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Defamation Law in Turbulence: Does Israel Need 'Libel Reform'?

Tamar Gidron[*]

Among the various bills proposing amendments to Israel's Defamation (Prohibition) Law that were presented to the 18th Knesset, the most controversial one is the bill proposing an increase in the caps on statutory damages (without proof of special or general damage). The current NIS 50,000 cap (NIS 100,000 when the publication was intended to cause injury) will be replaced, if the bill is approved, by a NIS 300,000 cap (NIS 600,000 when the publication was intended to cause injury). This proposed massive change has ignited a heated public debate. The bill, according to its proponents, is targeted principally at the media. Its aim is deterrence and even punishment, accomplished by attaching a higher price tag to libellous publications while focusing on remedies and leaving liability tests (including defences) untouched.

I claim that this bill is both unnecessary and detrimental.

Based on case law from the eight-year period 2004–11 on damages awarded by Israeli courts in defamation cases – both damages awarded 'without proof of damage' (the plaintiff does not need to prove damage caused by the publication) and damages awarded for 'general damage' (some general damage needs to be proved) – I conclude that the spectrum of judicial discretion is sufficiently broad to accommodate any level of deterrence seen fit by the courts in any circumstances. The fact that average damages awards do not reach the statutory caps indicates that, for all practical purposes, legislative intrusion in the manner proposed is erroneous. As to the normative standards the bill strives to convey, I maintain that absent reasonable justifications based on identifiable changes in cultural, social or other circumstances over time, the attempt to change the currently accepted balance between the rights of reputation and freedom of speech in Israeli defamation law in terms of damages awards is also erroneous.

Even if some modification of the current balance between reputation and free speech, as a result of specified changes in circumstances, do indeed appear to be necessary, the particular content, form and measure of this specific bill – which have yet to be examined and assessed – do not seem to provide the right approach to achieve such modifications.

Keywords: defamation, reputation, statutory damages, freedom of expression, human rights, constitutional rights

1. Introduction

Defamation law has attracted significant public attention in Israel. Both academia and the press have dealt extensively with the need to find the optimal balance between protection of reputation and freedom of speech suitable for Israel's culturally and socially complex society. The debate focuses on the need to cope with technological phenomena that pose new threats to reputation as well as with broader issues, mainly the role of the media as the watchdog of democracy and public mores and the tools by which the media's checks and balances should be maintained.

[*] Professor of Tort Law, Shtriks Law School, College of Management, Israel. Tgidron@colman.ac.il. The author would like to thank Roei Raynzilber, Roei Ilouz and Uri Volovelsky for their useful assistance in research. Many thanks to the anonymous referee of the *Israel Law Review*, and to Professor Yuval Shany and Dr Yaël Ronen whose comments on earlier drafts proved most useful. The research was funded by the COMAS Research Foundation.

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During the last few years, a significant number of members of the Knesset, Israel's legislature, have joined the debate by presenting a flow of (mostly private) bills proposing amendments to the Defamation (Prohibition) Law.[1] Some of these bills advocate the promotion of freedom of speech and freedom of the press while some call for increased protection of reputation. The latter are the subject of this article.

The battle over the Defamation Bill in particular and protection of reputation in general was triggered by the growing tension between the press and Israel's political and financial leadership. A documentary entitled *The Shakshuka Method*[2] is probably the best-known example of investigative reporting linking one of Israel's leading financial tycoons with a prestigious media figure. A series of unflattering television and newspaper stories accusing public figures of unethical and even criminal deeds[3] are also good examples. Since then, a persistent flow of new bills[4] introducing revisions, amendments and alterations to the Israeli Defamation (Prohibition) Law have piled up before the 18th Knesset's Constitution, Law and Justice Committee, thus keeping alive the sometimes very heated public debate on reputation protection by Israeli private law.[5]

Most of these bills, like those dealing with group defamation and SLAPP,[6] have almost no impact on the delicate hierarchy of norms represented by the Defamation (Prohibition) Law.

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[1] Defamation (Prohibition) Law, 1965 (Israel) (Defamation (Prohibition) Law).

[2] This was an investigative television film by Miki Rosenthal, broadcast on 28 July 2009. Shakshuka is a special Israeli dish (originally from Morocco), a mixture of eggs and vegetables. The idiom 'Shakshuka Method' was coined by one of Israel's leading lawyers to portray the special 'mixture' of money, power, politics and media in Israeli society. See Merav Yudilevich, 'The Ofer Family Sues Miki Rosenthal', 13 July 2009, http://www.ynet.co.il/articles/0,7340,L-3745939,00.html.

[3] See, for example, the threatened defamation claim by one of Israel's television network owners (Sheldon Adelson) that led to a live apology by the network (Channel 10) and the resignation of one of the network's leading anchormen: Ran Boker, 'Guy Zohar Resigns from Hosting "The Week" Show', 9 September 2011, http://www.ynet.co.il/articles/0,7340,L-4120113,00.html. See also the defamation suit filed by Prime Minister Netanyahu against an Israeli television network (Channel 10) with regard to his financial affairs: Mark Schon, 'Bibi Tours: The Prime Minister Files a NIS 2 Million Law Suit against Channel 10 and Ma'ariv', 29 March 2011, http://www.calcalist.co.il/local/articles/0,7340,L-3513161,00.html.

[4] Draft Bill Amending the Defamation (Prohibition) Law (Preventing the Misuse of the Legal Proceedings) (Private Bill) 2010 P/18/2403 (Israel); Draft Bill Amending the Defamation (Prohibition) Law (Uncovering Anonymity) 2010 P/18/2476 (Israel); Draft Bill for the Establishment of the National Fund for Protection of the Public Right for Information (Private Bill) 2011 P/18/3839 (Israel); Draft Bill Amending the Defamation (Prohibition) Law (Defamation of a Group and State Authorities) (Private Bill) 2011 P/18/2937 (Israel); Draft Bill Amending the Defamation (Prohibition) Law (Expansion of the Obligation to Inform regarding Further Development) (Private Bill) 2011 P/18/2872 (Israel); Electronic Commerce Draft Bill (Maintaining Confidentiality in Use of Electronic Documents) (Private Bill) 2011 P/18/3418 (Israel); Draft Bill Amending the Defamation (Prohibition) Law (Effective Date for the Defence of a Truthful Publication) (Private Bill) 2012 P/18/4117 (Israel).

[5] The Israeli Defamation (Prohibition) Law and the new bills have attracted international interest as well. See 'News: Defamation in Israel – Are the Proposed Amendments to the Law Objectionable?', 3 December 2011, http://inforrm.wordpress.com/2011/12/03/news-defamation-in-israel-the-proposed-amendments-to-the-law/#more-12766. cf Israeli newspapers: Ido Baum, 'The Silencing Law Will Produce More Rapist Presidents', 23 November 2011, http://www.themarker.com/news/1.1573375; Zelo Rosenberg, 'Some Are Worth More Than Others', 26 November, 2011, http://www.nrg.co.il/online/1/ART2/310/005.html. For a different view see Yedidia Meir, 'News, Newspapers and Media, Enough of the Bitter Tone, Enough Silencing', 2 December 2011, http://www.bhol.co.il/Article.aspx?id=35012.

[6] Strategic Lawsuits Against Public Participation. See Michael Birnhack, 'SLAPP 2.0', 18 July 2011, http://www.the7eye.org.il/DailyColumn/Pages/190711_SLAPP_2_point_0.aspx.

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These bills do not threaten to introduce a meaningful change in either the original balance between reputation and freedom of speech established by the Defamation (Prohibition) Law or the much broader issue of protection of human dignity and reputation under Israeli private law in general.[7] Some of these proposed amendments – such as the bill regarding anonymity on the internet[8] and liability of web services providers[9] – are clearly motivated by technological changes. Other amendments are meant to override jurisprudence on various provisions of the Law. For instance, the bill relating to group defamation[10] is obviously a direct response to the Supreme Court's controversial decision that denied a film producer's liability towards a group of Israeli soldiers portrayed as cold-blooded murderers because – according to the Supreme Court's interpretation – the Law limits civil liability to individual rather than group defamation.[11]

Each of these bills, notwithstanding their specific triggers, signifies a slight shift in the delicate balance achieved by the current Defamation (Prohibition) Law and by relevant case law. Each introduces a small change into the complicated puzzle; and each represents a fraction of the overall norm-creating regime by adding or detracting a bit to or from the normative setting, reflecting the value preferences of Israeli society with respect to the optimal balance between freedom of expression and reputation protection. Yet none of these bills threaten the status quo of Israeli defamation law, which has been compiled by both the legislator and the judiciary over the past 48 years.

However, Amendment No 10 to the Defamation (Prohibition) Law – a bill introducing higher caps to compensation without proof of damage[12] – is different. It bears an overall impact on the existing Israeli defamation law. It constitutes a huge threat to the achieved balance because it pertains to some of the basic value choices that Israeli law has struggled to adopt during the last few centuries.

The new perspective on evaluative and normative hierarchies introduced by the bill may be acceptable and even hailed when one can trace a reason – cultural, political, economic or social – calling for a shift in the accepted legal regime. I contend that there is no such reason for any change in Israel's current defamation law. The empirical data I present in the second part of this article will show that the annual average sum of compensation for reputation damages does not reach the current NIS 50,000[13] statutory cap. The data also shows that the statutory

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[7] Protection of reputation under Israeli law is achieved mainly through the Basic Law: Human Dignity and Freedom, 1992. The tort of negligence is contained within the Civil Wrongs Ordinance, 1947 (Israel) (CWO 1947).

[8] Draft Bill Disclosure of User Information on an Electronic Media Network (No 421) 2011 HH 36 (Israel).

[9] Electronic Commerce Draft Bill (Private Bill) 2011 P/18/3418 (Israel).

[10] Draft Bill Amending the Defamation Law (Amendment No 10) (Expansion of Remedies) (No 415) 2011 HH 22 (Israel).

[11] CA 8345/08 *Ben Natan v Bachri* (not published, judgment delivered on 27 July 2011).

[12] Draft Bill Amending the Defamation Law (Additional Remedies and Additional Causes of Action) (Private Bill) 2010 P/2584/18 (Israel): the statutory cap offered here is NIS 300,000 (approximately US$80,437 or £51,264 as at end-January 2013) and twice this sum in malice cases; Draft Defamation Bill (Amendment – Compensation without Proof of Damages) (Private Bill) 2010 P/2332/18 (Israel): introducing the NIS 500,000 cap (approximately US$134,062 or £85,440 as at end-January 2013) and twice the sum in malice cases. The two proposed bills were amalgamated, following the debate in the Knesset held on 10 October 2011, into the Draft Bill Amending the Defamation Law (Amendment No 10) (Expansion of Remedies) (n 10).

[13] Approximately US$13,406 or £8,544 (as at end-January 2013).

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cap does not really form a 'cap' at all because the courts apply their long-established power to award (unlimited) 'general damages' whenever they want to make awards rising above the cap. There is practically no difference in the underlying logic, the amount of proof, or the evidence required that differentiates between these two processes for awarding damages.

Hence, if the main reason for the proposed bills lies in the shift in values towards protection of reputation, expressed in increased deterrence and punishment, such a shift must follow a comprehensive analysis of current legal culture and practice in general. It demands a reconsideration of theoretical as well as practical aspects of the balance set by the Defamation (Prohibition) Law *and* by recent case law, as well as issues regarding additional sources of personality interest protection as found within current Israeli private law. It needs to take into account liability rules, not just remedial considerations. And it needs to adopt a holistic rather than a limited, casuistic approach.[14]

Defamation law reform in the UK may serve as a good example of the above argument. London's plaintiff-friendly defamation regime, adopted by both the legislator and case law, has become a globally targeted forum for defamation claims (the 'Mecca' of libel tourism) and has been constantly condemned for the courts' one-sided decisions by public opinion in and outside the UK as well as American courts and legislators.[15] In response to the criticism, the British legislator initiated the long-awaited 'libel reform': Lord Lester's Defamation Bill and the UK government's 2012 Defamation Bill.[16] The government also appointed the

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[14] Amit Ashkenazi, 'Compensation Without Proof of Damages' in Michael Birnhack and Guy Pessach (eds), *Authoring Rights: Reading the Israeli Copyright Act* (Nevo Publishing 2009) 573, 583. The author deals with a similar statutory cap in the Copyrights Law, 2007, and contends that the issue of compensation should be examined together with the issues of liability and defences.

[15] In New York Bill No A09652B designed to amend the civil practice law and rules in relation to enforceability of certain foreign judgments ('Rachel's Law', named after Dr Rachel Ehrenfeld, author of *Funding Evil: How Terrorism is Financed*; also known as the Libel Terrorism Protection Act). The proposed bill was approved: http://assembly.state.ny.us/leg/?default_fld=&bn=A09652&term=2007&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=. Similar laws have since been passed in California, An Act to Amend ss 1716 & 1717 of the Code of Civil Procedures Relating to Judgments, Senate Bill No 320, ch 579, 2009, http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0301-0350/sb_320_bill_20091011_chaptered.pdf; Tennessee, An Act to Amend the Tennessee Code, House Bill No 3300, Public Ch No 900, Senate Bill No 3589, 2010, http://state.tn.us/sos/acts/106/pub/pc0900.pdf; Utah, Grounds for Nonrecognition of Libel Judgments, Utah Code 78b-5-320, http://www.lawserver.com/law/state/utah/ut-code/utah_code_78B-5-320; Florida, An Act Relating to Grounds for Nonrecognition of Foreign Defamation Judgments amending sec 55.605, House Bill No 949, 2009, http://laws.flrules.org/files/Ch_2009-232.pdf; Illinois, An Act Concerning Civil Law, Public Act 095-0865, 2008, http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0865, and other states. A federal version of Rachel's Law was passed unanimously by Congress and enacted in August 2010, entitled Securing the Protection of Our Enduring and Established Constitutional Heritage Act, Public Law No 111-223, 124 Stat 2480-4 (codified at 28 USC s 4101-05) (Speech Act 2010). The American press welcomed the law. See, for example, Alex Spillius, 'US Law to Counter "Libel Tourism" in British Courts', 28 July 2010, http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7915063/US-law-to-counter-libel-tourism-in-British-courts.html, stating that the legislation 'will prevent US federal courts from recognising or enforcing a foreign judgment for defamation that is inconsistent with the first amendment and will bar foreign parties from targeting the American assets of an American author, journalist, or publisher as part of any damages'. See also 'Are English Courts Stifling Free Speech Around the World?', 8 January 2009, http://www.economist.com/node/12903058.

[16] See also Draft Defamation Bill, Ministry of Justice Consultation Paper CP3/11, March 2011, http://www.guardian.co.uk/law/interactive/2011/mar/15/draft-defamation-bill-libel-reform (usually referred to as the Libel

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Leveson Committee,[17] whose mandate required it to examine media culture, practices and ethics. The process was transparent and open to public debate. So is the four-volume Leveson Report which has recently been published.[18] All grounds were covered and most arguments – for and against the proposed reform – received a response.

The British experience can thus provide an excellent model for both a public debate, before and throughout the course of change, and a comprehensive legislative process. It demonstrates the proper method and fashion in which changes should be decided and applied.

Israeli lawmakers and other proponents of change in current defamation law could have adopted a similar process. Supporters of increased protection of reputation in Israel could have initiated a public debate on the issue of change, using academic and social forums; they could have introduced facts showing that a change is called for; they could have used comparative law – contrasting English defamation law with American freedom of expression values; they could have used all the relevant defamation bills as an opportunity to conduct a thorough and comprehensive deliberation on the broad issue of the relationship between protection of reputation and freedom of expression in Israeli private law.

Yet the promoters of the Israeli defamation bill are doing exactly the opposite. Parliamentarians advocating the bill are intent on revising the current balance between reputation and freedom of speech in defamation law through a supposedly 'minor' adjustment of the existing mechanism for awarding compensation without proof of damage, by increasing the statutory caps. I argue that, contrary to the claimed minimalism of the adjustment, its impact on defamation law may be meaningful. This is why the rationale, procedure and context of the bill require close and critical study. This article aims to make a small contribution to that examination.

Reform Bill 2011, followed Lord Lester's Private Member's Bill). See also Rachel McAthy, 'Lord Lester to Give Evidence on Defamation Bill to New Committee', 7 April 2011, http://www.journalism.co.uk/news/lord-lester-to-give-evidence-on-defamation-bill-to-new-committee/s2/a543607/. The Draft Defamation Bill resulted from a long and heated public debate, which followed extensive criticism of the phenomenon of 'libel tourism' in England. See PA Media Lawyer, 'Government Libel Reform Bill Set for March 2011', 15 July 2010, http://www.pressgazette.co.uk/story.asp?storycode=45711; Charlotte Williams, 'PA Welcomes Libel Reform Bill', 16 March 2011, http://www.thebookseller.com/news/pa-welcomes-libel-reform-bill.html; Roy Greenslade, 'Three Cheers for Libel Reform Bill', 15 March 2011, http://www.guardian.co.uk/media/greenslade/2011/mar/15/medialaw-kenneth-clarke.

[17] Lord Justice Leveson was appointed on 13 July 2011 by the British Prime Minister to conduct an Inquiry 'into the culture, practices and ethics of the press', which is 'running in four modules. These are: (a) Module 1: The relationship between the press and the public, and looks at phone-hacking and other potentially illegal behaviour; (b) Module 2: The relationships between the press and police and the extent to which that has operated in the public interest; (c) Module 3: The relationship between press and politicians; and (d) Module 4: Recommendations for a more effective policy and regulation that supports the integrity and freedom of the press while encouraging the highest ethical standards'. See the Leveson Inquiry site, http://www.levesoninquiry.org.uk/about/. The appointment was made according to the Inquiries Act 2005 (UK), s 12, and promulgated draft Terms of Reference.

[18] See the Leveson Report (No 0780 2012–13), published 29 November 2012 on http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp. The report has reignited the public debate. See, for example: Tim Press, 'The Leveson Report, (Ab)use of Process?', http://inforrm.wordpress.com/2012/12/05/the-leveson-report-abuse-of-process-tim-press/; Brian Cathcart, 'An Ugly Stitch-up is Taking Place', http://inforrm.wordpress.com/2012/12/06/opinion-an-ugly-stitch-up-is-taking-place-brian-cathcart/; Andrew Sparrow, 'MPs Debate the Leveson Report: Politics Live Blog', http://www.guardian.co.uk/politics/blog/2012/dec/03/mps-debate-leveson-report-live-blog; See also the BBC site, 5 December 2012, http://www.bbc.co.uk/news/uk-15717764.

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The article is structured as follows. Section 2 outlines the protection of reputation under Israeli private law. Section 3 details the suggested changes to the Defamation (Prohibition) Law, focusing on the 2011 bill on statutory damages. I then argue that, although some of the latest amendments might appear reasonable in light of modern technological and other time-induced changes, at least two issues should be examined extensively before such an amendment is adopted. The first relates to the basic, practical need for any amendment to the current statutory caps. The second, emanating from the first, refers to whether the specific proposed changes are indeed appropriate in manner and context. I shall argue that attacking free speech by introducing higher compensation caps without proof of damage – general or special – is a mistake.

2. Protection of Reputation under Private Israeli Law

2.1 The Statutory Framework – Plaintiff-friendly Legislation

Reputation has always been highly appreciated in the Jewish tradition. The notion of 'a good name is better than fine perfume'[19] is deeply rooted in biblical culture as well as in modern Israeli society and legal discourse.[20] The right to reputation is in itself a segment of the right to human respect and dignity[21] within the framework of Basic Law: Human Dignity and Freedom,[22] which provides the formal legal foundation of human rights protection under Israeli law. Reputation is also protected by the Defamation (Prohibition) Law, which imposes civil and criminal liability for publication of defamatory content,[23] as well as by the old-fashioned tort of injurious falsehood,[24] which deals primarily with economic and commercial reputation.[25] And, because protection of reputation is sometimes linked with protection of privacy,[26] the

[19] 'And the day of death better than the day of birth', Ecclesiastes Ch 7(1): 'Tov shem m'shemen tov' (in Hebrew, translation by Biblegateway), http://www.biblegateway.com/passage/?search=Ecclesiastes+7&version=NIV, Holy Bible, New International Version (NIV).

[20] CA 466/83 *Shaha v Dardarian* 1986 PD 39(4) 734; CC (Beer-Sheva) 711/01 *Bank Leumi Ltd v Latinok* (not published, judgment delivered on 10 April 2002); CC (Rishon Lezion) 3359/02 *Garvitz v Geva* (not published, judgment delivered on 19 September 2006).

[21] On the multi-faceted nature of respect and dignity in Israeli culture see Orit Kamir, *A Matter of Dignity: On Israelism and Human Dignity* (Carmel 2004); Doron Shultziner, 'Human Dignity – Justification, Not a Human Right' (2006) 21 *Hamishpat* 23. Mordechai Kremnitzer and Michal Kramer, *Human Dignity as a Supreme and Absolute Constitutional Value in German Law – In Israel Too?* (The Israel Democracy Institute 2011).

[22] Basic Law: Human Dignity and Freedom (Israel), s 7.

[23] There is no difference in Israeli law between libel and slander.

[24] Civil Wrongs Ordinance, 1968 (Israel) (CWO 1968), s 58: 'Publication maliciously … of a false statement … concerning the trade, occupation, profession, or the goods or the title to property [of any other person]'.

[25] cf with the current popularity of this tort in English law as illustrated in *Tesla Motors Ltd v BBC* [2011] EWHC 2760 (QB). For an example of group defamation and injurious falsehood, see CA (Tel Aviv) 37333-03-11 *Zoer v Zoler* (not published, judgment delivered on 24 March 2011).

[26] On the overlap of defamation and privacy from a comparative perspective see Tamar Gidron, 'Publication of Private Information: An Examination of the Right to Privacy from a Comparative Perspective (Part One)' (2010) 1 *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 37; Tamar Gidron, 'Publication of Private Information: An Examination of the Right to Privacy from a Comparative Perspective (Part Two)' (2010) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 271.

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Protection of Privacy Law[27] provides an additional important cause of action in some instances. The moral rights of authors are protected by the Copyright Law,[28] and unfair competition practices linked with libellous activities also incur tort liability according to the Commercial Torts Law.[29] The last and perhaps most powerful element in this evolving law protecting reputation is the ever-expanding tort of negligence.

Taken together, this legislation provides an impressive arsenal of legal measures. I shall concentrate on the Defamation (Prohibition) Law and Basic Law: Human Dignity and Freedom and then evaluate the protective umbrella they provide in light of the protection of freedom of expression in Israeli law.

2.1.1 The Defamation (Prohibition) Law – A General Survey

The origins of protection of reputation in Israeli private law are rooted in the Civil Wrongs Ordinance of 1947[30] which, for the most part, replicated contemporary English common law. Israel's Defamation (Prohibition) Law, enacted in 1965, incorporated all the relevant rules regarding defamation in one comprehensive statute: civil and criminal liability components;[31] definitions; special limitations on specific problematic situations (for example, posthumous defamation and group defamation); a closed list of defences; onus of proof; remedies and other miscellaneous factors.[32]

The basic principles of Israeli civil liability for defamation are thus quite similar to those under the English model. Liability for defamation requires proof that publication is likely to provoke a derogatory impact: to lower a person's position in society; expose a person to ridicule, hatred or contempt; degrade or harm a person's business, vocation or profession[33] and so forth, all in accordance with an objective standard ('right-thinking member of the society') as applied by the court.[34] Liability is strict (no fault need be established)[35] and no proof of injury is required.[36] The law protects both individuals and corporations,[37] although the protection

[27] Protection of Privacy Act, 1981 (Israel).
[28] Copyright Law, 2007 (Israel), ss 46, 52. s 46 protects the integrity of the copyrighted work by prohibiting any falsification, damage or other change that harm the author's honour or reputation. s 52 constitutes tortious liability upon infringement of the moral right of the author: 'no falsification, damage or other change is made on his work'. Note that s 50 subjects the right to integrity to a standard of reasonability.
[29] Commercial Torts Act, 1999 (Israel).
[30] The CWO 1947 (n 7), which was enacted in 1944 and came into force in 1947, was a Mandatory Legislation which was maintained in force by Israeli law.
[31] According to the Defamation (Prohibition) Law, s 8, either the public prosecutor or the private individual who has been defamed may initiate criminal proceedings if the defamation was made with intent to harm.
[32] For an overview of the Israeli law of defamation see Elad Peled, 'The Israeli Law of Defamation: A Comparative Perspective and a Sociological Analysis' (2012) 20 Transnational Law and Contemporary Problems 735.
[33] Defamation (Prohibition) Law (n 1) s 1.
[34] *Shaha* (n 20) 740. The Court allowed some subjective criteria into the objective tests. CA 4534/02 *Schocken Gou Ltd v Hertzikovitch* 2004 PD 58(3) 558.
[35] For a different view see Tamar Gidron, 'Defamation as a Negligence Action' (1998) 4 *Hamishpat* 219 (in Hebrew). For a different opinion see Uri Zur, 'A Defamatory Action as Negligence – Response' (1998) 4 *Hamishpat* 239 (in Hebrew).
[36] Israel Gilead, 'Tort Law: Israel', *International Encyclopaedia of Law* (Kluwer 2003) 97–112.
[37] Defamation (Prohibition) Law (n 1) s 1.

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against group defamation where the individuals comprising the group are not personally defamed is more limited.[38]

The Law is quite stingy regarding defences against a defamation claim and affords only three avenues of defence:

1. *Permitted publications*. These are primarily fair reports of official information usually made in public or by public officers. The onus of proof lies on the defendant to establish that publication indeed occurred in the circumstances listed in section 13. Yet, once established, the public interest reflected in the listed circumstances supplies an absolute defence.[39]
2. *True statement made in the public interest*. Interestingly, truth in itself does not suffice as a defence, not even in a criminal action for defamation. Public interest must also be proved. The level of proof necessary[40] to establish the defence that the publication was indeed true depends on the severity of the defamation.[41]
3. *Good faith*. This defence is somewhat narrow in Israel as compared to other common law systems. It applies only when publication was made in good faith in one of the situations listed in the Law.[42] The most important privileged situation relates to publication of comments and opinions.

As for remedies, aside from temporary or permanent injunctions (which are quite rare), courts usually award the successful plaintiff damages according to standard civil criteria.[43] As in most tort cases, the primary aim of compensatory damages is to eliminate the consequences of the wrongdoing and to shift the loss suffered by the plaintiff onto the defendant.[44] Although punitive damages are not unknown to Israeli law, the Defamation (Prohibition) Law makes no reference to such compensation and contains no special rules in this regard.

In 1998, a significant addition to the common tort/defamation compensation rules was introduced by the Defamation (Prohibition) Law:[45] the new[46] provision allowed the courts to award damages up to NIS 50,000 (NIS 100,000 in cases of intentional injury) without the plaintiff having to prove damage – neither general nor special. It is important to stress that notwithstanding this rule's substantial importance and despite the fact that it became the refuge of most plaintiffs, the 'compensation without proof of damage' format did not eliminate or alter the original

[38] ibid s 4.

[39] ibid s 13: 'shall not be grounds for criminal or civil action'.

[40] According to current case law, 'substantial truth' is not enough, yet trivial mistakes do not obstruct the defence of truth. See CrimA 232/55 *A-G v Gruenwald* 1958 PD 12; CA 8735/96 *Bitton v Kop* 1998 PD 52(1) 19.

[41] *Gruenwald*, ibid 2063-65. In this case, the defendant had to prove facts that happened during the Holocaust in order to convince the Court that the plaintiff indeed was corroborating with the Nazis.

[42] Defamation (Prohibition) Law (n 1) s 15.

[43] LCA 4740/00 *Amar v Yoseph* 2001 PD 55(5) 510.

[44] Aharon Barak, Mishael Cheshin and Itzhak Englard, *The Law of Civil Wrongs: The General Part* (Gad Tedeschi, ed) The Magnes Press, The Hebrew University Jerusalem 1976) 566–75. For an overview of Israeli tort law and the underlying values see Israel Gilead, *Tort Law: Limits of Liability, Vol 1* (Sacher Institute, Hebrew University of Jerusalem 2012) 51–90.

[45] Defamation (Prohibition) Law (n 1) s 7A.

[46] Indeed it was the old version of the Copyrights Act which was the first to introduce the idea, yet in a different manner. Today, approximately 30 Israeli Acts include the same provision.

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common evidential rule of compensation that places the onus of proof regarding the nature and amount of loss on defamation plaintiffs. Thus when the plaintiff chooses the capped 'compensation without proof of damage' route then no damage has to be proven yet the awarded damages are capped. When, on the other hand, the plaintiff can satisfy the court that the publication indeed caused damage – special or general – and that the damage is higher than the statutory cap, the court is free to award any level of damages proven.[47]

In 2011, statutory damages became the subject of two new private bills. Both bills aimed to increase the statutory NIS 50,000[48] caps to NIS 300,000 and NIS 500,000[49] respectively. The two bills were eventually amalgamated into one bill following the first formal round of debates in the Knesset Constitution, Law and Justice Committee.[50] (This bill is discussed in detail in Section 3 of the article.)

2.1.2 THE CONSTITUTIONAL ARENA – BASIC LAW: HUMAN DIGNITY AND FREEDOM

Israel does not have a formal constitution. Instead, the early legislators enacted a series of basic laws that would eventually comprise the equivalent of a constitution.[51] The most important is Basic Law: Human Dignity and Freedom, which came into force in 1992.

The first sections of the Basic Law declare its purpose of preserving human dignity and freedom: 'Every human being is entitled to protection of life, body and dignity'.[52] In view of the Basic Law's explicit reference to human dignity, it is now accepted that reputation is constitutionally protected by Israeli private law.[53]

Regarding the effect of Basic Law: Human Dignity and Freedom on Israeli private law, case law has supplied two principled insights. First, the Basic Law provides no direct private cause of action – not even through use of the tort of breach of statutory duty;[54] second, it nonetheless has an indirect impact on private law in general and tort law in particular. Following this line of interpretation, 'dignity', including reputation,[55] has become a constitutional right with regard

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[47] *Amar* (n 43); see also CA 89/04 *Nudelman v Sharansky* (not published, judgment delivered on 4 August 2008); LCA 3832/11 *Fishbein v Bombach* (not published, judgment delivered on 18 January 2012).

[48] Approximately US$13,406 or £8,544 (as at end-January 2013).

[49] Approximately US$80,437 and US$134,062 or £51,264 and £85,440 (as at end-January 2013).

[50] Draft Bill Amending the Defamation Law (Amendment No 10) (Expansion of Remedies) (n 10).

[51] According to the Harari Committee's decision of 13 June 1950, each Basic Law stands for one chapter in the Constitution. See Tamar Gidron, 'Israel' in Vernon V Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn, Cambridge University Press 2012).

[52] Basic Law: Human Dignity and Freedom (Israel), s 4.

[53] Aharon Barak, 'The Constitutional Revolution: Protected Human Rights' (1992) 1 *Mishpat Umimshal* 9 (in Hebrew); Daphne Barak-Erez and Israel Gilead, 'Human Rights in the Laws of Contract and Tort: The Silent Revolution' (2009) 8 *Kiryat Hamishpat* 11 (in Hebrew); Israel Gilead, 'Tort Law in Aharon Barak's Adjudication' in Celia W Fassberg, Barak Medina and Eyal Zamir (eds), *The Judicial Legacy of Aharon Barak* (Nevo Publishing 2009) 487.

[54] CWO 1968 (n 24) s 63. Tamar Gidron and Roei Ilouz, 'Breach of Statutory Duty' (2012) *Mishpat Va'Assakim* (forthcoming).

[55] Meaning 'the esteem in which [a man] is held'. See George Spencer Bower, *A Code of the Law of Actionable Defamation: With a Continuous Commentary and Appendices* (2nd edn, Making of Modern Law 2010) 3.

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to all relevant balancing processes with contrasting rights. Nevertheless, this change in status has had only limited influence on the delicate balance between reputation and freedom of speech. The reason for this is that although the latter is not explicitly mentioned in the Basic Law, case law has construed 'human dignity' as accommodating freedom of speech as well.[56] Hence, the rights to both reputation and freedom of expression are now usually regarded as equal in force and origin, and equal in status under existing case law.[57]

2.1.3 Freedom of Expression

As noted above, Israeli statutory law does not explicitly refer to freedom of expression. Unlike the profound commitment of American society to freedom of expression, Israeli society and its legal system, devoid of legislation corresponding to the First Amendment, has developed its own balancing regime as prompted by the Supreme Court's activist leadership.[58]

Israeli case law has set the American model, which ascribes absolute supremacy to freedom of expression, as its guide in jurisprudence, yet with an independent Israeli interpretation.[59] This practice stems from the need to adapt foreign values to the very different Israeli society as well as

[56] For an update summary of the various arguments, see Justice Rivlin's holding in CA 751/10 *John Doe v Ilana Dayan* (not published, judgment delivered on 8 February 2012), paras 66, 75–78 and Justice Fogelman's holding, para 15. Because of the importance of the *Dayan* case, the Supreme Court agreed to hold a further hearing before an expanded nine-judge panel: CFH 2121/12 *John Doe v Ilana Dayan* (not published, decision delivered on 3 October 2012). In the meantime the initial panel's decision remains the law.

[57] CFH 7383/08 *Ungerfeld v The State of Israel* (not published, judgment delivered on 11 July 2011); HCJ 6126/94 *Senesz v The Broadcasting Authority* 1999 PD 53(3) 817; LCA 10520/03 *Ben Gvir v Dankner* (not published, judgment delivered on 12 November 2006). Aharon Barak, 'Human Dignity as a Constitutional Right' (1994) 41 *Hapraklit* 271, 280 (in Hebrew); Dov Levin, 'Freedom of Expression vis-a-vis the Right to Reputation (Balances and Defences)', *Shamgar Book – Life Story*, *Vol 1* (The Israel Bar Association 2003) 47, 50; Kremnitzer and Kramer (n 21). For a different view regarding the constitutional standing of freedom of expression in the Israeli system see Justice Dorner's holding in CA 4463/94 *Golan v Prisons Service* 1996 PD 50(4) 136. In *Dayan* (n 56) Justice Rivlin made an effort to elevate freedom of speech to a higher position than the right to reputation, while Justice Fogelman and Justice Amit did not share this view.

[58] The holding of Justice Agranat in HCJ 73/53 *Kol Ha'am Company v Minister of the Interior* 1953 PD 7(1) 871 is still the leading authority on freedom of expression in Israel. cf with Justice Rivlin in *Dayan* (n 56).

[59] The following are some leading examples of the Israeli Supreme Court's decisions in which it strongly relied on the American notions of freedom of expression: CA 323/98 *Sharon v Benziman* 2002 PD 56(3) 245, regarding a story about the 1982 war in Israel's northern border; *Hertzikovitch* (n 34), a famous insult exchange between the press and one of the leading figures in Israeli sports, and CFH 7325/95 *Yedioth Ahronoth Ltd v Kraus* 1998 PD 52 (3) 1, an offensive series about police misconduct, exposing suspicions against a high-ranking police officer. It was clear that the Supreme Court gave precedence to freedom of expression. In the latest case of CC (Jerusalem) 8206/06 *Captain R v Dayan* (not published, judgment delivered on 7 December 2009), dealing with a documentary television report on a shooting incident by an IDF officer, liability was imposed by the District Court. The Supreme Court (n 56) was led by the Vice-President of the Supreme Court, Justice Rivlin (now retired), who openly and unhesitatingly led the Court to reconsider the balancing process between reputation and freedom of the press. The effect of this decision is yet to be seen. On the other hand, cases like *Amar* (n 43) in which a publication accused the plaintiff of abandoning her newborn child as a result of her drug addiction, and LCF 9818/01 *Bitton v Sultan* 2005 PD 59(6) 554, a colourful story featuring accusations of brutal treatment for lice in a kindergarten, illustrate the circumstances under which protection of reputation seems more important.

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a reconstruction of the original meaning of freedom of speech and its implementation.[60] On the whole, the Israeli Supreme Court clearly demonstrates true dedication to freedom of expression (especially regarding political content),[61] and the legal acrobatics – in its rhetorical and normative settings – that the Court has had to perform in order to overcome the legislative void makes protection of this important value quite impressive.[62]

Freedom of the press and freedom of information comprise two aspects of freedom of expression. Freedom of the press is protected through the Basic Law as part of freedom of expression, while freedom of information is explicitly protected by the Freedom of Information Law.[63] Both have high standing in the Israeli discourse on personal rights.[64]

Israeli law has not yet adopted a SLAPP and anti-SLAPP [65] procedure to further protect freedom of speech. SLAPP – Strategic Lawsuits against Public Participation[66] – are lawsuits targeted at organisations, public officials, and even private persons who initiate public debates on an issue of public interest. These lawsuits (which are mainly defamation actions but also include privacy, injurious falsehood and negligence actions) pose a threat to the free flow of information and freedom of expression by forcing an expensive legal process as a means of silencing criticism and opposition.[67] Many legal systems fight SLAPP suits with anti-SLAPP rules, usually within a

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[60] Amnon Reichman, 'The Voice of America in Hebrew? The US Influence on Israeli Freedom of Expression Doctrines' in Michael Birnhack (ed), *Be Quiet, Someone is Speaking! The Legal Culture of Freedom of Speech in Israel* (Tel Aviv University Press 2006) 185 (in Hebrew).

[61] On the issue of freedom of expression and the threat of terror in the Israeli context see Daphne Barak-Erez, 'On Cinematographic Lies and Historic Truth: Between the Voice of the People and "the Voice of the People" Precedent' in Birnhack (ibid) 141. Artistic content is also protected, see *Senesz* (n 57), as is commercial content. For a lesser extent see HCJ 606/93 *Kidum Ltd v The Broadcasting Authority* 1993 PD 48(2) 1. The Israeli Supreme Court had also dealt with pornographic freedom of expression. See HCJ 5432/03 *SHIN, Israeli Movement for Equal Representation of Women v Council for Cable TV and Satellite Broadcasting* 2003 PD 58(3) 65. For an overview discussion of the commitment of Justice Shimon Agranat, one of the leading legal minds in Israeli history, to freedom of expression see Pnina Lahav, 'Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy' 16 *Iyunei Mishpat* 475 (in Hebrew). For a discussion of human dignity in Israeli law, see Kremnitzer and Kramer (n 21).

[62] For a comprehensive survey of freedom of expression in Israeli law see Justice Rivlin's holding in *Dayan* (n 56). Justice Rivlin's decision praises freedom of expression, explicitly placing this freedom above reputation. Justice Fogelman and Justice Amit disagree.

[63] Guy Pessach, 'The Theoretical Foundation of the Principle of Freedom of Speech and the Legal Status of the Press' (2001) 31 *Mishpatim* 895 (in Hebrew).

[64] The Movement for Freedom of Information in Israel is very active and has already made a few impressive achievements. See, for example, the battle regarding the operational circumstances of some of the leading televisions networks in Israel: Roni Koren-Dinar, 'In Response to the Movement for Freedom of Information Request, the Second Authority Shall Publish Commitments of Channel 10', 25 April 2007, http://www.haaretz.co.il/misc/1.1404214. In Administrative Claim Appeal 10845/06 *Keshet Broadcasting v The Second Authority of Television and Radio* (not published, judgment delivered on 11 November 2008), para 74, Justice Danziger implied that the right forming a special aspect of freedom of speech enjoys some measure of constitutional standing. On the history and nature of Israeli press, see Oz Almog, 'From Enlisted to Investigating Journalism', 21 April 2009, http://www.peopleil.org/details.aspx?itemID=7861.

[65] Birnhack (n 6).

[66] The origin of the title and the rule is explained in George W Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press 1996).

[67] 'Draft Bill Amending Defamation (Prohibition) Law – The Association for Civil Rights' Approach', 4 October 2011, http://www.acri.org.il/he/?p=16974. James A Wells, 'Exporting SLAPPs: International Use of the US

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civil procedure code, which allow the courts to decide at the outset whether the claim has any probability of success. If the court holds the case to be non-viable, the claim is dismissed and the defendant is awarded legal defence costs. Although gaining force not only in the US,[68] Israeli free speech proponents have only recently discovered the potential of such SLAPP and anti-SLAPP. In consequence, legal discourses have only just emerged, obliging the courts to form an educated opinion on the budding legal issues of the SLAPP phenomenon and the means for combating it.[69] They also induced some Knesset members to introduce two private bills,[70] supported primarily by Israeli labour organisations and the Association for Civil Rights in Israel. These legal developments, as well as a public scandal involving one of the wealthiest families in Israel (settled without legal proceedings),[71] are likely to evoke heated public debate in the future.

2.2 Balancing Reputation and Freedom of Expression – Israeli Case Law

Israel's Defamation (Prohibition) Law reflects the original statutory balance between reputation and other competing interests and provides the first module of protection of reputation in Israeli defamation law as a whole. It is commonly accepted that the Law adopted a pro-plaintiff attitude.[72] The second module is case law. It is no less important, and certainly much more complex and unstable. While statutory law creates the framework, case law in fact forms the heart of defamation law, mirroring the passage of time together with changing values and beliefs. Case law is the instrument that helps to constantly reshape protection of reputation, keeping it relevant and able to preserve human dignity on the one hand, while ensuring that freedom of expression –

"Slapp" to Suppress Dissent and Critical Speech' (1998) 12 *Temple International and Comparative Law Journal* 457.

[68] On US SLAPP legislation see California Code of Civil Procedure (2009), s 425.16 (e)(3) and (e)(4). For legislation in other US states, see California Anti SLAPP Project, http://www.casp.net/. No federal SLAPP legislation exists, but see 'The Citizen Participation in Government and Society Act of 2009', 28 May 2009, http://law.wustl.edu/landuselaw/Statutes/Anti-SLAPP%20Legislation.doc. See also Ramani Nadarajah and Renee Griffin, 'The Failure of Defamation Law to Safeguard Against SLAPPs in Ontario' (2010) 19 *Review of European Community and International Environment Law* 70; Greg Ogle, 'Anti-SLAPP Law Reform in Australia' (2010) 19 *Review of European Community and International Environment Law* 35. On the European perspective, see Fiona Donson, 'Libel Cases and Public Debate – Some Reflections on whether Europe should be Concerned about SLAPPs' (2010) 19 *Review of European Community and International Environment Law* 83. On SLAPP in South Africa, see Franny Rabkin and Sue Blaine, 'Developers Warned of Using Courts to Silence Critics', 18 February 2011, http://www.bdlive.co.za/articles/2011/02/18/developers-warned-on-using-courts-to-silence-critics.

[69] See, for example, CC (Jerusalem) 10827/09 *YD Barazani Assets and Building Co v Yoram* (not published, judgment delivered on 6 December 2011); CC (Tel Aviv) 18029-02-11 *Or-City Real Estate Ltd v Tabakman* (not published, judgment delivered on 7 July 2011). These cases are still pending.

[70] Draft Bill for the Establishment of the National Fund for Protection of the Public Right for Information (n 4); Draft Bill Preventing the Misuse of the Legal Proceedings (n 4).

[71] The television screening of the 'Shakshuka Method' began a massive conflict that ultimately subsided and produced no legal outcomes.

[72] Peled (n 32) 741–65, 782–90. On the interplay between the Law and case law in Israel see also Tamar Gidron, 'World Map of Libel Tourism and Defamation Law in Israel' (2010) 15 *Hamishpat* 385 (in Hebrew).

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reputation's perpetual rival – maintains its status as protector of the general public interest as well as individuals, on the other.

Israeli case law currently exhibits a very delicate balance between protection of reputation and freedom of expression, sometimes slightly favouring reputation[73] but usually giving preference to freedom of speech.[74] It is in fact quite clear that recent Supreme Court case law reflects at least some opposition to the Defamation (Prohibition) Law's original plaintiff-friendly attitude as well as strong opposition to recent plaintiff-friendly bills.[75] The latest illustration of the Supreme Court's inclination towards free speech is the 2012 decision in the *Dayan* case, discussed below. This decision has openly and explicitly challenged the current equilibrium.[76] The legislature, quickly reacting to this decision, produced a new bill aimed at introducing into the Law the new 'responsible journalism' defence adopted by the Supreme Court in the *Dayan* case.[77] Indeed, such 'exchanges' between the legislature and the Supreme Court, common in Israeli law in general[78] and in defamation law in particular,[79] clearly underline the salience of case law in this field.

Usually, the impact of case law on the balance between reputation and freedom of speech relates to the following issues: (i) the definition of 'defamation'; (ii) the scope of the main defences; and (iii) the choice of remedies – injunctions or compensation. The specific problems posed by advanced technologies forms a separate cluster of case law. I relate shortly to the relevant case law on each of these issues.

2.2.1 Cause of Action – What is a 'Defamatory' Context?

As previously stated, the Defamation (Prohibition) Law's cause of action is based primarily on proof that a publication contains potentially injurious content. In order to decide whether a publication is injurious or not Israeli case law applies an objective test, looking at each allegedly defamatory publication through the lens of the reasonable addressee, while asking whether the publication may lower or degrade the plaintiff's standing in her group or society. This test sometimes demands delicate moral and cultural choices.

The case law scale is continually tilting in one direction or another as it reflects the difficult struggle between reputation and freedom of speech. Although the Supreme Court has clearly stated in a series of important cases that both rights – the right to a good name and the right to

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[73] *Ben Natan* (n 11) is a good example. *See* also *Sharansky* (n 47); *Bombach* (n 47).
[74] *Hertzikovitch* (n 34); *Senesz* (n 57).
[75] Peled (n 32).
[76] Justice Rivlin in *Dayan* (n 56). Both Justices Fogelman and Amit refrained from supporting the shift in the standing of free speech in Israeli law.
[77] ibid.
[78] See, eg, the many changes to the compensation for physical injuries caused by car accidents in the Road Accident Victims Compensation Law, 1975 (Israel) (Amendment No 8) as a response to the Supreme Court's decision in CA 358/83 *Shulman v Zion Insurance Co* 1988 PD 42(2) 844, which the legislator did not favour.
[79] The *Ben Natan* decision (n 11) by the Supreme Court was almost immediately answered by a private bill recognising group defamation. In addition, the decision in LCA 4447/07 *Mor v Barak ITC [1995] – The International Telecommunication Corporation* (not published, judgment delivered on 25 March 2010) has produced a bill proposing to limit anonymity on the internet.

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freedom of expression – basically enjoy the same status, it is clear that the weighing scale is in a constant sway, reflecting a changing perception of the optimal scope of 'injurious' publication. The different rhetoric and the different approaches to social and cultural values within the Supreme Court mirror a true debate on moral choices of normative hierarchy. On the one side of the scale we find the expansive approach to 'injurious publication', allowing more instances of defamatory meaning into section 1 of the Law. Two famous examples which were both answered positively and incurred liability are (i) a story which ascribed homosexual tendencies to the plaintiff,[80] and (ii) a picture of an identifiable overweight woman linked to a promotion for a television series on the phenomenon of obesity;[81] these serve as good instances of the dominance of the right to society's esteem in two very complex circumstances. The legal choices reflected here are not free from moral criticism.[82] The same expansive interpretation of the common objective, right-thinking member of Israeli society test of defamatory content was adopted when the Court decided to apply subjective criteria in cases where the plaintiff belongs to a community whose normative standards and morals are different from those held by Israeli society in general. The introduction of subjective elements into the commonly used objective test not only introduces uncertainty, it also broadens the scope of liability for defamation.[83]

On the other side of the scale, liability has been denied in a series of cases which also reflect not merely a different fortuitous assortment of media victory but a cluster of instances that all reveal explicit dedication to freedom of expression and freedom of the press. The famous case of *Ben Natan*,[84] which triggered emotional public responses, is a good example. The true meaning of the publication and its reference to the plaintiffs – either personally to each one of them or to the group as a whole – could easily be interpreted differently. It was clear that the decision was motivated by the dominance of freedom of expression.[85] In *Hertzikovitch* the Supreme Court not only denied liability for an extremely vulgar publication, but Justice Rivlin also used the opportunity to explain that zealous publications should usually be exempted from liability because the reasonable reader would not attach any serious meaning to such outrageous content as the test for

[80] CC (Tel Aviv) 20174/94 *Amsalem v Klein* (not published, judgment delivered on 20 June 1995). Klein's appeal was denied: see CA (Tel Aviv) 1145/95 *Klein v Amsalem* (not published, judgment delivered on 30 March 1997), and the award of NIS 150,000 was upheld by the District Court. The newspaper petitioned a second appeal to the Supreme Court but, following the 'advice' of Justice Aharon Barak, revoked its petition. See Hedi Viterbo, 'The Crisis of Heterosexuality: The Construction of Sexual Identities in the Israeli Defamation Law' (2010) 33 *Iyunei Mishpat* 5, 15 (in Hebrew).

[81] CC (Tel Aviv) 3645/07 *Kozover v News 10 Ltd* (not published, judgment delivered on 12 May 2009).

[82] Viterbo (n 80).

[83] In *Shaha* (n 20) the Supreme Court adopted the subjective test but did not apply it to the circumstances of the case. The plaintiff, an Israeli and Jordanian citizen, was said to have collaborated with Israeli authorities. Since he was an Archihegmon of the Armenian Church, this was an unbearable accusation. Following a long debate, the Court did not impose liability on the Archbishop defendant, although it agreed, in an obiter dictum, that under less sensitive circumstances liability would have been imposed.

[84] *Ben Natan* (n 11).

[85] Defamation (Prohibition) Law, s 4, explicitly negates liability in group defamation cases, although the interpretation of a certain publication may lead to the conclusion that not only was a particular group defamed, but so was each of the individuals comprising the group. Yet in *Ben Natan* (n 11), the Court refused to interpret a film that portrayed a group of IDF soldiers as cold-blooded murderers to amount to defamation of each of the individual soldiers.

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'injurious publication' does not provide a positive reply within the meaning of section 1 of the Law.[86] The cases in which the plaintiffs were called 'Nazis' and the courts were hesitant with regard to the 'injurious' meaning of the publication provide additional examples of the expansion of freedom of speech.[87]

2.2.2 DEFENCES

All three statutory defences – permitted publication (section 13), truth (section 14) and good faith (section 15) – have been extensively discussed by the Supreme Court and no doubt provide the most appropriate reflection of the ongoing struggle between opposing policy considerations and conflicting interests. Until recently, the leading case law did not provide a clear answer as to which of the two interests – reputation or freedom of expression – prevails. However, in 2012, in *Dayan*, the Supreme Court issued a decision that is likely to impact deeply on legislation and future defamation case law. The plaintiff was a Captain in the Israeli Defence Forces (IDF) whom the District Court deemed to be a victim of libellous television reportage; the defendant was one of Israel's most esteemed media figures. Both the District Court decision imposing liability[88] and the Supreme Court decision allowing the appeal[89] elicited heated public debate. The following is a concise summary of the leading precedents over recent years on the defences to a defamation claim in Israeli defamation law, and include the main innovations of the *Dayan* case.

Interpretation of section 13

The absolute defences in section 13 – which relates to special public interest, public situations, public officers and specific public formal associations (usually governmental and administrative entities) – are usually construed in favour of freedom of speech. Thus, for example, the Supreme Court decided that courtroom freedom of speech is absolute even when the defamatory speech is totally irrelevant to the subject of the legal proceedings.[90]

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[86] *Hertzikovitch* (n 34). Hertzikovitch, a public figure plaintiff, was compared in a publication to a British lord who spends his nights in the stinking gutter, but lost his defamation suit. The celebrated plaintiff in CC (Jerusalem) 5358/09 *Federman v The Second Television and Radio Authority* (not published, judgment delivered on 20 November 2011) also lost his case. The Court preferred the satirical freedom of speech interest of the popular television show over the reputational right of the plaintiff, who was depicted by the defendants as a political extremist. In the famous case of *Ben Gvir* (n 57) the Court decided that calling somebody 'a filthy Nazi' during a live television show does, in fact, amount to defamation (yet clearly, this decision was influenced by the highly delicate circumstances).

[87] 3242/02 CA (Jerusalem) *Ben Gvir v Dankner* (not published, judgment delivered on 21 September 2003); Justice Rivlin in *Ben Gvir* (n 57) in the Supreme Court; CC (Netanya) 45765-10-10 *Zyon Yefet v Daniel Finkelman* (not published, judgment delivered on 7 August 2012).

[88] *Captain R v Dayan* (n 59).

[89] *Dayan* (n 56).

[90] LCA 1104/07 *Hir v Gil* (not published, judgment delivered on 19 August 2009). The Court had, in fact, no discretion on the issue because of the explicit language of the Law and the history of this special defence.

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Rejection of over-protection in public defendants' cases

Although all three defences granted by the Defamation (Prohibition) Law relate to defendants who are public officials or public figures and to public interest publications, Israeli defamation law does not a priori provide special rules for public as opposed to private plaintiffs. Israeli law has never accepted the philosophy behind the *New York Times v Sullivan* rule that established the actual malice standard in public figure defamation actions.[91] The fact that a plaintiff is a public figure, public official or engaged in public activity is just one of the many relevant circumstances that the courts consider in order to determine liability.[92]

Expanding defence in cases of public interest

The definition and application of 'public interest' as an element in all three defences is constantly expanding.[93] Public interest, which reflects the moral justification of all three defences, played an important role in the statements of all three justices in the *Dayan* case.

Expanding the meaning of 'truth' as a defence

The meaning of 'truth' for section 14 purposes has been expanded by the Supreme Court to include the following:

1. *Truth at the time of publication*. Facts would be regarded as 'true' if they were true at the time of publication, even if later they were revealed to be incorrect.[94] This 'truth at the time of publication' defence had already been established by the Supreme Court some 15 years ago.[95] Yet, in *Dayan* it was stressed and further clarified, with the circumstances of the case giving the Court the perfect opportunity to reassess the meaning of this defence. In this specific case, the defendant, an officer in the Israeli Defence Forces, was reported to have ordered his soldiers to shoot and 'confirm the killing' of a Palestinian girl who was approaching a restricted military zone. At the time of the broadcast, the Military Tribunal had only just begun its proceedings. Later, the Tribunal acquitted the officer. The Supreme Court decided that, as the facts broadcast were true when aired, the truth defence should be allowed.[96]
2. *Journalistic truth*. This new category of truth, according to the Supreme Court, is not an objective, or legal, truth. It is a portrait of the facts as established by a journalist following a reasonably professional investigative process.[97] A fact established as 'true' by

[91] 376 US 254 (1964). cf *Nudelman* (n 47); *Hertzikovitch* (n 34); CA 5653/98 *Fluss v Halutz* 1999 PD 55(5) 865.
[92] Justice Rivlin's holding in *Dayan* (n 56) paras 100–10.
[93] ibid, Justice Rivlin's holding. *Nudelman* (n 47); *Sharon* (n 59).
[94] *Kraus* (n 59); *Sharon* (n 59); *Dayan* (n 56), all three justices agreed on this point.
[95] *Kraus* (n 59). Following this decision the Law was amended and today a publication regarding criminal investigation should be followed up: Defamation (Prohibition) Law, s 25A (Amendment No 7).
[96] All three justices agreed on this point.
[97] Justice Rivlin's holding in *Dayan* (n 56) paras 91–92.

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responsible journalistic practice is regarded as true according to section 14 even if it turns out to be untrue in reality.[98]

Expanding the defence of good faith

The defence of 'responsible journalism' was imported into Israeli defamation law by the Court in the *Dayan* case as part of the defence allowed by section 15, the 'good faith' defence.[99] The origin of the responsible journalism defence is the famous *Jameel* case, argued in the UK.[100] The Supreme Court also stressed that in certain public matters the press owes a moral and/or social duty to publish. This duty to publish, when it is accomplished in a 'responsible journalistic way' and according to 'responsible journalistic' standards, provides a 'good faith' defence under section 15 of the Defamation (Prohibition) Law. This is perhaps the most important innovation emanating from the *Dayan* decision.[101]

2.2.3 Remedies

In accordance with the priority that the Supreme Court attaches to freedom of speech – and contrary to the preferences adopted by the legislator in the Defamation (Prohibition) Law – Israeli courts are very cautious in issuing prior restraint orders and injunctions (temporary or permanent), and allowing closed-doors proceedings and other means by which defamation may be avoided or minimised.[102] The Israeli courts' attitude towards temporary injunctions is of particular interest, especially in light of the 'injunction festival' displayed by British courts during the summer of 2011.[103] The initial position of Israeli law regarding prior restraint of defamatory publications was formed two decades ago, when an extremely unflattering book about a famous candidate for a Knesset seat was scheduled for publication a few days before elections. This incident provided the Supreme Court with a perfect opportunity to define a clear and comprehensive rule

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[98] ibid para 93.
[99] On the German origins of 'good faith' in the Defamation (Prohibition) Law, see Peled (n 32) 768–73.
[100] *Jameel v Wall Street Journal Europe* [2007] 1 AC 359.
[101] All three justices in *Dayan* (n 56) agreed on this innovation setting aside an old precedent. See FH 9/77 *The Israel Electricity Company v Ha'aretz Newspaper Publishing* 1978 PD 32(3) 337.
[102] LCA 3614/97 *Itzhak v Israel Television News Company Ltd* 1998 PD 53(1) 26.
[103] For a broad look at the current trends adopted by the UK courts during the second half of 2011 see David Leigh, 'Super Injunction Scores Legal First for Nameless Financier in Libel Action', 29 March 2011, http://www.guardian.co.uk/law/2011/mar/29/superinjunction-financier-libel-legal-case. For typical examples of the use of injunctions in the UK, see the well known Trafigura saga: Alan Rusbridger, 'Trafigura: Anatomy of a Super-Injunction', 20 October 2009, http://www.guardian.co.uk/media/2009/oct/20/trafigura-anatomy-super-injunction. For typical use of injunctions by celebrities in the UK courts, see *Terry v Persons Unknown* [2010] EWHC 119 (QB). See also *ZAM v CFW* [2011] EWHC 476 (QB). See Master of the Rolls, Practice Guidance, 'Interim Non-Disclosure Orders', http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/practice-guidance-civil-non-disclosure-orders-july2011.pdf. The phenomenon of the popularity of injunctions is constantly linked to libel reform. See 'The Defamation Act: Not Fit for Purpose', 24 May 2011, http://super-injunction.blogspot.com/2011/05/defamation-act-not-fit-for-purpose_24.html. cf 'News: Six Privacy Injunctions Discharged, Anonymity Retained', 1 August 2012, http://inforrm.wordpress.com/2012/08/01/news-seven-privacy-injunctions-discharged-anonymity-retained/#more-16504. It is worth mentioning that some of the 'privacy' cases can also constitute an action for defamation.

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regarding the optimal balance between public and private interests together with a plaintiff's prospects for obtaining a prior restraint order in such circumstances. The Court refused to issue the injunction.[104] This priority of freedom of speech over a plaintiff's reputation with respect to prior restraint of publication was reaffirmed a few years ago. Again, the circumstances indicated that the damage that the defendant's television reportage could cause the plaintiff – a well-known gynaecologist – would be severe. Nevertheless, the injunction was refused.[105] In both cases, the Court stressed that the plaintiffs were free to claim damages following publication.

The frugality with which the Israeli legal system approaches prior restraint is backed by the effect of technological changes and the accelerating instance of defamation appearing on the internet. Thus, case law on this issue does not indicate any prospects for change.[106]

Damages are still the usual remedy in defamation cases. Their amount is meant to reflect the gravity of the injury and the chances for rehabilitation.[107] Yet, as both these factors are difficult to prove – just like injury to privacy or autonomy – the Israeli legislator decided to ease the evidentiary burden placed on the plaintiff and introduced into the Defamation (Prohibition) Law the capped statutory compensation without proof of damage procedure. Accordingly, courts may today award a successful plaintiff up to NIS 50,000 without proof of damage.[108] They may, of course, award higher compensation when the plaintiff is able to prove some general and/or special damage caused by the publication.

The proposed new bill raising statutory compensation caps will be discussed in detail in the next part.

3. Damages under the Defamation (Prohibition) Law

One of the leading goals of tort law in general and defamation in particular is to restore the plaintiff's position to its pre-injury status and to shift the burden of the loss suffered by the plaintiff onto the defendant.[109] The onus of proof lies on the plaintiff to convince the court also of the nature of the damage – special damage that can be backed by factual data and/or general damages that are awarded according to general impression and general circumstances – as well as the amount of the damages. These damages are 'compensatory damages'.[110]

[104] CA 214/89 *Avnery v Shapira* 1989 PD 43(3) 840.

[105] LCA 10771/04 *Reshet Communication and Production (1992) Ltd v Etinger* 2004 PD 59(3) 308.

[106] See the recent Supreme Court decision in the petition of the State of Israel to restrain a television programme regarding the state's witness in the criminal case against former Israeli Prime Minister, Ehud Olmert, which the Court refused. The facts broadcast can result in both defamation and privacy claims. The Court stressed the fact that most of the information had already been published on the internet: CA 6578/12 *The State of Israel v Reshet Noga* (not published, judgment delivered on 6 September 2012); see also CC (Kiryat Shmona) 24553-06-12 *Oved v Oved* (not published, judgment delivered on 16 July 2012).

[107] *Amar* (n 43).

[108] This statutory cap was regarded as reasonable by the legislator compared to the average level of compensation (reflecting special and general damages) adopted by courts in 1996–99 case law: see Yuval Karniel and Amiram Barkat, 'Compensation in Defamation: Reputation and Oil' (2002) 2 *Alei Mishpat* 205 (in Hebrew).

[109] Gilead (n 44) 311–16.

[110] *Amar* (n 43), *Sharansky* (n 47).

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Yet liability in defamation sometimes involves other types of compensation. Although all are common in other areas of tort, they are more frequently applied in defamation cases. Through these types of compensation the courts try to achieve additional goals: vindicating the plaintiff's reputation and providing deterrence and punishment, especially in cases of media defendants, are some of the most important of these goals. A value declaration and a moral statement on the balance between reputation and free speech are also of particular importance. Therefore, in addition to compensatory damages, Israeli courts sometimes award aggregated damages, punitive damages and at times even contemptuous damages.[111] Still, compensatory damages are the rule in tort law cases in general and in defamation cases in particular.

Compensatory damages reflect the injury that was caused by the defamatory publication and are based on the evidence supplied by the plaintiff. However, because of the problematic nature of reputational harm, it is often difficult for plaintiffs to present convincing proof to support their claims for specific and general damages.[112] This evidential problem is not limited to defamation cases: similar problems arise in cases of invasion of privacy, sexual harassment and negligence (when harm to autonomy is asserted), and indeed in many other tort cases where pain and suffering, and similar non-physical harm, is claimed.

In order to ease the burden of proof of reputational harm, a unique legal tool – rather revolutionary at the time – was introduced into the law of defamation in 1998, in the form of section 7A of the Defamation (Prohibition) Law: 'compensation without proof of damage'.[113] The provision empowered the courts to award up to NIS 50,000[114] without proof of damage when the defendant had not acted maliciously, or up to NIS 100,000[115] in the case of a maliciously defamatory publication. The true meaning of section 7A was initially debated by both the courts and academia;[116] this debate was later settled by the Supreme Court by explaining that if the plaintiff can convince the court that damage indeed was incurred, then the court may award any sum of compensation it

[111] For a survey of the heads of damages in defamation cases, see Chief Justice Barak's comments in *Amar* (n 43). Justice Barak defines in an obiter dictum the punitive damages that form part of compensatory damages. For punitive damages in defamation actions, see CA 30/72 *Friedman v Segal* 1973 PD 27(2) 225, relying on *Rookes v Barnard* [1964] AC 1129 (House of Lords, UK). Note that the large sum awarded in *Nudelman* (n 47) were regarded as compensatory damages. For contemptuous damages, see the famous decision in *Ben Gvir* (n 57), in which the plaintiff was awarded 1 NIS (less than 30 US cents). Recently, a very angry Israeli court awarded a plaintiff 10 agorot (which in total amounts to one-tenth NIS, less than 3 US cents) – the smallest sum ever to be awarded in legal proceedings. The Court stressed that this is the smallest coin used in Israel: CC (Herzliya) 8054/06 *Hirsh v The State of Israel* (not published, judgment delivered on 15 November 2011). cf UK principles and case law in Cameron Doley and Alastair Mullis (eds), *Carter-Ruck on Libel and Slander* (6th edn, Lexis Nexis UK 2010) 475–533.

[112] See text accompanying the bill that originally introduced compensation without proof of damages: Draft Defamation Bill (Amendment – Compensation without Proof of Damages) (n 12).

[113] Defamation (Prohibition) Law, s 7A, was incorporated into the Defamation (Prohibition) Law in 1998 (Amendment No 6). On the interpretation of s 7A see CC (Tel Aviv) 14716–04–10 *Bombach v Fishbein* (not published, judgment delivered on 11 April 2011); *Fishbein v Bombach* (n 47).

[114] Approximately US$13,406 or £8,544 (as at end-January 2013).

[115] Approximately US$26,812 or £17,088 (as at end-January 2013).

[116] Amir Rozenberg, 'On Reputation and Monetary Damages' (2000) 18 *The Lawyer* 50; Uri Shenhar, 'Reputation Damages and the Way by which They Are Proved' (2001) 21 *The Lawyer* 54; for an overall survey see Karniel and Barkat (n 108).

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sees fit without reference to the statutory damages cap. The statutory cap thus aims to help successful plaintiffs who find it hard to show the scope of their loss.[117]

A 2002 study by Karniel and Barkat of 108 magistrate courts' cases decided between 1996 and 1999 showed that prior to the introduction of section 7A the sums awarded by the courts were increasing rapidly. The average compensation per case in those years was approximately NIS 43,000.[118] At the time of the study's publication, the interpretation of section 7A was still under discussion, so it was impossible for the authors to predict its impact on the amount of compensation to be awarded by the courts in future. Nevertheless, the authors recommended abolishing the then-new legislation. They emphasised the potential harm that the plaintiff-friendly rule might cause to the balance between freedom of speech and the right to reputation, and concluded that the threat to freedom of speech in general and to freedom of the press in particular was substantial and undesirable.[119]

Now, ten years later, the Israeli legislature not only openly rejects the authors' critical position, but even takes the section 7A innovation a good deal further by suggesting a much higher statutory cap. Moreover, over the years, statutory damages have been introduced into more than 30 other Israeli laws (with minor changes dictated by the subject matter).[120] Their attractiveness to the legislator and to the plaintiff is obvious.[121]

Consequently, we witness an interesting phenomenon in Israeli tort law: an ongoing expanding category of plaintiffs who enjoy special evidential rules when it comes to proving their damages. Plaintiffs claiming privacy rights, protection from sexual harassment, discrimination, consumer protection, economic rights and other diverse interests[122] are all entitled to compensation without proof of damage. The possible reciprocal relationship between the bill increasing the reputational caps and the other caps in the diversified list of laws that also allow for compensation without proof of damage will be discussed later.

Supporters of the new bill[123] argue that the Defamation (Prohibition) Law does not supply adequate protection to reputation; that the original balanced protection of reputation by the Law has been lost in the constant war between reputation and free speech in recent case law; that the damages awarded by the courts are too low and that the protection that the Law grants to public figures does not meet the democratic and political needs of modern society.[124] They contend that the media in general and the press in particular have abandoned most of their original commitment to high-standard professional ethics and that the law should intervene in order to protect against further abuse of personal reputation (mainly for public figures). The recent

[117] *Ben Gvir* (n 57); *Nudelman* (n 47).
[118] Approximately US$11,529 or £7,347 (as at end-January 2013).
[119] Karniel and Barkat (n 108) 246.
[120] For example, Protection of Privacy Act, 1981 (Israel); Commercial Torts Act, 1999 (Israel); Consumer Protection Act, 1981 (Israel); Prohibition of Sexual Harassment Act, 1998 (Israel).
[121] Defamation Bill (Amendment – Compensation without Proof of Damages) (n 12).
[122] The list of statutory provisions allowing compensation without proof of damages includes 31 Acts.
[123] Both caps, NIS 300,000 and NIS 500,000, were eventually merged into one bill following the Knesset debate.
[124] See text accompanying the two bills.

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Supreme Court decision in *Dayan*, which has already been referred to in some new defamation cases,[125] is likely to strengthen the position of the bill's proponents in this public debate.

Opponents of the bill – mainly the media, the Association for Civil Rights in Israel and The Israeli Institute for Democracy[126] – maintain that the bill is harmful and unnecessary. They are of the opinion that the bill lacks factual justification as no empirical data supports a need for a change in balances and preferences in the Defamation (Prohibition) Law that the bill promotes. The extreme protection of reputation is thus unconstitutional in their view.

These arguments call for a comprehensive discussion. I shall relate to some of them in Section 3.2. Yet both proponents and opponents of the new bill could benefit from the empirical data collected from defamation case law over the eight-year period from 2004 to 2011 with regard to compensation awarded by Israeli courts to successful defamation plaintiffs, which I shall now present. This empirical data can also shed light on the above-mentioned normative debate and provide a common basis for an educated debate on the pros and cons of the change in compensation awards through increased statutory damages.[127]

3.1 Compensation Awards: 2004–11

This section provides data from 563 successful defamation cases that were decided by Israeli courts between 2004 and 2011, awarding damages to the winning plaintiffs. The working assumption of the research team[128] was that the current debate on the various defamation bills can benefit from case law data on the following issues:

- How is reputation valued by Israeli courts?
- What are the awards granted by the courts in certain types of defamation?
- How expensive is the deterrence created by reputation awards and what was the impact, if at all, of section 7A on subsequent rulings?

Both proponents and opponents of the bill would be better equipped to weigh the need for change in the status quo of Israeli defamation law if they are fully informed as to the current trends in defamation awards.

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[125] *Bombach* (n 47); CC (Tel Aviv) 58826/07 *Post-Primary Teachers Union v Channel 10 Ltd* (not published, judgment delivered on 27 February 2011).

[126] The representatives of the organisations opposing the bill participated in the debate in the Knesset: see Knesset Constitution, Law and Justice Committee Transcript No 458, 10 October 2011, http://oknesset.org/committee/meeting/4936/ (see especially Member of the Knesset (MK) Meir Shitreet and MK Yariv Levin).

[127] On the importance of empirical data see Judith Townend, 'A Dearth of Data about Defamation Cases in England and Wales', http://inforrm.wordpress.com/2012/09/25/a-dearth-of-data-about-defamation-cases-in-england-and-wales-judith-townend/#more-17162.

[128] The research was originally conducted by Roei Ilouz, Roei Reinzilber and Tamar Gidron. We used the Takdin database. A random sample cross-check with other data bases did not demonstrate meaningful differences. We indexed approximately 500 cases from 2004 to 2011 in which the plaintiffs were awarded compensation. We included only cases in which damages were awarded based on infringement of the Defamation (Prohibition) Law. Cases in which compensation was awarded based on invasion of privacy or negligence were excluded. The starting point – decisions rendered in 2004 – demonstrates the effective influence of the change in the Defamation (Prohibition) Law regarding compensation without proof of damages. While we examined some district court cases as well, case law from magistrates' courts best illustrates the trend of the judiciary.

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Following up on the Karniel and Barkat findings of data before the enactment of section 7A, and based on their prediction of the potential impact of the section, we assumed that the compensation awards would have increased following the adoption of section 7A by the courts. Furthermore, the reasonable assumption was that most plaintiffs would still avoid the statutory caps and try to prove that 'general damage'[129] actually occurred rather than settle for the statutory capped awards.

As case law, as well as academic writings, prior to 2004 still reflects the debate upon the precise meaning of section 7A, the starting point of the research is 2004. This allows for a few years until the courts had become sufficiently familiar with the amendment and had learned to apply it routinely and confidently.[130]

The data collected does not show the overall number of defamation claims filed in Israeli courts between 2004 and 2011. No formal data regarding the number of defamation files opened each year could be located. There is also no formal data regarding the number of cases referred to mediation or arbitration, or the number of cases that were settled between the parties. Thus there is also no data regarding the ratio between the number of defamation cases filed each year and the number of successful cases. The data shows only the number of successful defamation plaintiffs and the compensation awarded.

It is also important to stress that the data relates to *all* successful defamation cases and to *all* types of award: general damages in which the courts were satisfied that some damage was indeed caused to the plaintiff, and compensation without proof of damage in which the plaintiff does not present evidence of any loss claimed. The latter is capped. The former is uncapped and the courts may grant any award they see fit.[131] Indeed, the original aim of the research was to relate to the two formats of compensation award separately. Yet, unfortunately and unexpectedly, there was no reliable method by which two separate groups of defamation cases could be formed. The courts usually use the two formats without reference to which of the two was adopted. Therefore, the following figures reflect all the cases and all types of compensation. Nevertheless, it is important to stress an interesting conclusion regarding the use of the two compensation formats concurrently and alternatively: when the award is low, the reference to section 7A is usually explicit. When the award is high, the court tries to establish[132] that damage was in

[129] For a comprehensive explanation of 'general damage(s)' and 'special damage(s)' see Barak, Cheshin and Englard (n 44) 167–69.

[130] Karniel and Barkat's study (n 108), published in 2002, helped to clarify the situation. Case law from 2002 to 2003 still reflects the courts' doubts as to the proper interpretation of the statutory caps. See, for example, CC (Jerusalem) 1839/01 *Netanyahu v Schocken Group Ltd* (not published, judgment delivered on 25 July 2002). CC (Tel Aviv) 101110/00 *Shemesh v Surgery, Aesthetics and Laser Ltd* (not published, judgment delivered on 11 April 2002). In both cases, as well as in many more, serious doubts remain regarding the true meaning of the statute. Cases from 2004 on, however, are quite clear about the true meaning of the Defamation (Prohibition) Law, s 7A.

[131] *Amar* (n 43); *Ben Gvir* (n 57). As to the definition of 'general damages' see Barak, Cheshin and Englard (n 44) 167–69.

[132] Usually unconvincingly. The history of the *Sharansky* (n 47) case in which the District Court awarded a very high award that was later reduced by the Supreme Court is a good example. The decision of the District Court in *Dayan* (n 56) is a further example of a case in which it is not clear how the Court assessed the exact award.

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fact proven. In all other circumstances, when the awards are lower than the cap, it is difficult to know how the court treated the case at hand.

This finding is nonetheless meaningful and will later support the argument that the bill proposing to increase the cap on compensation without proof of damage is incorrect.

The data certainly presents interesting findings:

1. The number of defamation claims in which compensation was awarded is not increasing.
2. There was no increase in the amounts of damages awarded by the courts. As previously explained, the data recounts all successful defamation claims, under both section 7A and otherwise.

   Figures 1 to 4 reflect per year the number of successful defamation cases through the duration of the research and the awards granted.

	Compensation Awards			
Year	Successful awards	Average	Standard deviation	Median
2004	59	53,881	99,501	23,868
2005	83	50,026	67,375	23,492
2006	67	42,445	37,916	34,792
2007	84	38,534	40,504	22,800
2008	85	64,164	142,778	27,491
2009	68	30,528	34,243	21,230
2010	32	25,241	24,930	20,571
2011	50	32,084	39,314	20,000

Figure 1 Summary of compensation awards – 2004 to 2011

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Figure 2

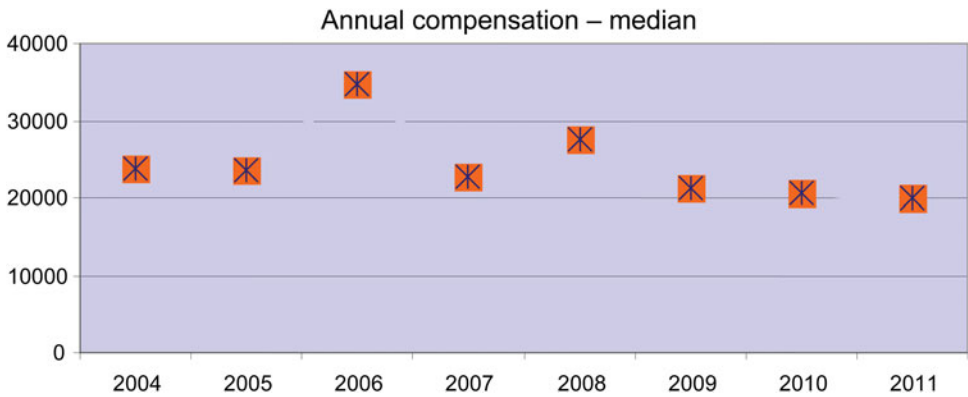

Figure 3

Figure 4

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3. The overall number of claims against the media – old and new – is also quite steady: in 2011, only eight defamation defendants were media institutions or journalists.[133]
4. Although it was impossible to neatly divide compensation awards into two separate categories as explained above, it is still clear from the reasoning and the rhetoric of the courts that in most of the cases compensation was indeed awarded according to section 7A. In most non-7A cases, it is unclear what the evidence was on which the court relied in deciding on the (high) awards.[134]
5. In most of the section 7A cases, the amount of compensation awarded did not reach the statutory cap.
6. Even in cases where the plaintiff claimed and proved that damage was indeed sustained, the awards usually remained below the statutory caps.

The empirical data is not surprising from a comparative perspective. It corresponds with data collected in other jurisdictions, although most of that data relates to both the number of cases and to the compensation awards, whereas our research does not relate to the number of defamation claims filed in courts. Data from the US and England also shows that during the last few years there was no increase in the overall number of defamation cases nor in the average amount of compensation – neither generally nor specifically against the media, old and new.[135]

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[133] In 2004, there were 12 successful cases against the media; in 2005, 24; in 2006, 14; in 2007, 22; in 2008, 16; in 2009, 15; in 2010, 4; in 2011, 7. For a comparative look at compensation caps in the UK and in Europe see 'Libel Reform Debate: Part 2 "Damages Cap and Remedies"', 14 June 2010, http://inforrm.wordpress.com/2010/06/14/libel-reform-debate-part-2-damages-cap-and-remedies/.

[134] *Sharansky* (n 47); *Dayan* (n 56).

[135] Data from the UK on defamation cases in 2011 was published in 'Defamation Trials, Summary Determinations and Assessments in 2011', 11 January 2012, http://inforrm.wordpress.com/2012/01/11/defamation-trials-summary-determinations-and-assessments-in-2011/. The number of first instance hearings was 21. The corresponding number in 2010 was 23. Data for 2010 was published in 'Defamation Trials, Summary Determinations and Assessments 2010 [updated]', 1 January 2012, http://inforrm.wordpress.com/2011/01/02/defamation-trials-summary-determinations-and-assessments-2010/. More data on defamation, privacy and contempt in the UK was published in Jude Townend, 'Media Law Review of the Year 2011: Defamation, Contempt, Privacy and a Public Inquiry', 30 December 2011, http://inforrm.wordpress.com/2011/12/30/media-law-review-of-the-year-2011-defamation-contempt-privacy-and-a-public-inquiry-jude-townend/. For an update on defamation cases which ended in agreements to pay damages and/or statements in open court, see 'Defamation Actions in 2011: Statements in Open Court', 13 January 2012, http://inforrm.wordpress.com/2012/01/13/defamation-actions-statements-in-open-court-and-other-disposals-2011/, in which it is stated that 'the large majority of these [claims] (21 out of 24) involved the mainstream media'. The data confirms that

> [t]he low number of statements in open court in 2011 is another indication of the declining numbers of libel cases before the English courts … statements in open court for each legal year from 1 October 2003 … ranged from 63 (2007 to 2008) to 39 (2004–2005 and 2005–2006). However, in the legal year commencing 1 October 2010 the figure was only 27.

As to the division between 'old' and 'new' media, it is interesting to note that, whereas the number of claims against the new media is on the increase, the number of cases against the old media is decreasing. Yet, as noted above, no increase is marked in the overall number of cases. The number of cases against the new media increased from 83 to 86 (mostly against bloggers and tweeters); Sweet & Maxwell research reveals 'News: Online Defamation Cases "Double", Defamation Claims Decline by 47%', 26 August 2011, http://inforrm.wordpress.com/2011/08/26/news-online-defamation-cases-double-defamation-claims-decline-by-47/. The issue of 'old' versus 'new' journalism raises a very interesting additional issue involving the definition of a 'journalist'. See, for example, a discussion regarding the 'journalists' privilege' by Hugh Tomlinson, 'Should

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3.2 Increased Caps on Compensation without Proof of Damage: An Uncalled for and Risky Bill

The recent bill proposing to amend the Defamation (Prohibition) Law by increasing the statutory caps on compensation without proof of damage poses two main issues. The first questions the theoretical and practical need for the proposed change in the statutory caps. The second relates to the potential impact of the bill's form and style on the initial value choices made by the law and on the current balance achieved by Israeli defamation law between reputation protection and freedom of speech. These issues, as well as additional issues inherent in the increased statutory caps, are discussed below.

3.2.1 'If It Ain't Broke – Don't Fix It'

It is generally accepted that Israeli courts are authorised to award general damages in tort cases.[136] The awards are practically unlimited. The courts have had the power to award such damages long before the introduction of the new format for compensation without proof of damage into the Defamation (Prohibition) Law.[137] Thus, section 7A, when enacted in 1998, had almost no practical effect on the power of the courts to award damages in defamation cases apart from the declarative effect of the 'new' explicit power and the specific financial guidance set by the legislator. In practice, the difference between the nature and scope of proof in section 7A cases (where the scope of damage need not be proved yet the plaintiff has to convince the court that *some* damage in fact occurred) and most non-section 7A 'general damages' cases (where *some* 'general damage' must be proved) is trivial.[138] Thus, in the case of Natan Sharansky – the Knesset member and former Prisoner of Zion in Russia who was severely defamed in a libellous book written by a fellow Russian immigrant – the District Court awarded compensation of NIS 900,000[139] (which the Supreme Court later reduced to NIS 500,000[140]) even though the plaintiff did not really present hard evidence to support either claim. In the *Dayan* case, the District Court

Journalists Have Privilege? Part 2 – Accreditation and Privileged Access', 7 December 2011, http://inforrm.wordpress.com/2011/12/07/should-journalists-have-privileges-part-2-accreditation-and-privileged-access-hugh-tomlinson-qc/. cf the decision of the Oregon court on whether a law relating to newspapers, magazines and other printed periodicals is applicable to blogs as well in *Obsidian Fin Group LLC v Crystal Cox* CV-11-57-HZ (D Or 30 November 2011). On the issue of who or what constitutes media, see also Lara Fielden, 'Future Press Regulation Must Recognise Multi-Platform Content', 10 December 2011, http://inforrm.wordpress.com/2011/12/10/future-press-regulation-must-recognise-multi-platform-content/. On defamation on the web, see also Ben Dowell, 'Rise in Defamation Cases Involving Blogs and Twitter', 26 August 2011, http://www.guardian.co.uk/media/2011/aug/26/defamation-cases-twitter-blogs. Additional comparative data is supplied by Article 19 Organization, http://www.article19.org/. The information supplied by the Media Law Recourse Center (30 years, 600 cases) is also interesting: see Media Law Resource Center, 'Study of Media Trials Celebrates 30 Years, Analyzes 9 New Trials for 2009: 3 Wins, 6 Losses', http://www.medialaw.org/Content/NavigationMenu/About_MLRC/News/Damages_2010_press_release.pdf (on file with author).

[136] Gilead (n 36) 251–84; Barak, Cheshin and Englard (n 44) 566–84.

[137] Justice Gerstl in *Fluss* (n 91); Karniel and Barkat (n 108).

[138] In *Sharansky* (n 47); *Bombach* (n 47).

[139] Approximately US$241,312 or £153,781 (as at end-January 2013).

[140] Approximately US$134,062 or £85,440 (as at end-January 2013).

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awarded NIS 300,000,[141] again without any precise evidence to sustain this relatively high level of compensation.[142] The same is true with regard to the case of Dan Tichon, the former Knesset speaker, whom the District Court awarded NIS 450,000[143] (reduced through settlement in the appeals process to NIS 300,000[144]), as well as other cases in which the courts – without any solid (specific or general) proof – were content to form a professional, educated and independent opinion on the appropriate amount of compensation without any effort to relate their decision to the evidence presented to them.[145] Thus, apart from the moral statement and the formal prompting to increase awards, section 7A had nothing to add to the judicial power of the courts with regard to compensating for defamation. The fact that the legislator abandoned the plan to amend the Civil Wrongs Ordinance and to introduce compensation without proof of damage in all tort cases[146] may be the best proof for the argument that section 7A was unnecessary and, as I shall shortly show, even harmful. The fact that the leading proponent of the 2011 bill, Member of the Knesset (MK) Meir Shitreet, had already stated openly – responding to a heated debate and a series of arguments from the opposition – that he was ready to reconsider the concept of the 2011 bill and strike out all references to specific caps, is yet additional proof for this argument.[147]

Moreover, for all practical purposes, the compensation caps introduced by section 7A have never really produced a 'capping effect' at all on damages for defamation. Even after the enactment of section 7A and the introduction of the NIS 50,000 cap, courts could still grant – whenever they saw fit – unlimited 'general compensation' in the same manner in which they award uncapped compensation for a negligent breach of autonomy, for example, even though the Civil Wrongs Ordinance lacks any explicit reference to compensation without

[141] Approximately US$80,437 or £51,264.24 (as at end-January 2013).

[142] This decision was later altered by the Supreme Court, with damages of NIS 100,000 being imposed on the television network alone.

[143] Approximately US$120,656 or £76,896 (as at end-January 2013).

[144] Approximately US$80,437 or £51,264 (as at end-January 2013). CC (Jerusalem) 1624/99 *Tichon v The IDF Broadcasting Unit* (not published, judgment delivered on 4 September 2003).

[145] See, for example, CC (Tel Aviv) 1320/97 *Vinshtock v Ha'aretz Daily Newspaper Ltd* (not published, judgment delivered on 4 June 2009). The plaintiff, suing three defendant newspapers, was awarded NIS 190,000. The Court emphasised the lack of evidence yet constructed its decisions on precedents; see also CA (Jerusalem) 5452/04 *Miller v Cohen* (not published, judgment delivered on 2 November 2004). The plaintiff was awarded NIS 300,000 for an injurious publication during election time; CC (Tel Aviv) 1714/97 *Nissenkorn v Wilder* (not published, judgment delivered on 23 February 2004). The plaintiff, a gynaecologist, was awarded NIS 250,000. The publication accused him of indecent acts. The Court stressed the lack of evidence yet based the outstanding amount of money on the special circumstances of the case. See the recent decision in *Bombach* (n 47) where, again, the decision of the District Court was altered by the Supreme Court. Compare with the debate regarding the settlement in the *McAlpine* case on 15 November 2012. The BBC agreed to settle the claim and pay £185,000 plus costs and opened a public debate on the issue of libel damages in Europe and the US: 'Libel Damages and Lord McAlpine: Did the BBC Pay Too Much?', http://inform.wordpress.com/2012/11/16/libel-damages-and-lord-mcalpine-did-the-bbc-pay-too-much/#more-18020.

[146] Draft Bill Amending the Civil Wrongs Ordinance (Amendment No 10) (Compensation Without Proof of Damages) (Private Bill), 2004 P/2284 (Israel).

[147] MK Meir Shitreet speech at the Knesset Constitution, Law and Justice Committee (n 126).

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proof of damage and is likely to remain devoid of such a remedial procedure at least in the near future.[148]

Yet, unnecessary as section 7A may have originally been, it is still important to see if the new formula did, in fact, have any influence on compensation for defamation.

The first possible impact that the then new plaintiff-friendly amendment to the Law could have had was an increase in compensation awards. In fact, this was indeed the motivation behind the section 7A innovation.[149] Yet the data shown above, collected from case law covering the eight year period 2004–2011, clearly shows that the average annual defamation award in 2011 was no higher than the annual average compensation awarded in the period 2004 to 2010.

The stagnation in compensation awards after 1998, especially in light of the legislator's explicit efforts to increase awards, can be explained in a number of ways. First, it is possible that the amount of compensation awarded in recent years actually reflects the true value of reputation according to the best judgment of the courts. If this is the case, then neither the statutory caps nor the higher 'general damages' option plays a major part in the process of translating the injured reputation into compensation awards. The data shows that in most cases the NIS 50,000 cap is not exhausted. Assuming that this relatively low level of compensation represents the actual evaluation of the abused interest, then the proposed new increased cap of NIS 300,000 is also unlikely to produce a change and is thus absolutely redundant.

If, on the other hand, the statutory NIS 50,000 cap had indeed played a role in the process of setting compensation awards, then this role should be traced back and explained prior to any further change in caps or otherwise. I maintain that, since the statutory cap merely provides a maximum limit to compensation without proof of damage – offering guidance rather than binding to a certain award – and since the courts still have very wide discretion regarding compensation awards, then the role played by the statutory defamation caps is minor, doubtful and not sustained by relevant data. In light of the availability of the 'general damages' option, this role is all the more negligible.

The main potential impact of the increased statutory damages caps on the courts is obvious. They are supposed to set a higher price for the plaintiff's injured interest. We have already seen that this is not the case here. Yet statutory caps, as indeed other special forms of compensation such as punitive damages, have an additional potential effect, known as the 'anchoring effect'.[150] Research shows that information to which a decision-maker is exposed prior to making the

[148] ibid. It is clear that as the Civil Code Bill lacks reference to compensation without proof of damage and at the same time it does introduce other forms of special damage, it is not likely that the former bill to amend the CWO will be presented again in the near future.

[149] Draft Bill Amending the Defamation Law (Compensation Without Proof of Damage) (Amendment No 6), 1998 (Israel).

[150] The 'anchoring effect' is a cognitive bias whereby people evaluate numbers by focusing on a reference point – an anchor – and adjusting up or down from that anchor. Collin Miller, 'Anchors Away: Why the Anchoring Effect Suggests that Judges Should be Able to Participate in Plea Discussions', 5 September 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672442; Francisca Fariña, Ramón Arce and Mercedes Novo, 'Anchoring in Judicial Decision-Making' (2003) 7 *Psychology in Spain* 56; Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* (New Series) 1124; Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108 *Proceedings of the National*

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decision is reflected in the decision, sometimes without the decision-maker even being aware of the psychological process. Thus, the NIS 50,000 cap may serve as an anchor for the court, causing it either to avoid the statutory top awards and 'reserve' them for extreme circumstances only, or to settle between the edges of the awards' spectrum and adopt the average (NIS 0–NIS 50,000) as the optimal fall-back. Each of the two courses of action provides a reasonable explanation for the low average/median in compensation awards during the years 2004–11. If indeed the statutory caps serve as an anchor then defamation awards are low not because the courts really believe that an injured reputation is worth less than NIS 50,000 but because their judgments are swayed by the Law's anchoring effect which, in turn, serves as a potential argument sustaining the effectiveness of statutory caps and even explaining the proposal to increase them.

The data presented above responds to this argument. It confirms that although courts usually do refer to the NIS 50,000 as a guideline,[151] they nevertheless freely and consistently turn to the 'general damages' format as an alternative whenever they feel that the awards should be higher than the statutory caps. They do not regard the NIS 50,000 cap as real. This practice eliminates – or at least minimises – the popular anchoring argument: where there is no real anchor it is reasonable to believe that the courts' discretion is much less affected than the anchoring phenomena may suggest.[152]

All of the above, backed by case law data from 2004–11, forms a firm argument against the proposed increases in defamation compensation awards according to all practical aspects. The 1998 initiative to increase defamation compensation awards was rejected by case law – both section 7A case law and 'general damages' cases – that persist in making awards which do not come close to the statutory caps. This level of the awards reflects the real price of defamation unaffected by undercurrent factors.

3.2.2 A Casuistic Disproportionate Attack on the Current Hierarchy of Values Reflected in Defamation Law

Israeli defamation law reflects a constant wrestling between the legislator and the judiciary.[153] The Israeli Defamation (Prohibition) Law reflects the original value choices of Israeli society as to the proper balance between reputation and freedom of expression. These choices are mostly plaintiff friendly. Israeli case law, on the other hand, has taken a different course. Some of the most important decisions of the Supreme Court openly challenge the said pro-plaintiff agenda.[154]

As defamation law is a mirror of ideological, cultural and social norms of Israeli society, both the legislator and the judiciary are very actively reacting to each other's attempts to change the status quo of current defamation law and promote new ideas. Thus we have witnessed in recent

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Academy of Sciences 6889; Lee Epstein and Tonja Jacobi, 'The Strategic Analysis of Judicial Decisions' (2010) 6 *Annual Review of Law and Social Science* 341.

[151] *Bombach* (n 47); *Amar* (n 43); *Sharansky* (n 47); *Vinshtock* (n 145).

[152] For a different statutory format and outcome in Australia see Matthew Lewis, 'Capping Libel Damages in Australia: A Closer Look', 29 May 2011, http://inforrm.wordpress.com/2011/05/29/capping-libel-damages-in-australia-a-closer-look-matthew-lewis/.

[153] Peled (n 32).

[154] *Hertzikovitch* (n 34), *Bombach* (n 47); *Dayan* (n 56); *Fluss* (n 91). See also Peled (n 32).

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years many bills (mostly private) proposing amendments to the Defamation (Prohibition) Law, along with some important Supreme Court cases responding to the legislator's winds of change as well as to changing times and new circumstances.

The following are the most important pending bills of the last three years:

Exposure of anonymous publications.[155] Following the controversial decision of the Supreme Court that centred on the insufficient procedural means by which anonymity on the internet might be curbed, this bill proposes a practical way to avoid defamation on the one hand, yet on the other hand to preserve anonymity – an aspect of privacy and freedom of speech – as much as is reasonably possible.[156]

The duty to update.[157] The duty to update a publication of a criminal investigation was originally inserted in the Defamation (Prohibition) Law[158] following a two-round decision of the Supreme Court in which liability was denied even though the newspaper failed to update its readers that no criminal proceedings followed the investigation.[159] This bill proposes to impose the said duty in additional circumstances.

Group defamation. This bill is a response to the Supreme Court's decision on the much debated *Ben Natan* case[160] in which the liability of a well known Arab-Israeli film producer with regard to a movie in which a group of Israeli soldiers were accused of inhumanities against the Arab population was denied. The Court had no choice but to abide by the explicit language of the Law[161] and decided that, as the film related to the plaintiffs as a group (of soldiers in the Israeli Defence Forces), no individual plaintiff could constitute a cause of action. The bill proposes the introduction of a group action mechanism.[162]

Defamation of the state.[163] Building on the previous notion of the group action mechanism, this bill proposes that defaming the State of Israel is to be regarded in the same way as defamation of any other legal entity. The State Attorney will bring and run the claim for such an action.

Preserving the public right to know.[164] This bill voices the Parliamentary opposition in the Knesset, and proposes to form a public national fund to help defendants in cases of public interest.

Truth at the time of publication defence.[165] Following *Dayan*,[166] proponents of freedom of the press hurried to try and turn the important ruling into explicit law by introducing a bill which defines 'truth at the time of publication' as 'Truth' for section 14 purposes.

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[155] Draft Bill Amending the Defamation (Prohibition Act) (Uncovering Anonymity) (n 4).
[156] *Mor* (n 79).
[157] Draft Defamation Bill (Amendment – Broadening the Duty to Provide Notice) (n 4).
[158] Defamation (Prohibition) Law (n 1) s 25.
[159] *Kraus* (n 59).
[160] *Ben Natan* (n 11).
[161] Defamation (Prohibition) Law (n 1) s 4.
[162] Class Action Law, 2006 (Israel).
[163] Draft Bill Amending the Defamation (Prohibition) Law (Defamation of a Group and State Authorities) (n 4).
[164] Draft Bill for the Establishment of the National Fund for Protection of the Public Right for Information (n 4).
[165] Draft Bill Amending the Defamation (Prohibition) Law (Defence of a Truthful Publication) (n 4).
[166] *Dayan* (n 56).

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Liability of internet service providers.[167] The issue of liability of internet service providers is settled in the Electronics Signature Law,[168] which also addresses other forms of tort committed on the internet.[169] This private bill proposes a means to decide upon liability when defamatory publication appears online. The liability of internet service providers in tort is at present vague.

SLAPP and anti-SLAPP.[170] The procedure of striking out defamation claims that are aimed only at silencing public debate on public issues[171] is still to date unknown to the Israeli legal system. The proposed anti-SLAPP procedure, heavily supported by the Association for Civil Rights in Israel,[172] aims to combat the use of legal proceedings to silence criticism and debate on important public matters (SLAPP) by offering a detailed method, imported from the US, to strike out such unjustified claims.

This list of amendments to the Defamation (Prohibition) Law portrays a mixture of issues and interests, and even an interesting fusion of right and left political affiliations, liberalism and pragmatism. Each of the amendments targets a specific perceived flaw in the existing defamation law. Each was triggered by a certain need or want, by technological progress and even by explicit request from the Supreme Court.[173] Yet none of these bills aims to achieve an overall change or a general normative innovation. They are all targeted at a specific issue and, if and when adopted, will have only limited impact on the present balance between reputation and freedom of expression. They do not pose a threat to the current status quo of defamation law at large.

The bill advocating increased caps on compensation without proof of damage in defamation is clearly different. It deals with a central issue of basic rights; it is aimed to alter a very delicate balance between reputation and freedom of speech. It is expected to achieve change across the board. This is why it is both deceptive and hazardous.

The change in the cap on compensation without proof of damage is deceptive because it *appears* to be dealing with only one component of the struggle between reputation and freedom of speech, namely the price of defamation, while *actually* it threatens to affect the whole normative balance and hierarchy of values of reputation, on the one hand, and freedom of speech on the other. It fails to look at the issue of reputation protection as a whole. It overlooks the complicated liability elements as well as the defences provided by the Law. It merely addresses caps on statutory damages, disregarding important implications such as prior deterrence, over-deterrence, press silencing and other undemocratic side effects.[174]

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[167] Draft Defamation Bill (Internet Provider Duty to Provide Internet User Details) (Private Bill) 2011 P/18/ 2816 (Israel).

[168] Electronic Signature Act, 2001 (Israel).

[169] Such as copyright infringement.

[170] Draft Bill Prohibiting the Misuse of the Legal Proceedings (n 4). cf *Barazani* (n 69).

[171] See Pring and Canan (n 66).

[172] See *Tabakman* (n 69) and sources accompanying n 67.

[173] See, for example, the holding in *Mor* (n 79). Justice Rivlin urged the legislator to supply tools to combat anonymous defamation on the internet. The same is true for the holding in *Cher* (n 91) dealing with absolute protection of courtroom defamation according to Defamation (Prohibition) Law, s 13(5).

[174] The added force of the proposed duty to publish the response of the defamed person, enforced by liability of up to NIS 1,500,000 in case of breach, again trying to force change, further intensifies the potential 'overdose' inherent in the draft. See Draft Bill Amending the Defamation Law (Amendment No 10) (n 10). In fact, this

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The bill is not only unwarranted; it is also hazardous. It endangers the balance achieved through centuries of deliberations by both legislator and the judiciary. It threatens to shake the delicately stable scale by brutally addressing an isolated issue of defamation liability alone – raising the current cap six-fold – and totally neglecting to weigh the potential change on the overall legal regime governing reputation protection in Israel.

Such casuistic legislation might be understandable when changing circumstances call for the shift in rules, norms or values addressed by the proposed amendment. But this is not the case with the defamation bill. The incremental development of protection of reputation in Israel has thus far reflected a dialogue between the Knesset and the judiciary. Mostly it has reacted to certain needs and objective cultural social and moral developments. The increase in compensation caps has no justification whatsoever in current Israeli society. The courts are reluctant to increase defamation awards. Forcing them to do so without an objective good reason will only end up with unwanted battles in which each tries to subjugate the other.[175] The *Dayan* case may well have been the first response of the judiciary to the legislator's ongoing effort to curb freedom of the press[176] and, based on past experience, it is not going to be the last.

The new UK Defamation Bill[177] provides an example for an alternative legislative process. This bill, which was announced by the British government in 2012, followed a long public debate on the flaws of defamation law and very extensive preliminary work by some leading members of Parliament,[178] a report on the Draft Defamation Bill by a joint Committee of the House of Lords and House of Commons,[179] and a lively discussion by some leading blogs,[180] the Coordinating Committee for Media Reform,[181] academic research centres,[182] and other professionals from the British media and renowned law firms.[183]

Although the bill is still under deliberation and commentators are uncertain as to its potential impact on the 'volume or nature of libel litigation',[184] it is certainly a product of a holistic approach, reflecting the intricacy of the issues involved and reviewing all the components of

change is included in the same bill that deals with caps on compensation without proof of damage. Indeed, part of the fierce opposition to the bill may be attributed to this proposed change, which infuriated the Israeli press no less than the proposed change in the compensation caps. On prior notification, see Gavin Phillipson, 'Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions' (2009) 1 *Journal of Media Law* 73. Andrew Scott, 'Prior Notification in Privacy Cases: A Reply to Professor Phillipson' (2010) 2 *Journal of Media Law* 49.

[175] Peled (n 32).

[176] ibid.

[177] Defamation Bill (HC Bill 5) 2012-2013 (UK).

[178] A private member's bill by the Liberal Democrat, Lord Lester: see text at n 15.

[179] Draft Defamation Bill (House of Lords and House of Commons: Joint Committee, HL Paper 203 HC 930–I), http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf.

[180] 'About Inforrm', 30 December 2011, http://inforrm.wordpress.com/about/.

[181] Coordinating Committee for Media Reform, http://www.mediareform.org.uk/about-us.

[182] Goldsmiths, University of London: Department of Media and Communications, http://www.gold.ac.uk/media-communications/.

[183] The UK Human Rights Blog is edited by members of the One Crown Office Row Barristers' Chambers, http://www.1cor.com/london.

[184] 'News: Queen's Speech – At Last the Defamation Bill', 15 May 2012, http://inforrm.wordpress.com/2012/05/15/.

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defamation liability: definition, defences and remedies, together with specific clauses on website operators,[185] limitation period,[186] jurisdiction,[187] and publication of a summary of the judgment by a losing defendant.[188]

Israeli defamation law, on the other hand, is in no dire need of such an overall reform. The original Law – amended, refined and adjusted for modern circumstances – together with the leading precedents of the Supreme Court safeguarding freedom of speech, produce a suitable toolkit by which defamation law can be further developed to accommodate change.

3.2.3 SILENCING THE INVESTIGATIVE PRESS AND PUBLIC CRITICISM

The data, experience and current statutory changes in other countries serve as warning of the danger created by the 'chilling effect'[189] of over-deterrence and the over-silencing of open public debates. This negative impact of over-friendly defamation laws is reflected in a decrease in investigative journalism and academic research[190] and an increase in settlements of lawsuits for fear of legal costs. It can also cause intimidation of media, stifled public opinion and criticism, and obstruction of the free exchange of ideas and information.[191] It is only logical to assume that the greater the danger of liability and large compensation awards, the greater the precautions the press will adopt before publishing a story or airing a television reportage. Media decision-makers will check, then double-check, then re-check their assessment, and in some cases they will ultimately decide that the risk of publishing is too great. Hence there are stories, some carrying genuine public interest, that will be abandoned.

Although at first glance, one may doubt if such outcomes should really arouse cultural, moral or even legal concerns, as a more cautious press could certainly be an improvement that society

[185] Defamation Bill (n 177) cl 5.
[186] ibid cl 8, introducing the single publication rule.
[187] ibid cl 9, fighting libel tourism.
[188] ibid cl 12.
[189] Which is sometimes called the 'killing effect'; cf Mark Lewis in David Clarke, 'The Chilling Effect of Libel Laws', 4 April 2010, http://drdavidclarke.blogspot.co.il/2010/04/chilling-effect-of-libel-laws.html.
[190] The case of Simon Singh, *British Chiropractic Association v Singh* [2010] EWCA Civ 350, is probably the most well known example. Rachel Ehrenfeld, *Funding Evil: How Terrorism Is Financed – and How to Stop It* (Bonus Books 2003); cf David Pallister, 'US Author Mounts "Libel Tourism" Challenge',15 November 2007, http://www.guardian.co.uk/world/2007/nov/15/books.usa. This case was consequently decided in the US in *Rachel Ehrenfeld v Mahfouz* 489 F3d 542 (2d Cir, 2007); Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (Plume 1994), was sued by David Irving in the UK in *David Irving v Penguin Books Ltd and Deborah Lipstadt* [2000] EWHC QB 115. The *Ehrenfeld* and *Lipstadt* cases are both of great importance. 'Conversation with Robert Todd and Gordon Hughes of Ashurst: Insights into the Impact of Social Media on Defamation Law and Legal Practice', http://www.lawgazette.com.sg/2012-07/471.htm.
[191] John Koblin, 'The End of Libel?', 9 June 2010, http://www.observer.com/2010/media/end-libel; Alan Dershowitz and Elizabeth Samson, 'The Chilling Effect of "Lawfare" Litigation', 9 February 2010, http://www.guardian.co.uk/commentisfree/libertycentral/2010/feb/09/libel-reform-radical-islamic-groups. See Matt Williams, 'US News Publishers Warn Libel Laws May Stop UK Distribution, Brand Republic', 9 November 2009, http://www.brandrepublic.com/News/965043/US-newspublishers-warn-libel-laws-m. Christine A Corcos, 'KinderUSA, Laila Al-Marayati Drop Lawsuit against Yale, Author; Cambridge Agrees to Destroy Unsold Copies of "Alms for Jihad"', 16 August 2007, http://lawprofessors.typepad.com/media_law_prof_blog/2007/week33/index.html.

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should strive for, and more meticulous professional ethics are to be cherished. Yet the real issue does not concern the media's ethics or the self restraint of the press alone. The key challenge here lies in determining the reasonable deterrence level. Whereas achieving 'responsible journalism' through a careful combination of many public interest considerations is certainly a positive goal,[192] the road to over-deterrence[193] is quite short.[194] The British experience in the fight against 'libel tourism' and international criticism shows how imminent this danger is.[195]

Moreover, rather than investigating, promoting positive criticism and contributing to the fight against corruption, the press might become too eager to satisfy the rich and powerful.[196] It might tend to adopt compromising practices, both regarding its original task as the watchdog of a free, western democratic society and as a placating mechanism vis-à-vis the wealthy and powerful plaintiffs it offends.[197]

3.2.4 Legalising Punitive Damages

The initial goal of the changes promoted by the new bill is to increase protection of reputation. Monetary deterrence is an effective method. In responding to irresponsible media, it is certainly a meaningful tool.[198] Yet NIS 300,000 compensation caps are problematic, at least in light of the far more modest current average reputation compensation awards that Israeli courts usually

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[192] In *Dayan* (n 56) the English decisions in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and in *Jameel* (n 101) were imported into Israeli law.

[193] Yehiel Limor and Hillel Nossek, 'Unspoken Censorship: Economic Censorship and the Mass Media' (2001) 29 *Kesher* 98 (in Hebrew).

[194] See, for example, a comment written by one of the leading partners in a famous Israeli law firm representing Israeli media: Yigal Kava, 'The Increase of Damages due to Defamation – A Danger to Freedom of Expression', 25 October 2011, http://www.themarker.com/law/1.1531124. For recent examples, see 'Censorship in the Media', http://sites.google.com/site/censorshipcomunication/8.

[195] See sources accompanying n 15 regarding the public cry for a change in the UK libel law. See also the US Congressional Research Service Report on the (mostly UK) phenomenon of 'libel tourism': 'The SPEECH Act: The Federal Response to "Libel Tourism"', 16 September 2010, http://www.fas.org/sgp/crs/misc/R41417.pdf. For further data on additional aspects of freedom of the press, see Karin D Karlekar, 'Freedom of the Press 2011: Signs of Change Amid Repression', http://www.freedomhouse.org/report/freedom-press/freedom-press-2011. For an interesting input see Law Council of Australia, 'Submission to the Ministry of Justice of the United Kingdom on Consultation Paper CP3/11 Draft Defamation Bill', Media and Communications Committee, May 2011, http://inforrm.files.wordpress.com/2011/07/lca-media-and-communications-committee-submission-on-uk-draft-defamation-bill.pdf. For data on the US position, see the Speech Act 2010 (n 15) provisions. On the problematic balance between free speech and the media in South Africa, see 'South Africa: Media Freedom's Roller Coaster Ride in 2011 – Pamela Stein and Dario Milo', 28 December 2011, http://inforrm.wordpress.com/2011/12/28/south-africa-media-freedoms-roller-coaster-ride-in-2011-pamela-stein-and-dario-milo/.

[196] Unfortunately, the difficult financial condition of the Israeli media is a factor that should also be noted. The live apology of an Israeli television channel (Channel 10) to Sheldon Adelson, which caused a huge number of angry professional responses and the resignation of one of the leading news editors, is a good example of the consequences: Ophir Bar-Zohar, 'Due to Apology to Sheldon Adelson: Channel 10 CEO Reudor Benziman Resigns', 7 September 2011, http://www.themarker.com/advertising/1.1423295.

[197] On the danger of going too far see Alastair Mullis and Andrew Scott, 'Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation' (2009) 14(6) *Communications Law* 173.

[198] *Amar* (n 43).

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grant. Indeed, the proposed caps reflect punitive purposes far more than compensational purposes.[199] The new high caps thus pose a theoretical problem that goes to the roots of compensation awards in tort law. Compensational damages are supposed to correspond to the claimant's loss. Yet a cap of NIS 300,000 can hardly be regarded as a reasonable sum by Israeli standards.[200] The NIS 1,500,000 cap on compensation for breach of the duty of prior notification and response publication is also exaggerated. Indeed, recent awards hardly ever reach the present cap of NIS 50,000. Very few cases result in an award that even approaches the increased suggested caps. Hence the new caps are undoubtedly more punitive then compensatory.

According to most theories on tort law and tort compensation, punitive damages – contrary to the well known tortious principle of *restitution in integrum* – are problematic.[201] Most legal systems try to limit them.[202] In Israel, punitive damages (in contrast to aggravated damages, which are an augmentation of general damages to compensate for aggravated injury, yet are still compensatory in nature[203]) are awarded only in limited situations, mostly in defamation cases.[204]

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[199] 'Comparative Analysis: Damages Awarded in Defamation Claims and Publishing the Response of the Defamed Person', Knesset Legal Department, 9 January 2012, http://www.knesset.gov.il/LegalDept/heb/docs/Survey090112.pdf.

[200] From a comparative perspective, it is important to stress the irrelevance to Israeli practice of the amount of compensation awarded in other jurisdictions. Thus, the comparisons regarding the Israeli proposed caps with the US and UK caps made in 'News: Defamation in Israel – Are the Proposed Amendments to the Law Objectionable?' (3 December 2011, http://inforrm.wordpress.com/2011/12/03/news-defamation-in-israel-the-proposed-amendments-to-the-law/) are not persuasive. See the award of damages in *Cooper v Turrel* [2011] EWHC 3269 (QB). On compensation awards in Australia see Lewis (n 152). These awards are enormous by Israeli standards. On punitive damages in the UK see Doley and Mullis (n 111) 500–08.

[201] For a new approach, see Amir Nezar, 'Reconciling Punitive Damages with Tort Law's Normative Framework' (2011) 121 *Yale Law Journal* 678.

[202] Christopher J Robinette, 'Peace: A Public Purpose for Punitive Damages?, Symposium: Punitive Damages, Due Process, and Deterrence: The Debate After Philip Morris v. Williams' (2008) 2 *Charleston Law Review* 327; *Cooper Indus Inc v Leatherman Tool Grp* 532 US 424 (2001); Michael L Rustad, 'The Uncert-Worthiness of the Court's Unmaking of Punitive Damages' (2008) 2 *Charleston Law Review* 459; *Philip Morris v Mayola Williams* 549 US 346 (2007); *BMW of N America, Inc v Gore* 517 US 559 (1996); *State Farm Mutual Automobile Insurance Company v Campbell* 538 US 408 (2003); *Exxon Shipping Co v Baker* 554 US 471 (2008); Ronen Perry, 'The Deepwater Horizon Oil Spill and the Limits of Civil Liability' (2011) 86 *Washington Law Review* 1; Jim Gash, 'The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good' (2011) 63 *Florida Law Review* 525. Theodore Eisenberg, Michael Heise and Martin T Wells, 'Variability in Punitive Damages: An Empirical Assessment of the U.S. Supreme Court's Decision in Exxon Shipping Co v Baker', Cornell Legal Studies Research Paper 09-011, 20 April 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392438. Rachel D Trickett, 'Punitive Damages: The Controversy Continues' (2011) 89 *Oregon Law Review* 1475. For a summary of the English case law see Doley and Mullis (n 111) 500–08.

[203] For the distinction between aggravated and punitive damages see the Law Commission report, 'Aggravated, Exemplary and Restitutionary Damages (Item 2 of the Sixth Programme of Law Reform: Damages)', http://lawcommission.justice.gov.uk/docs/lc247_aggravated_exemplary_and_restitutionary_damages.pdf.

[204] Apart from the now pending Civil Code Bill that refers to punitive damages in cases where the harm was caused intentionally, no reference to punitive damages is made in Israeli law. For punitive damages in Israeli case law see CA 3806/06 *John Doe v Jane Doe* (not published, judgment delivered on 26 May 2009). See also Chief Justice Barak's holding in *Amar* (n 43). See also Benjamin W Janke and François-Xavier Licari, 'Enforcing Punitive Damage Awards in France After Fountaine Pajot' (2012) 60 *American Journal of Comparative Law* 775.

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As the average amount of compensation awards in Israeli case law is much less than the proposed new caps, one might mistakenly infer that in practice the new bill legitimises punitive damages as a routine practice in defamation cases. Yet Israeli legislation refers to punitive damages, when allowed, in very few laws and under strict limitations, which are totally different from the sweeping potential impact the new bill will introduce, if adopted. To allow 'punitive damages' without an explicit reference or reasonable justification through the back door of 'caps' on statutory damages in defamation cases stands in contrast with the very limited use of punitive damages in the budding Israeli private law codification.[205]

3.2.5 Problematic Relations with Other Acts Providing for Caps on Compensation without Proof of Damage

Section 7A of the Defamation (Prohibition) Law was followed by many similar amendments in Israeli legislation. Compensation without proof of damage is now awarded not only in cases of constitutionally protected personal interests, but also in diverse contexts that involve diverse interests.[206] The main common denominator of all these laws is the unique nature of the protected interests and the harm caused: hurt feelings, pride, reputation, autonomy (social, economic or other), discrimination, insult, dignity, privacy and many additional interests of this non-physical type. Harm to these interests is always difficult to prove and quantify.

The troubling aspect of this proliferation of statutory damages is the difference in the caps of the various Acts. Whereas some similarities exist between the defamation/privacy/sexual harassment Acts, different and diversified caps have been set in other laws, ranging from NIS 20,000[207] to NIS 200,000.[208] Any change in the Defamation (Prohibition) Law caps must involve careful examination of the caps under the Privacy (Protection) Law as well as the Prohibition of Sexual Harassment Law, for example. This is especially important because many defamation cases also give rise to causes of actions under other Acts. Needless to say, any change in the Defamation (Prohibition) Law caps is likely to prompt a similar legislative move in statutory caps under various other Acts. The signs of this process were already evident at the first hearing of the proposed bill in the Knesset Committee on Constitution, Law and Justice. Knesset Member Meir Shitreet – one of the initiators of the new bill and the driving force behind the concept of statutory compensation in defamation claims – when faced with the issue of parallel caps was prepared to introduce the same increased caps into the Privacy (Prohibition) Law. Moreover, when asked, he admitted that there is no reason to believe that

[205] The proposed Israeli Private Law Codification, s 461, http://www.knesset.gov.il/committees/heb/material/data/H06-07-2011_11-33-01_595.pdf. See the explanatory notes with regard to the requirement of malice. A bill proposing to introduce punitive damages into the Civil Wrongs Ordinance (Amendment No 10) 2004 was eventually abandoned by the Ministry of Justice.
[206] See the statutory caps, inter alia, in the following Israeli Acts: Protection of Privacy Act, 1981; Commercial Torts Act, 1999; Consumer Protection Act, 1981; and Prohibition of Sexual Harassment Act, 1998.
[207] Approximately US$5,362 or £3,417 (as at end-January 2013).
[208] Approximately US$53,625 or £34,176 (as at end-January 2013).

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this trend would halt and that the Defamation (Prohibition) Law would be the last to undergo such a change.[209]

As explained above yet still important to stress, a potential across-the-board drift in such a direction could present a significant hazard. An increase in compensation caps causes a meaningful change in liability. Such a change should be backed by suitable theoretical reasoning accounting for its overall impact on the specific Laws in question as well as Israeli private law in general. The current (mostly) political sense that defamation awards should be higher hardly constitutes a sufficient basis for an overall increase in the statutory caps. The potential danger of a slippery slope is self-evident.[210]

3.2.6 Problematic Relations with Other Liability Sources

Liability for reputational harm is gradually moving[211] from the particular torts of defamation, privacy and injurious falsehood into the ever-expanding tort of negligence.[212] The theoretical justification for this shift – if any exists – is beyond the scope of this article.

Since liability in negligence (as opposed to defamation)[213] is based on proof of damage, the proposed increased caps under the Defamation (Prohibition) Law may affect the growing popularity of the 'negligent-defamation' cause of action. A plaintiff claiming under the Defamation Law may claim compensation up to NIS 50,000 (NIS 300,000 according to the bill) without proof of damage, whereas a plaintiff claiming negligence has to convince the court that the publication had indeed caused *some* damage. Nevertheless the 'general damages' formula that courts apply so eagerly in Defamation (Prohibition) Law cases, as the data shows, can provide a suitable alternative in negligence cases as well.[214] The Defamation Bill's proponents might also reconsider the long-forgotten 2004 bill that proposed to insert compensation without proof of damage in the Civil Wrongs Ordinance[215] in order to achieve equal effect in all avenues of reputation protection.[216]

4. Conclusion

Israeli tort law is solidly rooted in English law. It is therefore only natural to examine the English 'libel reform' process of the last few years and the current UK Defamation Bill – which reflect the

[209] See Constitution, Law and Justice Committee transcript (n 126).
[210] See, for example, a case relating to tort/contract based liability in family matters (with no defamation component), in which the Court stressed that the Defamation (Prohibition) Law's statutory cap should be applied: FC (Tveria) 10541-03-11 *MZ v AZ* (not published, judgment delivered on 30 January 2012).
[211] Gidron (n 26).
[212] Civil Wrongs Ordinance (New Version), ss 35–36.
[213] Civil Wrongs Ordinance, ss 35–36, explicitly names damage as one of the elements of liability, whereas Defamation (Prohibition) Law, s 1, presumes damage when publication of the defamatory material has been proved.
[214] Karniel and Barkat (n 108). Judge Gerstl's holding in *Fluss* (n 91).
[215] Draft Bill Amending the Civil Wrongs Ordinance (Compensation Without Proof of Damages) (n 146).
[216] Such amendment to the CWO is in practice unnecessary: Karniel and Barkat (n 108), Justice Gerstl in *Fluss* (n 91), just as Defamation (Prohibition) Law, s 7A was originally unnecessary.

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twists and turns taken by defamation law in England during the past few years – as an illustration to back not only those who support the argument that reputation in Israel needs increased protection but also those who believe that freedom of speech should be carefully guarded against unreasonable curbs, in their effort to improve the balance between the two rights.

The recently introduced Defamation Bill (2012) in the UK[217] is a product of intensive legal research of theoretical/normative and practical/implemental issues.[218] It mirrors the results of a long and heated public debate on the need for a modification in the over plaintiff-friendly defamation law, which turned London into the 'Mecca of libel tourism'[219] and the target of fierce criticism, especially from the US, where special laws were enacted to fight the unbalanced decisions of the UK courts.[220] In the midst of the legislative process the phone hacking scandal of summer 2011 erupted. Unethical and even criminal practices – phone hacking, police bribery and improper influence on politicians – of some very popular newspapers were exposed causing the closure of *The News of the World* and the resignation of Rupert Murdoch, chairman and chief executive of News International. These regrettable events – which also led to the establishment of the Leveson Committee[221] to examine the culture, practices and ethics of the press and its relationship with the public, police and politicians – served as an additional catalyst for the intensive legal and administrative groundwork accompanying the legislative procedure. It involved long public and Parliamentary debates, including a House of Lords private defamation bill ('Lord Lester's Bill'),[222] a government proposal and consultation papers,[223] a Scrutiny Committee Report[224] followed by government response,[225] and intense private and public campaigns in

[217] Defamation Bill (n 177).

[218] For the background to the libel tourism phenomenon and some details on the current inquiry into the optimal changes in values as well as the rules of liability, see Mullis and Scott (n 197); One Brick Court, 'Libel Tourism in England: Now the Welcome is even Warmer', http://www.onebrickcourt.com/files/Libel_Tourism_in_England_95156.pdf. See also 'Libel Tourism: Hearing before the Subcommittee on Commercial and Administrative Law of the Committee of the Judiciary', 111th Congress 4 (2009).

[219] Barbara M Jones, 'Libel Tourism: Why Librarians Should Care' (2009) 40(11) *American Libraries* 40; Rachel Ehrenfeld, 'Rescue Writers from Scourge of Libel Tourism', 7 October 2009, http://www.nydailynews.com/opinion/rescue-writers-scourge-libel-tourism-article-1.383190; Robert Balin, Laura Handman and Erin Reid, 'Libel Tourism and the Duke's Manservant – An American Perspective' (2009) 3 *European Human Rights Law Review* 303.

[220] See text at n 15.

[221] See the official site of the Leveson Inquiry, 'Culture, Practice and Ethics of the Press' (n 17). See also the Leveson Report (n 18).

[222] Defamation Bill (HL Bill 3) 2010– 2011 (UK) (introduced on 26 May 2010), details and progress can be traced at the official site, http://services.parliament.uk/bills/2010-12/defamationhl.html.

[223] Draft Defamation Bill, Ministry of Justice Consultation Paper CP3/11, March 2011, http://www.guardian.co.uk/law/interactive/2011/mar/15/draft-defamation-bill-libel-reform.

[224] The Joint Committee Report on the Draft Defamation Bill, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm. For a summary of the Joint Committee's recommendations see 'Joint Committee Publishes Report on Draft Defamation Bills', 19 October 2011, http://www.parliament.uk/business/committees/committees-a-z/former-committees/joint-select/draft-defamation-bill1/news/publication-report/.

[225] See Libel Reform Campaign response to the Joint Scrutiny Committee report, 'Scrutiny Committee of the Draft Defamation Bill Report Today', undated, http://www.libelreform.org/news/510-scrutiny-committee-of-the-draft-defamation-bill-report-today. See also 'The Government's Response to the Joint Scrutiny Committee on the Draft Defamation Bill Report', February 2012, http://www.parliament.uk/documents/joint-committees/Draft%20Defamation%20Bill/Government%20Response%20CM%208295.pdf.

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magazines and websites,[226] all reflecting comprehensive endeavours to improve English defamation law and enhance UK media ethics. The method, pace and management of the whole process illustrates how a legal 'reform' can be achieved.

Across the sea, in the US, we have witnessed a persistently growing trend towards the adoption and implementation of SLAPP and anti-SLAPP legislation.[227] The Australian government has recently announced an inquiry into media practices and media regulations,[228] while in Canada, the Supreme Court has initiated a look into important issues of journalistic responsibility, libel tourism, defamation on the internet and freedom of speech.[229] Most of these legislative initiatives focus on the need to update and improve the balance between protection of reputation and freedom of speech. Thus, the English Defamation Bill reflects a less plaintiff-friendly approach[230] than the current English defamation law, whereas in the US we witness a growing number of proponents of the protection of reputation.[231]

What can Israel learn from this global experience? Over the years, the Israeli legislature has introduced some quite important changes into the Israeli Defamation (Prohibition) Law of 1965. Basic Law: Human Dignity and Freedom has also affected the balance between freedom of expression and reputation. Parallel developments in privacy and in negligence law have also had their impact.

Ultimately, the present Israeli defamation law – both the Defamation (Prohibition) Law and case law – reflect a relatively well established moral hierarchy of norms and values, which can be said to portray Israeli society. And, unlike English law, Israeli defamation law does not seem to invite major revision. Thus, while it would be wise for the Israeli legislature to address technological changes and other special issues that call for precisely targeted solutions through piecemeal legislation, it would definitely be ill-advised to introduce major changes that might endanger the fragile status quo.

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[226] Index: The Voice of Free Expression, http://www.indexoncensorship.org/about-index-on-censorship/; English PEN, http://www.englishpen.org/; Sense about Science, http://www.senseaboutscience.org/pages/keep-libel-laws-out-of-science.html.

[227] Following California's Code of Civil Procedure s 425.17 (2009), other states had adopted various types of anti-SLAPP law. The Citizen Participation Act of 2009, HR 4364, 111th Congress (2009) was introduced in the US Congress. See also Donson (n 68); Nadarajah and Griffin (n 68); Samantha Brown and Mark Goldowitz, 'The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in USA' (2010) 19 *Review of European Community and International Environment Law* 3; Ogle (n 68). See also the official site of the California Anti-SLAPP Project, http://www.casp.net/.

[228] 'Australian Independent Inquiry into the Media: Issues Paper Published', 10 May 2012, http://inforrm.wordpress.com/2011/10/05/australian-independent-inquiry-into-the-media-issues-paper-published/. Robert French, 'Protecting Human Rights Without a Bill of Rights' (2010) 43 *John Marshall Law Review* 769.

[229] *Quan v Cusson* [2009] SCC 62.

[230] Iain Overton, 'New Defamation Bill "To Protect Freedom of Speech"', 9 May 2012, http://www.thebureauinvestigates.com/2012/05/09/new-defamation-bill-to-protect-freedom-of-speech; Rachit Buch, 'Comment: How Will the Defamation Bill Protect Free Speech?', 20 May 2012, http://ukhumanrightsblog.com/2012/05/20/comment-how-will-the-defamation-bill-protect-free-speech.

[231] Doug Rendleman, 'Collecting a Libel Tourist's Defamation Judgment?' (2010) 67 *Washington and Lee Law Review* 467; Robert L McFarland, 'Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism' (2010) 79 *Mississippi Law Journal* 617.

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The proposed bill to increase compensation caps should be abandoned. First, case law data from 2004 to 2011 demonstrates practically no need for such increases. Second, the proposed changes in the caps carry meaningful declarative cultural and social value choices regarding the hierarchy of reputation and freedom of speech in Israeli society. Third, there is no evidence to justify the legal earthquake that the proposed bill will trigger, if adopted, or the negative impact that it is likely to have on the important role of the media.

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