At the Supreme Court **CA 361/00**
Sitting as the Court of Appeals for Civil Affairs

Before: **Honorable Vice President (retired) E. Mazza**
Honorable Justice M. Cheshin
Honorable Justice E. E. Levy

The Appellants:
1. **'Azem Dhaher**
2. **'Abduallah Dhaher**

v.

The Respondents:
1. **Captain Yoav**
2. **State of Israel**

Appeal from the judgment of the Court for Jerusalem District Court dated December 1, 1999 in CC 649/91, rendered by Honorable Justice **A. Procaccia**

On behalf of the Appellants: Adv. S. Abu Hussein

On behalf of the Respondents: Adv. D. Plumenbaum-Amsalem

Judgment

Vice President (retired) E. Mazza:

1. Appellant 1 (**the appellant**), a resident of Jenin demanded that the respondents compensate him for the severe bodily harm he suffered as a result of a bullet that penetrated his head. In his civil claim, which was mostly directed against the state (**respondent 2**), the appellant attributed the shooting to respondent 1 (**Captain Yoav**). Appellant 2, who is the appellant's father, demanded compensation for expenses and losses incurred as a result of his son's injury. The District Court rejected the claim, hence the appeal at bar.

2. On July 7, 1991, in the afternoon, the appellant was brought to the hospital in Jenin suffering from a head injury. Due to the severity of his condition, he was transferred to a hospital in Ramallah on that very night and from there to Hadassah Ein Kerem Hospital in Jerusalem. The next day (July 8, 1991), after undergoing extensive tests there, the appellant was taken back to the hospital in Ramallah for continued care and treatment.

   The appellant was brought to the hospital in Jenin by his cousin, Baha' Hamdan Sai'd (**Baha'**). Two days later (July 9, 1991), Baha''s brother, Ala' Hamdan Sai'd, went to the Jenin Police and reported an incident that occurred two days earlier, in which his cousin (the appellant) was seriously wounded and his brother (Baha') was lightly wounded by gunshots while riding in a car together. Ala' brought in the car which the appellant and Baha' had allegedly been driving when they were wounded. Police Officer Nahleh Bishara, who took Ala''s statement, examined the car (an orange Opel). The back window was shattered. The windshield and passenger head rest were damaged and there were blood stains on and around the passenger seat. Since Ala', who was not present at the time of the incident, was unable to provide details, Officer Bishara asked him to have his brother Baha' come to the police station to give a witness account. It seems that at the time of Ala''s visit to the police station, there was no forensic expert on duty. For this reason, thus according to Ala', he was asked by Officer Bishara to take photos of the damage to the car. Ala' took the car, and the day after his visit to the police, took photos of the damage done to the car, as Officer Bishara had instructed him to do. He gave the photographs to the police and took the car to be fixed. The appellant, who was unable to provide any details about the incident owing to his condition, did not come to the police station to give a witness account; whereas Baha', who was summoned to the police station to give a witness account via his brother Ala', reported to the police and provided his account only on October 13, 1991, namely more than three months after the date of the incident.

3. The appellant's claim relied on the account Baha' provided in questioning, an account he repeated in his testimony before the court. Baha' recounted that on July 7, 1991, at around 6:00 p.m., he collected the appellant in his car in downtown Jenin and drove him along al-Muhatta Street toward their home in Wadi Bourqin. As they approached the intersection near the civil administration building (known as "the refugee camp junction"), they drove past a few soldiers who were standing next to a jeep that was parked by the side of the road. Shortly thereafter, a few shots were fired at the car from behind. As a result, the back window of the car was shattered. The appellant (who was sitting in the seat to his right) was seriously wounded in the head and he was lightly wounded (probably from glass shards). According to Baha', he continued driving and

crossed the intersection with the intention of taking the appellant to the home of a physician, but he met the physician on his way and the latter instructed him to turn around and drive the appellant to the hospital. He did so. According to Baha', there were no unusual events in the intersection. The road ahead was open and the soldiers did not order him to stop. In the claim, the plaintiffs argued that the appellant was hit by plastic bullets. The shooting was attributed to Captain Yoav, the commander of the unit stationed at the intersection. According to the plaintiffs, this was a case of negligent shooting at a car that was innocently driving on the road and whose passengers were not involved in any activity that might have threatened the soldiers' lives. They alleged that the shooting was carried out without reasonable cause or prior warning and in breach of the open-fire regulations the soldiers must follow. In addition to Baha', the plaintiffs called another witness, Khaled Farkhati, who recounted that on the aforesaid date, at around 4:30 or 5:00 p.m., he parked his car near his home, which is close to the refugee camp junction. He suddenly heard two or three shots and at that point, noticed an orange Opel driving toward Wadi Bourqin. The person sitting next to the driver (whom he later recognized as the appellant) was bleeding from the head. The witness claimed he was not able to assist the wounded man, as the car continued driving across the intersection. He therefore went into his house. The witness, Farkhati, like Baha', also contended that there were no unusual events in the vicinity of the intersection at the time of the shooting.

The respondents rejected the appellants' version. They did not dispute that Captain Yoav and two or three of his soldiers participated in an action on the day of the incident in the aforesaid intersection. The action was the dispersal of a violent riot and during this action, Captain Yoav did shoot a number of plastic bullets. However, according to their account, the aforesaid incident terminated at no later than 5:00 p.m. and during the incident Captain Yoav did not shoot at any car (nor did any of his soldiers) and no car drove through the intersection, nor could it have driven through the intersection, which was entirely blocked. According to a description given by Captain Yoav and his soldiers during their testimonies before the court, they arrived at the location in a jeep at around 4:00 p.m., having received reports of shots fired from the direction of the refugee camp. When they arrived at the intersection, they encountered a crowd of hundreds of youths who were near the mosque that is located next to the refugee camp. They youths were burning tires and waste bins. When the soldiers appeared, the rioters began throwing iron bars and Molotov cocktails at them. After they parked the jeep at the edge of the intersection, thereby blocking traffic, the soldiers attempted to disperse the rioters using routine riot control methods, including stun grenades and gas grenades. As the crowd continued rioting, Captain Yoav ordered one of his soldiers to shoot two rubber bullets at rioters who were hiding behind some barrels that were at the curb. As this measure failed to deter the rioters, Captain Yoav shot a number of plastic bullets (using an M16 gun), approved for use by officers only according to the orders. He estimates he shot seven or eight bullets in single shots, which he directed at the legs of individuals who appeared to him to be leading and instigating the riot. The soldier who, at Captain Yoav's command, fired rubber bullets at the rioters who were hiding behind the barrels, disputes Captain Yoav's account on this point. According to this soldier, the plastic bullets shot by Captain Yoav were aimed, *inter alia*, at the barrels. In any event, Captain Yoav and his soldiers vehemently denied shooting at any car whatsoever. The soldiers explained that upon arrival at the location of the incident, they blocked the intersection to vehicular traffic. At the time Captain Yoav fired the

plastic bullets in the direction of the rioters, the intersection was entirely blocked. They did not see a car traveling on al-Muhatta Street in the direction of the intersection and they believe that it is impossible that any car could have entered the intersection at the time of the incident, as it was blocked. Alternatively, the respondents claimed that even if it were found that the appellant was hit by plastic bullets shot by Captain Yoav, the shooting was not negligent. They further claimed that the shooting was carried out as part of a wartime action by the military and that they therefore should not be held civilly liable for its outcome.

4. The District Court accepted Captain Yoav's account. In its judgment, the court held that Captain Yoav shot the plastic bullets as part of an action intended to disperse a severe riot that began between 3:30 and 4:00 p.m. and lasted for about an hour. During this action, the road was blocked in a manner which did not allow for any vehicle to travel through the intersection and the plastic bullets were aimed at the legs of rioters who were approaching from the direction of the refugee camp mosque, which is different from the direction of the road. The significance of this is that the appellant, whose alleged injury was caused at around 5:30 or 6:00 p.m., was necessarily wounded in a different incident, the details of which never came to light. It should be noted that the appellant, who was severely wounded, was unable to testify. The plaintiffs' account was therefore mostly based on the evidence given by Baha', who was allegedly driving the car at the time of the incident. It was not just the time of the injury according to Baha''s testimony that did not match the time of Captain Yoav's and his soldiers' action. Other factual claims on which the plaintiffs relied were disputed by the medical and ballistics experts who testified at the trial: how many bullets hit the car, the distance from which they were shot and whether the bullet that penetrated the appellant's head was indeed a plastic bullet. Exit and entry wounds caused by a bullet were detected in the appellant's head. However, x-rays and CT scans indicated that metal pieces were lodged in the head. Three physicians who submitted opinions about the appellant's condition, including the division medical officer who examined the appellant at the hospital, attributed this finding to an injury caused by a plastic bullet. Such bullets contain metallic components and the physicians testified that in their experience, a plastic bullet that penetrates the cranium breaks into pieces. However, a police forensic expert on ballistics, who provided an opinion on behalf of the respondents, believed that a plastic bullet remains intact even when it penetrates the cranium. Having addressed the positions of the experts for both parties, the court ruled that the appellant had failed to establish his claim that the metal pieces that were lodged in his head originated from an injury caused by a plastic bullet.

Moreover: Baha' testified that the shooting that was directed at his car began after he was about 100-120 meters away from where the soldiers were standing. The photographs of the damage to the car, taken, as recalled, by Ala', showed seven points of entry on the back of the passenger's side headrest. The origin of these marks was a bone of contention among parties' experts. The ballistics expert who testified for the respondents determined that the probability that plastic bullets fired from that range would enter the headrest was nil; whereas an Israel Police targetting expert, who also testified for the respondents, determined that the collection of seven adjacent points of entry is inconsistent with firing single bullets at a moving car. The expert who testified for the appellant was of the opinion that the marks on the headrest could have been caused by glass shards that flew forward when the back window of the car was shattered as a result of being

hit by a bullet that was fired from a distance. Respondents' expert was skeptical about this possibility.

5. Baha''s car was not inspected by forensic experts. The testimonies the experts gave at trial were based on the description of the events as given by Baha' and on the photos of the damage to the car, taken by Ala'. The expert for the appellant complained that "the investigators who investigated the incident in question did not use the conventional scientific methods the Israel Police and Military Police Investigations Unit use for investigating shooting incidents." He said that "If some of the ordinary tests had been done, the disputed versions could have been confirmed or denied." In reference to the aforesaid, the court noted: "There is much truth in this expert's approach". However, the court held that the appellant had failed to prove his allegations about the circumstances of the incident in which he was wounded. Relying on the expert opinion of the ballistics expert for the respondents, the court held that the physicians' prima facie findings that the metal pieces lodged in the appellant's head originated from a plastic bullet were inconclusive. Having analyzed the assessments of the ballistics expert, the court held that based on the "fragile" information that emerged from the photos, the experts obviously had different approaches as to the origin, type and number of hits and that based on these approaches "it is difficult to support or refute the plaintiffs' version". The court's overall conclusion was, therefore, that the appellant had not established that he was wounded at the time, place and manner alleged in his claim.

   The court found further support for its belief that it was possible the appellant was wounded in a different incident in the appellant's release letter from Hadassah Ein Kerem Hospital in Jerusalem. This document, prepared by Dr. Zvi Yisrael, indicates that the appellant was hospitalized from July 2, 1991 to July 8, 1991. The court was indeed aware of the fact that all the other medical documents presented at trial and the military operations log refer to the appellant's injury and admission to hospital (at the hospital in Jenin) as occurring on July 7, 1991. However, the court noted that if "indeed, the dates in the aforesaid medical document [i.e. the Hadassah Ein Kerem release letter] are correct and are not a mere technical error in notation, then the date of [the appellant]'s injury was 5 days prior to the date alleged in the action and therefore, the origin of the injury is entirely different from that alleged in the claim.". The court placed the responsibility for the failure to clarify this point on the appellant noting, "The plaintiffs were no doubt aware of this fundamental inconsistency and offered no explanation for it, nor requested a correction and clarification from the author of the medical document, Dr. Zvi Yisrael". The court added that it was indeed possible that the inconsistency in the dates of the appellant's hospitalization should not be construed as having material significance, but that, "Considering other inconsistencies and discrepancies, the question why the official Hadassah Hospital document lists [the appellant] as having been hospitalized there for six days and the hospitalization as beginning five days prior to the date of the alleged injury, is of particular importance." Based on the overall questions it had with respect to the facts on which the appellant's claim relied, the court did not exclude the possibility that the appellant was wounded in circumstances entirely different from those described in his *statement* of claim; for instance, that he was injured in a conflict with locals.

Alternatively, the court also held that even if the appellant had established that he was hit by a plastic bullet shot by Captain Yoav, it would have dismissed the claim in the absence of negligence. The court was convinced that in confronting hundreds of rioters who were throwing stones, metal bars and Molotov cocktails, the lives of the members of the unit under Captain Yoav's command were in danger. In this state of affairs, the controlled shooting of a few plastic bullets, using the gun sight toward the legs of the lead instigators was a reasonable act that was consistent with the open-fire regulations. Those guilty of negligence in the aforesaid circumstances were not the soldiers but rather Baha' and the appellant, who drove their car toward an area where a riot was taking place and in so doing put themselves at risk of random injury. In view of its accumulated conclusions, that the appellant had entirely failed to establish the circumstances in which he was wounded and failed to prove that the shots fired by Captain Yoav, assuming they did indeed cause his injury, were fired negligently, the District Court chose not to address the respondents' argument that the act on which the appellant based his action was "a wartime action of the Israel Defense Force", for which the state is not civilly liable under Section 5 of the Civil Wrongs (Liability of the State) Law 5742-1952.

6. In his closing arguments before the District Court, the appellant claimed that in failing to transfer the car for inspection by forensic experts, the police caused him evidentiary damage which alone suffices to shift the burden of proof to the state, to the effect that it would have to prove no liability on its part for his injury. Despite the fact that this argument was not included in the appellant's statement of claim but was rather first raised in the course of closing arguments, the District Court reviewed it on its merits and dismissed it. In the judgment, the court ruled that the evidentiary damage rule did not apply to the matter at hand. First, since this rule applies exclusively to cases in which the defendant fails to document an incident that it has a duty to document and it cannot be applied to a case in which the police did not perform and exhaustive investigation; Second, the circumstances under which the car was brought to the police raised suspicion that could explain how seriously the police took the complaint. The suspicion is rooted in the fact that the car was brought to the police only two days after the incident and by Ala', who had not been present during the incident, whereas Baha' (despite being the only person who was able to describe the incident) did not report to the police to give a statement and withheld his account of the events until he testified at trial.

7. The appellant sought to present two more pieces of evidence at his appeal: One is a copy of Baha's statement to the police with the objective of refuting the assumption made by the District Court that Baha' never reported to police questioning. The other is an amended release letter from Hadassah Hospital showing his hospitalization therein began on July 7, 1991 (rather than July 2, 1991, as erroneously noted in the medical document prepared by Dr. Zvi Yisrael). Counsel for the respondents did not object to the fling of Baha''s statement, but did object to the filing of the amended release letter from Hadassah Hospital. On this issue, she claimed that in light of the residual lack of clarity regarding the circumstances in which the appellant was injured remaining after he gave his evidence, and without a satisfactory explanation with respect to the error in the medical document prepared by Dr. Yisrael, the appellant should not be permitted to submit new evidence with respect to the time of his hospitalization. It should be noted that even before the appeal was brought to a hearing, the appellant produced other documents explaining the error in the original medical document. No decision has yet been rendered on the appellant's motion for

submission of new evidence. Before I address the arguments made by the appellant in the appeal, I shall first refer to his motion for submission of new evidence.

My opinion is that both parts of the motion should be granted. A review of the reasoning provided for the judgment of the District Court leads to the impression that in reaching its decision to dismiss the appellant's claim, the court gave weight to each of the following suppositions: The first is that Baha' never reported to police questioning and the second is that the particulars in the appellant's release letter from Hadassah Hospital, if not a pure technical error, support the possibility that the appellant was wounded in a shooting that took place five days before the date cited in his claim. In the circumstances of the matter and in view of the severity of the injury sustained by the appellant, it seems to me that the new evidence should rightly and justly be admitted. A review of Baha's statement, the submission of which was unchallenged by counsel for the respondents, indicates that despite the fact that he did report for questioning more than three months after the incident, he gave the same version of the events at the time of the police investigation as he gave to the court. The appellant's amended release letter from Hadassah Hospital, which was presented to us, clearly indicates that the appellant was admitted to hospital (at the request of the hospital in Ramallah) on July 7, 1991 and that after undergoing some tests, he was brought back to the hospital in Ramallah for further treatment on the following day. In a public servant document, prepared in accordance with the law, the Medical Records Department Director at Hadassah Hospital testified that when the appellant was in hospital, the time of his admission was erroneously printed in his release letter as July 2, 1991, when in fact, he was admitted on July 7, 1991.

8. In his appeal, the appellant complained that the District Court was overly rigid with respect to certain inaccuracies in his evidence, whereas it refrained from attributing significance to inaccuracies in the testimonies of Captain Yoav and the soldiers. The court also erred in holding that Baha' never reported to police questioning and never gave his account of the events, as well as in supposing that the appellant could have been hurt at a time and place different from those he alleged. The appellant reiterated his contention that the incident in which he was injured took place as described in Baha''s testimony. To support this contention, he relied, *inter alia*, on the conclusions of the investigation conducted by the Military Police Investigation Unit (MIU), which indicated that there was reason to believe that Captain Yoav shot the bullet that hit the appellant. In addition, the appellant argued that in failing to properly examine the damage to the car, the police caused him evidentiary damage. If the car had been examined by an expert, he would have probably been able to demonstrate that he had been hit by a plastic bullet shot from Captain Yoav's weapon. Under these circumstances, he contended, the onus of refuting his account of the circumstances on which he based his claim shifted to the state. The appellant contended that further evidentiary damage was caused to him when, during the MIU investigation, the investigators took the x-rays and C.T.s that were done to him at the hospital in which had had been hospitalized. These were not returned and could not be located at the time of the trial.

The respondents relied on the judgment of the District Court. The appellant, they contended, had entirely failed to prove that he was hit by a bullet shot by CaptainYoav. He also failed to prove that the plastic bullets shot by Captain Yoav were shot negligently. The court did err in its

supposition that Baha' did not give a statement to the police. However, once it came to light that he reported to the police to give his statement more than three months after the date of the incident, the aforesaid erroneous assumption on the part of the court does not detract from the correctness of its finding that Baha' had withheld his testimony. The respondents disputed the appellant's arguments with respect to the application of the evidentiary damage rule; both based on the arguments included in the judgment of the District Court and in light of the special circumstances that prevailed in the Judea and Samaria Area during the Intifada (to which the adjective "the first" has been added since). On this issue, the explanation was that in view of the high number of incidents that were taking place in the Area in the aforesaid period of time, many of which required forensic testing every day, and in view of the difficulties and danger involved in conducting the tests in hostile territory, the police was forced to limit its tests to the more difficult cases, particularly those that resulted in death. The taking of the medical images from the hospital caused no evidentiary damage as they were required to complete the MIU investigation, which was conducted at the instruction of a military advocate and be made available to the doctors who testified at trial. The respondents repeated their contention – on which the District Court refrained from ruling – that the action due to which they were sued for compensation for the appellant was a "wartime action", for which the state has immunity from civil liability.

9. When the appeal at bar was heard by us for the first time, in a session dated October 10, 2001, parties' counsel accepted our suggestion that the hearing of the appeal be postponed until judgment was rendered in CivA 5964/92 **Bani Odeh v. State of Israel**, in which the question of what constitutes a "wartime action" was under review by an extended panel. The judgment in **Bani Odeh** was handed down on March 20, 2002 (see: CivA 5964/92 **Bani Odeh v. State of Israel**, IsrSC 56(4) 1). Thereafter, parties filed their supplementary submissions. The respondents relied on **Bani Odeh** as an authority that supported their position. On this issue, they claimed that the findings of the District Court with respect to the severity of the danger the soldiers faced while under attack by a mob of rioters came under the criteria established in **Bani Odeh** for defining a military action as a wartime action. The appellant, on the other hand, claimed that the soldiers' description of the incident and the severity of the danger they faced was exaggerated. He contended that if it were true that they were attacked by hundreds of rioters who were throwing stones, iron bars and Molotov cocktails at them, one would think that shooting two rubber bullets and eight plastic bullets would not have sufficed. The fact that the soldiers used only a few measures necessarily leads to the conclusion that the riot because of which they had been called to the refugee camp junction was much less serious than they described and that their assignment was no more than an ordinary police assignment.

10. During the review, we requested parties' counsel to complete their closing arguments on the question of the application of the evidentiary damage doctrine, both from the evidentiary-procedural aspect and its material-tortuous aspect. In his closing arguments, counsel for the appellant repeated his arguments in brief. According to counsel, the police and the MIU, who handled the investigation of the incident, had a duty to examine the damage to Baha''s car using forensic experts. In their omission to conduct such an examination, they caused the appellant evidentiary damage which was expressed in the impairment of his ability prove his allegation that he was injured in the head from a plastic bullet using objective evidence. The appellant claims he

suffered further evidentiary damage caused by the removal of his x-ray and C.T. images from the investigation files.

Counsel for the respondents denied the applicability of the evidentiary damage doctrine to the matter at hand. She admitted that, as the District Court believed, the doctrine may not apply exclusively to omissions in documentation, but that it might also apply to other types of negligent omissions. This notwithstanding, she argued that the doctrine should not be applied to an investigative omission on the part of the police which did not undermine the ability of a suspect who was under investigation to defend himself but, instead, undermined a victim's ability to establish the details of the incident in which he was harmed in a civil action. In our matter, in any event, the absence of a forensic examination cannot be attributed to a negligent omission by either the police or the MIU. Once the District Court rejected the account given by plaintiff's witnesses of the circumstances under which the appellant was injured and preferred the account provided by Captain Yoav and his soldiers, there was no "evidentiary stalemate". According to the evidentiary-procedural aspect of the evidentiary damage rule, the existence of such a "stalemate" is an additional condition for shifting the burden of proof to the defendant.

11. The rejection of the appellant's claim was based on three major reasons: One, the appellant entirely failed to establish that he was hurt by a plastic bullet that was fired by Captain Yoav in the direction of the car in which he was riding at the time and place cited in his statement of claim. Second, that the evidentiary damage rule does not apply in any way to the appellant's matter and as such, the failure of the police to properly examine the car Ala' brought to the station in Jenin does not support the appellant's position with respect to the incident in which he was shot; Third, that even if the appellant had proven that he was hurt by plastic bullets at the time and place he alleged, his claim would have been rejected due to lack of evidence proving that Captain Yoav was negligent in carrying out the shooting.

A careful review of the evidence presented to the District Court has led me to the conclusion that the appellant did provide prima facie evidence to establish his claim that he was hurt while riding in Baha's car at the refugee camp junction in the afternoon of July 7, 1991. The fact that the exact time at which he was injured was not fully ascertained was not sufficient for ruling out the possibility that the harm was done while Captain Yoav and his soldiers were in action in the area of the intersection. I am also of the opinion that the failure of the police to properly examine the physical evidence in Baha's car justified shifting the burden of proof on the issue of the type of bullets that hit the car in which the appellant was riding to the state, and, it follows, also on the issue of confirming or excluding a ballistic match between these bullets and Captain Yoav's weapon. I am, with all due respect, unable to agree with the alternative reason provided by the court, that in carrying out the shooting toward the car, Captain Yoav did not breach the duty of care he had toward the appellant. My conclusion is, therefore, that the appeal must be accepted. This conclusion necessitates intervention in the factual findings of the District Court. Needless to say, such intervention is not characteristic of the appeals instance. However, having examined and reexamined the evidence, I have seen no way to avoid such intervention.

12. The District Court had full confidence in the accounts given by Captain Yoav and his soldiers, that during the incident in which Captain Yoav shot the plastic bullets at the rioters, the

intersection was completely blocked and no car drove through it. Baha''s account that the intersection was clear and that as he was not detained by the soldiers who were standing next to a jeep by the side of the road, he continued driving toward the intersection and that even after the shots hit his car, he continued driving through the intersection, was rejected seeing as it was inconsistent with the reliable testimonies of Captain Yoav and the other soldiers who were at the intersection. Another reason that guided the court toward its conclusion that the appellant was not hurt at the time and place alleged in his claim relied on the discrepancy between the time of the event as testified by Captain Yoav and his soldiers and the time at which, according to Baha''s testimony, he arrived at the intersection.

13. With all due respect, I believe that the evidence presented at trial justified different conclusions. I will first address the impression the court drew from Baha''s testimony on the one hand and Captain Yoav's testimony on the other. In rejecting Baha''s account, the court gave weight to its erroneous presumption that Baha' never reported to the police to give a statement during the investigation. This can only mean that based on this assumption, the court found reason to suspect that Baha' avoided giving a statement during the investigation in order to cover up the real circumstances under which the appellant was shot. Another erroneous supposition, which also appears to have influenced the court's assessment that the appellant was injured at a different time and place, at least to a certain degree, was the fact that the appellant's original letter of release from Hadassah Hospital (mistakenly) listed his hospitalization there as begining on July 2, 1991, whereas he was actually transferred from the hospital in Ramallah to Hadassah in the early morning hours of July 8, 1991. I am not ignoring the fact that Baha''s statement during the investigation was given with great delay. However, on the issue of considering Baha''s testimony to be withheld testimony, the difference between the wrong assumption that Baha' never reported for investigation and the fact that he did report and provided his account of the incident, albeit late, is significant. On the one hand, it seems that in accepting the testimonies of Captain Yoav and his soldiers, that they blocked the intersection upon arrival at the location of the incident and that at the time Captain Yoav shot plastic bullets, the intersection was blocked in such a manner that did not allow any vehicles to drive through it, the court did not give weight to the fact that the claim that the intersection was blocked was raised by the witnesses for the defense for the first time when they were testifying in court. A review of their statements during the MIU investigation indicates that, in those testimonies, they stated they never saw an orange Opel driving on the road that leads to the refugee camp or through the intersection. None of them claimed that at the time the intersection was blocked and no vehicle could have driven through it. It is no wonder that neither the investigation summary report prepared by the MIU investigator, nor the opinion of the central command military advocate, which was addressed to the state attorney, contain any mention of the intersection having been blocked to vehicular traffic.

Moreover: another witness (besides Baha'), plaintiffs' witness Khaled Farkhati, also testified that the appellant was wounded by gunshots while Baha''s car, in which [the appellant] was riding, drove through the refugee intersection toward Wadi Bourqin. According to this witness' version, which was cited above, on the day of the incident, at around 4:30-5:00 p.m., he parked his car near his home, which is close to the refugee camp intersection. He suddenly heard two or three shots and then noticed Baha''s car, which was driving toward Wadi Bourqin, with the person in the passenger seat bleeding from the head. According to the witness, he was about to offer the

wounded man assistance. However, as the car continued driving through the intersection, he turned around and went home. The court mentioned Farkhati's testimony. It appears that it did not trust the witness' account that at the time of the shooting there was no unusual occurrence at the intersection. However, the court entirely failed to address the witness' main claim that the car was shot when it was approaching the intersection and that the car then continued to drive and crossed the intersection.

14. Accepting Captain Yoav's account that he aimed the plastic bullets only at the legs of rioters who were approaching from a direction different from that of the road was inconsistent with the findings of the inquiry held by District Brigade Deputy Commander, Lieutenant Colonel Guy Refaeli on the evening after the incident. Captain Yoav's account was also inconsistent with the testimony of one of his soldiers, who testified that the plastic bullets were aimed, *inter alia*, at the rioters who were hiding behind barrels. The information provided to the army at the time was that at around 5:00 p.m., the appellant was brought to the hospital in the city, suffering from a head injury sustained as a result of a bullet and that in light of the severity of the injury, some twenty minutes after admission, he was transferred to hospital in Ramallah. The information did not indicate that the appellant was wounded while riding in Baha''s car toward the intersection and it seems that Lieutenant Colonel Refaeli assumed that the injured person had taken part in the riot. However, a review of Captain Yoav's account of the shooting (Captain Yoav was the only soldier who shot plastic bullets), led Lieutenant Colonel Refaeli to the conclusion that some of the shooting was uncontrolled. Despite the fact that in the summary of the inquiry, he presumed the injured person who was admitted to hospital (namely, the appellant) was hit by unidentified shots, he did not exclude the possibility that he was injured by plastic bullets shot by Captain Yoav. The conclusion drawn by the MIU investigator in his investigation summary report and by the central command military advocate in his opinion, was much more unequivocal. Both arrived at the conclusion that the appellant was hit by the plastic bullets shot by Captain Yoav. It should be noted that in his opinion, the military advocate also addressed the direction of the shots as follows:

> The general direction of the shots fired is consistent with the location of the vehicle at the time [the appellant] was wounded, such that the possibility that the shots fired in the direction toward which Captain Yoav fired hit a vehicle driving on the Jenin Refugee Camp road cannot be excluded. It is noted that the area between the location from which the shots were fired and the location where the injury occurred was clear and there were no objects or obstacles that might have prevented a direct trajectory by a bullet shot from where the officer fired to the point at which, according to the diagrams, [the appellant] was hit while traveling.

Based on Lieutenant Colonel Refaeli's impression that Captain Yoav carried out uncontrolled shooting of plastic bullets, the military advocate added that this finding increased the probability that these shots were the ones that hit Baha''s car and caused the appellant's injury.

Needless to say, the District Court, to which the aforesaid investigative material and opinion were submitted when the appellant presented his evidence, was at liberty to prefer the testimonies

given by Captain Yoav and his soldiers and to base its findings upon them. However, in its judgment, the court made no reference to the fact that the accounts Captain Yoav and his soldiers gave in their testimonies at trial differed on material points both from the accounts they gave at the inquiry and investigation and from the conclusions the MIU investigators and the military advocate drew from the objective findings. The court also did not address the testimony of the soldier from Captain Yoav's unit, who recounted that some of the plastic bullets were aimed at the rioters who were hiding behind the barrels, contradicting Captain Yoav's account that he fired plastic bullets only toward the legs of the instigators of the riot, who were approaching him from the direction of the mosque at the refugee camp (which is different from the direction of the road). The court presumed that the account Captain Yoav gave in his testimony was fully consistent with the one he gave during the MIU investigation. In light of what has been presented, I find it difficult to accept this assessment. It also seems that in giving full credence to the testimonies of Captain Yoav and his soldiers, the court did not give any weight to the fact their statements to the MIU investigation were delayed until the middle of January 1992, namely, they were collected more than six months after the date of the incident, despite the fact that the investigation file was transferred to the MIU (on the instructions of the military advocate) as early as August 14, 1991. It seems that the court should have attributed weight to this fact in determining the prima facie credibility of the statements.

15. The court gave considerable weight to the discrepancy between the time of the incident and the time at which, according to Baha', he arrived at the intersection in his car. The court presumed that Captain Yoav and his soldiers were involved in the incident until 5:00 p.m. at the latest, whereas Baha' insisted that he arrived in the car no earlier than 6:00 p.m. In the court's view, the time gap excluded the possibility that the appellant was hurt by the plastic bullets that were shot by Captain Yoav. I have had difficulty finding solid ground for this finding as well. At least with respect to the time at which the incident terminated as far as the soldiers were concerned, the court seemed to have a solid fact. The inquiry conducted by Lieutenant Colonel Refaeli in the evening after the incident indicated that Captain Yoav's unit headed to the location of the incident after a report transmitted by a lookout at 4:35 p.m. The lookout reported shots heard from the direction of the refugee camp. The inquiry also indicated that shortly thereafter, a reinforcement border police unit was sent to assist Captain Yoav's unit and the two forces worked together to disperse the riot which continued until 6:00 p.m. and thereafter. The time at which Captain Yoav shot plastic bullets was not ascertained. However, the report of the hospital in Jenin, which indicates that the appellant was brought there at 5:00 p.m. (presuming that the report, which was made late at night, indicated an exact rather than an estimated time) could plausibly lead to the conclusion that the appellant's injury (presuming it was indeed sustained from these shots) occurred close to 5:00 p.m. This conclusion is consistent with the witness Farkhati, who stated that the incident occurred at about 4:30-5:00 p.m. It is also consistent with the testimony of Ala', who estimated he heard of the incident and rushed to the hospital sometime between 5:00 and 6:00 p.m. Baha', as recalled, claimed he arrived at the intersection at around 6:00 p.m., yet the possibility that he did not give an accurate time cannot be excluded (as the military advocate stated in his opinion). In any event, whether the hospital in Jenin registered the appellant's estimated time of admission, or Baha' was wrong about the time at which he arrived at the intersection, the time gap itself cannot lead to any conclusion. The material question before the

District Court was whether the appellant was indeed hit by a plastic bullet. A positive answer to this question necessitated the conclusion that he was hit by the shots fired by Captain Yoav, who, according to Lieutenant Colonel Refaeli's inquiry, was the only soldier who shot plastic bullets in the city of Jenin on the day of the incident. The decision on this question should have been based on other evidence and could not have been reached as the apparent consequence of the discrepancy between the time the shots were fired according to the accounts of Captain Yoav and his soldiers and the time Baha' claims he arrived at the intersection.

16. The appellant claims that the state caused him evidentiary damage both in the failure of the police to examine the physical evidence (including the damage and the marks left by the gunshots) in Baha's car and in the fact that MIU investigators took his x-ray and C.T. images from the hospital during the investigation of the incident and the images could not be located at the time of the trial. In the confines of this judgment, I have not found reason to make a ruling on the question of whether the taking of the medical images from the hospital constitutes evidentiary damage. The appellant's arguments on this matter remain as they are. I will hereinafter address only the appellant's contention that the failure of the police to examine the physical evidence in Baha''s car caused him evidentiary damage for which the state is liable, as this argument, is, in my opinion, based in law.

17. The testimony of Police Officer Bishara, who was called by the state at the request of counsel for the appellant, indicated that according to routine practice at the police station in Jenin, the car should have been brought for examination by a forensic expert. Based on this routine practice, the police officer attempted to deny Ala's account that it was Bishara who asked him to take photographs of the damage and blood stains in the car. According to Bishara, the forensic expert should have taken photographs of the car, and if there was no such expert at the station when Ala' went there, he should have left the car in the station parking lot so that it might be examined by a forensic expert the following day. However, when asked how it transpired that Ala' took photos of the damage to the car by himself, he was unable to produce a satisfactory answer. His role in the affair, he claimed, ended with his taking down Ala''s statement and preparing a report about the damage and blood stains he saw in the car, which was sent to the head of the investigation division. The aforesaid was meant to demonstrate that if the fact that the car was not examined by a forensic expert constituted an omission or if the investigation of the affair was deficient, these should not be held against him. It seems that the District Court, which chose to ignore Bishara's testimony, accepted Ala''s version that he was asked to take photos of the car by the officer. The respondents did not dispute this account before us. It seems, then, that Bishara could not explain why after giving his statement, Ala' took the car and drove off without being asked to park it at the police station. It is clear that Ala' took photos of the damage and blood stains in the car because he was asked to do so by Bishara and that if Bishara had told him to park the car in the police station parking lot to be examined by a forensic expert, he would presumably have done so.

18. As recalled, the District Court found "much truth" in the contention of the expert who testified for the appellant, that if the police investigators had used the accepted scientific methods usually practiced by the police and the MIU in the investigation of shooting incidents, it would have been possible to confirm or deny the divided positions of the experts who testified for the parties on the

question of identifying the type of bullet that hit the appellant. The court also ruled that based on the "fragile" information that emerged from the photographs, the experts had different approaches as to the origin, type and number of hits. On the basis of these approaches, it is difficult to support or refute the plaintiffs' version". This means that with respect to the origin, type and number of hits, there was a 'stalemate' in the evidence. However, the court rejected the appellant's contention that the failure of the police to perform the accepted tests caused him evidentiary damage which would sufficient to transfer the burden of proving lack of liability for the injury to the state; first, because of its presumption that the evidentiary damage rule is inapplicable to the matter at hand and second, since the circumstances under which the car was brought to the police station raised suspicion and this might shed light on how seriously the police took the complaint itself.

19. I find these reasons to be unacceptable. It is our established rule that where a defendant's negligence causes a plaintiff evidentiary damage, that is, impedes the plaintiff's ability to use a piece of evidence which could, at face value, potentially establish any of the factual arguments on which his claim is based, the court may shift the onus of persuading that the factual argument is incorrect to the defendant (see, e.g.: CivA 9328/02 **Meir v. Laor**, Dinim Elyon, 68, 53, §23; CivA 8151/98 **Sternberg v. Chechik**, IsrSC 56(1) 539, 551-552; CivA 6160/99 **Druckman v. Laniado Hospital**, IsrSC 55(3) 117, 125-126). This rule, which is largely based on considerations of justice and of the social need for deterring potential defendants from losing evidence, expresses the evidentiary-procedural aspect of the evidentiary damage doctrine (see: Porat and Stein, *The Evidentiary Damage Doctrine: Justifications for adoption and application in typical situation of uncertainty in torts*, **Iyunei Mishpat** 21(5758) 191, 241-254; Porat & Stein, *Tort Liability under Uncertainty* (2001), 165-167). This is separate and apart from the tortuous-material aspect of the doctrine which has yet to be explicitly incorporated into our case law and which requires no review in the matter at hand (compare: **Meir**, §14; CivA 6768/01 **Regev v. State of Israel** (not yet reported), §5). The evidentiary-procedural rule on evidentiary damage means that there is a factual presumption that, had it not been damaged as a result of the defendant's negligence, the missing evidence would have supported the plaintiff's account with respect to a disputed factual argument. Though this presumption is ostensibly refutable, indeed, by the nature of things, and like other presumptions used at the end of a trial – it is needed only when it is known that there is no other relevant evidence; namely, when there is an "evidentiary stalemate" between parties with respect to a factual argument that could have been proven by the plaintiff if he had the missing evidence. In this situation, the defendant lacks evidence for refuting the presumption. It follows that if the presumption arises, it effectively determines the factual dispute (Porat and Stein, CivA 5373/02 **Navon v. Klalit Health Fund**, IsrSC 57(5) 35, 47).

In the case law of the Supreme Court, the rule has been thus far applied only to actions regarding medical malpractice and mostly to cases in which medical records were not kept, went missing or were lost. However, it is clear that the rationale underlying this rule also applies to other types of actions and there is no relevant justification for limiting it to the medical context exclusively. In a judgment given in an action the cause of which was medical negligence, **Vice President Orr** has recently noted that: "The principle underlying the shift in the burden of proof covers more than omissions in preparing medical records and maintaining them properly. It also covers negligence of a different nature which diminishes the plaintiff's capacity to prove his cause of action" (**Meir**,

§13). In the same vein, **Justice Dorner** (in a single opinion and while referring to **Meir** among others), noted that: "In claims regarding medical negligence, it has been ruled that deficient or absent records as a result of negligence shift the burden of proof to the defendant with respect to those matters the records might have helped prove… and this rule is applicable to other areas as well." (CivA 8858/02 **State of Israel v. Zahawa**, Dinim Elyon, 78 53). It should be noted that the **Zahawa** case did not involve a claim for medical negligence, but rather a claim against the state for seizing private land, the exact size of which the plaintiff had difficulties proving due to landmines the army placed therein and which prevented him from measuring the land.

20. I believe that the evidentiary-procedural aspect of the evidentiary damage doctrine is applicable to the matter at hand. I find support for this position in the District Court's finding that the "fragile" information that emerges from the photos of the damage to the car (which were taken by Ala') and the different approaches among the experts as to the origin, type and number of hits, have resulted in a situation in which "It is difficult to support or refute the plaintiffs' version". This means that the opposing opinions of the experts result in a deadlock. In this context, one recalls the court's remark that there is "much truth" in the contention of the expert for the appellant that if the police had employed the scientific methods commonly used in shooting incidents, it would have been possible to confirm or deny the experts' different positions on the question of identifying the type of bullet that hit the appellant. Indeed, the fact that forensic experts did not examine the marks left by the shooting in the car constitutes an omission of negligence on the part of the police, as explained below. In so doing, it denied the appellant, who was unable to perform such an examination, evidence which could have potentially established his claim that he was hit by a plastic bullet. This situation is typically one in which the evidentiary damage doctrine should be applied, in the sense that the burden of proof with respect to the circumstances of the incident in which the appellant was harmed would shift to the state.

The District Court, which found that the evidentiary damage doctrine did not apply to this case, ordered the dismissal of the appellant's action. The main reason for doing so was that the appellant had failed to prove his claim that he had been hit by a plastic bullet shot by Captain Yoav at the car in which he was riding. My opinion, as aforesaid, is that the appellant's case merits the application of the evidentiary damage doctrine. The matter herein concerns a civil claim by a victim against the state. The claim relies on the victim's contention that he was shot and hit by IDF soldiers. An examination of the marks left by the shooting by a forensic expert might have provided the appellant with the ultimate proof that could confirm or deny his claim that he was hit by a plastic bullet. Note: the military and the police are organs of the state and the state bears responsibility for their acts and omissions. In failing to have the car examined by a forensic expert, the police denied the appellant the central proof he required for proving his contention that he was hurt by a plastic bullet shot by Captain Yoav. Seeing as the appellant and the state are direct parties both in the civil claim and in causing the evidentiary damage, there is cause for an evidentiary presumption in favor of the appellant that he was shot and hit by a plastic bullet. The evidence indicates that Captain Yoav was the only soldier who shot plastic bullets on the date of the incident in the city of Jenin. Assuming that plastic bullets are possessed exclusively by the IDF (an assumption that remained undisputed by the respondents in their pleadings before us), the aforesaid presumption is enough to compel the conclusion that the appellant was hit by a plastic bullet shot by Captain Yoav. However, even if there were reason to

suspect that local residents of Jenin might also have had plastic bullets, it would not suffice to detract from the aforesaid conclusion: the evidentiary damage caused to the appellant by the failure of the police to examine the marks left in the car by the shooting is expressed in impairing the appellant's ability to establish what type of bullet hit him and demonstrate a ballistic match between that bullet and Captain Yoav's weapon.

21. As noted, applying the evidentiary damage doctrine to the matter at hand is subject to a finding that the failure of the police to examine the car was, in the circumstances of the matter, a negligent omission. My opinion, as stated, is that the appellant is entitled to this finding as well. On this issue, I cannot accept the reasons provided by the District Court, that the suspicion raised by the fact that Ala' brought the car to the police two days after the incident in which the appellant was hurt, whereas Baha', though summoned, did not appear to give his account, may explain the manner in which the police treated the investigation of the complaint. Even if the police investigators estimated that the IDF soldiers were falsely alleged to have harmed the appellant and the appellant was actually hurt in an internal conflict between residents of the city of Jenin, they had a duty to have the car examined by a forensic expert in an attempt to find the perpetrator of the harm. I am also unable to accept the state's contention that in view of the large number of incidents it had to examine in the course of the aforesaid Intifada, the police and the MIU were permitted to limit forensic testing mostly to incidents resulting in death. The appellant was severely wounded by a bullet that penetrated his head. This is a serious case. The car was an essential part of the investigation and the failure to perform the test constitutes a negligent omission on the part of the police. This simple conclusion can also be drawn from the account given by Officer Bishara, who testified that according to police station regulations, the car should have been examined by a forensic expert. It should also be noted that the examination of the car did not require extraordinary efforts or risks in sending an expert out to the field, as the car had been brought to the police station lot and could have been examined in this safe location.

22. The court's alternative reason for rejecting the claim was based on the assumption that the appellant was indeed hit by a plastic bullet shot by Captain Yoav in the direction of Baha''s car. In the circumstances of the matter, the court thought that Captain Yoav was in no way negligent in carrying out the shooting. As I have already noted, I am also unable to accept this reason for rejecting the claim. I will review this section of the ruling of the District Court based on the court's assumption that the appellant was indeed wounded by a plastic bullet shot by Captain Yoav. This notwithstanding, and in the absence of an objective finding with respect to the type of bullet that penetrated the appellant's head, I shall not rule against Captain Yoav that the appellant was shot by a plastic bullet shot by him. In this context, it could be noted that in its negligent omission of not examining the marks left by the shooting in Baha''s car, the police caused evidentiary damage not only to the plaintiff, but also to Captain Yoav. The damage the police caused to the plaintiff is expressed in impeding his ability to prove his claim that he was wounded by a plastic bullet shot by Captain Yoav; the damage it caused to Captain Yoav is expressed in impeding his ability to refute the latter allegation made by the appellant. I shall limit myself, therefore, to a review of the question of whether or not Captain Yoav was negligent in carrying out the shooting without this leading to the acceptance of the appeal against the rejection of the claim against him.

23. It is established case law that "during action in the midst of civilian population, whether within the Green Line or outside it, IDF soldiers have a duty of care toward civilians who might be harmed in all matters relating to the use of weapons." (CivA 3889/00 **Lerner v. State of Israel**, IsrSC 56(4) 304, 311; cf: CivA 1354/97 **'Akashe v. State of Israel** (not yet reported)). The question before us is whether in shooting the plastic bullets, Captain Yoav breached the duty of care incumbent upon him with respect to civilians (such as the appellant) who might have been hit by the shots. The District Court, which gave a negative response to this question, based its position on the testimonies of Captain Yoav and his soldiers. The latter, it is recalled, said that during the action in the area of the intersection, they were required to confront hundreds of rioters who threw stones, iron bars and Molotov cocktails at them. Only when he realized that he and his soldiers had found themselves in a situation in which their lives were in real danger, did Captain Yoav carry out controlled shooting of a number of plastic bullets toward the legs of the lead instigators of the riot. The District Court thought that in the aforesaid circumstances, his act was not unreasonable.

My opinion is that the testimonies of Captain Yoav and his soldiers did not establish a worthy evidentiary basis for supporting the ruling of the District Court that in the circumstances in which the soldiers found themselves, shooting plastic bullets was a reasonable course of action. The onus of proving their claim that this shooting was necessary in order to achieve the goal with which they were tasked, or to remove the danger in which they found themselves was on the respondents in the circumstances of the matter at hand (cf: CivA 2176/94 **State of Israel v. Tabenja**, IsrSC 57(3) 693, the remarks of **Justice Englard**, §12 of the judgment). The District Court accepted the account that Captain Yoav fired only after he realized he and his men were in a situation in which their lives were in danger. A pivotal fact in this context, to which Captain Yoav and his soldiers testified at trial, was that the rioters were throwing Molotov cocktails at them in addition to stones. Yet, this alleged fact was never mentioned by any of them in any of the statements they gave during the inquiry held by the deputy brigade commander on the evening after the incident, or in the MIU investigation. In all their statements, the soldiers recounted that the rioters burned tires and at some point, also threw stones, but said nothing about Molotov cocktails being thrown at them. The fact that the first version of the events from Captain Yoav and his soldiers which includes Molotov cocktail throwing by the rioters was given at trial, undermines the ruling of the District Court that Captain Yoav and his soldiers faced real danger to their lives and that in these circumstances, shooting plastic bullets was a reasonable course of action.

In any event, even if I assume that the shooting was a necessary measure, I cannot accept the conclusion drawn by the District Court that the manner in which Captain Yoav fired was not unreasonable. The aforesaid conclusion of the District Court is based on the supposition that Captain Yoav carried out a controlled shooting of a number of plastic bullets toward the legs of the lead instigators of the riot. My opinion is that this assumption is not sufficiently supported by the facts. I have already mentioned that the District Court was presented with evidence (the inquiry of Deputy Brigade Commander, Lieutenant Colonel Guy Refaeli and the testimony of one of the unit's soldiers) that cast real doubt on Captain Yoav's account that he performed controlled shooting only. The supposition that the shots he fired hit the car that was driving on the road that crosses the intersection constitutes (for the purpose of our ruling) evidence that the shots, at least

in part, were not controlled. Captain Yoav's testimony provides other indications that the shooting in the direction of the car was negligent. He claimed he never saw the car, and in his withheld argument, which, as stated, cannot be accepted, he also said that the intersection was blocked such that no vehicle could drive through it.

Herein also lies the answer to the respondents' additional alternative claim, that if the appellant was indeed wounded by plastic bullets, he was wounded in a "wartime action" carried out by the IDF, in the meaning of the term under Section 5 of the Civil Wrongs Law (State Liability). It seems to me that characterizing an action by three or four soldiers tasked with dispersing a riot by civilians who were burning tires and throwing stones as a "wartime action" goes too far. The judgment given in **Bani Odeh**, where criteria for characterizing a military action as a "wartime action" were stipulated, does not lead to a different conclusion.

24. For the reasons described above, I would reject the appeal inasmuch as it is directed against Captain Yoav, but I would accept it inasmuch as it concerns the rejection of the appellant's claim against the state and rule that the state must compensate the appellant for the damage he suffered as a result of the shooting. The proceeding shall therefore be returned to the District Court for completion of the hearing on the scope of the damage and the compensation rate and for a supplementary judgment. Inasmuch as the court finds that appellant 2, whose claim has not yet been heard on its merits, has an established cause for claiming damages, it shall also determine the scope of his damage and the rate of compensation. The respondents will pay the appellants (together) for costs incurred in both instances as assessed by the registrar and legal fees in the amount of ILS 40,000.

Vice President (retired)

Justice M. Cheshin

I concur.

Justice

Justice E. E. Levy

1. The District Court was presented with two factual accounts of the incidents that took place in the evening of July 7, 1991 on al-Muhatta Street in Jenin, near Wadi Bourqin.

A. Plaintiffs' version –

As stated in the opinion of my colleague, Vice President, retired (E. Mazza), the appellant was unable to testify due to his injury. Hence, the factual background was recounted by others. The first to report to the police station in Jenin was 'Ala' Dhaher, who did not witness the appellant's injury. In a statement he gave on July 9, 1991, Ala' claimed that he had heard from his brother, Baha', that on July 7, 1991, at about 6:00 p.m., as he was driving the

appellant in his car, soldiers suddenly opened fire on them and as a result, the appellant was wounded in the head. At the end of his statement, Ala' told the investigator as follows: "Baha', my brother, told me that he would go to the police station as soon as possible to give a statement".

Baha', in fact, reported only on October 13, 1991, more than three months after the appellant was injured. At this time, his account of the events was taken down. According thereto, he picked up the appellant in his car between 6:00 and 6:30 p.m. and when they arrived at the customs building intersection, he noticed a border police jeep and some soldiers standing next to it. The ensuing events were described by Baha' as follows: "I kept driving, and when I was about 100 meters away, I heard an explosion in the car. I felt glass shards flying into my face and saw two holes in the windshield… after driving for a few more meters, I looked at 'Azem [the appellant] and saw blood on his shirt. I spoke to him. He didn't respond… I didn't hear shots before the car was hit. I just heard the glass explode. I didn't see the soldiers who were standing next to the jeep shoot at me and I didn't see them signaling me to stop." Baha' further claimed: "There were no disturbances where I was driving and I didn't see youths throwing stones from the direction of the camp at the soldiers standing by the jeep."

Khaled Mundhir 'Abd al-Rahman Farkhati also testified for the appellant. He recounted that between 4:00 and 5:00 p.m. on the day of the incident, he heard shots fired and suddenly saw a car approaching with its back window shattered and the man in the passenger seat bleeding from the head.

To complete the picture with respect to the time of the incident, the appellant's friend, Zaki Sweiti, testified that the two went to a factory in Haifa Bay on the day of the incident and started on their way back to Jenin after 4:00 p.m. This detail may be consistent, though barely, with what was stated in the reports of the investigations of the incident that were conducted by army officials. These reports indicate that the appellant was admitted to hospital in Jenin at around 5:00 p.m. (see, P/35, P/36 and the operations log, P/25). However, it is very difficult to find consistency between these and Ala''s version, according to which his brother, Baha''s trip began sometime around 6:00 p.m. and that the appellant was wounded between 6:00 and 6:30 p.m., namely, a considerable amount of time after the appellant was already admitted to hospital.

B. Respondents' version –

This account relied on the testimonies of the soldiers who were at the scene of the incident, which painted an entirely different picture. According to the soldiers, they were called to the same intersection at around 4:00 p.m., following a riot in which hundreds of youths participated. The rioters were throwing anything they could find at the soldiers. In this situation, the intersection was blocked for the purpose of isolating it and therefore it is not possible that any car managed to drive by them.

2. The District Court, which had the advantage of gaining a direct, unmitigated impression of the reliability of the witnesses who appeared before it, decided to prefer the respondents' version to that of the plaintiff's witnesses. In the court's own words:

> "In essence, I trust the testimonies of the IDF soldiers, including Captain Yoav. They described a very difficult situation they were in and specified the manner in which they dealt with it, without attempting to detract from the degree of force and measures they used. I estimate that if they had witnessed the car passing by and the shots that hit it, they would have addressed this and explained the circumstances. Thus, I accept the account of the events that was given by the witnesses for the defense" (see p. 11 of the judgment)

As known, the rule is that an appeals instance does not intervene in findings of fact by the court that heard the case. I have found that no cause justifying a departure from this rule has been established in the circumstances of the case at bar.

3. It appears that despite the contradictory information presented to the District Court, there was no cause to doubt the records made at the hospital in Jenin with respect to the time at which the appellant was brought thereto, namely, around 5:00 p.m. This necessarily leads to the conclusion that the testimonies of Ala' and his brother Baha' unfortunately raise questions, if not more than that, seeing as according to their account, the appellant was injured an hour and a half after he was already in hospital. In these circumstances, I would not hasten to exclude the possibility that the appellant was not at all hurt while riding in Baha''s car, and perhaps this fact explains why Baha' did not report to the police for more than three months. Moreover, the trust the District Court put in the accounts provided by the soldiers necessitated the additional conclusion that the intersection was entirely blocked because of the riot that was taking place there and this too serves to refute Baha''s claims with respect to the circumstances in which the appellant was injured.

4. Another question is whether the respondents are guilty of a negligent omission in not having Baha''s car examined by forensic experts, and whether in these circumstances it is correct to rule that the appellant suffered evidentiary damage that justifies shifting the burden of proof from him to the respondents. On this matter, the common approach is that evidentiary damage is caused on condition that the defendant had a duty which he breached by omission (CivA 58/82 **Cantor v. Musseib et al.**, IsrSC 39(3), 253, 259; remarks of Justice D. Levin in CivA 2245/91 2359 **Bernstein et al. v. Atiya**, IsrSC 49(3), 709, 721; CivA 789/89 '**Amer v. Histadrut Klalit Health Fund**, IsrSC 46(1) 712, 721; CivA 6160/99 **Druckman v. Laniado Hospital**, IsrSC 55(3), 117, 125; CivA 8151/98 **Sternberg v. Chechick**, IsrSC 56(1) 539, 549). In the appellant's matter, the question is whether it is correct to rule that in the circumstances Ala' described to the police officer who took down his statement on July 9, 1991, there was a duty to open an investigation for the purpose of confirming or denying the claim that the appellant was injured by bullets shot by IDF soldiers toward the vehicle in which he was riding. In my view, in the circumstances of the incident at issue, this question should be answered negatively. Considering the large number of shooting incidents in the Territories, which involve more than just IDF soldiers, it is only natural for investigative efforts to be primarily directed at cases in which the circumstances of the injury raised suspicion, even if only initial suspicion, that an offense or omission was committed by security forces. Such suspicion could have arisen in a case where the injured party gave a detailed statement about the circumstances of his injury, or, if he was unable to do so, the account

could have been given by eye-witnesses who were present at the scene. On the other hand, it is very difficult to open an investigation when the investigator is only provided with indirect information that originates from hearsay, and when this "information" not only raises questions with respect to its veracity, but has also been contradicted by the soldiers who were present at the scene and who stand accused. In this situation, it was not unreasonable to wait until a full testimony was collected from Baha', who claimed he was driving the appellant in his car at the time he was injured. However, the latter chose to withhold his account, not for days or weeks, but for some months. Thus, the appellant should have addressed his complaint to Baha' rather than the respondents. Baha' is the party who is at fault for the fact that [the appellant]'s injury could not be investigated in real time. Claiming that Ala''s version sufficed to justify the examination of the car by forensic experts would put the respondents in a situation with which they would be hard pressed to cope, namely, that they were compelled to open an investigation to exclude the possibility that an injury was caused by security forces for every complaint of an injury during those days, even if they were not provided with basic details pointing to that possibility and even in complaints that seemed, on the face of it, to be concocted. In my view, such a burden places the state in a significantly inferior position compared to ordinary litigants. I do not believe that this outcome does justice to the respondents and as such, it is undesirable.

5. Therefore, if my opinion was to be heard, I would have rejected the appeal.

Justice

Decided, by majority opinion, as stated in the opinion of the vice president (retired)

Issued today, 1 Adar 5766 (February 10, 2005)

Vice President Justice Justice
