level.

Non-participating physicians can also be asked to make a financial contribution to the program. Between 1993 and 2001, such contributions were not required, but were subsequently reinstated. All physicians are currently required to pay US $300 per annum in order to maintain the actuarial soundness of the program. As of 31 December 2008, the assessment income was about US $3,507,000 from participating physicians (the equivalent of 626 physicians participating for the full 12 months, each paying US $5,600) and about US $3,546,000 from participating hospitals (there are 38 participating hospitals, each paying US $52.50 per live birth subject, up to

[486] Brennan, T.A., Leape, L.L., Laird, N.M., et al. (1991) 'Incidence of adverse events and negligence in hospitalized patients: Results of the Harvard Medical Practice Study 1', *New England Journal of Medicine*, 324(6), 370–76. Studdert, D. and Brennan, T. (2001a) 'No-fault compensation for medical injuries: The prospect for error prevention', *Journal of the American Medical Association*, 286, 217–23. Phillips, R.L., Bartholomew, L.A., Dovey, S.M., et al. (2004)''Learning from malpractice claims about negligent, adverse events in primary care in the United States', *Quality and Safety in Health Care*, 13, 121–26.

a maximum of US $200,000 per hospital)[487] (Oliver Wyman 2009: 55). As of 30 June 2009, income from non-participating physicians was approximately US $4,179,000 (approximately 13,930 doctors, each paying US $300). Income from liability insurers was approximately US $12,273,442 for 2009, amounting to one quarter of one percent of net direct liability premiums written in Virginia, the maximum permissible assessment under the governing legislation (Oliver Wyman 2009: 56). Administrative costs for the program for the year ending 31 December 2008 were approximately US $940,630, of which approximately US $752,504 (80%) were claims-related and 20% related to general administrative expenses.

As of 31st of December 2008, there were 142 claimants for whom coverage had been accepted, of whom 111 had been in the program for three or more years. As of the same date, it was estimated that the program had an outstanding liability of US $341.4 million and a deficit of US $168.9 million.[488]

Eligibility

Claims are evaluated by the Virginia's Workers Compensation Commission (VWC) with input from a three-physician panel to determine eligibility. In order to be eligible, the child must meet the following criteria:

(1) the definition of 'birth-related neurological injury' as outlined in the governing legislation;
(2) obstetrical services were performed by a physician participating in the program; and
(3) the birth occurred in a hospital that was also participating in the program.

In 1990, the eligibility criteria were amended so that criterion 1 and either criterion 2 or 3 needed to be met in order to qualify for coverage under the Program.

The definition of 'birth-related neurological injury' under the governing legislation (Section 38.2-5001 Code of Virginia)[489] is as follows:

> Injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation necessitated by the deprivation of oxygen or mechanical injury that occurred in the course of labor or delivery, in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled...such disability shall cause the infant to be permanently in need of assistance in all activities of daily living.

The law applies only to live births. It excludes disability or death caused by genetic or congenital abnormality, degenerative neurological disease or maternal substance abuse.

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[487] Oliver Wyman Actuarial Consulting, Inc. (2009) Virginia Birth-Related Neurological Injury Compensation Program: 2009 Annual Report Including Projections for Program Years 2009-2011 (http://www.vabirthinjury.com/News_Publications. htm). Access date must be given. In each reference.

[488] Oliver Wyman Actuarial Consulting, Inc. (2009) Virginia Birth-Related Neurological Injury Compensation Program: 2009 Annual Report Including Projections for Program Years 2009-2011 (http://www.vabirthinjury.com/News_Publications. htm).

[489] Virginia Birth-Related Neurological Compensation Program. Who We Are (www.va birthinjury.com/WhoWeAre.htm).

Processing Claims

It is often the case that claimants retain legal representation in relation to an application for coverage under the program. In order to determine eligibility, there is a need to establish that a birth-related neurological injury, as defined by the legislation in force, has taken place. This requires medical review by both the claimant and the program itself. It is now the case that three to four specialist medial opinions/reports are usually required.[490]

The Workers' Compensation Commission (WCC) administers and adjudicates on claims under the program. At a hearing, the Chief Deputy Commissioner considers the medical panel's recommendation on eligibility and makes a finding on the issue of general eligibility of bringing a claim. Either side may appeal this decision to the full WCC and from there to the Court of Appeals.

By 2008, there had been adjudications on 192 cases, 134 (70%) of which had been accepted, with 38 denied and 12 withdrawn.[491] The average annual expense per claim was US $94,400. For the financial year ending 31 December 2008, a total of US $10,778, 949 had been paid to claimants for whom coverage had been accepted under the plan. As of the same date, the cumulative total of payments made between 1988 and 2008 was US$ 84,404,276.00 [492](Oliver Wyman 2009: 20, 22).

Entitlements

Claimants submit to the program any costs not covered by private insurance or Medicaid. The program is responsible for paying these remaining costs. The actual payments recorded by the program represent 'net' payments after recoveries from private insurance and Medicaid. Medicaid is a health provision scheme that grants coverage to millions of US citizens, including eligible low-income adults, children, pregnant women, elderly adults and people with disabilities. The system is administered by individual states according to federal requirements. The program is funded jointly by states and the federal government.[493]

The types of compensation available to claimants for which the Program has accepted coverage include the following:

- Actual medically necessary and reasonable expenses – medical and hospital, rehabilitative, residential and custodial care and service, special equipment or facilities, and related travel.
- Loss of potential earnings may be claimed from the age of 18 and may continue through to the normal retirement age of 65. Loss of earnings is paid in regular instalments. The amount is

[490] Oliver Wyman Actuarial Consulting, Inc. (2009) Virginia Birth-Related Neurological Injury Compensation Program: 2009 Annual Report Including Projections for Program Years 2009–2011 (http://www.vabirthinjury.com/News_Publications. htm).
[491] Siegal, G., Mello, M.M. and Studdert, D.M. (2008) 'Adjudicating severe birth injury claims in Florida and Virginia: The experience of a landmark experiment in personal injury compensation', American Journal of Law and Medicine, 34, 489–533.
[492] Oliver Wyman Actuarial Consulting, Inc. (2009) Virginia Birth-Related Neurological Injury Compensation Program: 2009 Annual Report Including Projections for Program Years 2009–2011 (http://www.vabirthinjury.com/News_Publications. htm).
[493] https://www.medicaid.gov/medicaid/index.html

calculated at 50% of the average weekly wage of workers in the private, non-farm sector of Virginia.

- Reasonable expenses incurred in relation to filing a claim, including reasonable attorney's fees.
- The family of an infant that suffers a birth-related neurological injury and who dies within 180 days of birth may receive up to US $100,000.

Claimants must contact the program before committing to the purchase of equipment or incurring other expenses for which they may seek reimbursement. Failure to do so may jeopardise reimbursement from the program. Claims for reimbursement must be submitted within one year from when the injury is incurred. For expenses incurred prior to acceptance into the program, reimbursement requests must be submitted within two years of entry into the program[494]

Review and appeal mechanisms

Once the administrative judge on the WCC makes a decision, either party may file an appeal. The initial appeal is heard by the Full Commission of the WCC. Thereafter, the decision of the Full Commission may be appealed to the Virginia Court of Appeals, and, ultimately, to the Virginia Supreme Court.

Florida

Overview

Florida established a no-fault scheme for birth-related neurological injury in 1988. The governing piece of legislation is the Florida Birth-Related Neurological Injury Compensation Act, Fla (Stat 766.302, 766.303, 766.315, 766. 316). Many of its provisions follow the recommendations of the Governor's Select Task Force on Healthcare Professional Liability Insurance.[495]

Legal and Social Goals

The Plan aims to stabilise and reduce malpractice insurance premiums for physicians providing obstetric services in Florida; to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries which result in unusually high costs for custodial care and rehabilitation; to encourage physicians to practice obstetrics and make obstetric services available to patients; and to provide the requisite care to injured children.

Funding

There are four main sources of funding: participating obstetricians pay an annual premium of US $5000; all other Florida physicians, excluding residents, pay US $250 per annum as a condition of licensure; non-public hospitals pay US $50 per live birth (with exemptions available to those providing high levels of charity care); and the state of Florida has made a one-time grant of US

[494] Virginia Birth-Related Neurological Compensation Program. Program Guidelines (www.vabirthinjury.com).
[495] Siegal, G., Mello, M.M. and Studdert, D.M. (2008) 'Adjudicating severe birth injury claims in Florida and Virginia: The experience of a landmark experiment in personal injury compensation', *American Journal of Law and Medicine,* 34, 503.

$40 million to the scheme.[496] The statute includes provisions for assessing insurance companies up to 0.25% of their annual net direct premiums "should the fund become actuarially unsound".[497] The Neurological Injury Compensation Association (NICA) has also purchased a reinsurance plan.

Eligibility

A 'birth-related neurological injury' is defined in section 766.302 of the Florida Statutes as follows:

> Injury to the brain or spinal cord of a live infant weighing at least 2,500 gms for a single gestation or, in the case of multiple gestations, a live infant weighing at least 2,000 gms at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

The plan applies only to live births and does not include death or disability caused by genetic or congenital abnormality. Benefits under the scheme are available only to individuals in Florida whose doctor participates in the scheme by the payment of annual premiums. The injury must be sustained in a hospital. The infant must be permanently and substantially disabled, and the infant's impairments must be both physical and mental.

In determining eligibility under the plan, a pragmatic line is generally taken with the application of a rebuttable presumption of fulfilment of eligibility criteria where, on the balance of probabilities, the baby was deprived of oxygen during labour and has a poor neurological outcome.[498]

Processing Claims

A claim must be brought within five years of the child's birth. An application for acceptance of coverage under the Plan must be filed with the Florida Division of Administrative Hearings.[499] In terms of determining whether the claim should be accepted into the Plan, an administrative law judge examines a claimant's supporting documentation, including NICA's recommendation based on the information provided; a medical examination 60 of the child (within 45 days of petition); and independent assessments by 2-3 medical experts. Legal representatives of successful claimants are paid on the basis of "customary charges, given the locality and difficulty of the case".

In the event that a claim is accepted into the plan, the child will be covered for their lifetime. In this situation, no other compensation from a malpractice lawsuit is available. As an exclusive

[496] Horwitz, J. and Brennan, T.A. (1995) 'No-fault compensation for medical injury: a case study', Health Affairs, 14, 164–79. Siegal, G., Mello, M.M. and Studdert, D.M. (2008) 'Adjudicating severe birth injury claims in Florida and Virginia: The experience of a landmark experiment in personal injury compensation', American Journal of Law and Medicine, 34, 489–533.
[497] Horwitz, J. and Brennan, T.A. (1995) 'No-fault compensation for medical injury: a case study', Health Affairs, 14, 164–79.
[498] Siegal, G., Mello, M.M. and Studdert, D.M. (2008) 'Adjudicating severe birth injury claims in Florida and Virginia: The experience of a landmark experiment in personal injury compensation', American Journal of Law and Medicine, 34, 489–533.
[499] Section 766.305, Florida Statutes.

compensation plan, it is available only if there has not already been a settlement in a lawsuit, given that the plan provides for lifetime benefits and care.

Entitlements

The following categories of compensation are available:

- Actual expenses for necessary and reasonable care, services, drugs, equipment, facilities and travel, excluding expenses that can be compensated by state or federal governments or by private insurers;
- Non-pecuniary compensation up to a maximum amount of US $100,000 payable to the infant's parents or guardians;
- US $10,000 death benefit for the infant;
- Reasonable expenses for filing a claim, including reasonable legal fees.

Review and Appeal Mechanisms

In the event that a petition for coverage under the Plan is rejected by a judge within the Florida Division of Administrative Hearings, this decision can be appealed to the District Court of Appeal.

In this paper, I have considered different evaluation dimensions to compare fault, no-fault, and blended schemes. The findings are summarized below:

'No-fault' schemes cover a significantly higher portion of injuries than fault-based schemes.

There is no evidence that benefit levels are on average higher or lower in fault, no-fault or blended systems. However, there is evidence that benefits can vary significantly from one claimant to another in fault-based schemes, that less serious injuries tend to be over-compensated, while more serious injuries tend to be under-compensated, and that lower socio-economic groups are likely to obtain poorer compensation outcomes than higher socio-economic groups.[500]

Fault-based schemes tend to be associated with lump sum benefits, adversarial processes, and benefit delays, and hence tend to exhibit poorer claimant outcomes than no fault schemes. However, evidence from the blended schemes, such as New South Wales' motor injury scheme[501], indicates that reforms can be introduced to predominantly fault-based schemes to help improve claimant outcomes. On balance, fault-based and blended schemes probably have slightly more equitable allocation of costs than do no-fault schemes, because the cost of any compensation payable over and above any insurance caps will often fall directly on the party at fault. Overall, however, whether or not an insurance scheme is mandatory is a more important driver than fault versus no-fault.

[500] Armstrong, Kirsten & Tess, Daniel. "Fault versus No Fault: Reviewing the International Evidence", Presented to the *Institute of Actuaries of Australia*, 16th General Insurance Seminar, 9-12, 2008.
[501] Ibid.

There is no clear evidence that fault, no-fault or blended schemes are, overall, more expensive than the other scheme types in aggregate, but I note that more people are compensated under no-fault schemes; hence, the per claimant cost is lower overall under no-fault schemes. Where schemes allow common law access, tight controls need to be maintained on the common law process to ensure that scheme costs remain in check.

No-fault schemes have better results according to this evaluation, with a higher portion of claimants covered, a higher portion of scheme costs going to claimants, better claimant outcomes, a more equitable distribution of claimant outcomes, and a similar level of scheme costs, average benefits and prevention effects. These outcomes need to be weighed up against the potentially less equitable allocation of scheme costs and infringements on the freedom of people to pursue tort law remedies in response to their injuries and grievances.

Of importance is the fact that in many cases, it is the underlying scheme features which drive these outcomes, rather than the simple issue of fault versus no-fault. Periodic benefits, with appropriate access to case management of claims and rehabilitation, can achieve better claimant outcomes than similar lump sum schemes.[502] Appropriately structured premium rating systems may help to achieve the desired results.

From the above, it can be concluded that each country has a system that matches its fabric of life, population size, and economic and political situation regarding no-fault insurance in the area of liability for medical injuries.

Chapter IV Part II -Arguments for the No-Fault System in Israel

Israel has a unique population composed of different religious and political groups, and the state's overall size is small. A no-fault system would be a suitable approach for a country characterized by these features, for several reasons. In this subchapter, I will propose a system that, to my mind, is superior in various respects to the existing one. My suggested approach to compensation would be a simpler, faster, cheaper, and more efficient system. Liability for medical injuries under the proposed system would, in most cases, be almost automatic. Insurance under this system would be compulsory and universal, meaning that it would apply to the entire population, and cover all possible medical injuries. In addition, compensation for the injured parties would be provided in a sufficient and balanced manner, equally or almost equally, to all those who are in the same situation, and the financial burden would be divided according to material considerations between the concerned parties.

Most Western countries adopt the approach that access to healthcare is a basic right and an essential resource contributing to the prosperity of the individual, the development and economic growth of society, and its stability. In Israel, this ethos was expressed in the State Health Insurance Act, which is based on the "principles of justice, equality, and mutual assistance." In Israel, there is already a "no-fault" approach in several areas: injury due to vaccination, HIV infection through

[502] Ibid.

infected blood, ringworm injuries, and road traffic accident injuries. Other medical injuries require proof of negligence, involve a determination of liability, a causal link, and damages. The non-fault system ought to be extended to other areas of medicine.

In a more comprehensive no-fault system, compensation to victims would be given equally in similar situations, and the financial burden divided according to factual considerations between the relevant parties. Another advantage of the proposed system is that it can likely be executed in the short term, without any need to allocate significant resources from the state budget, and without any need for measures beyond the capacity of the parties involved.

In light of the fact that medical problems have become significant social problems, they require a social solution. Such a solution is social insurance, which is based on the principle of social solidarity, and which generates maximum socialization of risk, the purpose of which is not to produce profits, but rather to secure individual financial security for all, and the main way to achieve this goal is through a system that runs deeper than commercial insurance. This option aligns with and responds to the conclusion that society's prime concern must always be the injured patient.[503]

The Existing System's Advantages and Disadvantages

Before I examine an alternative compensation method, I should demonstrate that the existing method is insufficient, and therefore that it is appropriate to discuss changing it. The legal system in operation in Israel has many disadvantages, relying as it does on the principles of fault. These were presented in a report of the Ministry of Health's Committee on Medical Malpractice in Israel, both in the majority opinion, and in the minority opinion of Dr. Peretz Segal.[504] The following points are highlights of the report:

1. The existing system does not cover cases when there is no successful proof of negligence – in such cases, in addition to the harm to the patient, the claimant must bear both the costs of the damages and the expenses associated with the lawsuit.

2. Even if one wins at trial, there is a danger that the rate of compensation will not reflect the real damages.[505]

3. The system operating today is cumbersome. A legal action before the courts takes a very long time, and demands the allocation of significant resources, which means that at times the patient may eschew filing a claim, because of the knowledge that he or she might need the same doctor in the future.

4. The existing situation results in defensive medicine, which is not good for doctors, but most importantly, poorly serves the public. Due to the expansion of the boundaries of liability, to the point that almost every complaint or claim results in imposing fault on the doctor, doctors find themselves engaged in finding ways to protect themselves, such as sending patients for

[503] D.E Carpenter, "*The Patient's Compensation Board An Answer to the Medical Malpractice Crisis*" 637 Ins. L.J (1976) 81, 83.
[504] "*The committee to review the responsibility for injury in medical treatment*" [Hebrew], Jerusalem, 2019.
[505] Carlson RT. *A Conceptualization of a System for Medical Injuries*. 7 L. and Society R. 329 (1973).

numerous tests, referrals to other doctors for consultation, etc. I will elaborate on this point below.

The main opposition to a system of "strict liability" stems from the costs. Opponents claim that if we abolish the need to prove negligence, the number of claimants will grow – to which one must respond: the costs caused will be offset by the savings on administrative expenses.[506] A study published in the American Medical Association Journal indicates as much.[507] It is worth noting that in several states in the United States, there is a similar systemic development.

It is essential to stress the arguments that support a system of both efficiency and justice, which include the following: It is not necessary to prove negligence, and therefore there is no situation in which there will be no financial compensation for the victim; there will be fewer expenses in respect of legal procedures; fewer resources will be allocated to insurance companies, legal systems, and lawyers; and, lastly, more resources will be available to compensate patients and for improving the quality of the health system.

Attempts to operate a strict liability system in other countries demonstrate that there is a middle path between pure strict liability and a system based on negligence. In Sweden, for example, compensation is given only to "compensable events", which are determined according to the criterion of whether the damage was preventable. This is a moderate position, which does not support the solution of compensation only after proof of negligence, or the solution of providing compensation for all damages.

One of the problems, and perhaps the most difficult aspects of establishing "no-fault" insurance, is the definition of the event that bestows entitlement to compensation, when the goal is to distinguish injuries caused by medical treatment from injuries caused by other causes.

In his article, Dr. Miller[508] tries to give a tentative definition of medical injury: "Personal injury caused to a patient due to a medical act or omission, excluding damages caused to prevent other, more serious, personal injury." The meaning of the definition is receiving compensation following any damages involving medical treatment, even in the absence of negligence. This definition also withstands the test of tort law, the purpose of which is to restore the situation to the previous condition. However, one can clearly distinguish heterogenic results (caused by medical treatment or omission), and phenomena concerning the development of the pathological process, from harm caused as a result of medical considerations, such as a mastectomy, etc.

Changing the Basis of Liability

[506] Studdert DM, Thomas EJ, Zbar BIW, Newhouse JP, Weiler PC, Bayuk J, Brennan TA. *Can the United States Afford a "No-Fault" System of Compensation for Medical Injury*. 60 Law & Contemp. Prob. 1, 3 (1997).
[507] Johnson WG, Brennan TA, Newhouse JP, Lawthers AG, Hiatt HH, Weiler P.C. *The Economic Consequences of Medical Injuries*. JAMA 1992, 267, 2487.
[508] Arieh Miller, *Proposal for Insurance Against Medical Injuries* [Hebrew], *Mishpatim Yud*, at 230.

Regarding compensation for injuries, a solution that disentangles compensation for the victim from a duty to prove negligence, in other words a no-fault system, will be the best answer to the range of situations mentioned above.

The proposed solution is the creation of compensation without proving medical liability; this solution is not simple. In the United States, many articles analyse the changes in tort law against the background of the increasing trend of setting strict liability in tort.[509]

The Advantages of the No-fault System

1. Informed Consent and the Patient-Physician Relationship – *universal advantage*
2. The Implications of Defensive Medicine – *universal advantage*
3. Social Insurance System – *an advantage unique to the Israeli context*
4. Medical Malpractice in Jewish Law – *an advantage unique to the Israeli context*
5. The Right of Access to the Courts – *an advantage unique to the Israeli context*
6. Power Disparities Between the Parties – *an advantage unique to the Israeli context*
7. Expert Opinion – *an advantage unique to the Israeli context*
8. A Suitable Legal Approach to Pain and Suffering Damages - *advantage unique to the Israeli context*

I will now elaborate on the reasons behind each of these advantages.

1. Informed Consent and the Patient-Physician Relationship – *Universal, Worldwide Advantage*

The main reason to provide information to the patient is in order for the patient to make autonomous decisions about their body. It should be emphasised that a person's autonomy to decide with respect to their own body is a distinct expression of the recognition of the innate dignity of every person *qua* person, and constitutes a change from the paternalistic ideology that controlled the medical establishment until several decades ago. This approach, which transforms the patient into a partner, and recognises the fact that they suffer as a result of the outcome of treatment (successful or otherwise), is part of a change in the global approach that recognises human rights in general, and patient rights, in particular.

The responsibility imposed on the doctor's shoulders was accepted from the times in which the attending physician had almost absolute autonomy in their decisions, and as a result, they also had exclusive responsibility for their actions. Until 60 years ago, in the United States, hospitals

[509] Steiner HJ. *Moral Arguments and Social Vision in the Courts: A Study of Tort Accident Law*, (Madison, 1987).

were immune to medical malpractice claims, as they were perceived as charitable institutions that only provide means for the doctors to heal their patients.[510]

Today, however, the doctor's autonomy has been significantly limited, and they form part of a broad team treating the patient. Their influence on conduct has been greatly reduced, and different organizations have the means and influence to determine standard treatments, decide whether and how to run control systems and enforce supervision in order to reduce the rate of damages as a result of the operation of the entire system.

However, there is no doubt that in the event that the result of treatment is damage to the patient, the matter of whether there was any negligence on behalf of the doctor must be investigated. The doctor's knowledge and training, as well as the fact that the patient puts their trust in the physician and believes that they can help, imposes a duty to act responsibly, carefully, and skilfully. The doctor's duty, defined as a "duty of care," is based on the understanding that there is a reciprocal relationship between the physician and the patient. The duty of care is the first fundamental in the examination of whether there was negligence, and it is divided into two parts: A conceptual duty of care, and a concrete duty of care.

The conceptual duty of care is tested in general, and according to legal policy towards the general public; it means that it is appropriate to apply a duty of care in the relations between the type of tortfeasor to which the tortfeasor belongs, and the type of victim under consideration, with respect to the type of damages at issue.

Harm to the quality of medicine: Doctors who must choose between different medical techniques – where one carries a low risk of harm, but also a low chance of recovery, while the other carries a high risk of harm, but also a high chance of full recovery – will always choose the safest technique, as far as they are able to ascertain. In other words, doctors will systematically choose the alternative that reduces the risk of liability over the alternative that increases the chances of recovery. For example, a physician debating whether to deliver a baby vaginally or by caesarean section is likely to choose the alternative of caesarean section, even when the total benefits of vaginal birth are higher than the alternative, if only due to the high risk of legal action to which he is exposed in the course of vaginal birth.

The Implications of Defensive Medicine – *Universal, Global Advantage*

Defensive medicine is regressive medicine: it is not advanced and wastes precious resources. Doctors who fear a potential claim will send the patient for numerous tests, not necessarily because they are convinced that this is the necessary medical treatment, but because they will want to protect themselves from any future claim.

I wrote about this issue extensively in Chapter 3 – no country wants its resources to be wasted on unnecessary tests and treatments, solely because of the fear of medical malpractice claims; defensive medicine necessarily increases costs, mostly unnecessarily. In this setting, the question is whether the multiplicity of medical actions, laboratory tests, imaging, invasive tests,

[510] Based on the report of the Committee Advising on Strengthening the Public Health Care System (the 2014GermanReport),Jerusalem,at299-301. https://www.health.gov.il/PublicationsFiles/publichealth2014.pdf

hospitalizations and medication, the benefits and effectiveness of which are not always clear, are a good and effective utilization of the system's resources.

In the State of Israel in particular, the decisions cannot be detached from the reality of the public health care system, which is in chronic budgetary deficit, and copes with limited resources. Therefore, it is necessary to maximize utilisation of the financial resources, and it is clear that we should find methods that will reduce the economic burdens.

The change of system will lead to financial savings, due to a limitation on the amount of compensation, and will enable doctors to consider the real motives for the treatment of their patients, and not be guided by a fear of legal action; there is no doubt that the relationship between the doctor and patient will be a healthy, good relationship, based on the patient's best interests.

Social Insurance System – An Advantage Unique to the Israeli Context

Compensation for any medical injury, unlike medical malpractice, facilitates suitable compensation also for victims of the correct medical treatment. Such compensation avoids viewing the physician as the "opposing party", thus strengthening the doctor-patient relationship. I believe that this transformation is the appropriate method for Israel. In view of the unique nature of the State of Israel and its characteristic as a democratic and Jewish state, I will describe the additional benefits of establishing a no-fault system, which include:

1. Social insurance is mandatory, and the insurance relationship is determined by law, meaning there is no insurance contract and no personal policy, which would likely lead to a system whereby the insurer is a private profit-motivated seller of social insurance; thus, from an economic perspective, social insurance is resilient even during a crisis.[511]

2. With social insurance, there is a relationship between the insuring entities and the insured public, so the insurance will also be able to pay monthly allowances, as well as one-time payments.

3. Securing compensation will be simple and fast,[512] since the insured will only have to prove that the injury was caused by a medical act or omission, without having to prove the fault of the tortfeasor, nor to identify a physician or medical employee responsible for causing the damages.

4. Since its purpose is not to produce profit, social insurance is cheaper than commercial insurance, and this difference can be significant.[513] Social insurance ensures that receiving compensation is a stable process. The proposed method would be more effective, as the insurance would be consistent as well as being universal, and therefore it would fulfil a social role as it would apply to all residents, without exception.

[511] G. Wannagat, *Lehrbuch des Zozialversicherungsrechts* (Tubingen,1965) 25-30.
[512] W.J Blum& H. Kalven, "*Public Law Perspectives On A Private Law Problem – Auto Compensation Plan*" 31 U. Chi. L.R (1964) 708-712.
[513] Y. Engelrad, "Road Traffic Accident Compensation Bill 1973-5733" [Hebrew] *Mispatim* E (5734) at 431, 436.

5. In terms of the interests of the insured, the possibility of social insurance should simplify things, ensure convenient access, and simplify the system.

Medical Malpractice in Jewish Law – An Advantage Unique to Israel

One of the advantages of the no-fault system relates to the Jewish religion, namely, that there is no need to file a lawsuit for compensation against the physician that treated the patient. Indeed, this method constitutes a form of corrective justice for the religious populace to obtain compensation for medical negligence. Although not a religious state, Israel has a Jewish ethos and identity, and therefore the principles and values of Jewish law are a source of inspiration in Israeli law, under the Foundations of Law Act,[514] the Basic Law: Human Dignity and Liberty, as well as the basic principles of the legal system.[515]

The foundational values of Jewish law shape Israel's image as a people and a state, while characterizing the fact that Israel is not only a democratic state, but also a Jewish one. These fundamental values are part of the basic values of the law in Israel; appealing to the basic values of Jewish law is not referring to comparative law. This is an appeal to the Torah,[516] the most authentic and original Jewish body of work; a theory of life. The values of justice, honesty, and fairness, all constitute part of the state's law, and one can be inspired and guided by Jewish law on how to behave in accordance with them.

The issue of imposing tortious liability on a physician who caused damage to the patient during the healing process was discussed extensively in *halachic* literature (the *halacha* is the name for the entire body of law according to which a Jewish person is supposed to act). The Babylonian Talmud set the fundamental rule that "A person forever bears guilt".[517] The meaning of this is that a person is subject to strict liability for any damages caused by his actions, but special laws were laid down in the context of medical practitioners.

In the opinion of the great Jewish thinker and physician Maimonides (the Rambam), the Torah is interested in encouraging people to practice medicine and allay the physician's fears even if he may err, and be found guilty of causing medical damage, or even of killing a human being.

This idea strengthens the Jewish value that if and when a doctor does cause harm, they did so incidentally to perform a role that is a good deed [a *Mitzvah*], and therefore special laws were developed, providing certain immunity to physicians from tortious liability. These laws were designed to encourage people to engage in the medical profession, by easing the burden of liability imposed on them.

The ***Tosefta***, *Baba* Tract, Chapter F, *Halacha* 14 states:

"**A professional doctor who healed with the permission of a state authority yet caused harm is absolved of human law and is liable only to the heavens**."

[514] Foundations of Law Act 1980-5740. Basic Law: Human Dignity and Liberty.
[515] M. Drori, *Abusing the Right in Jewish Law (Compelling Effortless Action)* [Hebrew], *Machon Mishpati Aretz*, 2010-5770.
[516] A. Barak, *A Judge in a Democratic Society* [Hebrew], at 290.
[517] BT, *Sanhedrin*, 70b: A.

Prima facie, this source indicates that a specialist physician who healed with the permission of the court, but accidentally caused harm, is exempt from liability in torts (human law), whatever circumstances of the occurrence of the damage.

But the ***Tosefta*** continues:

"**A specialist doctor who healed with the permission of a state authority yet caused harm – accidentally, is absolved, intentionally – he is liable, due to *Tikun Olam*** [Jewish concept denoting one's duty to assist in the process of healing the world]"

Here there is a distinction between damage caused accidentally from damage caused intentionally, as well as a reason to grant immunity from liability in tort - "Due to healing the world".

A third *Tannaic* source in the ***Tosefta*** stated that:

"**A specialist doctor who healed with the permission of a state authority and caused damage, is exempt. If he harmed more than was necessary, then he is liable**."

In the opinion of many rabbis, the concept 'intentionally' is parallel to the concept 'more than is proper'. In accordance with this assumption, they believe that the laws in the *Tosefta*, which absolve the doctor from liability, concern damage caused beyond reasonable treatment, while the laws that impose liability on the physician deal with treatment which was not reasonable.

According to the *halacha*, as developed throughout the generations, the main factor that influences the imposition of liability on a doctor is the nature of the treatment administered. For this purpose, professional mistakes committed in good faith, do not justify the imposition of liability for the damages caused by them. On the other hand, a mistake caused by criminal negligence, or some incorrect action done due to lack of attention, can be lead to the imposition of liability on a doctor.

There are many injured persons who believe, in accordance with their faith, that a doctor who comes to their aid and tries to save them should not be sued, and so they remain without compensation when they are injured. These people would receive due compensation if the no-fault system were adopted in Israel.

It should be noted that most of the Talmud's interpreters, who had to interpret the laws concerning doctors, preferred to interpret the regulation as easing the physician's punishment. According to this theory, the doctor was responsible from the outset, as every person is forever liable for any harm they commit, both accidentally and intentionally. The intention of the regulation was to incentivise and encourage people to engage in the medical profession despite the great risk involved, by granting immunity for the mistakes they commit.

Even if the "bottom line" refers to both possibilities (mistake – exemption, intentional – liable), they present a trend of improving society's general health condition. On the one hand, there are opinions supporting relief for doctors as far as possible, to create incentives to study medicine. On the other hand, there are those who take a stricter approach to raise their level of professionalism and reduce the dangers of medical accidents caused by the negligence of the doctor.

It is interesting to note that an ancient debate accompanied medical law throughout history, waxing and waning according to the spirit of the ages. In recent years, this debate has been expressed in the question of the multiplications of medical malpractice lawsuits. Since the 1970s, there has been a steep increase in the number of claims in respect of medical negligence in Israel and overseas. It is agreed that the increase is not the result of an increase in the number of negligent acts, but rather the result of social changes, such as the status of medical science in society, the status of physicians, and the doctor-patient relationship.[518]

Some claim that the multiplication of legal actions and the trend to be stricter with doctors have caused excessive caution on the part of doctors, but do not necessarily encourage better and more efficient medicine. The danger of prosecution hanging over the doctor's head causes them to think first and foremost of their own interests, and not about the patient in front of them. This is not just a legal problem, but a serious ethical problem which goes against to the entire "*raison d'etre*" of the medical profession. Prof. Steinberg presented this opinion in his book, the "*Medical Halachic Encyclopaedia*" by saying:

> The multiplication of legal claims in respect of medical malpractice, and a stricter approach on the part of the courts in applying excessive requirements of caution on doctors and holding them liable at law for negligence, does a great disservice to the goal of suitable medical education for the purpose of improving the quality of treatment [...] One of the results of the multiplicity of excessive negligence claims is the development of defensive medicine on behalf of doctors. A legal concept that imposes on doctors "strict liability" for their medical acts and omissions, causes doctors to worry more about themselves and propels them to advance the preparation of a defence in any possible legal claim. Thus, the trend of increasing negligence claims against physicians ends up harming the patients themselves.[519]

As examples of damage caused to patients, opponents of strictness note the many tests, the unnecessary operations, which cause great physical and mental suffering, as well as the referrals to additional experts in order to avoid taking sole responsibility – have all led to a decline in the prestige of the medical profession. Case law in Israel also found it necessary to emphasise the uniqueness of the medical profession, and the difficulty in implementing the usual laws of tort to medical malpractice, as can be seen from the words of Supreme Court Justice Kister:

> Indeed, usually in a matter of negligence, the question is how would a reasonable person have behaved, and in the case of medical negligence – what would a reasonable doctor have done, but in the words of Judge Denning: One finds an **additional factor which is not to place excessive demands on doctors and not to treat them overly severely because of the public interest**. [...] This factor of the public interest with respect to doctors – especially surgeons – was recognised in Jewish law. The principle in Jewish law is that a person who harmed his fellow man is liable even it if were by accident, because a person is forever liable, but for doctors dealing in their profession in accordance with the "Permission of the Court" (pursuant to a license on behalf of a public authority), liability was significantly reduced, that is to say: To cases of crime defined in the literature (Judge Kister in ***Civil Appeal* 522/66** *PeyDaledYud KafBet* (2), 480.

In contrast to the lenient approach to doctors in the past, an opposite trend can be seen in recent years, both among judges and scholars of medical law in Israel. Some view the multiplicity

[518] Abraham Steinberg, ***Medical Halachic Encyclopaedia (Vol. F)*** [Hebrew], Jerusalem, 5759, at. 244-247.
[519] Abraham Steinberg, ***Medical Halachic Encyclopaedia (Vol. F)*** [Hebrew], Jerusalem, 5759, at. 250-252.

of claims as welcome, a trend that creates a deterrent mechanism *vis-à-vis* doctors, and contributes to more professional and more cautious medicine. According to them, a doctor who is aware of the possibility of legal action due to their actions will be more cautious, will demand that they are better informed and updated with regards to the professional literature, and will not refrain from discussing their decisions with professional colleagues. In the opinion of those scholars:

> The effect of medical malpractice claims is a positive effect, which contributes to raising the level of professionalism and maintaining it. Supervision in any field means improving standards and meticulousness. The field of medicine – due to its enormous importance and preoccupation with human life – must withstand strict oversight. Medical malpractice claims are an excellent supervision device.[520]

Moreover, the attempt to impose reduced liability with respect to physicians was perceived by the judges as irrelevant and even unfair, and they emphasised the high standards, both ethical and professional, which are demanded from a doctor *qua* doctor. And in the words of Justice Aharon Barak:

> Indeed, the solution to the fears raised by doctors and hospitals against "defensive medicine" and its consequences, is not in privilege and concealment of the truth. The solution is education and establishing rules of liability (ethical and legal), which suit the medical profession and its place in modern society.[521]

The Right of Access to the Courts – An Advantage Unique to the Israeli Context

A person has the right to appeal to a judicial tribunal and receive a ruling on their case, and this includes the right to appear before the court in person. The other aspect of the right is granting a person the opportunity to defend themselves in court from legal proceedings conducted against them by a fellow citizen or state authority. The state is obliged by this duty to actualize this right of every citizen by establishing courts and employing judges to an appropriate degree. Another point is removing barriers so that the citizen may exercise this right. These barriers can prevent effective access to justice. The main barriers are physical distance, a prohibition on certain parts of the population applying to the courts, the statute of limitations, and legal fees. The last barriers are economic barriers, which may prevent those who do not have sufficient financial resources from realizing the legal rights due to them. The no-fault system can enhance every citizen's democratic right by reinforcing their access to the courts and a fair legal process.

Power Disparities Between Parties – An Advantage Unique to the Israeli Context

Ever more voices claim that the judge is required to look at the totality of circumstances and the power disparities between the parties. These demands rest on postmodern critical theories that focus on the structural power gaps in society. One popular version of these theories is the idea of distributive justice,[522] which argues that when we have to adjudicate a conflict between two sides,

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[520] Adi Azar and Ilana Greenberg, ***Medical Malpractice*** [Hebrew], Ramat Gan, 2000, at 52.

[521] Justice Barak in *Civil Leave to Appeal* 1412/94 **The Ein Karem Hadassah Medical Centre v. Ofra Gilad**, *PeyDaled MemTet* (2), 516.

[522] This theory is founded to a large extent on the definition of justice coined by the American philosopher John Rowels, and the test of the "Veil of Ignorance" he proposed to examine what that "justice" means.

we should not examine the circumstances of the case alone. For these theories, "who is right?" does not only mean "who is responsible for the damage caused?" Or "which of the parties' claims correlates to the contract's interpretation?" For them, the question also means, "what are the power gaps that led to the situation thus created?" "Was the contract between two sides of equal power? Or did one party force on the other a form of unfair contract?", and "does the defendant in a tort claim have insurance, or will he have to bear the costs of the claim himself?"

Precedent presents case law examples that will help us highlight the tendency of the Israeli legal system towards distributive justice. The clearest example of this was the Abu Hanna judgement,[523], which dealt with the case of a 5-month-old baby from a Bedouin village who was injured in a car accident. The court ruled that even though, in most cases, a girl growing up in a Bedouin village would not go out to work as an adult, her compensation would be awarded in accordance with the average wages in the marketplace – due to considerations of distributive justice.

A complex example of the idea of distributive justice – and its influence on the courts – is provided by the judgement in the Eden Malul affair. In 2005, the Supreme Court changed the nature of liability applicable in tort and held that when it is impossible to know the reason for the damage caused, the claimant is not required to prove his damage beyond reasonable doubt (51%), and the compensation awarded to him will be set according to the degree of probability that the defendant was responsible for the damage.[524] This judgement, which caused a revolution in tort law, related to a child who was born disabled, but it was not possible to prove that her disability was caused by the hospital's medical malpractice. Until that judgement, the prevailing rule had been "everything or nothing": If the plaintiff proved that it was likely that the damage was caused by the defendant's fault, he would receive full compensation; if he could not prove this, his legal action was completely dismissed. The judgement actually allowed the court to compensate the plaintiff, even if only in part. The central argument for the verdict was to deter entities which had been aware until then that in cases of less than 50% proof – they would not be charged with compensation. But another reason proposed in the verdict was distributive justice: Compensation for a child who was born with a severe disability and whose family could not finance her treatment could, with the appropriate insurance, be provided at the expense of the hospital, which would absorb the costs of treatment of the child.

In the past, when victims were required to assess the economic feasibility of applying to the courts, the possible result was clearer, since it correlated to their chances of proving that the defendant was indeed liable for the damages. Now, in view of liability per probabilistic weight, a significant incentive has been created to submit a claim in any event, since the chances of gaining some compensation (even if within an out-of-court settlement) are very high. Thus, the new idea of justice – which claims to adjudicate and decide not only according to the details of the case, but taking into consideration questions of morality and the effect of the legal proceedings on the

[523] *Civil Appeal* 10064-02 ***Migdal*** **Insurance Co. Ltd. v. Rim Abu Hanna**, *PeyDaled Samech* (3) 13 (2005).
[524] *Civil Re-hearing* 4693/05 **Carmel Hospital – Haifa v. Eden Malul**, *PeyDaled SamechDaled* (1) 533 (2010).

parties, and the whole of society – led to an increase in the number of legal actions against parties that may not have been negligent at all.

As we will see below, this problem is not just the result of verdict policy, it also stems from a policy that avoids employing legal tools that create a negative incentive to submit baseless claims (or claims that, to a high degree of probability, are not financially worthwhile), due to one value that flowered and captured a central place in the Israeli legal system (along with the expansion of the term "justice" to include ideas of distributive justice): the right to appeal to the courts.

The idea of distributive justice measures justice from a broad look at the parties. Therefore, preliminary conditions for the existence of justice are the provision of equal and easy access to the courts for all citizens. The right to access is not regulated in Israeli law, but it seems that since its beginnings, the Israeli legal system – even before the constitutional revolution – saw this as a basic right and acted to expand it. Over the years, this issue came up for discussion several times, and the courts decided – systematically – in favour of expanding the right, even when a claimant acted upon frivolous motives (or other irrelevant motives). One of the judgments[525] accompanying the enactment of the Basic Law: Human Dignity and Liberty, and the Basic Law: Freedom of Occupation stated: "The law is that even the frivolous have the right of access to the courts, and we will not lock the gates on them ourselves," – and with the constitutional revolution that followed their enactment, the court raised the value of this right to the status of a super-constitutional right.[526]

Expert Opinion – Advantage Unique to the Israeli Context

In medical malpractice claims, as in all personal injury claims, the litigants must submit the opinion of medical experts in order to prove their claims regarding the damages, if the issue concerns a subject such as disability and medical limitations. The principal difference is that in personal injury claims that do not deal with medical malpractice, the medical opinion is usually necessary for considering the damages and the causal link between them and the tortious event, and the question of the factual causal link does not raise special difficulties in ordinary cases. On the other hand, in medical malpractice claims, the medical opinion is also submitted with respect to the question of liability, namely, was there negligence on behalf of the medical institution or the attending physician? The question of the factual causal link is more complex, naturally, in such claims, and is raised frequently.

The expert medical opinion in medical malpractice claims places a heavy burden on the parties, and imposes great costs on them. The claim is that this field is characterized by a larger number of opinions than others. It is sometimes difficult to obtain them, and their costs to the parties are high, as are the costs to the court system.

The legal process is expensive, long, and cumbersome. An expert is also necessary to prove the damages. It is not always easy to find a doctor willing to testify. The "conspiracy of silence"

[525] *Civil Appeal* 18/75 **Alon v. State of Israel**, *PeyDaled KafTet* (2) 124 (1975) at 126.
[526] *Civil Appeal* 733/95 **Arpal Aluminium Ltd. v. Klil Industries Ltd.** *PeyDaled NunAlef* (3) 577 (1997) at 629. *Cf.* Yoram Rabin "*The Right of Access to the Courts: From an Ordinary Right to a Constitutional Right*" ***HaMishpat*** E, (5761) pp. 217-233.

on the part of doctors has yet to be overcome, and many doctors avoid testifying due to their heavy workload and the fear of harming colleagues, and of being exposed to cross-examination. These difficulties are also expressed in the price of an opinion, which increases the cost to the entire system. Defendants will also arm themselves with expert opinions and often the court appoints one,[527] all of which is very expensive. Therefore, there are many claimants that cannot finance an opinion, and thus they remain unable to receive compensation for their injury.

The Suitable Legal Approach to Pain and Suffering Damages – *an advantage unique to the Israeli context*

The purpose of tort law is to restore the victim to the condition he or she was in preceding the damages. Therefore, not only does tort law not have the power to punish the party responsible for the damages, but the interests of all victims are individual, hence it is necessary to address the totality of their damages specifically, in relation to their own personal way of life. The economic approach to law demonstrates that the guiding principle of tort law is justice that corrects the injury in an equal manner, and this is when legal certainty is achieved.[528]

In this situation, the types of damage and the types of victims determine the manner of calculating the rate of compensation, and therefore one must estimate, assess, and quantify the matter in numeric–financial terms. Therefore, for the purpose of quantifying the damages, data prior to the occurrence of the damages must be considered, as well as the implications of the damages on the victim with respect to the future. With regard to this, a forecast is necessary, which relies on concrete information pertaining to the victims and their characteristics, which is inevitably no more than hypothesis.

The forecast mechanism brings about an unwanted outcome of inequality between victims, a situation leading to legal uncertainty. The implications of the damages for the victim depend on the judicial assessment of the particular judge presiding over the case, who has in practice only two tools: An actuarial estimate – statistics and evidence of the victim's lifestyle. An overall estimate – overall data relating to society. However, even if the actuarial tool upholds the individual purpose of compensating the victim, statistical data is still not the be all and end all.[529]

One of the problems of formalism lies in the role of the court, due to which there are situations in which reform or deviation brings an unjust result. At which point the question arises as to the role of the norm in general, and the role of courts in particular. One of the ways to deal with these results is to attribute the norm to human nature and morality.

In essence, the legal formalism approach rests on the linguistic sense of the law, noting that in the absence of a law, there is also no source of legal liability. In intermediate cases, where there is a law, but the language does not provide a result in a specific case, the court is required to adjudicate between the parties to the dispute. A realistic decision rests on the doctrine that develops through norms and precedent, which in turn embody the norm hierarchy and its force, so that a

[527] "*Excessive Cost and Delay Deny Access to Justice*", Lord Woolf, *Access To Justice: Final Report*. 192 (1996).
[528] Ariel Porat, *The Theoretical Basis for Tort Law* (2013) at 43-44.
[529] See: *Civil Appeal* 10064-02 ***Migdal*** **Insurance Co. Ltd. v. Rim Abu Hanna**, *PeyDaled Samech* (3) 13 (2005) para 28.

"national" norm will provide a more certain outcome also with respect to cases on the margins. In such cases, the court's determination is more dependent on the wisdom of the judge, their beliefs and values, so that the result is only discovered in retrospect, but lacks the status of binding precedent.

It seems to me that even if we follow the approach of law and society, the totality of values and interests that withstand judicial review demand that the courts should reach the same result: A decision that has certainty for all parties on how to continue to manage their lives. This is a kind of competition between the law and actual life, and the role of the judge demands the provision of an adjudicative solution, while allowing room for agreements between the parties themselves.[530]

The totality of damages under the auspices of the term "non-pecuniary damages" are not as easy to simplify and categorically assign as they are in the case of pecuniary damages, since the issues are intermingled, and the lines separating them are fuzzy, at some times more so than at others.

Non-pecuniary damages belong to the more human field of law, and issues associated with the victim's pain – since a person is "a world entire" – make accuracy in the normative sense more difficult. By their very nature, these damages are attributable to lifestyle, and a need to settle an outline to identify them in the tortious relations between the litigants arises. The head of damages of pain and suffering to the human body are not foreign to law, and as the victim is a human being, so is the judge adjudicating on his case.

Noting that the legal tools that are used to assess damages are more suitable to pecuniary heads of damage, applying them to non-pecuniary damages leads to an injustice, in the sense that society lacks uniformity of outcomes, and the law imports subjective values. Indeed, it is difficult for a person in the position of a judge to produce a result that worsens the condition of the victim before them, but this should not be seen as a weakness but as a strength. The strength of judicial independence carries the need for objectivity, while placing a warning sign not to identify with the victim.

In contemporary reality, the lack of defined criteria that demonstrate uniformity of compensation in respect of the head of damages of pain and physical suffering – explains to a large extent why these damages would be better compensated on the basis of a no-fault system; there will be legal uniformity, and parameters that entitle victims on account of this head of damages.

The question arises as to whether limiting compensation in tort in respect of non-pecuniary damages is in itself a violation of a person's right to bodily integrity, or whether it depends on the nature of the arrangement. Ostensibly, it can be argued that the very limitation of compensation violates the ability to realise the right to protect bodily integrity. Full protection of the right to bodily integrity, in this context, means awarding full compensation. However, one must remember, that even tort law itself does not recognize every damage as compensable. It seems that in respect of compensation for pain and suffering in general, there is no violation of the constitutional right to bodily integrity, and this depends on the specific arrangement. It can be said that the laws of

[530] Menachem Mautner, "*The Hidden Law*" [Hebrew] (5758) 16, 45 & 72-74.

torts today, including the laws of compensation, reflect the position of Israeli law on the question: What is the proper protection of the right to bodily integrity? Therefore, no-fault compensation would provide a suitable solution to this problem. It is worth noting that the no-fault system has nothing to do with reducing future misfortune. These issues must be treated by means of improving quality, risk management, and in some cases taking disciplinary measures. All of these systems remain in place also upon the adoption of the no-fault system.

Chapter IV Part III– An Israeli No-Fault System

Changing the system is intended to ensure equality for victims of all medical accidents, providing appropriate compensation for their damages, rather than through the accepted fault laws, but from a perspective of fairness, respect, equality, and even granting fair compensation for casualties that suffer pain and suffering.

Although it seems that this would be a revolutionary change, this system has been successfully adopted by many nations around the world, so I see great importance in changing the issue of compensation for medical malpractice damages, and instituting a new era in the field of personal injury.

This system would be innovative in three main ways: First, it would define, for the first time, an important field (compensation for medical malpractice injuries) as different from the field of the accepted tort law, and would shift it into another, completely new one. Second, it would apply, for the first time, liability insurance with considerable scope (the intention is the liability of the state towards its citizens through social insurance), in an innovative manner of compulsory insurance. Third, it would operate a wide-ranging no-fault system for the first time, and this embodies the prototype of social insurance for injuries.

The proposed law would make life significantly easier for victims of medical negligence, in that it would not be necessary to prove the fault of the tortfeasor, as is customary today.

The No-Fault Compensation Parameters

Compensation without fault is intended to compensate the victim, or their survivors, in respect of several parameters:

1. Compensation for expenses – Today, Israeli citizens are insured under the State Health Insurance Act, with compulsory insurance, and therefore many treatments are currently given to patients by the Sick Funds [Hebrew – *Kupot Cholim*], and many are also covered with supplementary insurance plans. Therefore, expenses in respect of medical treatments do not always apply. In cases where treatment beyond what can be received in the setting of public medicine is necessary, there is scope to fully compensate for these expenses.
2. Compensation for loss of earning ability – this compensation is calculated according to an assessment of the person's ability to earn a living in the future. This is calculated by estimate, especially with respect to minors. It should be recalled that some of the damages can be recovered from other sources, such as allowances, disability stipends, and various insurance

plans. In such cases, the role of compensation is supplementary only. Moreover, this compensation should be given periodically, to prevent the sum of money from being inflated away, or utilised otherwise than for the victim's purposes. Similarly, it is possible for payments to be stopped, if the person returns to health.

3. Compensation for pain and suffering – this compensation is non-pecuniary, and is measured according to the judge's assessment. As detailed in the previous chapters, there is no uniformity in the sums of compensation awarded. My position is that a person suffering from excessive pain deserves to receive compensation for his or her suffering. However, a limit needs to be set on the amount of compensation, and it should not be determined arbitrarily, as the aim is to introduce certainty and balance into the system. The situation whereby this head of damages (an acceptable legal term for calculating compensation by a court) will become a source of punitive damages, and will be used to express anger at the doctor or the system, should be prevented. If we do not limit the compensation, the problem of uncertainty will not be solved.
4. Compensation in the event of death – when a patient dies due to medical malpractice, during a predetermined period of time, their survivors and dependents will be eligible for compensation.
5. The form of payment, and the sum paid, should be determined according to the ability of the survivors to support themselves (minors v. adults; a widow that remarries, etc.). In such cases, the survivors will not receive compensation for their suffering. We can recall that tort law in Israel does not give compensation for the pain and suffering caused to survivors and dependents.
6. We should consider whether the development of a no-fault system should not prevent the possibility of a victim applying to the courts to demand higher compensation. In such an event, the victim would waive the right to receive money without litigation. This resolves the issue of those who feel deprived, and want to try and receive higher compensation for their suffering.
7. It is understandable that for the purpose of this change to be effective, it should be noted that the amount awarded should be sufficiently high, but with a clear limit.

Supplementary Compensation Claim in Tort

In contrast to the Compensation of Road Traffic Accident Victims Act, which denies a victim's right to a supplementary legal action, we should consider whether the no-fault system should be different, so that a person who turns to the path of no-fault compensation would lose their right to apply to the courts. On the other hand, if they preferred to apply to the courts, they would lose their right to receive the automatic compensation.

Funding the System:

A committee must be established to discuss in detail the form of financing this system. In brief, the burden should be shared by the insurance companies, the medical institutions, the manufacturers and exporters of drugs, and the public.

Conclusion

A no-fault compensation scheme is one in which accidents and injuries are regarded as inevitable, and the emphasis is on compensating victims for related expenses – without anyone having to apply to the civil justice system and prove that another party is liable for the damages.

A fault-free compensation system and insurance model for medical injuries may be the answer to the malpractice crisis that is taking place everywhere in the world today. It would allow doctors to recover and continue after an error occurs; and a better relationship between patients and the hospital system could improve the entire health network.

The current "conspiracy of silence" carries great risks to society. If the error that hurt the patient is due to a broken system, then it has the potential to cause more harm. Silence and lack of investigation of the problem can have very detrimental consequences.

No-fault insurance schemes involve prohibiting the exercise of the natural rights of individuals to recover damages from those whose negligence causes them harm. Public debate over no-fault emphasises consequentialist benefits, and takes little account of the putative rights of individuals to recovery.

Therefore, implementing a no-fault system, based on principles of justice and solidarity, would improve the medical system and the care system, and save significant funds associated with the costs of litigation.

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