At the Supreme Court sitting as the Court of Appeals

C.A. 5964/02
C.A. 6051/91

Before:	**Hon. President A. Barak** **Hon.Vice-President S. Levin** **Hon. Justice T. Or** **Hon. Justice E. Mazza** **Hon. Justice M. Cheshin** **Hon. Justice D. Dorner** **Hon. Justice J. Turkel** **Hon. Justice I. Englard** **Hon. Justice E. Rivlin**
The appellants in C.A. 5964/92:	1. Jamal Qassem Bani 'Odeh 2. Estate of the deceased S'ud Hassan Bani 'O deh 3. Hassan Salim Bani 'Odeh 4. Fatma Saleh Bani 'Odeh
The appellant in C.A. 6051/92:	State of Israel
	v.
The respondent in C.A. 5964/92:	**State of Israel**
The respondents in C.A. 6051/92:	Jamal Qassem Bani 'Odeh
Appeal against the judgment of the Nazareth District Court C.A. 273/89 and C.A. 334/89, on October 30, 1992, given by Hon. Justice G. Ginat	
Session date:	7 Tamuz, 5758 (7 January 1998)
In the name of the appellants in C.A. 5964/92 and the respondent in C.A. 6051/92:	Attorney Anis Riad; Attorney Hussein Attorney Eliyahu Avram
In the name of the respondent in C.A. 5964/92 and the appellant in C.A. 6051/92:	Attorney Talia Sasson; Attorney Eyal Yinon

Judgment

President A. Barak

The State of Israel is not civilly liable for acts of commission or omission carried out "by wartime action of the Israel Defense Forces". The interpretation of this provision lies at the basis of the appeals before us.

General Background

1. Israel has held the territories of Judea, Samaria and Gaza (hereinafter: the Area) under "belligerent occupation" (Occupatio Bellica) since the Six Day War. The role of the Area's military commander is to uphold Israel's legitimate security interests and the needs of the civilian population (see HCJ 393/82 **Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Masuliya Cooperative Association Legally Registered at the Judea and Samaria Area Headquarters v. Commander of the IDF Forces in the Area of Judea and Samaria**, IsrSC 37 (4) 785, 794).

2. Towards the end of 1987 an uprising (intifada) broke out in the Area. This was an organized activity. It was characterized by demonstrations, tire burning, stone and Molotov cocktail throwing at IDF forces and Israeli civilians, stabbings, use of cold weapons and sometimes even firearms. In one of the cases in which the intifada was discussed, it was stated that "these riots attempt to challenge the very rule and authority of the military commander in the Area. The involvement of minors in these acts is intentional, comprehensive and extensive... this activity is of an organized nature" (Justice D. Levin in HCJ 591/88 **Taha N. v. Minister of Defense** IsrSC 45(2), 45, 61). In order to restore order, the military commander used various security forces, both for dispersing demonstrations and crowds, and in initiated action aimed at apprehending agitators and those dispatching them. Firearms were sometimes used in this context. These have led, on more than one occasion, to injuries being caused to various persons, whether they had been involved in the disturbances or not.

3. Shortly after the riots began, claims were submitted to various authorities by individuals who alleged that the state was civilly liable for damages caused to them in the course of the security forces' handling of incidents in the Area. Data presented to us (Notice on behalf of the State on, March 20, 2000) indicates that more than 900 files and claims are pending in the different instances due to damages which, it is alleged, were caused by the activities of the security forces. Thirty appeals have been submitted to this court which raise – in one form or another – the issue of the state's responsibility for bodily injuries caused to residents in the Area in the course of the security forces' actions to restore order.

4. The appeal before us also raises these issues. It has been slated for review by an expanded panel. During the sessions, the possibility was raised that the subject might be regulated in a Draft Law for Treatment of Defense Forces Claims in Judea, Samaria and Gaza Strip Law, 5747-1987 (Draft Laws 2645 (5757), 497). This draft law proposed various arrangements aimed at attempting to create an overall settlement for the issue before us. As notices by the State demonstrate, legislative procedures were unsuccessful. In view of this, and due to the pressure of time, we are required to give a decision on the matter at hand. I shall open with an interpretation of the provision that exempts the state from civil liability. I will proceed to the application of this provision to the case before us.

The Normative Framework

5. The parties accept that the State's civil liability resulting from the intifada shall be exclusively determined according to the provisions of Israeli law applicable in matters of civil wrongs. This law is determined in the Civil Wrongs Ordinance (New Version). The original version of the Ordinance, which came into force in 1947, reflected the traditional common law position, which grants full immunity to the Crown (The King can do no wrong). The changes that occurred in English law following the Crown Proceedings Act, 1947 were not included therein. With the establishment of the state, the need arose to remedy this state of affairs. The matter found its expression in the Civil Wrongs (Liability of the State) Law 5712 – 1952 (hereinafter Civil Wrongs Law). The general principle expressed in the Civil Wrongs Law is that "With respect to civil liability, the state shall be deemed as

any incorporated body" (Clause 2). A number of qualifications were stipulated for this principle, one of which addresses “wartime action” (Clause 5). It reads:

"The State is not civilly liable for an act performed as a wartime action of the Israel Defense Forces"".

What is a "wartime action" that grants the state protection from liability? This question is likely to arise in different contexts. In this judgment, we address replies thereto in the context of the acts performed by the military during the intifada in the area controlled by virtue of "belligerent occupation". Hence our judgment is limited to those situations in which both public order disturbances and the military’s response occurred in the context of that popular uprising. Indeed, the phrase "wartime action " serves to differentiate between acts that involve combat and acts that do not involve combat, such as civilian or law enforcement activities. The question facing us is what the dividing line between the different types of activity is, and on which side of this dividing line the case before us falls.

6. The state contends that a substantial number of the incidents that occurred during the aforesaid uprising could be viewed as "wartime actions" in accordance with Clause 5. The issue is the response of the security forces to organized activity both within the Area and outside of it. The riots included severe disruptions of public order, obstruction of access and violent demonstrations in which both cold weapons and firearms were used. This was a collective struggle with political aims, which called into question the legitimacy of the very control of the Area. Many individuals who were "soldiers without uniforms" took part in the riots, which made it difficult to distinguish between passers-by and rioters. Due to the nature of the incidents it was difficult to anticipate the response of the rioters and the implications of each incident. This situation, with the risk it presented for residents of the Area and IDF soldiers, includes central characteristics of war, the intensity of which varies from one incident to another. This is not law enforcement action. Riots on such a scale, with such a goal, and with the use of such means, are not a matter for the police. The threat, and the manner in which it is addressed, are therefore, in most cases, in the realm of "wartime actions".

7. The State contends that each case should be examined according to its circumstances, in order to determine if a specific action is of a "wartime” nature or not. In this context, one needs to examine, inter alia, the location of the activity (hostile population, battlefield); the extent and quality of the opposing force (a specific force, its extent, the equipment and arms available to it and the danger it poses); the organizational strength of the opposing force and its goals. Examining these criteria in the circumstances of the appeal before us (it is alleged) leads to the conclusion that this was a "wartime action" and not a "law-enforcement action", and that the state, therefore, has immunity against claims (and liability) for damages caused by it.

8. The respondents reject the s state’s interpretation of Clause 5 of the Civil Wrongs Law. In their view, a "wartime action" is a real act of war. Since the state has immunity, this should be interpreted frugally, owing to equality before the law, the basic rights of the individual and additional policy considerations. Wartime action must exceptional, both in its timing and in its extent. It must be connected to war and to be of the type of activities executed in time of real war (e.g. explosions, amassing forces prior to battle, etc.). Hence, steps taken by the security forces to suppress a popular uprising should not be viewed as wartime actions. These were "routine" acts which continued over a long period of time. In general, the steps included crowd dispersal and dealing with disturbances of public order, which are, in principle, law enforcement activities and not wartime actions. Even the manner in which IDF soldiers acted, whilst formulating special rules of engagement, was intended for this situation and not for real war. Consequently, it was argued, the state cannot be granted immunity under the auspices of the immunity in Clause 5 of the Law.

9. What is the underlying aim of immunity from civil liability granted to the state for "wartime actions" by the military? The approach appears to be that wartime actions that cause damage to the individual need not be determined by ordinary tort laws. The reason for this is that wartime actions create special risks, the handling of which should exceed the boundaries of ordinary civil liability. The risk is special in terms of its creator (the soldier carrying out the wartime action and planning it, and the state, which sends him on his assignments); the risk is special in terms of the injured party (whether he is "friendly"

or "an enemy"), and the risk is special in terms of the extent of the damage. The perception is that ordinary tort laws are not suitable for regulating this special risk. This inadequacy stems from the very essence of tort laws which address risk sharing due to harmful activities in the day-to-day lives of persons in their country. They are not suitable when the risk facing individuals and the public at large is abnormal and exceptional. By their very nature, wartime actions create risks with which the "regular" legal system is not intended to cope. The aims underlying ordinary tort laws do not apply when the damage stems from wartime actions carried out by the state against its enemies (see the remarks of Justice Reinhardt in **Koohi v. U.S.** 976 F. 2nd 1328,1334). The appropriate way to resolve the issue of compensation for damage caused by wartime actions is a special arrangement – beyond the bounds of the ordinary tort laws – which could reflect on the general picture, and which could dispense with the risk, taking into consideration the special character of the action, and taking into account international agreements which the state has made ((if there are such). Note the approach is not that "wartime action" is beyond the domains of the law. The approach is that the problem of civil liability due to wartime actions should be determined outside classic tort laws. Indeed, the denial of civil liability in situations of "wartime action" is also acceptable in other legal systems. English law recognizes the doctrine of "Act of State", whereby the Crown and its representatives may not be sued for damages caused to aliens outside England as the result of a retrospective mandate or authorization of the Crown (see Street, **On Torts** , 104, (9th Ed., 1993)]. In the U.S.A. an exception was to the general civil liability of the federal government was stipulated, which releases from liability for combatant activities in time of war.

"Wartime Action"

10. Against the backdrop of the purpose underlying the provision of Clause 5, of the Civil Wrongs Law, we can approach an examination of the meaning of the term "wartime action". The viewpoint is targeted at the essence of the action and at the special risk it poses. The question is whether the action that caused damage is a "wartime action". "You must examine the action – not the war" (Justice H. Cohen in C.A. 311/59 **Tractor Station Operator Ltd. v. Khayat**, IsrSC 14 1609, 1613; cf.: Request for Leave to Appeal 16/93 (Beer Sheva District Court) **HaMagen Insurance Company Ltd. v. Eli Wasserman** (not published). The action is a wartime one if it is a combat action, or a military combat operation of the military. It is not necessary that the action be carried out against the army of a state. Actions against terrorist organizations may constitute combat actions. Thus, for example, the wartime nature of the action directed against an enemy (whether an organized army or terrorist bodies) that seek to harm soldiers is what is likely to create the special risk that justifies the granting of immunity to the state. President Shamgar called attention to this, stating:

> The words of Clause 5 are aimed only at real wartime actions in the narrow and simple sense of this term, such as the gathering of forces for battle, combat attack, exchange of fire, explosions, etc., in which the special nature of warfare with its risks, and in particular its implications and results, is expressed". (C.A. 623/83 **Levi v. the State of Israel**, IsrSC. 40 [1) 477, 479).

The military carries out different "activities" in the areas of Judea, Samaria and Gaza. Not all of these are "wartime" actions. For example, if the injured party was injured by an attack made by a soldier due to his refusal to fulfill an order to erase graffiti, this should not be viewed as a "wartime action", since the risk that the action created was an ordinary risk of law enforcement action. This would not be the case if a military patrol in a village or a city finds itself in danger involving risk of death or severe bodily harm due to shots fired at it and stone and Molotov cocktail throwing, and in order to rescue itself it fires and injured someone. The act of shooting is a "wartime action", since the risk entailed in this action is a special risk. Intermediate situations, between these two extremes, may occur.

For example, consider the case of a military unit patrolling an area in order to maintain order. As long as it carries out ordinary policing activities, within the scope of ordinary police action risk, its activities cannot be seen as "wartime actions". Not so if there should be a stage of rioting, stone throwing or shooting, which poses a risk to the unit's soldiers. In this state of affairs, the action ceases to be a policing activity with its ordinary risks and becomes a wartime action entailing special dangers.

Consider the case of a military unit which is stationed in some location as part of its routine activity. Damage to property caused as a result of the stationing does not constitute "wartime action" (the **Levi** case). The same would hold true, if - as part routine training - the military negligently leaves behind a grenade which explodes and causes damage. This is an ordinary routine risk in training conducted by the military and it does not constitute a wartime action with special risks. In contrast, if the damage was caused due to shooting from an ambush set up by the military, it was caused by "wartime activity." since "we are dealing here with an ambush by military forces, which served the operational role of striking an enemy who was likely to appear, when necessary (Vice-President M. Landau in C.A. 542/75 Ribhi 'Atalla v. State of Israel IsrSC 31(2) 552,554). Consider a military unit detaining a suspect. It is possible that the action constitutes a routine policing activity that bears no combat nature. However, it is possible that the circumstances surrounding the action are such - e.g. in the course of a battle taking place in a certain area – that it has a combat character. The same holds true for a military unit that fires at a driver trying to evade a roadblock. It is possible that the unit's activity involves an ordinary risk, similar to the risk attached to a police blockade seeking to arrest drug traffickers. The unit's action may involve special risk, stemming from contact with enemy fire, in the context of which the roadblock was set up. Therefore, to answer the question of whether an activity is of a "wartime" nature, all the circumstances of the event must be examined. One must inquire after the aim of the action, the location of the incident, the duration of the action, the identity of the acting military force, the threat that preceded it and was anticipated from it, the strength and extent of the acting military force, and the duration of the incident. All these shed light on the nature of the special wartime risk caused by the action. Against the backdrop of this approach, let us examine the case before us.

11. In the afternoon of August 18, 1988, a civilian car, bearing civilian license plates of the Area, arrived at a metal workshop in the village of Tammun. A number of IDF soldiers got out of the car (some in uniform, some in civilian dress). When the car reached the metal workshop, three persons who were inside began to flee, including S'ud Hassan Bani 'Odeh (hereinafter: S'ud) and Jamal Qassem Bani 'Odeh (hereinafter: Jamal). The force's soldiers pursued them and fired at them. S'ud and Jamal were injured by these shots. S'ud died from his wounds. Jamal suffered a knee injury. The shooting took place within a very short time of the soldiers' arrival at the place, and was not conducted according to the "procedure for apprehending a suspect", nor was it proven that S'ud and Jamal were suspects. At the time of the action, the force was at no risk in any way. The District Court (Justice G. Ginat) found that the state was not eligible for the exemption stipulated in Clause 5 of the Civil Wrongs Law. It was further found that the shooting was negligent, and that the estates of S'ud and Jamal were entitled to compensation. Although it was determined that contributory negligence of ten percent should be ascribed to S'ud and Jamal. Following an agreement between the parties, (on January 23, 1996) the overall discussion in the appeal was limited to the matter of the inapplicability of Clause 5 of the Civil Wrongs Law.

12. Can the State argue that the shooting constituted "a wartime action"? In my opinion the reply is negative. The IDF force was not in any danger. This was a "policing" operation with the object of arresting a suspect, which was executed negligently and against procedure. The shooting was executed solely for apprehending suspects, not for fighting them. In the circumstances of the matter, the risk created by the shooting was the ordinary risk adequately addressed by tort laws. My conclusion would have been different had the military force been in danger – as indeed occurred after the shooting and as a result of it. In such a situation, the action would have changed its character, and would have turned from a "routine" policing action – and at times this transformation is sharp – to a wartime action. Indeed, tort laws address "ordinary" matters pertaining to the apprehension of suspects. Tort laws need not address action where a military force is in danger and deploys the firepower in its hands in order to protect itself or the security of the Area. The line between the two situations is sometimes fine, but we must not disregard it. It seems to me that in the case before us – and from a general view of the entire circumstances – we are not faced with a wartime action.

As a consequence we reject both the state's appeal (C.A. 6051/92) and the appeal of the injured parties (C.A. 5964/92)

President

S. Levin, Vice-President

I agree

Justice T. Or:

I agree

Justice E. Mazza:

I agree

Justice M. Cheshin:

I agree

Justice D. Dorner:

I agree

Justice J. Turkel:

I agree

Justice I. Englard:

I agree

Justice E. Rivlin:

I agree

President	Vice President	Justice
Justice	Justice	Justice
Justice	Justice	Justice