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TAMAR GIDRON, ROY ILOUZ & ROY RAYNZILBER

COMPENSATION FOR DEFAMATION – THE EMPIRICAL SITUATION

In recent years, the protection of personal rights, namely, reputation, privacy, autonomy, the right to personal commercialization (the right to publication) and others, have attracted considerable attention in Israeli society. Alongside the academic debate that deals with ethical issues and analyzes the theoretical basis for each of the personal rights, a fundamental debate is attempting to produce a practical change in the legal rules governing these matters. Some members of the legislature are actively participating on one side of this discussion, working vigorously to strengthen the group of classical personal rights, and in particular the right to reputation; representatives of the printed and broadcasting "media", the Press Council and other public bodies, are positioned on the other side.

The growth in public discourse, the ambivalent case law, political constraints and technological developments in this field, as well as reasons connected with the long time that has elapsed since the enactment of the Prohibition of Defamation Act, 1965 – have all led to an increase in the flow of proposals for amending this law. However, the arguments and working assumptions of the parties to this important debate suffer from one significant drawback – they lack an adequate factual basis. Both those desiring a harsher legal response to damage to reputation and those who are concerned about the fate of the free investigative press have failed to present any factual data regarding what actually goes on.

In this study we seek to meet the need for empirical data. We will present a factual picture of the relevant Israeli case law and the manner in which the courts perceive the value of reputation, including the financial balancing point of compensation for damage to reputation on the one hand and equally important conflicting interests on the other. The purpose of the study is to examine the data relating to awards of compensation for

damage to reputation in Israeli law over the past eight years: has the number of successful defamation suits in which compensation was awarded increased or decreased; has the amount of compensation currently awarded by Israeli courts in defamation cases increased or decreased; what is the current "price tag" for damage to the reputation of an elected official compared to that for damage to the reputation of an ordinary person; what is the value accorded to reputation; what is the amount of compensation imposed on the media when it publishes defamatory material; what does the court consider to be a suitable amount of compensation for damage to reputation in general and on what basis is that amount determined.

In order to present its findings, the article opens with a review of the principles of compensation – those originating in statute law and those derived from case law for damage to reputation under tort law in general and under the Prohibition of Defamation Act in particular. Following this, the article re-introduces the principle of compensation without proof of damage, one of the innovations of the Prohibition of Defamation Act. The research methodology is then explained and its findings are presented. Finally, the article offers some general conclusions based on the research findings and identifies possible approaches for future research, utilizing this study.

The key significance of this study is the creation of a broad set of factual empirical data that may serve as the basis for more coherent and consistent case law, as well as better founded and more realistic legislation, in the future.

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ITAY LIPSCHUTZ

TWO ARE BETTER THAN ONE? ON JURISDICTION, ESTOPPEL AND MODUS OF PANEL'S CONDUCT

This paper considers a question considered by Israel's High Court of Justice in HCJ 1555/05: the legitimacy of a "deficient panel" comprising two judges. The Dayanim (Rabbinical Judges) Law, 5715-1955 permits hearings before a "deficient panel" consisting of only one judge in certain cases. One such case is where the parties have given their consent to having their case decided by only one judge. Nonetheless, rabbinical courts have long relied on the parties' consent to conduct hearings before two-judge panels. In the HCJ case, the majority of the court ruled that a decision given by such a panel was invalid. The court decided that the practice of the Rabbinical Courts is illegal.

The paper endeavors to understand why the High Court of Justice did not apply the "two are better than one" principle. The discussion utilizes comparative research and analysis based on probabilistic principles.

The first chapter presents a critical view of the HCJ judgment. The second chapter includes a normative discussion as to the question: "Are two better than one"? The third chapter compares two legal systems, i.e., Israeli law and Jewish law. The fourth chapter offers a proposal based on the discussion. In the course of the discussion the article addresses a curious question: Why is it that a neutral procedural issue such as the number of judges becomes a subject of disagreement between the HCJ and the rabbinical courts? The article suggests that the answer to this question lies in the different premises of the two legal systems. While in the Israeli legal system a hearing before a single judge is the "default" case, in Jewish law a panel of three judges is the norm.

The article also discusses general questions such as the appropriate procedure to be followed by judges sitting on a panel. When may a judge simply say "I concur with my colleague's opinion" without writing his or her own view? When deviating from its own precedent, should the

Supreme Court (or the HCJ) clearly state that it is doing so? How should a majority opinion that ignores queries (even factual arguments) posed by the dissenting judge be treated?

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RUTH ZAFRAN

THE "JURISDICTION RACE" IS ALIVE AND KICKING – RABBINICAL COURTS GAIN POWER OVER CIVIL FAMILY COURTS

Up until several years ago, it seemed that the "Jurisdiction Race" in Israel had declined due, among other things, to the waning of the rabbinical courts' jurisdiction. Several legal issues were completely removed from the rabbinical courts' jurisdiction and certain other subject matters were partially transferred from their jurisdiction in such a way that persistent and affluent litigants were able either to avoid legal proceedings in the rabbinical courts altogether or to subject their rulings to review by the High Court of Justice. With these changes, the disparity between the rulings of rabbinical courts and those of civil family courts was reduced (although never completely eliminated), as the religious system was forced to rule according to civil legislation and High Court precedents which included the protection of basic rights on both the procedural and substantive levels. However, over the last few years this reality has changed yet again. In a surprising series of rulings handed down by the High Court of Justice during the past decade, the rabbinical courts' influence and strength has been re-established and as a result, the Jurisdiction Race sprints on.

This article begins with an outline of the Jurisdiction Race phenomenon, its characteristics, and the changes it has undergone through the years. The outline demonstrates that this is a harsh race, which among other things affects conflicts between husbands and wives and marital litigation. In this respect, the article sketches the jurisdictional divide between the realms of the rabbinical courts and civil family courts, their interface, and their points of conflict. In Part Two the article establishes the claim that beginning in the mid-eighties, and in particular in the mid to late nineties, the Jurisdiction Race became limited, as the incentives to race to the courthouse of choice were reduced. It then explores the High Court

decisions that led the way to this change, and the changes made by the (then) new Family Courts. The third and most significant part of this article demonstrates the more recent and less explored shift – reinforcement of the rabbinical courts' jurisdictional powers, which serves not only to speed up yet again the Jurisdiction Race, with all its severe consequences, but also to exacerbate the potential for human rights violations, especially those of female litigants.

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MICHAL LAVI & TAL ZARSKY

INTERNET INTERMEDIARY LIABILITY – A SOCIAL NETWORK PERSPECTIVE

Recent technological developments allow internet users to disseminate ideas to a broad range of recipients. These advances empower individuals and promote important social objectives. However they also create vast opportunities for committing speech-related torts and for generating harm and abuse. Individuals have learned that asserting their rights vis-à-vis the direct offenders is a difficult and often futile task, because of both technological and legal impediments. Therefore, the legal discussion has quickly turned to the liability of internet intermediaries and the ability to collect damages from these deep-pocketed, ever-present entities that facilitate harmful exchanges. The liability of internet intermediaries has generated a great deal of attention from courts, regulators and legal scholars. While different countries have established different legal regimes, the various policy models used are commonly criticized as being either over – or under – inclusive.

In order to provide an optimal regulatory setting the article asserts that a more nuanced, context-specific regulatory regime is required. To that end, the article sets forth an innovative taxonomy. Relying on sociological studies premised on social network theory and analysis, the article formulates a technologically-neutral regulatory framework. This framework distinguishes between different technological settings on the basis of the strength of the social ties formed in each technological context. The article explains that the strength of such ties is a suitable tool for distinguishing between different liability regimes; such ties serve as a proxy for the extent of damages the online action might cause, as well as for the social norms that might mitigate or exacerbate speech-related harms.

The classification proposed in this article makes it possible to adapt a sociological analysis to the legal realm and to outline modular rules for

content providers' liability at every juncture. The article does so while taking into account basic principles of tort law, as well as freedom of speech and the importance of promoting innovation.

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GUY SAGI

AN INTEGRATED APPROACH FOR ANALYZING TYING ARRANGEMENTS IN ISRAEL

Tying arrangements, in which a monopolistic company coerces consumers to purchase additional products, were thought to extend monopoly power to additional markets as well as to foreclose them. They were therefore considered anti-competitive by antitrust agencies and by the courts. Modern economic analysis, however, teaches us that most tying arrangements are in fact pro-competition and efficient. They create better and improved products, and reduce production and marketing costs. In some situations, tying arrangements may have mixed effects – both competitive and anti-competitive. Therefore they are not necessarily harmful to consumers or to markets. Modern economic analysis also informs us that the leveraging of monopoly power and the foreclosing of markets are not as common as was once believed.

In light of the modern developments in economic analysis and the characteristics of the small Israeli market, which include higher market concentration ratios and the robustness of companies' dominant position, this article proposes the implementation of an integrated approach to analyzing tying arrangements. This model strives to create the appropriate legal rule for different tying scenarios according to their anticipated effect on consumers and on competition. Implementation of this integrated approach will increase the likelihood of approving efficient tying arrangements as well as that of blocking harmful ones, thus contributing to consumer and overall welfare. As a secondary alternative to this integrated approach, one that does not require legislative amendment, the article proposes adopting an "efficiency" defense whereby, if proven to be efficient, the tying arrangement will be deemed lawful and permissible.

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TALI GAL & HADAR DANCIG-ROSENBERG

RESTORATIVE JUSTICE AND PUNITIVE JUSTICE: THE TWIN FACES OF CRIMINAL LAW

The last three decades have seen the emergence of an alternative approach to punitive justice known as Restorative Justice (RJ). Developed largely to compensate for the shortcomings of mainstream punitive justice, RJ has often been constructed as an antithesis to punitive justice. Similarly, the two paradigms have often been described as addressing different goals.

This article seeks to challenge these views and argues that the restorative and punitive approaches are two distinct philosophies promoting similar, rather than mutually exclusive, goals. We demonstrate that RJ can potentially achieve the goals of punitive justice in addition to its own stated goals. Accordingly, we argue that RJ should be construed as an integral part of substantive criminal law, rather than as an external alternative.

The article provides a comprehensive theoretical framework for the integration of restorative goals with the traditional goals of criminal law. It shows that, in contrast to much of the literature, this integration is attainable and beneficial. The article also demonstrates the practical implications of the model and proposes parameters for predicting the level of success of each paradigm in achieving various goals.

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HADAS AHARONI BARAK

PUBLIC ENFORCEMENT, CONCENTRATED OWNERSHIP AND MINORITY PROTECTION

Transactions between a controlling shareholder and the corporation may produce benefits only for the former. This concern is a major challenge to corporate law in concentrated capital markets. Corporate law deals with this concern through appropriate regulation accompanied by appropriate enforcement; in order to fulfil regulatory goals, optimal enforcement is required as well. Today, controlling shareholders' transactions are enforced through private enforcement, such as class action or derivative suits.

This article offers a new theoretical discussion of capital market enforcement; it discusses the question whether private enforcement is sufficient for controlling shareholders' transactions, or whether there is also some justification for public enforcement. Protection of minority shareholders in concentrated capital markets requires efficient enforcement. Therefore, this article suggests a new theoretical justification for dual enforcement, both private and public, for controlling shareholders' transactions. The justification differs according to the different aspects disclosure and substance, each of which is subject to a different degree of intervention in corporate decision making. The article concludes with preliminary thoughts for implementing the theoretical justification in Israel.

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TOMER KREMERMAN

RULING DAMAGES WITH NO DAMAGE IN THE NEW AMENDMENT TO THE ISRAELI DEFAMATION LAW

Section 7A of the Israeli Defamation Law allows the court to award damages of up to NIS 50,000 when the plaintiff is unable to prove his damage The provision has been criticised mainly as being unnecessary: even before it was adopted the courts routinely utilized a legal presumption to deal with the unique nature of defamation cases, and awarded damages of NIS 50,000 and even higher in such cases.

A new amendment to the law was recently proposed, increasing the maximum sum set in section 7A and authorizing the courts to award damages of up to NIS 300,000 in cases such as these. This amendment appears to be based on the same legal mistake that led to the original enactment of section 7A.

This article explores the courts' treatment of section 7A since its enactment, and attempts to categorize the various approaches expressed by the courts. The article's main thesis is that the mainstream approach adopted by the courts empties section 7A of any meaning and effectively restores the legal presumption that existed prior to its enactment. However, some indirect effects of the section's enactment will also be noted, specifically its influence on the behavior of judges and plaintiffs.

The second part of the article deals with the potential consequences of the proposed amendment; it explores the possibility that section 7A will be reinterpreted, and suggests the form such reinterpretation might take in the light of various approaches expressed by the courts in the past.

The essay concludes that the new amendment to the Israeli Defamation Law serves no purpose, and will probably be emptied of meaning by the courts in the same way as its predecessor. Consequently, a general outline for amending the law in a way that might better accomplish the legislator's goals will be suggested.