In the Supreme Court sitting as the Court of Civil Appeals

CA 5604/94

Before: The Honorable President A. Barak
The Honorable Deputy President T. Or
The Honorable Justice E. Mazza
The Honorable Justice M. Cheshin
The Honorable Justice D. Dorner
The Honorable Justice Y. Turkel
The Honorable Justice E. Rivlin
The Honorable Justice A. Grunis
The Honorable Justice E. Hayut

The Appellants: 1. Osama Hemed
2. Ibrahim Hemed

V.

The Respondent: The State of Israel

Appeal against the judgment of the Haifa District court in CP 1032/90 of August 3, 1994 delivered by the Honorable Judge Tova Strasberg-Cohen

Date of the hearing: 7 Tamuz 5758 (July 1, 1998)

Counsel for the Appellants: Hussein Abu Hussein, Advocate

Counsel for the Respondent: Talia Sasson, Advocate, Eyal Yinon, Advocate

Judgement

President A. Barak:

The Facts

1. On July 10, 1990, there were riots and disturbances in the Jenin refugee camp in region of Judea and Samaria which is under belligerent occupation. The rioters hurled stones at the military headquarters base situated near the refugee camp, the guard tower, and the detainees' tent which is located near the entrance gate. In the evening, a motorized Border Police unit traveling in a jeep that was on patrol in Jenin received a message concerning the riots. The motorized unit drove to the refugee camp to contend with the disturbances. When it reached

the camp's main road, it ran into rock and iron rods barriers that had been placed on the road. The jeep and the team were pelted with stones. The jeep continued its way on the main road, removing the barriers. The stone hurlers began to retreat. Two police officers who were on the jeep stepped out and carried out an outflanking action on foot in order to shift the stone hurlers away from the road and to apprehend them. When the youths spotted the police officers moving on foot they began to throw stones at them. The police officers pursued a group of stone throwers which numbered approximately 25 youths, and called on them to stop. During the pursuit, while running, one of the police officers shot one rubber "Roma" (three rubber bullets that are simultaneously shot through an instillation called Roma installed on firearms), i.e. three rubber bullets, at the group of stone hurlers. During the pursuit, the police officers seized two of the protesters. After their apprehension, the police officers returned to the meeting point with the police officers who remained on the jeep on the main road. The police officers did not notice that someone was hit by the rubber bullets.

2. Appellant 1 (a minor born on February 12, 1979, hereinafter: the Appellant) is a resident of the Jenin refugee camp. He was present at the scene of the incident. He was hit in the head by a rubber bullet. He and his father (Appellant 2) filed a tort lawsuit against the state. The District Court (Judge T. Strasberg-Cohen) determined with "a high degree of probability" that the Appellant participated along with other youths in the hurling of stones. Nevertheless, the judge added "I do not determine this as a proven fact", and that she is also examining the responsibility of the Border Police officers on the basis of the assumption that the Appellant was an innocent passerby.

Judgment

3. In light of this factual infrastructure, the District Court held that the firing of rubber bullets was within the powers granted to the Border Police officers by the regulations concerning conduct in the Territories and the open fire regulations. It was determined that these regulations are not flawed and that they were not breached. It was further determined that "there standard of precaution during peaceful and quiet activities is not identical to the standard of precaution during combat activity under pressure of the events on the ground and during mob riots". Against this background, it was decided that the Border Police officers took reasonable precautions under the circumstances. The judge noted "I do not believe that the measures taken here were excessive and unrelated to the events on the ground and the purpose the Border Police personnel had to achieve" (page 6). The claim was rejected on these grounds.

The Appeal

4. The Appellant argued before us that the factual determinations of the District Court are unfounded. Thus, for example, he contended that during his injury there were no disturbances in the area, and that soldiers fired towards him and hit him while he was walking innocently, and that, in any case – on the basis of the factual infrastructure maintained by the Appellant –

the state's liability for the shooting carried out by the Border Police officers ought to have been recognized. The Appellant further argued that even on the basis of the factual infrastructure determined by the District Court, liability ought to have been imposed on the State of Israel. The grounds for this liability are the torts of assault, negligence, and breach of a statutory duty.

5. The State requests that we do not intervene in the judgment of the lower court. It claims that the District Court did not believe the Appellant and his witnesses, and that there is no basis for intervention by the court of appeal. Regarding liability under the Tort Ordinance, it was contended that there are no grounds for the tort of assault, and that, in any event, Border Police officers are granted protection under "self-defense". Regarding the claim of negligence, it was argued that the Border Police officers did not deviate from the appropriate standard of precaution. Finally, it was argued that the grounds relating tort liability due to the breach of a statutory duty were not met.

The Factual Infrastructure

6. The factual determinations of the lower court are well anchored in the evidentiary material presented before it. The District Court explicitly stated that it does not believe the witnesses for the prosecution. In contrast, "the witnesses for the defense testified honestly and fairly". In this situation, the factual infrastructure determined by the District Court will serve as the factual infrastructure in whose framework this appeal will be examined. In the framework of this infrastructure, I will presume – as did the lower court – that the Appellant was an innocent passerby, and did not participate in the violent demonstration.

The Normative Framework

7. State liability is determined in the case before us by the provisions of the Torts Ordinance (New Version) (hereinafter – the Ordinance). Although the state argued halfheartedly that, alternately, it be exempted from liability due to "combatant activity" (Article 5 of the Civil Wrongs (Liability of the State) Law, 5712 – 1952), no evidence was presented to establish this claim in the circumstances of the case in question. "When responding to the question whether an activity is a "combatant" one, all the circumstances of the incident should be examined. The following should be considered: the purpose of the act, the place where it occurred, the duration of the activity, the identity of the military force that is operating, the threat that preceded it and was anticipated from it, the strength of the military force that is operating, its scope, and the duration of the incident" (CA 5964/92, *Jamal Qasem Bani Ouda and three others v. the State of Israel*, IsrSc 56(4) 1,8; hereinafter: the Ouda Case). In the case before us, the Appellant was hit by a rubber bullet during a pursuit by two police officers who attempted to apprehend stone throwers. In light of the overall circumstances, the actions of the police officers must be regarded as a police action with all of the usual risks rather than a combatant action involving an exceptional danger. In this situation, the state is not exempt from liability as "as long as (a military unit) carries out regular policing duties, with the usual risks a police action entails, its activities must not be viewed as "combatant activity (the Ouda case, page 8). The risk created

by the shooting of rubber bullets under the circumstances of this incident is, therefore, a usual risk that the torts laws address.

Negligence

8. There is no dispute between the parties that in the case before us the state has an obligation to act with caution towards the Appellant. The doubt rests in the question of whether the state violated its duty towards the Appellant. We have found that of the three key elements of the tort of negligence– the duty (Article 36 of the Ordinance), the breach of duty and the damage (Article 35 of the Ordinance) – our concern is with the element of the breach of duty. The question is whether. in the circumstances of the case before us, employees of the State (the police officers) deviated, from the level (or standard) of appropriate conduct. If the reply is positive, then it is possible to impose liability on the state by force of its (personal or vicarious) liability.

Reasonableness

9. The level of precaution required according to the tort of negligence is determined in Article 35 of the Ordinance:

> "Negligence
> 35. Where a person commits an act which a reasonable and prudent person would not have committed under those circumstances, or fails to commit an act which a reasonable and prudent person would have committed under those circumstances, or fails to use skill or take proper precaution in the exercise of any occupation as a reasonable and prudent person qualified to exercise such occupation would use or take under those circumstances, then such act or failure thereof shall constitute negligence; where a person was negligent with regards to another person, for whom he has the obligation not to act as he did under those circumstances, it shall constitute as negligence. Any person who causes damage to another by his negligence commits a civil wrong.

This provision determines a single level of precaution. There are no diverse "standards" of reasonable behavior. The set standard of precaution is that of the reasonable person. This is but a personification of the concept of reasonableness. This criterion reflects an appropriate balance between the values and interests that must be taken into account (See Additional Civil Hearing 1740/91, *Barclays Discount Bank Ltd. V. Prost Kotsman, heir of the late Dr. A. Kholi*, IsrSc 47(5) 31,84; hereinafter: the Prost case). Indeed, reasonableness is not a physical of metaphysical concept. Reasonableness is a normative concept. It is a process of evaluation, not a theoretical one. Reasonableness is not bound by deductive logic. It is determined by detecting the relevant considerations and balancing between them according to their weight (see H. MacCormick "On Reasonableness". Les Notions A Contenu Variable En Droit 131, 136 (Perlman and Vander Last (ed.), 1984).

Reasonableness as an Objective Concept

10. The concept of reasonableness (or negligence) in negligence tort is an objective concept. "The reasonableness of measures of precaution is determined by objective criteria embodied in the axiom that the offender must act as a reasonable person would act in the circumstances of the event" (CA 145/80 *Vaknin v. the Beit Shemesh Local Council*, IsrSC 57(1), 113,131; hereinafter: the Vaknin case). The question is not whether the offender deviated from the standard of conduct he is capable of ("subjective negligence"). The question is whether the offender deviated from the standard of conduct deemed appropriate by society ("objective negligence"). Indeed reasonableness in negligence tort is not based on personal "guilt". The offender may do his best and still act unreasonably in a situation where the competence of the offender falls short of the competence expected from a reasonable person. The judge, Lord Denning, expressed this well when he noted that "his incompetent best is not good enough" (in the case of Netleship v. Weston (1971) 2 Q.B. 691, 699). "Social fault" lie at the foundation of the concept of reasonableness. The concept is that the offender deviated from the standard of conduct required by society (See Tedeschi (editor), *Torts Laws: the General Torts Theory* 129 (1969); Y. Gilad "On the Foundations of the Civil Wrong of Negligence in Israeli Torts Law", *Law Review* 14 319, 321 (5749), and, Second Torts, Restatement p.11).

11. The reasonableness of conduct under the tort of negligence ("the negligence") is not scrutinized in a vacuum. It is always a function of circumstances ("in those circumstances": Article 35 of the Ordinance). Indeed "he who leans on a walking cane must take different measures from those taken by a person who leans on a stick of dynamite". (Above Prost case, page 85). These may be the offender's "personal" circumstances. Thus, for example, when the offender is a minor, his age is taken into account when determining the objective criterion. An offender's special knowledge is also taken into account (see CA 61/89 *the State of Israel v. Eiger*, IsrSC 45(1) 580; CA 3056/99 *Stern v. the Haim Sheba Medical Center* IsrSC 56(2) 936). In most cases, the circumstances are external to the offender and reflect the situation (external) in whose framework the event that led to the harm occurred. Indeed the concept of reasonableness places a reasonable person in the event in which the harm was caused and asks what precautions should be taken in this situation. We, therefore, have before us a kind of subjectivity of the objective test, or more precisely, an objective test that takes the particular circumstances of an incident into account. The question is not how would a reasonable person who was not exposed to the special circumstances of the incident act; the question is how a reasonable person would act if he found himself in the offender's circumstances. Even if the examination of the reasonableness of the behavior is conducted, as it naturally is, after some time had passed, the purpose is to examine the reasonableness of the conduct when it took place, according to what was known at the time. The examination is not that of hindsight (CA 491/73 *Gidulei Haholeh Ltd. V. Ezra Mahrah*, IsrSC 29 (2) 32,37; CA 3108/91 *Rivi v. Weigel* IsrSC 47(2) 497. 513; CA 323/89 *Kohari v. the State of Israel*, IsrSC 45(2) 142,151). The examination is conducted from the perspective of what was known when the event took place.

12. Important external circumstances that must be taken into account in the framework of the objective test of reasonableness are circumstances that deviate from normal conditions. When such circumstances exist, the laws of negligence do not require the offender to take precautions beyond those expedient in such exceptional circumstances. Indeed, the offender's

need to make a quick decision, without being able to deeply consider various alternatives available to him, and without being able to prepare in advance, must be taken into account. The very fact that a harmful alternative was chosen by him, - an alternative that during a calm examination would not have been chosen – does not suffice to point to negligence (see Restatement, *ibid*, page 64, and Prosser Keeton, the Law of Torts 196 (5th edition, 1984). I discussed this in a case that concerned reasonableness while driving and noted:

> "Because negligence is always a function of circumstances, the degree of precaution takes into account, as one of the relevant factors, the conditions of congestion in which the driver acted. The level of precaution required of a driver in conditions of congestion, that he did not cause, is not like the level of precaution required of a driver who has the time to determine his manner of conduct in a calculated manner. But even in conditions of congestion, the driver must act in a manner that a reasonable driver would act in his place" (CA 732/77 *Yosef v. Adler* IsrSC 34(2) 414,415).

These remarks also apply when the security forces carry out operations of containment of violent riots and disturbances of public order. At times, the security forces are compelled to act in stressful emergency conditions. In one case, a riot occurred in one of the villages. Police officers who were called in to impose order employed firearms. One of the injured parties sued the state for damages due to the police officers' negligence. In his ruling, President Agranat stated:

> "It must be noted that the police officers acted under emergence conditions the whole time while ordered to contain a mass riot during which people hurled stones at them even when they retreated…It is impossible that we will appraise their conduct when they shot towards an olive grove according to the same level of precaution that is required of a person who caused an accident when he was in a 'normal' situation…It is our duty to consider the tense situation they found themselves in during the act, and not to determine our evaluation only on the basis of the dry facts, that became known after the fact, when it is possible to consider them calmly " (CA 751/68 *Hamama Raed v. the State of Israel* IsrSc 25(1) 19, 214).

Indeed, when police officers or soldiers act in stressful emergency conditions that they did not cause, which prevent them from considering and examining alternatives as they normally would and compel making a quick decision for which it was not possible to prepare in advance, the reasonableness of the actions must be examined in the framework of these exceptional conditions. Their conduct must not be isolated from the conditions it took place in. It must not examined in "laboratory conditions" (see CA 3684/98 *The State of Israel v. Zawyd Bader Ahalayel*(unpublished); hereinafter: the Zawyd case). Errors of judgement that do not amount to negligence must be taken into account. It must be noted: a state of emergency does not establish an exceptional criterion of reasonableness. A state of emergency is one of the circumstances that determine reasonable behavior. Even in emergency situations a person may behave unreasonably and must bear the consequences of his negligence.

13. The question that arises is how, in light of this, is negligence is determined in a negligence tort. According to what criteria must the reasonableness of the conduct of the police officers or soldiers who suppressed a violent riot be examined? How must exceptional circumstances of stressful emergency situations be taken into account? It is true that in the framework of the

objective test of reasonableness exceptional circumstances in which the damage occurred must be taken into account. However, conditions of stress and emergency themselves do not rescind the possibility of negligence. How, therefore, is reasonableness in these situations determined? What are the factors that must be taken into account? All agree that reasonableness does not require employing all possible measures to avoid the danger. Reasonableness requires employing reasonable measures of precaution to avoid the danger (that was anticipated or should have been anticipated). The question is not what measures physically prevent damage. The question is what measures must be required to prevent damage. What measures of precaution are these, and under what circumstances must they be taken? Thus, it must be remembered: liability for negligence is not an absolute liability. It is a liability that imposes on the offender the obligation to take reasonable measures of precaution for the purpose of preventing the damage (see CA 4025/91 *Zvi v. Karol*, IsrSC 50(3) 784, 790; hereinafter: the Zvi case).

Balance between Interests and Values

14. The content of reasonableness (or negligence) is determined by the proper balance between the values and interests relevant to the decision. The purpose of the balance is to determine the social value of the offender's conduct (see Gilad, *ibid*, page 322). The principle of "Social guilt" that lies at the basis of liability for negligence is thus expressed. The interests and values that must be taken into account are the interests and values of the injured party, the offender, and society (CA 285/73 *Tramkolin and Israel Sport Equipment Ltd. V. Nahmias*, IsrSc 29(1) 63,74; the Prost case, page 84; the Vaknin case, page 131; CA 3124/90 *Sabag v. Amsalem*, IsrSc 49(1) 102,107; hereinafter: the Sabag case; The Zvi case, page 790; A. Porat, "Negligence and Interests", *Law Review* 24 275 (2000). The gravity of harm to life, dignity and bodily integrity of the injured party must be examined from his perspective. Consideration must also be given to the probability of the realization of the harm. From the perspective of the injured party, the greater the harm, and the greater the probability of its realization, the greater are the measures that must be taken to prevent the danger. From the perspective of the offender, the costs he is required to expend to prevent the danger and the cost of the resources and means necessary for the prevention of harm must be examined. From the perspective of the offender, the greater the expenditures required of him are, and the lesser the probability for the realization of the harm to the victim is, the lesser are the measures required from him for the prevention of the danger. From the public's point of view, the social importance of preventing damage on the one hand, and refrain from the activity that creates the danger on the other must be considered. "The public consideration that balances between the needs of the public and the distribution of the resources at its disposal, and the requirements that arise from time to time in the framework of the measures needed for greater security in a specific area must be contemplated" (Justice Shamgar in CA 343/74 *Grovner v. the Haifa Municipality*, IsrSC 30(1) 141, 162). From the public's perspective, the more a harmful activity is devoid of social importance, the greater are the measures that must be taken to prevent it.

15. These values and interests – of the injured party, the offender and society – clash with each other. The reasonableness of the conduct is the result of this clash. It is the "vector" of the parallelogram of the forces. I deliberated this in one case and noted:

> "The court must balance between the interest of the injured individual in personal safety, and the interest of the offender in freedom of action, against the backdrop of the public's interest in the continuation or cessation of the activity in question. The court must consider the danger and its scope. It must consider the social importance of the action. It must consider the measures required for the prevention of the danger …it has been found that necessary precautions are not a constant factor, but a factor that varies according to the circumstances. They must be in appropriate relation to the danger generated. The terms "secure" and "dangerous" are relative terms that vary according to the nature of the danger factor, the victim, and the measures for preventing the danger. Discharging a duty, like its existence, is not a technical matter, but constitutes a "legal consideration" in the parallelogram of forces that are composed of the interests of the potential parties and the needs of society" (Vaknin case, page 131, 132).

In a similar vein, Justice Dorner noted:

> "The criteria for determining the appropriate judicial policy in this case are based on the calculation of the balance between the level of danger and the cost of precautionary measure, and the consideration of the social value of the activity due to which the danger was created. In other words, the factors that must be considered are: the probability of the realization of the danger; the extent of the anticipated damage; the cost of the precautionary measures in terms of time and effort; public interest in the action that generates the danger" (the Sabag case, page 107).

The question that arises is, therefore: How is this complex balance achieved?

16. The reply to this question is simple as all considerations lead in the same direction. Indeed, when harm to the injured party is great and the likelihood of its occurrence is substantial, and when the measures necessary for the prevention of the damage are minor, and there is no public interest in the activity that caused the damage – when all these factors exist, it will be easier for us to determine that the conduct that caused the damage is unreasonable. "Indeed, the higher the probability of damage occurring, the more severe the damage, and the slighter the cost of preventing these and the social interest in the provision of the service, the greater will be the tendency to impose liability on the offender" (Justice Dorner in the Sabag case, page 109; also see CA 2061/90 *Marcelli v. the Ministry of Education and Culture*, IsrSC 47(1) 802). But not all cases are of this type. There are situations in which the determination of reasonableness or negligence is not at all simple. Justice Learned Hand's "formula" by which the offender must consider the probability of damage occurring (P) the extent of the damage (L), and the cost of preventing the damage (B) is well known. The conduct of the offender is unreasonable when the extent of the damage, in consideration of the probability of it occurring, exceeds the cost of preventing it (B<PL) (see United States v. Carroll Towing Co. 159 F. 2d 169, 173; *Conway v. O'Brien*, 111 F. 2d 611, 612 (1940). This formula is useful, but cannot provide a comprehensive solution to all the problems of reasonableness in negligence tort (see Porat, *ibid* and I. Englard, The Philosophy of Tort Law 36 (1993)). Indeed, the concept of reasonableness must not be confined to one formula or another (compare CA 3901/96 *the Ra'anana District Planning and Construction Committee v. Horowitz*, IsrSc 56(4) 913). A

reasonable person is not only an efficient person, but also a just, fair and moral person. This is a person who cares for himself, for others and for the public, and even all of this does not express his full complexity. However, a reasonable person is not a perfect person. This is a person who mirrors the complexity of our lives, their virtues and drawbacks. Reasonableness, therefore, expresses society's appropriate response. This response is always related to the circumstances of the incident, and it expresses society's attitude concerning "social guilt", which lies at the basis of negligence. We are concerned, therefore, with the attitude of society – as expressed by its judges – regarding the appropriate conduct in the circumstances of the case (see Vaknin case, page 23) and Proser and Kitan, *ibid*, page 173). We will now address the circumstances of the case at hand in light of this.

From the General to the Specific

17. According to the ruling of the District Court, riots and disturbances took place in the Jenin Refugee camp. The rioters blocked the road with rocks and iron rods. A Border Police patrol unit arrived at the camp to contain the riots, remove the roadblocks and restore order. Approximately 25 youths clashed with the police officers and hurled stones at the jeep. Two police officers began to pursue them on foot in order to apprehend them. During the pursuit of the rioters, one of the police officers shot several rubber bullets. The Appellant – a local resident who was passing by – was hurt. Was the shooting of rubber bullets under the circumstances of the incident, and at the injured party who was a passerby, negligent?

18. There is a great public interest in preventing disturbances, stone throwing and the blockading of roads in the Area. The military commander, who controls the Area, must take measures to ensure the safety of the public. Soldiers, police officers and residents of the Area may be hurt when these measures are taken. This is a fact of life that must be taken into account. Security operations intended to maintain law and order must not be avoided only by the fear of harm to those present at the scene of the event. Justice Vitkon rightly noted that:

> "We must remember that many activities, which are vital or necessary to a person as an individual or as part of society, create risks that are well known to us and, nevertheless, we do not argue that for the sake the integrity of body and mind it is necessary or possible to forgo them…. the importance of the activity from a social aspect must also be taken into account, *inter alia*, with scope of the danger involved in a particular activity, in order to determine whether it was reasonable to have demanded refraining from the action if there is no way of executing it without risk" (Criminal Appeal 363/78 *Zur v. the State of Israel*, IsrSC 33(3) 626, 632).

Indeed, given the security risks and dangers caused by violent riots, the blocking of roads and stone hurling in the Area, the public interest is that measures be taken to prevent these, even if this means that damage to property or physical harm may occur. Actions whose purpose is enforcing law and order in the Area must not be avoided only because they may entail a risk that harm will be done (see CA 559/77 *Lampert v. the State of Israel*, IsrSc 33(3) 649, 651). Nevertheless, not all conduct of police officers, in these circumstances, is reasonable. Police officers are not permitted to do anything and everything in order to suppress riots and restore order. Only those measures that are reasonable under the circumstances may be taken. A disturbance or a security threat does not grant a license to act unreasonably. A security threat

is an important consideration and influences the precautions that must be reasonably taken under the circumstances of the incident. Did the police officers act reasonably according to these tests?

19. In the statement of claim submitted to the District Court, the Appellants contended that the police officers were negligent during the shooting. Thus, as there was no justification for the shooting, it was carried out, according to their claim, in violation of the rules of engagement. In their summaries they added that negligence was expressed by shooting in the dark, and by firing at an 11 year old child, as the rules of engagement forbid shooting in the dark and firing at children under 14 years of age. The District Court (Judge T. Strasberg-Cohen) rejected these claims stating that it does not believe that the rules of engagement brought before it were violated adding "I do not believe that the measures taken here were excessive and disproportional to the events on the ground and the purpose which the Military Police officers were charged with achieving".

20. In the appeal before us, the Appellants once more raised the claim of negligence arising from the violation of the rules of engagement. They referred to rules of engagement during a life-threatening situation (N/5) and to other sections of the regulations. It was principally claimed that the use of live fire towards stone throwers is permitted only when the stone hurling presents a real and immediate danger or a threat to life, and, even then, live fire may not be opened on children under the age of 14. In the case before us, it was argued that the stone-hurling was not life-threatening and that the shots were fired at Appellant no. 1, who was 11 years old at the time of the incident. Moreover, according to the aforementioned procedure, the opening of fire was supposed to be carried out in stages: a warning called in Arabic, followed by the firing of a warning rubber bullet shots in the air, and finally firing at the legs. The State, in its response, contended that the Appellants relied on rules of engagement that are not relevant to the case at hand. Thus, there is no dispute that the fire that was opened – injuring the Appellant – was that of rubber bullets ("rubber roma") and not live fire.

21. I accept the State's position that the Appellants' claims seemingly relied on an open-fire procedure that is not relevant to the circumstances of the event. However, this does not suffice as a response to the question of whether the officers were negligent in carrying out the shooting. The Appellants' argument is that, in fact, the actual shooting in the dark, towards a minor, and without a threat of danger being posed to the security force – was negligent. Is this really the case? My reply to the question is yes. The Border Police unit arrived in the refugee camp in a jeep for the purpose of dispersing the riots and removing barriers from the main road, near the army headquarters. The jeep removed the barriers and the rioters retreated away from it. Two police officers got off the jeep and carried out a flanking operation on foot in order to shift the stone-throwers away from the road and to apprehend them. A pursuit of the rioters by the police offices developed, in the course of which they called on the rioters to stop. When they did not stop, one of the officers shot one batch of three rubber bullets at the group. The shooting took place in the dark, while the officer was running, in a time of poor visibility. These circumstances apparently made it difficult for the shooter to properly identify the source of the danger, to aim accurately, and to avoid hitting passers-by. The officer shot

directly at the rioters, without first firing warning shots with rubber bullets in the air, which is a less severe measure that may have prevented the harm involved in direct firing. It should be noted that the fact that the State did not present the rules of engagement concerning the firing of rubber bullets to the Court will be held against it.

22. From the various testimonies hear, it is not in any way clear why the officers shot rubber bullets directly in the course of the pursuit of the rioters and how the shooting was supposed to assist in their apprehension. In any case, the testimonies do not indicate that there the lives of the officers were in danger when the shooting was carried out, or that they were forced to operate in emergency conditions. Although the officers were forced to act quickly under pressure, this does not mean that they were in a under stress or in a situation of emergency. It must be assumed that the officers were trained to carry out this type of actions. The officers initiated a pursuit for the purpose of apprehending the rioters and restoring law and order in the refugee camp. The officers' operation was an initiated combatant action, in a residential area, whose aim was to apprehend rioters who, at the time, were fleeing the officers. The use of rubber bullets, in these circumstances, amounts to negligence. It must be kept in mind that rubber bullets are an inaccurate, potentially lethal, type of ammunition, (particularly in short ranges). The use of this ammunition in the framework of initiated policing action aimed at restoring order, dispersing riots and detaining suspects, when no danger is posed to the police officers, is unreasonable, particularly when it is possible to employ other, less severe, means to realize these aims. Of course, all depends on the particular circumstances of each incident. As we stated: reasonableness is always a function of circumstances there is no "simple" reasonableness.

23. In the circumstances of the case before us, the means employed by the Border Police officers was not reasonable. The shots were fired during an initiated pursuit, while running, in the dark, in conditions of poor visibility, and the very purpose of the shooting was not fully clarified. Even when we consider the social need for restoring law and order in an area under the control of a military governor, it appears to us that firing rubber bullets in circumstances of poor visibility and limited ability to aim precisely and accurately, when the shooting was intended to assist in the apprehension of persons suspected of hurling stones who did not endanger the officers or the public, is not reasonable. The firing of rubber bullets in these circumstances also presents a great risk of serious injury to innocent passers-by, who happen to be at the scene of the incident. Although the injury of the Appellant – as a passer-by – was unintentional, it is the result of the firing of rubber bullets that was carried out without the possibility aiming precisely and accurately. This lack of precision is also due to the physical limitations of the ammunition (deviation from the target and scattering of a trio of bullets fired at once). Under the circumstances of the event, the danger the officers created by the employing the means of firing rubber bullets was not reasonable. The shooting of rubber bullets was negligent.

Assault and Breach of Statutory Duty

24. In light of our conclusion regarding the vicarious liability of the State for the Border Police officers' negligence, there is no need for a discussion of liability for assault and the breach of a statutory duty.

The result is that the appeal is accepted. The case is to be reverted to the Haifa District Court for deliberation of the damage and the scope of compensation. The Responder will pay the Appellants' court expenses and attorney fees totaling 15,000 NIS.

The President

Deputy President T. Or

I agree with the President's judgment

The Deputy President

Justice E. Mazza

I agree.

Justice

Justice M. Cheshin

I agree

Justice

Justice A. Grunis

I agree

Justice

Justice E. Hayut

I agree

Justice

Justice D. Dorner

It is accepted that the element of negligence in negligence tort is estimated objectively, and that an offender is liable for damage if he deviated from the standard of normative behavior set by the "reasonable person" test. However, as described in detail by my colleague, President Aharon Barak, the circumstances of the concrete event, including its being a case of emergency, may influence and relax the required standard of precaution.

The question that arises in this appeal is that of the threshold of precaution required of police officers or soldiers (hereinafter: the police officers) in the course of policing actions during incidents of severe disturbances that appear to fall within the definition of emergency situations.

The reply to the question whether certain circumstances fall under the definition state of emergency that brings about a relaxation of the standard depends on the occupation of the persons whose action caused the damage. The prerequisite skill in certain professions, such as medicine or fire-fighting, is the capacity to handle situations that for the general population would constitute states of emergency.

Indeed, Article 35 of the Civil Wrongs Ordinance that defines negligence tort relates separately to the standard of precaution required of a professional. The article states:

> … when [a person] fails to use skill or take proper precaution in the exercise of any occupation as a reasonable and prudent person qualified to exercise such occupation would use or take under those circumstances, then such act or failure thereof shall constitute negligence.

In my opinion, policing actions are expert actions. Policing is a profession that requires a great deal of training, competence and skill. Policing actions must be examined according to the reasonable expert standard in the circumstances of the case. Compare CA 2694/90 *the Hadassah Medical Organization v. Assi*, IsrSc 46(5) 628; CA 3056/99 *Stern v. the Chaim Sheba Medical Center*, IsrSc 56(2) 936; Also see Note: "Police Liability for Negligent Failure to Prevent Crime", 94 *Harv. L. Rev.* 821 (1981). Indeed "in police cases, the analysis is in effect not addressed in light of a 'reasonable person' standard, but instead a 'reasonable police officer' standard, because police officers can be expected to behave differently than the rest of the population (Seth D. DuCharme, "Note: The Search For Reasonableness In Use-Of-Force Cases: Understanding The Effects Of Stress On Perception And Performance", 70 *Fordham L. Rev*. 2515, at p. 2534 (2002).

Among the skills required for policing activities is the containment of disturbances within the civilian population in circumstances that may require the use of means that endanger the demonstrators and possibly the lives of passers-by. In any case, it is the duty of the State, the police officers' employer, to ensure that they are given proper training. This training grants the police officers their expertise and distinguishes between them and ordinary citizens. This training must prepare the police officers for a full range of possible situations they are likely to encounter in the framework of their role. In this framework, they must be guided and drilled in the procedures for opening fire.

As Stated:

> Setting the professional standard of care expected of the "reasonable police officer" should present no undue problems for courts…increasing numbers of professional groups, such as lawyers, doctors, engineers, and architects, are judged by a higher standard of care due to the special skills of their professions, police officers, too, bring superior knowledge,

> equipment, training**,** experience, and skill to their profession of protecting the public from harm. These professional qualities thus define a professional standard of care for the duty to rescue.
>
> [Lisa McCabe, "Police Officers' Duty to Rescue or Aid: Are They Only Good Samaritans?", 72 *Calif. L. Rev.* 661, 681 (1984)]

Circumstances it is possible to prepare and train for cannot, therefore, as a rule, bring about the relaxation of the standard of liability of professionals who work in the field of emergency situations. Therefore, the comprehensive actions of civilian or military bodies responsible for the maintenance of security and order must not be viewed as operations "in stressful or emergency conditions …that prevent them from the usual consideration and examination of alternatives, and require a quick decision that it is impossible to prepare for in advance" (Paragraph 13 of the President's judgment). It is understood that it is not possible to prepare for all events. Most likely, there are situations that will be considered emergency situations, even by the standard of the professional police officer. But there is no avoiding the fact that the purpose of the training is the impartation to the police officer of the skill to routinely handle situations that for the average person would constitute a state of emergency.

A reasonable standard of conduct is determined, therefore, by the level of performance that it is expected will be exhibited in the circumstances of the event by skilled police officers who had undergone the appropriate training. As my colleague, the President, demonstrated, the case before us was a routine action that did not amount to a stressful or emergency situation even by the standards of the non-professional person. Consequently, there is no doubt that the police officers were negligent, and thus the state is liable by virtue of its vicarious liability for their actions.

I, therefore, agree to accept the appeal as specified in the President's judgment.

Justice

Justice E. Rivlin

1. I agree with the well-reasoned judgment of my colleague, President A. Barak. I would like to add two brief remarks regarding the element of negligence in negligence tort. My colleague, the President, addressed this extensively in his ruling and my colleague, Justice D. Dorner, added her own comments on the same issue.

   The first remark relates to the nature of the criterion by which the offender's conduct is examined. My colleague, Justice D. Dorner, believes that it is appropriate to examine the behavior of police officers when they are dispersing disturbances according to a heightened standard of precaution. In practice, she believes that it is appropriate, in this case, to raise the bar of the reasonable person standard, in accordance with subjective - personal qualities of the wrongdoer, and in this case –the police officers' special level of skills.

2. The criterion which examines the conduct of a reasonable person is an objective criterion. Traditional Anglo-American law practice, as stated by my colleague, the President, demonstrates that, other than in exceptional cases, this standard is not lowered on account of the wrongdoer's personal qualities. Indeed, in the words of Justice Holmes, the wrongdoer, who is unable to meet with the required standard of conduct, may find forgiveness in the court of Heaven, but his neighbors on earth would find it difficult to forgive him. This is due to the fact that human society is interested not only in moral guilt but also in social guilt. In his words:

> If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account (O. W. Holmes *The Common Law* (Boston, MA, 1881) 108).

On the other hand, this Court determined in CA 3056/99 *Stern v. the Sheba Medical Center*, IsrSc 56(2) 936, that the threshold of reasonableness may be raised in accordance with the offender's subjective characteristics. Imposing liability in such cases is considered justified because there was a moral flaw in the offender's actions – for failing to act as he could and was capable of acting. Indeed each and every wrongdoer, and each set of circumstances must be examined to determine whether such an elevated standard should be applied, as there may be cases in which this type of determination would lead to undesirable social consequences.

In the case at hand, the outcome would be the identical, whether we apply an objective criterion or a subjective criterion. I do not deem it necessary, therefore, to make a decision regarding the important question raised by my colleague, Justice D. Dorner, regarding the degree of subjectivity that the standard of the reasonable person in the exceptional circumstances of this incident should be subject to. As aforesaid, the raising of the threshold she proposed is possible in light of case law.

3. My second remark concerns the balance that shapes the content of reasonableness – the balance between values and interests. The President, in his judgment, discusses the Hand formula which is accepted in the United States as a test for the existence of negligence (see Second Torts Restatement, 291). Justice hand explains this test as follows:

> Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B<PL (*United States v. Carroll Towing Co.*,159 F. 2d 169, at p. 173 (2nd Cir., 1947)).

The calculation of the three elements of the formula, namely – the probability of the occurrence of damage, its gravity, and the costs required for its prevention– also served as a tool for the determination of the criterion of degree of negligence in England (see for example: The Wagon Mound (No. 2), *Overseas Tankship (U.K.) v. The Miller Steamship Co. Pty . Ltd*. [1966] 2 All, *Latimer v. A.E.C. Ltd* [1953] 2 All E.R. 449, 455- E.R. 709, 718-719 [P.C.] 457

[H.L.), and in Israel (see for example CA 434/94 *Berman v, Mor*, IsrSc 51(4), 205, 211-212, 217).

My colleague, President A. Barak, believes that the concept of reasonableness must not be confined to this formula. He explains that when a court deliberates the existence of negligence, it must also consider whether the reasonable man is not only the efficient man, but also the just, fair and moral person. No one disputes this. Nonetheless, all of these factors can be taken into consideration in the Hand formula. There is no contradiction between them and it. The formula, I believe, does not have to limit itself solely to considerations of economic efficiency. Indeed, it is not a "formula" in the conventional, mathematical sense of the word. It is a theoretical framework which serves the court as a tool of logic. It is the court that fills it with content. The probability of the occurrence of damage, the gravity of the damage and the cost of its prevention – all these are not mathematical values that the court calculates in order to arrive at a numerical result at the conclusion of the calculation,. These are social values, and the court is required to provide them with meaning. In doing so, the court may insert any value it deems fit into the formula– it can devise balances between various risks caused to various parties – the offender, the injured party, a third person, and the public (A. Porat "The Many Faces of Negligence" 4, *Theoretical Inquiries in the Law* (2003) 105). It can also take into account considerations regarding just, fair and moral conduct. It is the court that decides what constitutes cost and what constitutes benefit. An infringement of justice – is cost, corrective justice – is benefit. The terms cost and benefit may refer to different considerations from the field of "justice" –for example, considerations of "distributive justice (see Keren-Paz "Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law? "4, *Theoretical Inquiries in Law* (2003) 275, at pp 328-329.

4. Different concepts of efficiency and justice may, therefore, be integrated in the theoretical framework created by the Hand Formula. Hand himself did not designate the formula to be a tool for economic analysis of tort laws. He used it for the purpose of balancing between competing ethical considerations in the field of constitutional law and human rights. When asked in one case about the possibility of restricting freedom of expression in light of the First Amendment to the American constitution, he ruled:

> In each case [the courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger (*United States v. Dennis* 183 F. 2d 201, 212 (2nd Cir., 1950)).

Indeed, the constitutionality of infringements on the freedom of expression is often examined by comparing between the harm incurred by the violation of the freedom of expression and the gravity of the harm (i.e. the scope of the harm) the expression under discussion causes other interests, in consideration of the probability of the realization of this harm (see for example: HCJ 806/88 *Universal City Studios Inc. v. the Film and Play Review Board*, IsrSc 43(2) 22, 36). If this conceptual framework can be used by the court for the purpose of setting a constitutional criterion – and including "moral" considerations alongside "economic"

considerations in its calculations – there is no reason it should not serve it for the purpose of setting the standard of negligence tort.

5. An alternative method to the method embodied in the Hand Formula, is proposed by the method of corrective justice - in the pure form of this method. One method, indeed, precludes the other due to the fact that the approach of corrective justice which focuses on the injured party seemingly requires disregarding an important factor in the Hand Formula – the factor of the cost of preventing the damage, and considers only the gravity of the damage and the probability of its occurrence. The prophet harbinger of the concept of corrective justice, Professor A. Weinrib believes this:

> The role of B in controlling the legitimacy of PL renders the [Learned Hand] test problematic from the standpoint of corrective justice. The test centers on whether the defendant who does not take precautions gains more ex ante than those exposed to the risk lose. It thus pivots not on the equality of the parties to the transaction but on the surplus that one party realizes at the expense of others. As its role in economic analysis shows, the Learned Hand test aims not at achieving corrective justice between the plaintiff and the defendant, but at maximizing the aggregate wealth of those affected by the risk-creating act…From a corrective justice standpoint, disregard of B makes sense, because it is the risk, not the cost of eliminating it, that connects the parties to an accident as doer and sufferer (E. J. Weinrib *The Idea of Private Law* (Cambridge, MA, 1995) 148).

However, the gap between the economic outlook and the outlook of corrective justice is often narrower. According to the emphasis of corrective justice, a person is negligent when damage is caused as a result of a danger whose probable realization is reasonable - regardless of the cost of preventing the damage. However, this rule itself has an exception that exists when the probability for the occurrence of the damage is particularly low. Complete disregard of the burden imposed by the prevention of the damage will make it more difficult to evaluate the reasonableness of the risk. In practice, case law did not disregard the factor of the cost of preventing damage, not even case law that is presented as illustrating the principle of corrective justice (*ibid*. pp. 148-151).

6. The Hand formula may, therefore, also serve as a theoretical framework for assessing the reasonableness of conduct outside the scope of the approach that focuses on the examination of the results through the prism of efficiency. In choosing between the various values that can be introduced into the formula, the court may be required to examine various considerations for the purpose of fulfilling the diverse purposes relating to tort laws. Thus, as noted by my colleague, the President, in general as well as regarding the matter of the conduct of the police in the case at hand, the reasonable person is not only the efficient person, but also the just, fair and moral person. As aforementioned, it is also possible to realize the values of justice in the theoretical framework proposed by the equation.

I concur with the judgment of my colleague, the President.

Justice

Decided as per the judgment of President Barak
Given today, 18 Tevet 5764 (January 12.2004)

The President	Deputy President	Justice
Justice	Justice	Justice
Justice	Justice	Justice