

ALON KLEMENT

## CLASS ACTIONS SETTLEMENTS AND VOLUNTARY DISMISSALS

**T**his article discusses settlement and voluntary-dismissal proceedings in class actions, presents the problems inherent in these proceedings, and explains how the Class Actions Act addresses these problems. The article analyzes the Act's provisions that regulate settlement and voluntary-dismissal pleas, and discusses the various interpretative issues raised by these provisions. It examines these provisions in light of the objectives of class actions: the right to access courts; law enforcement and deterrence against wrongdoing; proper assistance to parties harmed by a violation of the law; and just, efficient, and exhaustive administration of lawsuits.

The article maintains that, to solve the problems inherent in the settlement and voluntary-dismissal proceedings, courts must strictly abide by the procedures set in the Class Actions Act. Furthermore, courts must provide the parties with sufficient incentives to apply these procedures so as to reach a fair and adequate settlement. The article examines the current implementation of these procedures by the courts and recommends adopting a stricter policy than the one currently practiced.

OREN GAZAL-AYAL & AMNON REICHMAN

## PUBLIC INTERESTS AS CONSTITUTIONAL RIGHTS

**W**hat distinguishes an infringement of constitutional rights (e.g., to life, bodily integrity, human dignity, or property) from an infringement of public interest in defending the underlying values of these rights? In several cases, justices of the Israeli Supreme Court expressed conflicting opinions. For example, in the *family unification case*, the justices differed on whether legislation restricting entry of Palestinians to Israel for the purpose of family unification should be viewed as a measure for defending the right to life of Israeli citizens from terror attacks that might result from allowing such entrances, or whether the restricting legislation should be viewed as a means for defending the public interest of national security. Similarly, in the *Ghanimat* case, opinions differed on whether a detention aimed at the prevention of car thefts is necessary for promoting the public interest of fighting crime (i.e., maintaining law and order), or whether it is the constitutional right to property (of car owners) that is at stake. Drawing a line between constitutional rights and public interests is legally significant because constitutional rights and public interests are protected differently. Under the structure of Israel's Basic Laws, the Court is obliged to review whether an infringement of a protected right meets the requirements set forth in the limitation clause, whereas no similar judicial requirement exists when non-constitutional public interests are at stake.

In this essay we will propose criteria for differentiating between a state action (or omission) that infringes on a basic right and an action (or omission) that harms the public interest of protecting the values on which these rights are based. The thrust of the paper is that not every state action that increases the quantity of infringements of the said rights should be viewed as an infringement of constitutional rights. Arguing that a right (rather than a public interest) has been violated requires that the claimant demonstrate a concrete and specific right holder, a direct-enough link between the state action (or omission) and the infringement, and a high

degree of probability that the action might indeed cause the specified harm. This thesis is based on moral justifications within liberal political thought, on positivistic justifications rooted in Israeli law, and on institutional justifications for constitutional judicial review (and its scope).

BENJAMIN SHMUELI

## THE NEXT GENERATION OF TORT ACTION FOR ATTAINING A REFUSED GET BASED ON THE CALABRESI & MELAMED'S LIABILITY RULE

**I**ntrafamilial tort actions have become increasingly common in Israel. Children sue their parents, and spouses and ex-spouses sue each other. These legal actions create fascinating intersections between tort law, which traditionally deals with relationships between strangers, and family law that, naturally, deals with intrafamilial relations. In some of those actions, there is no intersection between tort law and family law and tort law applies exclusively in the family sphere, as seen in actions for defamation, domestic violence, etc. The most interesting actions, however, feature intersections between the two systems of law. This is particularly relevant in the reality of the Israeli law, where marital law is based on religious-Jewish law and the relevant court is the rabbinical court, whereas tort actions are filed with secular family courts and are dealt with according to the civil law. Acknowledging these actions is controversial at times, particularly in tort actions of women against their recalcitrant husbands who refuse to grant them a *get* (the Jewish divorce bill) as some argue that secular courts actually circumvent rabbinical courts and intervene in divorce cases, directly or indirectly influencing the acceptance of the *get* and its validity.

The article presents the overall scheme of intrafamilial tort actions in Israel between members of dysfunctional families as seen in the central case study - tort actions for the refusal to grant the *get*. These actions are primarily analyzed using the presently-famous Calabresi and Melamed 1972 paper, which presents, inter alia, options of damage entitlement via primary remedy or via secondary remedy. The framework presented by Calabresi and Melamed, especially via one of the rules they present – “liability rule in favor of the plaintiff/injured” – will assist not only in presenting the relations between the systems (tort law and family law) and

the remedies they offer; but also in establishing a theoretical tort foundation for future developments in cases of real conflicts between laws and courts in tort actions filed against both recalcitrant husbands and recalcitrant wives (who refuse to accept the *get*). Primarily I examine the possibility of awarding damages for *get* refusal in cases where rabbinical courts failed to rule and did not order husbands to grant a *get*, thus allegedly allowing secular courts to award damages in what could be viewed as some kind of a secular *get*.

Among other things, the article examines the following issues: Are rights connected to personal status tradable or alienable? Can the family court play an active and legitimate role in creating some kind of transaction under state auspices in which one family member harms the personal status rights of another? Does the state allow placing a price tag on harmed personal status by providing a monetary remedy for an infringement of entitlement through tort law?

ITSHAK COHEN

## THE INDEPENDENT STANDING OF MINORS IN FAMILY LAW: CURRENT PROCESSES AND TRENDS, AND WAYS OF CREATING A RENEWED BALANCE

**T**his article examines minors' right to an independent standing in family law in light of developments over the past few decades, the problems they created, and possible future trends. This right stems from the fear that, while in the process of a divorce, parents might neglect their children's best interests. This paper argues that this fear has almost attained the status of a legal presumption that the minors' interests are neglected by their parents in the Israeli judicial system. This presumption directly conflicts with the fundamental assumption of Israeli law that parents are the children's natural guardians.

This article attempts to characterize the series of legal rulings that elevated the minors' status and, in so doing, claims that the legal rulings wavered between first advancing procedural arguments then substantive ones, and finally returning to procedural rulings again. The article further notes that rights accrued from the minors' independent status were applied to matters that were not previously addressed. This article delineates two processes that led to the current state of affairs: The impact of modern values and perceptions that grant weight to minors' rights, and the civil courts' loss of faith in the religious courts.

The practical ramifications of this right are extremely problematic on several counts: the damage caused to contractual security and to the finality of proceedings; the courts' wasted time; an intensification of the tension between the civil and religious court systems; and acrimonious struggles between divorcing couples that continue under the pretext of concern for the minor. The article suggests several ways of dealing with this state of affairs, including the following: legislators may stipulate clear guidelines to define the best interests of the child so as to prevent a future reopening of the divorce proceedings; not only obligating the court

addressing the issue of minors to take their best interests into consideration, but also anchoring this role in the law so that the cases could not be reopened; prohibiting parents from conducting negotiations regarding the fate of the children; and providing minors with independent counsel. A more balanced legal formula that mediates between the values at play can be achieved by adopting these suggestions. They should minimize the damage caused as a result of the entrenchment of the minors' independent standing in the Israeli legal system.