The Courts

The Magistrates Court in Jerusalem		**Civ. 002899/98**	
Before the Honorable Justice Rephael Yaacovi		Date:	11 February 2001

In the matter of: **_____ Abu Rian**
represented by attorney H. Shabaita
The Plaintiff

v.

The State of Israel - The Ministry of Defence
represented by attorney Tamar Shachaf
The Defendant

Judgment

A. General

1. A claim for damages due to bodily injuries, for an incident of 4 October 1992. The complaint was filed on 5 February 1998, namely, more than five years after the incident alleged therein.

2. The Plaintiff was born in 1974 and is from Halhul in the District of Hebron, and the Defendant is the State of Israel.

B. The Parties' Claims

3. In the complaint, the Plaintiff describes the circumstances of the incident as follows:

> **3. On 4 October 1992, between 20:00 and 21:00 or thereabouts, while the Plaintiff was attending his cousin I.'s wedding ceremony at the neighborhood reception courtyard (hereinafter: the courtyard), together with many other guests, he heard that another cousin of his, S., had been kidnapped near the entrance to the Courtyard by approximately four people in civilian dress, who were driving a Peugeot bearing local license plates. The Plaintiff**

later learned that the persons in civilian dress were *mistaarevim* [undercover soldiers] and/or other Israeli security forces personnel.

4. The Plaintiff, together with many other local residents, stepped out of the courtyard to check whether his cousin S. had indeed been kidnapped. Several moments later, a commercial Volkswagen and/or another vehicle with local license plates (hereinafter: the car) came to a stop near the entrance to the Courtyard, a few meters away from the many local residents who had gathered at the place, including the Plaintiff.

5. Four armed men in civilian dress immediately stepped out of the car and started shooting, without any warning or discrimination, toward the group of local residents (hereinafter: the soldiers). The Plaintiff ran in an attempt to evade the soldiers' fire. Several meters away, the Plaintiff felt that he had been shot in the right thigh and the right hand, and fell down.

6. A few minutes later, the Soldiers left the scene of the incident, and another group of soldiers arrived. The Plaintiff was treated by a military paramedic, taken to the main road in Halhul and from there rushed in a military ambulance to Alia Hospital in Hebron.

4. He describes the damage he suffered due to the injury as follows:

15. As a result of the Soldiers' acts and/or omissions, the Plaintiff was injured, as aforesaid, in the right thigh and the middle finger of the right hand. The Plaintiff was rushed, as aforesaid, to Alia Hospital, where he was hospitalized for three days. At the hospital, the Plaintiff underwent debridement of the wound in the middle finger, and a suture to the cut created as a result thereof. A photocopy of the medical certificate is attached to this complaint as Appendix A and constitutes an integral part hereof.

16. As a result of the incident, the Plaintiff suffered pain in his right thigh and hand for approximately one month, during which time the Plaintiff was bedridden and devoid of any ability to move freely. During this time, the Plaintiff was unable to work as a farmer on the family's land in the village of Halhul, as he had done before the incident.

17. Currently, as a result of the incident, a small scar has remained on the Plaintiff's body above the middle joint of the third finger of the right hand, and two scars (entry wound and exit wound) on the right thigh."

5. The Plaintiff did not file a medical opinion, nor is he claiming damages for general damage, other than for non-pecuniary damage. In addition to this damage, he is claiming special damages for the following: past medical treatment and travel expenses - NIS 5,000, third party help - NIS 10,000, and lost earnings - NIS 10,000 (Articles 18-19 of the complaint).

6. The Defendant is protesting the tardiness with which the complaint was filed. It claims that the Plaintiff filed his complaint in extreme laches, the dimensions of which are more significant in view of the fact that he did so after the Defendant no longer controlled the alleged scene of the incident. Thus, so it claims, he has inflicted upon it evidential damage and great difficulties.

7. On the merits of the matter, the Defendant is claiming that the injury to the Plaintiff by IDF soldiers was committed under circumstances which do not bring upon it a liability in torts. This is due to the specific conditions under which the Plaintiff was injured, which pertain to breaches of the peace during the Intifada. The Defendant claims that, considering those conditions, no civil wrong was perpetrated against the Plaintiff. Additionally and alternatively, the Defendant claims that even were it to be determined that the specific soldiers committed a tort against the Plaintiff in the manner which he alleges, the complaint against it should still be dismissed. The reason for this is that the significance of such a determination would be that the soldiers had committed the tort of battery. With regard to this tort, Article 25 of the Torts Ordinance provides that there is no vicarious liability.

To all of the aforesaid the Defendant further adds that, in any event, it is protected by the immunity for "acts of war" fixed in Article 5 of the Torts Law (State Liability), 5712-1952. This article provides that "the state is not liable in torts for an act

performed through an act of war of the Israel Defence Forces". The Defendant also relies on the defence under Articles 151-154 of the Penal Law (Consolidated Version), 5737-1977, that is granted to policemen filling various policing duties (see Articles 30-31 of its summations).

C. The Course of the Trial

8. In the trial, the Plaintiff himself (P.W.1) and another 4 witnesses testified on behalf of the Plaintiff.

P.W.2 is I., the groom in the said wedding, who is the Plaintiff's relative. According to his statement, "the Plaintiff's mother is my cousin" (p. 5 of his testimony, line 3 from the bottom).

P.W.3 is S., the Plaintiff's cousin, whose arrest generated the unrest that ended in the incident in question.

P.W.4 is H., the Plaintiff's brother. According to him, he was one of the participants in the said wedding, and was an eye witness to the incident in question.

P.W.5 is M., who defines himself in his affidavit (P/5) as a friend of the Plaintiff's (Article 2) and who, when asked about his relationship with the Plaintiff in the cross examination, mentioned that "we know each other, he is a relative of mine, a distant cousin", and: "we're good friends" (p. 1, lines 6-7).

9. Two soldiers who were involved in the incident in question testified on behalf of the Defendant. The one served as an officer in the said sector in the relevant period, was involved in the incident in question, and testified under the alias "Noam".

The other served at the time as a soldier in the same sector, and he too was involved in the incident. He testified under the alias "Paz".

A tape-recording of a conversation between the Defendant's investigator and the Plaintiff was also filed, with a transcript thereof, along with affidavits by the investigator and the transcriber (D/5-D/7).

10. The parties filed summations in writing, which were comprehensive and thorough.

D. Final Outcome in a Nutshell

11. After perusing all the evidence and the parties' arguments, I have concluded that the complaint should be dismissed.

12. My conclusion is composed of the following layers:

a. No negligence by IDF soldiers against the Plaintiff was proven; nor any other tort against him.

b. Even had I determined that the soldiers had committed a tort against the Plaintiff, under the circumstances of the case it would have been battery, for which there is no vicarious liability, hence the State should not be held liable.

This is by virtue of Article 25 of the Torts Ordinance.

c. It appears, therefore, that even without needing to deliberate the issues regarding the immunities for acts of war or policing acts, the complaint should be dismissed.

E. Establishing the Result - Testimony Assessment

13. The testimonies on the whole should be divided into two groups: The first group comprises the Plaintiff's testimony and that of "Paz", who is the shooting soldier. These testimonies are characterized by their reference to the injuring shooting incident itself.

The second group comprises all the other testimonies, all of which relate to background events that surrounded the shooting that hit the Plaintiff.

14. Already now, I shall state that insofar as there are any differences in versions between the Plaintiff and his witnesses, and the Defendant's witnesses, I clearly prefer the testimonies of the Defendant's witnesses. The latter, especially "Noam", left a particularly good impression. They answered to the point, and did not evade giving answers also regarding those issues that were less convenient to them. They also gave statements at the Military Investigating Police shortly after the incident, which are consistent with their affidavits, and their version also withstood the cross examination. Unfortunately, I cannot say the same for the Plaintiff, in whose testimony and in the statements he made on other occasions there are no few problems.

In this matter, I accept the Defendant's arguments and references to the different versions expressed by the Plaintiff on different occasions, as specified in Sections 9 and 11 of the Defendant's summations. Although I will not go so far as to grant the motion made in Section 10 of the Defendant's summations, based on the judgment of the Hon. Justice Strashnov in CApp 1142/94 Wiener v. The State of Israel. I will not rule that for this reason alone, namely the substitution of versions by the Plaintiff, his complaint cannot stand and should be dismissed, but insofar as questions of

credibility are concerned, the Defendants' testimonies are far superior in my eyes to the Plaintiff's testimony.

Also the Plaintiff's other witnesses are close to him, as family and friends, and this information posts warning signs where their testimonies are concerned.

15. However, despite the family and social ties between the Plaintiff and the other witnesses who testified on his behalf, I am ready to put faith in their testimonies regarding the general background facts, of the wedding and of the cousin's arrest, and regarding the other facts on which they testified, insofar as they do not contradict the testimonies of the Defendant's witnesses.

16. In view of all of the aforesaid, and in general, I do not accept the Plaintiff's claim (in Section 2A of his summations), that the failure to call "Benny" to the stand should be held against the Defendant. On this matter, I clearly prefer the Defendant's claims (in Sections 14-15 of its summations), that calling him was completely unnecessary. The untrustworthiness of the Plaintiff's testimony, joined with the trustworthiness of the Defendant's witnesses, result in that the picture on what drove Noam and Paz's force to act is crystal clear, also without Benny's testimony. In light of all of the aforesaid, not having called him to the stand should not be held against the Defendant, and all of the findings made below can be determined.

F. Establishing the Result - The Background to the Incident and the Course of Events - Factual Findings

17. From all of the evidence, and in light of the aforesaid, my factual findings are as follows:

18. With regard to the general background, this was a period in which stones were being thrown every evening at Halhul junction, on the road between Jerusalem and Hebron (Section 3 of D/1 and of D/8).

19. As for the evening in question -

    a. Indeed, the wedding ceremony of the Plaintiff's cousin did take place, and was attended by the Plaintiff (Section 2 of P/1 and more).

    b. During the wedding, the news spread that S. had been arrested by the security forces (Section 3 of P/1 and more).

    c. This news generated unrest at the wedding, and caused many people to step outside (Section 4 of P/1 and more).

20. As for the events shortly before the shooting, I do not in any way accept the Plaintiff's version, that is supported by his brother's testimony (P.W.4), whereby they innocently stood with family and guests on the street, when suddenly a civilian car of the army stopped by his side, from which "several armed men in civilian dress came out, and started shooting without any warning or discrimination in the direction of the crowd, which included elderly people, women and children", and that the Plaintiff himself was hit while running due to the panic from that automatic and wild shooting (Sections 5 and 6 of P/1 and D/3). Had this been the case, we would have had a situation in which the Plaintiff would not have been the only casualty in the entire incident, but there would have been far more wounded. The Defendant's version, whereby the Plaintiff was hit by targeted shooting that was aimed at him only, and to the lower part of his body, is far more likely.

The fact that the Plaintiff was the only one who was hit, and the specific manner in which he was hit, significantly support the version of the Defendant's witnesses.

I fully accept the Defendant's version, as expressed in D/1 and in D/8. The findings are, therefore, as follows: A group of stone-throwers that proceeded into Halhul was identified and reported to Noam with their description. Noam's force moved into Halhul, where it identified a group of three persons holding stones in their hands, one of whom was the Plaintiff, at whose side stood a group of people with no bad intentions. The force commanded by Noam passed by where they stood and did a U-turn, to get closer to those identified as the stone-throwers.

In this matter, namely that the Plaintiff held stones in his hand shortly before being hit, and was one of the earlier stone-throwers, none of the issues raised by the Plaintiff's counsel can shake the version of the Defendant's witnesses.

First - to my mind it is not surprising at all that the Plaintiff abandoned the wedding in favor of throwing stones. As we have already learned from the wisest of all men, "It is better to go to the house of mourning, than to go to the house of feasting" (Ecclesiastes 7, 2). From his words we can learn that there are higher ends than taking part in a feast and a celebration, and therefore there is no wonder that a person up and leaves a house of feasting for such an end. In this case, when the news on S.'s arrest reverberated in the midst of the nuptial festivities, apparently there were those who decided that the commandment of responding to this news was greater than the

commandment of gladdening the bride and groom. From the evidence, it appears that one of those who acted in this manner was the Plaintiff.

Second - there is also no wonder that those who had been throwing stones only a short while earlier, would blend in with an "innocent" crowd that comprised little children, women and elderly people. Such a thing is even likely, as an act of camouflage. Indeed, it is possible that the escapees did not flee while holding stones in their hands the whole time, but stones are not a rarity, and it is not inconceivable that the Plaintiff and his friends gathered stones close to where they stood, in such a manner as to have stones in their hands when the soldiers arrived.

21. As for the procedure for detaining suspects - the Plaintiff does not refer at all in his affidavit to the possibility that such a procedure was followed, and this as part of his attempt to depict an incident of wild and unbridled shooting. His version in this context is entirely unacceptable, and also greatly diminishes the chances of any other version by the Plaintiff being accepted. As aforesaid, I fully accept the version of the Defendant's witnesses.

It is acceptable to me that the course of events was as described in Noam and Paz's affidavits. Noam states as follows (in D/1):

> **10. When we arrived at a distance of approximately one to two meters away from the persons holding the stones, whom we had previously identified, we got off the car. While descending the car, we shouted at them to freeze.**
>
> **11. At this stage, the stone holders split, with two running towards the group of people and the house next to them (hereinafter: the first stone holders). Another stone-holder (hereinafter: the third stone holder) ran into the street, moving away from the group of people.**
>
> **12. I and another soldier pursued the first stone holders, who ran toward the group of people, and caught one of them outside the house and the other near the front gate to the house. I did not continue with the suspect detention procedure, fearing an injury to civilians who were not associated with the stone-holders.**

13. **Paz pursued the third stone holder who, as aforesaid, fled away from us, toward the street, while distancing himself from us and from the group of people.**

14. **While I was pursuing the two first stone holders, I heard a small number of isolated shots, I do not recall how many.**

15. **After we caught the two first stone holders, another soldier arrived, who stayed with the soldier who ran together with me, to arrest the stone holders we had apprehended. At this point, I went out to investigate the source of the shooting.**

16. **I saw the stone holder whom I had previously identified lying on the road, and received a report from Paz that he (Paz) had carried out the suspect detention procedure toward the stone holder.**

Paz (in D/8) adds the following to Noam's testimony:

9. **When we had arrived very close to the stone holders, whom we had previously identified, we got off quickly and while descending the car shouted at them to freeze and identified ourselves as soldiers, we shouted "Waqf, Jaish", which means - Freeze, Army, and when they did not stop, I fired one shot in the air.**

10. **I focused on a single young man, whom I had identified with certainty as a stone holder. That man ran in the opposite direction of the route of escape of most of the people, who had run into a nearby courtyard. That man ran in the opposite direction, up the street. Since the young man did not stop even though he had been called to do so, I stopped and fired one or two single shots toward the man's legs.**

11. **The young man fell down, I went over to him and saw that he had been injured. I called the paramedic on the team, who arrived on the scene and gave him first aid. A military ambulance evacuated him to the hospital.**

G. Establishing the Result - The Soldiers Committed no Tort against the Plaintiff

22. When examining the question of whether the soldiers committed a tort against the Plaintiff, we have to guide ourselves by a few basic principles. Let us review the main ones.

23. Case law has already established in a long line of judgments, the most prominent of which is CA 751/68 *Ra'ed v. The State of Israel, Piskei Din* 25 (1) 197, that when examining whether the conduct of security forces constituted a tort, we must do so in consideration of the specific circumstances in which they operated.

Thus it is stated, for instance, in the said CA 751/68, on p. 214, that:

> **It is our duty to take into account the tense atmosphere that existed in real time, and not to determine our assessment based only on the dry facts that become known after the fact, when we are able to weigh them in a calm atmosphere.**

Pursuant to the aforesaid it was stated, in another affair, by the Hon. Justice T. Strasberg-Cohen, that:

> **The standard of caution in times of calm and quiet operations is not identical to the standard of caution in operational activities, under the pressure of the events taking place in the field and the rioting of the crowd** (CApp (Haifa District Court) 1032/90 *Hammed v. The State of Israel* (not published; attached to the Defendant's summations) on p. 6 of the printout, and the reference there to the Ra'ed case and to another authority).

The Hon. Chief Justice Seiler adds, in CApp (Jerusalem District Court) 553/92 *Natshe v. The State of Israel* (not published; attached to the Defendant's summations), on p. 14 of the printed judgment, that a justified use of force, when made in the appropriate measure considering the circumstances "**is not in itself an act of negligence, but an act of law enforcement which involves a sound use of force**" and that "**such use takes into account the possibility of damage being caused, but when made lawfully and properly, and to the appropriate degree, it does not constitute negligence**".

24. In light of the foregoing principles and what underlies them, the Supreme Court has ruled specifically with respect to the suspect detention procedure, that in respect thereof

> **the soldiers should be left a reasonable margin of error which might be caused as a result of the conditions of the place, the field and the time constituting the backdrop to the operational incident in dispute, and which require a quick decision and not a legal consultation on what is and is not allowed in that incident** (CA 3684/98 *The State of Israel v. Ahalayel*, *Takdin Elyon* 99 (1) 1332).

This ruling is consistent with a long line of precedents, whereby, even under "simpler" circumstances, not every mistake amounts to negligence or a civil wrong (see, for example, CA 58, 37/86 *Levy v. Sherman*, *Piskei Din* 44 (4) 446, 465; CA 935/95 *Jane Doe v. Clifford*, *Takdin Elyon* 98 (3) 644, and others). *A fortiori* so under sensitive circumstances like the foregoing, as was indeed ruled.

25. Another extenuation that was determined in the context of our case, is that when the operations of army forces are legitimate, they are not held liable even if an innocent passerby is unfortunately injured at the time of the use of force, and that "**those who exercise violence, rioting, breaches of the peace and stone-throwing, are putting themselves and others in unnecessary risk**" and in any case, "**anyone injured thereby can complain to no-one but the rioters and stone-throwers**" (the said CApp (Haifa District Court) 1032/90, on p. 5; the Hon. Justice A. Procaccia, CApp (Jerusalem District Court) 210/93 The Estate of *Naser v. The State of Israel, Takdin Mehozi* 95 (4) 180, and others).

26. I am ready to follow the path on which the Plaintiff wishes to lead us, whereby the open-fire regulations, the probable existence of examples of which at the time of the incident was not denied by the Defendant's witnesses (P/7), can serve as a standard for reviewing the soldiers' behavior.

27. The open-fire regulations on stone-throwing situations provide as follows:

> **a. Fire shall not be opened at a stone-thrower, other than as part of the suspect detention procedure, and only when the stone-throwing poses genuine and immediate danger.**

b. Genuine danger shall be deemed to exist in a throwing of stones at a moving car, with the intention of hitting it; or stone-throwing in other circumstances that endanger human life - taking into consideration the field conditions, the size of the stones, the balance between the forces of the aggressors and our own, etc.

c. No fire shall be opened unless the detention procedure is carried out immediately and promptly after the stone-throwing. If the suspect is not detained immediately and promptly after the incident - weapons shall no longer be used as part of the detention procedure.

28. Moving from the rule to the specific case, and looking upon the manner in which the soldiers acted in the circumstances of this case, it is my opinion that their conduct involved no wrongdoing against the Plaintiff.

29. In this case, it was determined above that the shooting was performed as part of a suspect detention procedure, prior to which the Plaintiff took part in stone-throwing. The individual shots that were fired toward him were made when the Plaintiff did not heed the cries to stop, but fled, holding stones in his hand.

30. The Plaintiff is seeking to draw support from the words "immediately and promptly after the incident". According to his claim, in this case, even according to the Defendant, the time that elapsed from the stone-throwing by the Plaintiff until the use of the suspect detention procedure against him, cannot be defined as "immediately and promptly after", and therefore there was no room to use a weapon in his direction.

31. I cannot accept his claim. It was determined above that the Plaintiff took part in a throwing of stones at vehicles, that was reported by Benny, and that thereafter he fled and blended into the innocent group, and when Noam's force arrived he was holding stones in his hands. Under these circumstances, the Plaintiff's conduct should be viewed as a single stone-throwing continuum, in relation to which there is no impediment to using weapons. To that it might be added that also the circumstances of the Plaintiff's flight from Paz, while holding stones, could have put Paz in danger of the Plaintiff throwing a stone or stones at him during the course of the chase.

32. To conclude this point - the soldiers committed no civil wrong against the Plaintiff. Their conduct should be seen as being without blemish, or at least as being within the

"reasonable margin of error", considering the circumstances in question. Either way, the result is the same, namely that the complaint should be dismissed.

H. Establishing the Result - Even if the Plaintiff's Version or Claims were Correct - the Complaint would still be Dismissed

33. From the point of view of the course of events, the Plaintiff's version, whereby he was hit in the course of wild and automatic shooting that was committed by the soldiers, has been rejected. The version that was accepted, that of the soldiers, led to the determination that they did not commit any civil wrong against the Plaintiff. In this chapter I shall clarify that also two other options, that are possible in principle, do not cure his complaint, which cannot stand.

These options are:

a. Accepting the Plaintiff's version of the course of events shortly before his injury.

b. Accepting the soldiers' version of the course of events, but the Plaintiff's interpretation regarding the relationship between the soldiers' conduct and the then-prevailing open-fire regulations.

34. Either way, in my opinion, the result is identical, namely that the Defendant has no liability to the Plaintiff. This is true particularly according to the first option, but also according to the second one.

35. If the Plaintiff was hit by a bullet that was shot by Paz under circumstances which did not justify the shooting, and that violated the open-fire regulations determined by the Defendant and forwarded by its representatives to the military force that operated in the field, then the Defendant - the State of Israel - should not be held liable for the said shot. At the most, and on the conceptual level only, the Plaintiff might have had a cause of action in relation thereto against the specific shooter, but the claim before us is not such a personal claim. Against the State there can be no action due to such shooting, since the shooting of a live bullet under circumstances that do not justify it, means that the shooter is committing the tort of battery, for which the State has no vicarious liability, and from which it is even immune, by virtue of Article 25 of the Torts Ordinance. No negligence was proven in the trial on the part of the State in the manner of provision of the regulations and guidelines to the soldiers on opening fire. On the contrary, on this matter the two sections numbered 4 in Noam and Paz's

affidavits stand firm and have not been rebutted, on that, as a matter of fact, appropriate orders had been given.

In other words, even from this possibility, which is so dear to the Plaintiff, he cannot draw support, and it too will provide no salvation for his claim.

I. The Defendant's Immunity for "Acts of War" or "Acts of Policing"

36. With respect to this judgment too, I can state what was said by the Hon. Justice Brener in CApp (Jerusalem District Court) 1376/96 *Elmashiach v. The State of Israel*, *Dinim Mehozi* 32 (2) 177, that "in this case, an examination of the act in order to determine whether or not it has the nature of an act or war, is not necessary for the adjudication". The same applies to immunity for policing acts. A similar approach was taken also in other judgments, alongside judgments that did not hesitate to classify the security forces' operations in the Intifada as "acts of war", conferring the immunity of Article 5 of the Torts Law (State Liability), 5712-1952. As aforesaid, in this case there is certainly no need to decide on the two foregoing immunities.

J. Conclusion

37. In view of all of the foregoing, the result is that, in any case, the Plaintiff's complaint is dismissed.

K. An (Alternative) Perspective on Additional Aspects on the Issue of Liability and the Issue of the Plaintiff's Damage - General

38. In the trial, both the issue of the liability and the issue of the Plaintiff's damage have been laid out in full. Accordingly, in case I erred in my ruling whereby the complaint should be dismissed, and it is determined that the Defendant is liable to such or another degree, I shall also address other issues with regard to liability and damage.

L. An Alternative Perspective on the Issue of Liability

39. On the matter of liability it is my opinion, as aforesaid, that the Defendant has none. In any event, if the correct result is that liability exists then, in my opinion, two weighty factors should be taken into account to substantially reduce the degree of responsibility and liability, both of which should be mentioned, even though they overlap to a great extent. In this context, I accept the Defendant's claim in Section 33 of its summations.

40. I am aiming at Article 65 of the Torts Ordinance, and Article 68 of the Ordinance, which apply to the circumstances of the case before us.

Article 65, entitled the "Plaintiff's Conduct", provides that

> **Where a defendant caused damage through his culpability, but it was the Plaintiff's behavior that caused the culpability, the court may absolve him of his liability to compensate the Plaintiff, or reduce the damages as the court shall deem just.**

The better known Article 68 speaks of the Plaintiff's contributory fault.

41. This is a classic case in which "it was the Plaintiff's behavior that caused the culpability" of the soldiers. This is true in several tiers and in several stages:

First - the Plaintiff is the one who created the entire problematic situation from the start, by throwing stones on the road.

Second - the Plaintiff was part of the camouflage setting which the soldiers came across, by feigning innocence while standing together with the innocent group on the side of the road, but holding stones in his hands. This factor created particular difficulty for Noam's force, which moved in the Plaintiff's footsteps.

Third - during the suspect detention procedure that was carried out toward him, the Plaintiff did not heed the cries ordering him to stop, and instead fled afar.

This continuous conduct by the Plaintiff, on the majority of which he decided in a sober and calculated manner, placed the soldiers in a particularly problematic situation. As opposed to the Plaintiff, who was able, quietly and calmly, to prevent all the problems, the soldiers had to take a quick and immediate decision, with clear difficulties.

42. As aforesaid, according to the alternative possibility in which we are found now, it is possible that the soldiers failed somewhat regarding that immediate decision that they made in the moment of truth. But still, "it was the Plaintiff's behavior that caused the culpability", to a great extent, and it justifies, in my opinion, reducing at least one half of the damages which the Plaintiff would have been due had his claim been granted, according to the alternative possibility with which we have now dealt.

M. Alternative Perspective on the Issue of Damage

43. In his summations, the Plaintiff dedicated only several lines to the issue of the damage, and has in fact left the entire issue to the Court's wide open discretion. The Defendants too designated only a minute part of their summations to the issue of damage, while claiming that the Plaintiff's damage was minor.

44. Indeed, even the Plaintiff is aware that his injury in the said incident was not severe. He was left with no permanent disability as a result thereof, but with only slight scars and small marks. It was for good reason that he did not file a medical opinion.

45. However, I do accept that shortly after the injury, there was a period of three days of hospitalization, and thereafter another two to three weeks in which the Plaintiff was unable to work, during which time he required certain assistance from his family, and also experienced intensified pain. In these contexts, two more points should be considered. The first - that also the help that was given to the Plaintiff was by his family, and not hired help for a fee; and the second - that also with regard to work the Plaintiff suffered no pecuniary loss, but rather his condition imposed another burden on his brothers, who had to augment their own work, and to take his place too in the agricultural work in that period of time.

46. Considering the aforesaid, and what will be stated below, for the purpose of this alternative possibility, I determine that the appropriate damages are as follows:

Non-pecuniary damage - a lump sum of NIS 12,000, according to the value thereof on the date of the judgment, which also includes interest for the period from the date of the incident until the date of the judgment.

Third party help and earnings - in view of the aforesaid, these two should be bound together, since both implied an enhanced effort by family members - a lump sum of NIS 5,000 as of the date of the judgment, which too includes also the interest for the period from the date of the accident until the date of the judgment.

Expenses - the Plaintiff did not mention this damage in his summations. In his testimony, he testified that he did not pay for the treatments, that were given to him where he lives, probably with no need for travel, or almost no such need. According to him, he paid only for the drugs he bought very shortly after the incident (p. 5 of the transcript). Under these circumstances, the appropriate compensation for all of the aforesaid is a lump sum of NIS 300 as of the date of the judgment, which also includes the element of interest to date.

47. In the event that the alternatives are used for the issues of liability and damage, then the sum of the damages amounts to NIS 17,300 as of the day of the judgment. Of this amount, the Plaintiff should be compensated for one half only (as aforesaid, in Article 42). The resultant amount is NIS 8,650 as of the date of the judgment. In the event that the said alternatives are used, the Defendant would have to add to this sum also

trial expenses and legal fees in the sum of 20% of this amount, plus VAT. As aforesaid, it is my opinion that there is no room to use them, and that the complaint should be dismissed.

N. Conclusion

48. As summarized above, in Section 37, the complaint is dismissed.

The Plaintiff shall pay the Defendant trial expenses plus legal fees in the sum of NIS 2,500 (including VAT), which shall bear differences of linkage and interest from the date of the judgment.

Issued in the absence of the parties today, 18 Shevat 5761 (11 February 2001).

The Office of the Court Clerk shall send a copy of the judgment to the parties' attorneys.

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Justice Rephael Yaacovi