[Emblem of the State of Israel]

The Courts

The Magistrates Court in Jerusalem **C.C. 004350/97**

Before the Hon. Justice David Mintz

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In the matter of:

1. **_____ Abu Hassan**
2. **_____ Abu Hassan**

both represented by Attorney Michal Pinchuk

The Plaintiffs

v.

1. **_____ Kusayev**
2. **The State of Israel – the Ministry of Defence**

both represented by Attorney A. Galili-Yolezri of the Tel Aviv District Attorney's Office

The Defendants

Judgment

Background

In the Complaint, it is claimed that Plaintiff 1 (hereinafter: the Father) was born in 1930 and is a resident of Kafr Batir (hereinafter: the Village). Plaintiff 2, the son of Plaintiff 1 (hereinafter: the Son), was born in 1965 and is too a resident of the Village. On 26 April 1990 in the afternoon and evening hours, Defendant 1 (hereinafter: Kusayev) and other soldiers under his command, attacked the Plaintiffs. Kusayev and the soldiers who were under his command shall be referred to hereinafter jointly as "the Soldiers". According to the claim, the Soldiers beat the Plaintiffs up in all parts of their body, while using their hands, legs and rifle butts. The Soldiers also pulled the Plaintiffs' hair, and used vulgar and degrading language against them. The said beating began in the Village itself and continued in the Jeep in which the Plaintiffs and the Soldiers traveled on the road leading from the Village to Canada Forest (which subsequently turned out to be the forest near Yad Kennedy), which crosses the railroad at the entrance to the Village and goes on towards Jerusalem.

In the narrative of the incident, it is described in the Complaint that the alleged day was the Muslim holiday "Id El Fitter" (hereinafter: the Holiday). Toward the Holiday, representatives of the Village spoke to the officer who was in charge of the military outpost located near the railroad at the entrance to the Village (whose name subsequently turned out to be N. Alon, and who shall be referred to hereinafter as the Officer) and reached an arrangement with him whereby peace would be maintained during the Holiday. The agreement provided that the Villagers would not throw stones at the train riding on the railroad, whereas the soldiers would not enter the Village. According to the claim, suddenly, without any explanation or justification and in deviation from army procedures, an IDF patrol Jeep carrying the Soldiers emerged from the direction of Beit Jala. It is claimed that the Jeep's entry to the Village was "provocative" and uncoordinated with the appropriate IDF authorities. For this, Kusayev even faced disciplinary charges later. Once the Jeep entered the Village, the Soldiers began detaining people and demanding their ID's, and even ordered some young men, including the Son, to run before the Jeep while the Soldiers shot in the air. It is also claimed that the Soldiers picked particularly on the Son because they had a prior acquaintance with him. When the Father tried to find out why the Soldiers were beating his son up, he too was beaten. The Jeep left the Village with the Father and Son on board, and with the Soldiers continuing all the while to shoot in the air. On the way to the outpost, the Jeep met the Officer's vehicle that was coming up from the outpost, and an argument broke out between the Officer and Kusayev. The Jeep started moving again, while ignoring and evading the Officer and the soldiers at the outpost, and took off in the direction of Yad Kennedy. Also further down the road, the Soldiers continued beating the Plaintiffs. Even though the Father begged the Soldiers to [let him] stay in the Jeep and accompany his son to the detention facility at the Bethlehem Administration, the Soldiers objected, left him on the road and drove on. The Father filed a complaint for battery at the Bethlehem Police. Due to these acts of the Soldiers, the Plaintiffs claimed damages in the sum of NIS 20,000 each.

The Plaintiffs submitted five affidavits to the court. The Father's affidavit, the Son's affidavit, two more affidavits by young men who were with the Son and another affidavit by a neighbor who intervened in the incident. In all of the affidavits, the affiants repeat the narrative described above in one way or another, while depicting the serenity that prevailed in the Village prior to the Jeep's "provocative" entry to the outskirts of, and thereafter into, the Village.

In view of the fact that the Father filed a complaint with the police on 28 April 1990 (Exhibit D/1 [A+B] in the Defendants' exhibit file – Exhibit A is a photocopy of the statement itself and Exhibit B is a printed transcript thereof), and even turned to MK Dedi Zucker with an "affidavit" that was taken from him and documented what had happened, in the Father's opinion (D/5, see more on this "affidavit" below), and after MK Zucker turned on 1 May 1990 to the Minister of Defence (D/6), an investigation into the matter was opened by the Investigating Military Police, at the order of the Advocate General of Central Command (of the IDF), as documented in the letter of the Minister of Defence of 15 June 1990 (D/7). In that investigation, the Father, the Son, the five Soldiers who were in the Jeep and the Officer, were questioned. A copy of the Father's statement and a transcript thereof were marked as Exhibits D/3 [A+B] and the Son's statement and a transcript thereof were marked as Exhibits D/4 [A+B]. The statements of each Soldier and of the Officer, as taken at the time by the investigator of the Investigating Military Police, were attached to the affidavit given by each one in lieu of a direct testimony.

The Father's affidavit – D/5, is a record of what happened, as narrated by the Father to a worker of the "Association for Civil Rights" by the name of Dalia, who helped reduce to writing what had happened, according to the Father. The Father explained in his testimony in court (p. 27 of the transcript) that Ms. Dalia wrote the narrative down in Hebrew and then referred the Father to Adv. Muhammad Mussalem. At Adv. Mussalem's office, the document was translated for the Father from Hebrew into Arabic, and it was explained to the Father exactly what he was signing. The Father then signed the document in the presence of an attorney. Although the document was titled "affidavit" by the persons who drew it, it was not signed as an affidavit pursuant to Section 15 of the Evidence Ordinance (New Version), 5731-1971. Nevertheless, this document should be treated with gravity, since it is the first documentation of the Father's version and it was following this document that the investigation by the Investigating Military Police was ultimately launched.

The common claim of all the Soldiers was that they had received an order from Bethlehem Brigade Command to inquire into a fire from which smoke was rising in the area of Beit Jala. They traveled down the road leading from Beit Jala to the Village, came up against a pile of burning tires on the road, passed the pile of tires, and young men who were up on the hill,

above the road, started throwing stones at them. The entire road was scattered with stones and rocks. The Jeep started moving toward the outskirts of the Village, where a new fusillade of stones was showered upon them. Once Kusayev had made a positive identification of the Son as a stone-thrower, he started chasing him and caught him. According to all the Soldiers, they did not beat up the Son or the Father, although they do admit to have used reasonable force to arrest the Son and ward off the Father from interfering with the arrest.

Further reference to the testimonies of all those involved in the incident will be made below.

The Region and the Period

The alleged incident took place at the height of the "Intifada". It is no secret that at that time, the security forces faced the unbearably difficult task of imposing order on the Arab villages in Judea, Samaria and the Gaza Strip. Stone-throwing at security forces and Israeli citizens was a matter of daily routine. It appears that Kaft Batir too was no stranger to rioting, and, according to the Soldiers' testimony, even held a place of honor at the top of the rioters' list.

The Village itself is located west of Bethlehem, slightly to the north. The Village is located in major part on a range overlooking the Soreq river, which constitutes the main route of the railroad leading from the Capital to the low plains (a map of the region was attached to Kusayev's affidavit and is marked Exhibit 2, and an identical map was appended to the affidavit of another soldier by the name of Sasson Sasson). The main road leading to the Village traverses the village of El Hader which is located near the road which led, at the time (prior to the paving of the new "Tunnel Road"), south from Bethlehem to Gush Etzion and Hebron. The said road is an ordinary asphalt road and it runs along the entire range to the center of the Village. In addition to the said road, there is a dirt path that leads from Beit Jala to the Village and is located northeast of the main road. The dirt path is a mountain route that draws along the contours of the range until it slopes down into the Village, ultimately reaching Soreq river, where the said railroad runs. In addition to the maps that were submitted to the court, an aerial photograph (hereinafter: the Aerial Photo) was also submitted, in which the route of the road may easily be discerned (D/9).

The fact that the Soldiers were riding along the mountain route was not in dispute, and it was from here that the Soldiers entered the Village through its eastern entrance (rather than through its southern entrance, located on the main road leading to the Village). Also the fact that several hundred meters after the eastern entrance to the outskirts of the Village, a steep slope descents toward the railroad, was not in dispute. The incident therefore took place between the outskirts of the Village and the road leading to the river (which was nicknamed by the parties "Death Curve") and on the road leading to the railroad, on which the military outpost was built. The military outpost was marked on the Aerial Photo by a large blue circle, and the "feud territory" was outlined by two blue lines.

As specified above, contrary to the serene description of the Plaintiffs, the Soldiers said that they found themselves in a genuine state of war, in which their lives were in danger; burning tires; rocks scattered along the road; stones being thrown from all directions; crowding of villagers and attempts by the villagers to prevent the stone-throwers' arrest. However, before analyzing the testimonies, I will discuss the parties' claims on the "evidential damage" which each party believes to have suffered at the hands of the other.

Evidential Damage

The doctrine of evidential damage provides that a defendant is liable to a plaintiff, if his tortious behavior robs the plaintiff of the ability to prove or the chances of proving the components of his cause of action against his wrongdoer. The denial of the ability or chances of proof is the "evidential damage" caused to the Plaintiff (see a principal article written on this subject, A. Porat, A. Stein, **The Evidential Damage Doctrine: Justifications for its Adoption and Implementation in Typical Cases of Uncertainty in Wrongdoing**, *Iyunei Mishpat* 21 (5758), 191, and C.A. 789/89 *Amar, Minor, v. Clalit Health Services*, PDI 46 (1) 712, 721 and C.A. 664/95 *Cohen v. Clalit Health Services*, *Takdin Elyon*, Vol. 99 (2), 5759/5760-1999, 232). The said doctrine was typically applied in medical malpractice suits, and it was ruled that when medical documentation is lacking, the burden of proof of the disputed facts which might have been clarified from the records, shifts from the Plaintiff's to the Defendant's shoulders (see C.A. 2245/91 *Bernstein v. Clalit Health Services*, PDI 49 (3) 709). By shifting the burden to the Defendant, the physician's liability for the patient's damage may be determined even where it would not have been possible to prove a causal

relation under ordinary circumstances (C.A. 6330/96 *Binger v. Hilel Yaffe Hospital*, *Takdin* 98 (1) 249). The said doctrine was also adopted in suits filed against the army (see, for example, C.C. (Jerusalem) 82/94 *Panon v. The State of Israel*, *Takdin Mehoz*i, Vol. 96 (3) 5756/5757-1996, 748), although it was ruled that the army might be deserving of more lenient treatment, in that evidential damage will be found only when gross negligence is proven (compare C.C. (Jerusalem) 170/94 *Abu Lakhia v. The State of Israel*, *Takdin Mehoz*i, Vol. 97 (3) 5757/5758-1997). Evidential damage caused by the Defendant to the Plaintiff, is also conceivable.

The Plaintiffs' attorney claims that a debriefing was held by the Brigade Commander after the incident, and that this debriefing was neither found nor disclosed to her. The fact is, so she claimed, that disciplinary action was brought against Kusayev for his acts in the Village, and that apart from the trial form (Form 630) that was attached to his affidavit, nothing can be learned about the debriefing that preceded the said trial. According to the Defendants' attorney, the situation is quite the reverse. Because the Complaint was filed on 11 March 1997, only several days before the expiration of the statute of limitations, the Defendants suffered huge evidential damage.

"As luck would have it", an investigation by the Investigating Military Police was opened at the Father's and MK Zucker's request. As a result of this investigation, we now have the versions of all those involved, shortly after the incident, in abundance. In this respect, therefore, the Plaintiffs were denied no evidence. They had in their possession all of the Defendants' statements and versions for seven years. To complain now against Defendant 2 requires no little boldness.

The evidential damage is expressed not only in the written documentation, but also, and possibly mainly, in this case, in the oral testimonies given in court and in that the witnesses who came to the stand would remember as much as possible of what actually happened. Thus, the court could form a direct impression of the witnesses and would not base its impressions only on, and draw its conclusions only from written evidential material. This is true in particular where the findings are based on the witnesses' credibility. The situation that occurred in this case in the court because of the Plaintiffs was, in a certain respect, rather disparaging. The Soldiers testified laconically and repeated their statements that were taken

10 years ago by the Investigating Military Police. None of them remembered exactly what had happened. The Soldiers, who were at the time of the incident young men of under 20, appeared in court as (relatively) older people of around 30. The Officer, who was 36 at the time of the incident, testified when he was 46, and had long since been released from reserve duty. All of the Soldiers testified that in those days stone-throwing was a matter of routine, and that they were involved in dozens and hundreds of incidents during their service, the vast majority of which involved riots in the Intifada. It is therefore not surprising that this incident was not engraved on their memory. Even Kusayev, who was brought to trial for the incident, and despite his attempt to recall what had happened, was unable to do so properly. The Plaintiffs, on the other hand, are the ones who chose the timing of the filing of the Complaint and who elected to file it at the end of the period of limitation, when they were able to document their version easily and properly prepare for the Complaint over several years. The truth is that Defendant 2 is worthy of no little praise for managing to find all the Soldiers who were involved in the incident and to have them sign affidavits and come to the witness stand. Had this not been the case, the Defendants would have been in an even worse situation. To my mind, the Plaintiffs caused an unbearable situation and inflicted upon the Defendants tremendous evidential damage. Even though the Complaint was filed before the expiration of the statute of limitations, the Plaintiffs used this period in bad faith, possibly in the hope that the Defendants would be unable to properly prove their defence. It should also be kept in mind that the IDF carries out thousands of missions in every 24 hour period. It does not usually keep lasting records of a mission, and of where, when and by whom the mission was carried out. With time, the soldiers who take part in such or another activity, transfer out of their units and are released from the regular and reserve forces. Sometimes, so one can assume, the army has no documentation whatsoever of incidents and activities attributed thereto by such or another Plaintiff, and the army learns thereof only when the complaint is actually filed. In this sense, the army (and the State) is not an ordinary litigant, who has direct knowledge of what goes on in his own backyard. As time passes, the task of location becomes harder. At times, presumably, the army finds itself helpless, unable to inquire into the specific incident for which the complaint is filed. Obviously, no rigid rules should be laid down as to when laches in the filing of a claim against the army should be deemed as abuse of process. The army's blood is no redder than that of any other litigant. However, every case should be decided by its special circumstances. In the case of considerable laches in the filing of a claim without any justification or reason, the court could conclude from that that the Plaintiff

wanted to hit the army in its "soft belly" and to cause the State intentional evidential damage, if the court is convinced that the Plaintiff's desire was to exploit the army's weakness in finding witnesses and evidence. In this case, no explanation was given as to why the Plaintiffs took so long to file their Complaint, and when the court draws its conclusions, this matter should be taken into account.

The Burden of Proof

At this point, we need to discuss the burden of proof. The Plaintiffs claim against the Defendants that the Soldiers attacked the Father and the Son. The alleged attack is no minor assault but, according to the description arising from the Complaint and from the Plaintiffs' affidavits, an act of abuse and genuine sadism. It is an old-time precedent that a party bearing the burden of proving facts which stigmatize its opponent with the commission of a criminal offense, must do so with weightier and more substantial evidence than that required in ordinary civil trials (C.A. 475/81 *Zikri v. Clal Insurance Company Ltd.*, PDI 40 (1) 589). Even those who believe in the theory whereby one should not deviate from the law that says that there are only two levels of proof – one for criminal law and one for civil law – according to the balance of probability, claim that the preponderance of evidence needed to satisfy the required degree, varies in accordance with the substance of the issue (the opinion of the Hon. Justice Barak, as was his title then, in the **Zikri** case, id., p. 605; see also C.A. 954/93 *Khajabi v. Ben Yossef*, PDI 50 (1) 417; C.A. 6138/93 *The Organization for the Realization of the Security Convention v. Ben Yona*, PDI 50 (1) 441). The preponderance of evidence is measured, therefore, according to the gravity of the complaint (C.A. 678/86 *Hanipas v. Sahar Insurance Company*, PDI 43 (4) 177). It is therefore superfluous to state, in view of the severe claims cast by the Plaintiffs at the Soldiers, that the Plaintiffs' versions need to be very credible. Needless to say, this is enhanced in view of the evidential damage caused by the Plaintiffs to the Defendants as specified above.

Taking into account, therefore, both the evidential damage caused to the Defendants by the Plaintiffs and the burden of proof that lies with them, I shall now turn to an analysis of the evidence.

The Facts Underlying the Plaintiffs' Claims

As aforesaid, the Plaintiffs are claiming that a "truce" had been agreed upon between the Village dignitaries and the Officer. This truce, even according to the Plaintiffs, was not balanced. According to the claim, which is, on its face, peculiar and even absurd, the Village dignitaries agreed with the Officer that the villagers would refrain from breaching the peace and from throwing stones at the train and at security forces, whereas the army would refrain from entering the Village. This claim was asserted on the basis of the sole testimony of the witness Mahmoud Halil Adawi (hereinafter: Adawi). This witness, who filled no office in the Village, neither at the relevant period nor now, tried to present himself as an "all-powerful" person, the supreme authority of the Village. According to him, he tried to calm down the agitation that arose in the Village after the Jeep arrived, although the Soldiers testified that it was he who actually inflamed the people. The Officer with whom Adawi had allegedly made the agreement denied that an agreement had been made and claimed that even had he wanted to reach such an agreement, he would not have been able to do so because he was not authorized to make such an agreement. Furthermore, the Officer testified that the outpost's lifeline passed through the Village, and that all supplies were transported through it. Therefore, the mere claim that he had reached an agreement whereby no IDF forces would pass through the Village is entirely groundless. Adawi's testimony was not credible from other angles. In his affidavit, he claimed that one of the Soldiers tried to drape his rifle on the Son, in the attempt to put on a show whereby the Son was trying to snatch the rifle. The snigger expressed by the Defendants' attorney at this claim in her summations is justified, since the mere raising of the claim that while facing mortal danger it even occurred to the Soldiers to put their rifles on the main rioter, is truly ridiculous. This witness also tried to depict the atmosphere in the Village before the Jeep arrived as genuine serenity. The role of village leader, which the witness tried to impart to himself, is also documented in his affidavit, in which he claimed that one of the Soldiers even ordered him to put the Son on the Jeep. No support has been found for this claim, neither in the Plaintiffs' testimonies nor in the Soldiers' testimonies. In conclusion, therefore, no agreement was proven. I shall even say that even had such an agreement been proven, it is difficult for me to see any justification for breaching the peace, throwing stones and rioting, even if the agreement had been breached by the army.

Another argument of the Plaintiffs was that the IDF Jeep's entrance into the Village was provocative. This argument, apart from the specific circumstances of the case, is entirely without merit and does not stand up to any scrutiny. The defined and stated role of the army is to be everywhere at any given moment. This is how the army maintains public order. The fact that the army's presence in the Village was not to the villagers' liking is neither here nor there. Furthermore, the Defendants' attorney justifiably claimed that the rules of conduct in the territories, that were attached to Kusayev's affidavit, indicated nothing about the refrainment of IDF forces from entering certain places during holidays. The rules contain no restriction on the movements of security forces at any place and at any time. No other evidence to contradict the rules has been presented to the court, and behavior or agreements not expressed in the army's written and official material cannot be based on the mere words of Adawi alone.

The Plaintiffs also tried to draw support from the fact that disciplinary action was brought against Kusayev for the "entrance into the village… [that] was not coordinated with the appropriate authorities in the IDF" (Section 12 of the Complaint). However, the testimonies heard in court have shed a completely different light on the matter. The Village itself was under the responsibility of a reserve battalion to which the Officer belonged. Although the armored infantry battalion to which the Soldiers belonged was in charge of a different front, on the day of the incident the Soldiers' Jeep was defined as a "brigade reaction force". The Jeep was dispatched, on the orders of "brigade operations", to find out what had caused the smoke that was rising from the Beit Jala area. This area of Beit Jala and of the route leading to the Village were under the responsibility of the armored infantry battalion. Although it has not been sufficiently clarified where the boundary between the fronts of the two brigades passed, it appears that the boundary between the reserve battalion and the armored infantry battalion passed somewhere before the outskirts of the Village. When the Jeep arrived in the area of the burning tires – an area which was probably still under the responsibility of the armored infantry battalion (or at least an area to which the Jeep had arrived under the orders of the brigade), a continuous and developing incident of stone-throwing and rioting started taking place. It appears that at that point Kusayev took upon himself the initiative of handling the incident. At that stage, then, the Jeep entered a front that was not under the responsibility of the battalion to which it belonged. Therefore, the on-scene front commander – namely the outpost Officer, was surprised to see the Jeep, since nobody had notified him that a foreign

force had entered his front. After the incident started developing and the rioting intensified, the Officer thought, and justifiably so, as it turned out, that the Jeep should not have come in to handle the incident without prior coordination with him as the senior commander in the area. It was for this **only** that Kusayev was charged. This appears also from Form 630 – Annex 4 to his affidavit. Kusayev was not judged for his conduct in the Village, and his disciplinary trial reveals nothing on his behavior as aforesaid.

Another fact that was asserted by the Plaintiffs as a basis for their claim was that the Soldiers picked on the Son, because they knew him as a rioter with a history, and because the Father and the Son belonged to a family which lost one of its sons in another incident in the Intifada. This claim has been proven to be entirely wrong, as it appeared from the testimonies of all the Soldiers that not only did they not know that the family had lost one of its sons and that the Son himself had served approximately 3 months in administrative detention in the past, but that when the said events took place, they were not even in that front. According to the Son's testimony, he was in administrative detention for three months from September to November 1989 (p. 23 of the transcript), whereas according to Kusayev, the entire unit did not arrive in the Bethlehem area before September 1989 (p. 65 of the transcript). Sasson, who was also on the Jeep, even claimed that the unit arrived in the area in October-November 1989 (p. 62 of the transcript). In other words, the Soldiers neither knew nor could have known that the Son was in administrative detention, and they most certainly did not have anything to do with the detention, as the Father claimed in his affidavit – D/5. They were, *a fortiori*, not the soldiers who killed the Father's other son, and his claims in this matter are a fabric of his imagination.

As all of the facts surrounding the incident that were claimed by the Plaintiffs have been proven to be incorrect, all that remains to discuss, therefore, is the Soldiers' conduct in the Village and the question of whose version will prevail.

The Convicting Judgment in the Son's Trial

It should be stated that had the Plaintiffs admitted that they were the ones who were responsible for the rioting and that the Soldiers, despite this fact, treated them with unreasonable force and beat them up unnecessarily, the decision would have been harder. However, once the Plaintiffs chose to entirely deny the rioting that they caused, and drew, as

aforesaid, a picture of an unbelievably tranquil serenity, the decision is easier. Kusayev's affidavit was accompanied by the Son's entire file from the military police (Annexes 3 to the affidavit). This file reveals that the Son was brought to the detention facility on the day of the incident, underwent a medical examination, and was found fit for custody (Annex 3B). One would imagine that had the Son been beaten up and injured as he described, he would not have been found fit for custody. An arrest order for 96 hours was issued against the Son (Annex 3E), his detention was extended (Annex 3G), and an order was issued to arrest him until the end of the proceedings against him (3H). In that hearing, the Son was represented by counsel, as the Son confirmed in his testimony. At that time the Son denied the allegations against him. In the first stage of the hearings and in the material that was submitted to the court as evidence in the exhibit file, only the order of arrest issued against the Son following the incident was attached. As the annexes show (3I-3L), the Son was judged and found guilty of breaching the peace, and was sentenced to 5 months in prison and a NIS 500 fine. The Son confirmed the entire adjudication process he underwent in his testimony (p. 24 of the transcript), even though he claimed, laconically, that he was not allowed to defend himself at all in the trial and that the sentence had been prepared in advance (p. 27 of the transcript). Only later, during the hearing of evidence, were the supplements to the military court file submitted (D/8). From the military court file, it appears that on 24 May 1990 the Defendant denied the facts of the indictment against him, and that his case was scheduled for the hearing of evidence on 1 July 1990. However, the hearing was held before that date, and on 7 June 1990 the Son chose to retract his denial and was convicted. It appears that the Son's admission was the result of a plea bargain in which the Son asked the court to honor the bargain and to give him the sentence that was actually handed down in the end.

In view of the late submission of the military court file during the hearing of the case for the defence, I ordered on 12 March 2000 that the Son be allowed to take the stand again in order to respond to the contents of the file. Accordingly, a special session was held on 23 March 2000 in which the Son completed his testimony and the parties' attorneys completed their summations on the admissibility of the evidence (D/8). In his testimony, the Son said that when his case was heard at the military court, a large number of litigants were present, and he did not understand what was going on at all, because there was no interpreter at the hearing. The Plaintiffs' attorney based her summations on two main arguments, whereby she believed that the said judgment could not be relied upon, since it was not a Convincing Judgment in a

Criminal Trial, within the meaning of this term in Section 42A of the Evidence Ordinance (New Version), 5731-1971 (hereinafter: the Ordinance), since the judgment was given in a military court in the Judea and Samaria region. Additionally, it was claimed that a material defect tainted the proceeding, since no interpreter was present in the courtroom and the Son was not represented by counsel.

As for the first claim, the Plaintiffs' attorney claims that Section 42A of the Ordinance speaks of an unappealable judgment in a criminal trial held in Israel and not in a foreign country. According to the claim, the military court in Hebron, established under the Security Instructions Order (Judea and Samaria) (No. 378), 5731-1970 (hereinafter: the Order) is a court in a foreign country, and therefore the judgment is not admissible as evidence in this trial. In this matter, the Plaintiffs' attorney drew support from the judgment of Justice Aloni in B.R.E. (Tel Aviv) 10503/85 *Ali Omar, Elhadad et. al. v. Mahpul Lawi*, PDI 5743, 170, in which it was ruled that a judgment given by the **local** court in Bethlehem is not a judgment in a criminal trial which may be relied upon according to Section 42A of the Ordinance. And, indeed, there is no doubt that the local court in Bethlehem is a foreign court, which operates outside the borders of the State of Israel and is not subject to the laws of Israel. However, this case is different.

Section 42A of the Ordinance is based on the rule of estoppel. The use made of a criminal judgment in a civil proceeding is double: as evidence on the one hand, and as *res judicata* on the other hand (C.A. 581/72 *Arbiv v. The State of Israel*, PDI 27 (2) 513). The rationale underlying the provision is that the convicting judgment is legitimized as evidence in the civil proceeding because a criminal conviction is based on evidence proven beyond reasonable doubt, whereas a civil proceeding requires a decision based on the balance of probability only (C.A. 269/82 *Hellman v. Carmi et. al.*, PDI 41 (4) 1). Thus, the rights of the party against whom the convicting judgment was given are not compromised, because his culpability was proven according to the more stringent rules of evidence of the criminal law, which "culpability" would certainly have been proven according to the more lenient rules of civil law. On the one hand, therefore, relying on the criminal judgment saves the court's valuable time, but, on the other hand, the parties' rights are not prejudiced (see C.A. 581/72 in the **Arbiv** affair, and C.A. 79/72 *The Guardian for Absentees' Property from the Israel Lands Administration in Jerusalem v. Yitzhak Yaacov et. al.*, PDI 27 (1) 768).

According to the precedent, the criminal judgment can be by any competent instance which decides an issue within its jurisdiction, even if that instance does not belong to the general courts system. Thus it was ruled, for instance, that a convicting judgment by the labor court (according to Section 89 of the Safety at Work Regulations) is a judgment which may be relied upon in a civil trial (see C.C. (Tel Aviv) 2774/80 *Falah v. Barabi*, *Takdin Mehoz*i, Vol. 91 (3) 5751-5752-1991, 367). In principle, the interpretation of Section 42A in case law is that the judgment of a judicial instance may be relied upon, provided that it does not fall within the exceptions listed at the end of the said section, namely that the instance is not a military court for traffic offenses or that the judgment is not by a municipal court, the judgment of which was handed down by a judge who is not a magistrate. The exception to the rule teaches us what the rule is. A good explanation of this matter was given by the court in the matter of C.C. (Bat Yam) 89/88 *Cilov v. Zalah*, PDI 5750 (B) 39, namely that it was the legislator's intention to qualify the applicability of Section 42A of the Ordinance only with respect to courts in which the judges are professional justices or at least jurists. This intention which underlies Section 42A (b) (the qualified applicability) is expressed, mainly, in the joining together of two instances whose judges are not necessarily jurists. In that case, the court referred to the judgment of a military court in Ramallah as a convicting judgment on which it based its findings, and even ruled that a judgment given by an **Israeli** military court in Ramallah is distinguishable from the **local** court, which was the subject matter in B.R.E. 10503/85 in the **Elhadad** affair. The reason for this is that the law, on the basis of which the judgment was given in the Israeli military court was the Israeli law, rather than a foreign law as was the case in the **Elhadad** affair (see also **Kedmi, On Evidence**, Updated and Consolidated Edition, 1997, Part III, p. 1150).

Furthermore, it was already said in the judgment in C.A. 581/72 in the **Arbiv** affair, that on the civil level, the issue preclusion doctrine is applicable where the judgments were rendered on the basis of essentially similar laws of evidence. Also Justice Aloni, in B.R.W. (Tel Aviv) 10503/85 in the **Elhadad** affair emphasized that the rationale of applying Section 42A of the Ordinance is that the criminal judgment must be a judgment handed down by an Israeli court, which is governed by the same laws, including the laws of evidence, which govern the hearings in civil courts (Id., p. 172). Relying on the judgment of a local court in Judea and Samaria, according to Justice Aloni, is wrong because the civil court is not authorized to

"review" the judgment. This is not the case here. When perusing the Order, one learns that the military court conducts trials according to the laws of evidence and the rules which are applicable in military courts which try soldiers (Section 9 of the Order), and there is no dispute that an (ordinary) military court is a court within the meaning of Section 42A of the Ordinance, even according to the Plaintiffs' attorney in her pleadings. Not only, therefore, is the military court not a "foreign" court which conducts trials according to foreign law, it also imports the Israeli rules and laws of evidence, via the laws governing the same. It is therefore my opinion that there is no doubt that the judgment rendered in the Son's case in the military court, is a convicting judgment in a criminal trial, which is admissible in this trial, and that it embodies the facts of the indictment to which the Son admitted as an inseparable part of the findings in the judgment (see C.A. 71/85 *Aryeh, Insurance Company Ltd., v. Bouhbout et.* **al.**, PDI 41 (4) 328).

As for the second claim, namely the absence of an interpreter from the hearing at which the Son admitted the charges against him. On this matter, the Plaintiffs' attorney draws support from Section 12 of the Order, which provides that if the Defendant "does not hear" Hebrew, the military court will appoint an interpreter to translate what is said in the hearing and the court's decisions for him. The absence of an interpreter from the hearing, so it is claimed, taints the entire proceeding.

The acts of the administrative authority, including the military court, are generally protected by the "presumption of legality". The presumption is that the administration's decisions are made lawfully. Therefore, a party who claims that the decision was made unlawfully is imposed with the burden of so proving (HCJ 5621/96 *Herman v. The Minister for Religious Affairs*, PDI 51 (5) 791; HCJ 4733/94 *Prof. Naot v. The Council of the City of Haifa*, PDI 49 (5) 111). A person seeking to rebut the presumption has to base his claim on proven facts (R.E.P. 1088/86 *Mahmoud v. The Building and Zoning Committee for the Eastern Galilee*, PDI 44 (2) 417). Furthermore, the presumption of legality can grow in weight with time. After many years, it will carry substantial weight. As time passes, so will rebutting it become increasingly harder (HCJ 4146/95 *The Estate of the Late Dankar et. al. v. The Director of the Antiquities Authority*, *Takdin Elyon* 98 (3) 576). In this case, the Plaintiffs' attorney is moving this court to strike down the entire judicial proceeding that took place before the military court, by the mere words of the Son. No positive evidence has been presented to me whereby

no interpreter was present at the hearing, and the fact that in the proceeding for the Son's arrest until the end of the legal proceedings against him (Exhibit 3H to Kusayev's affidavit) there is a space on the form for the interpreter's name, does not indicate that an interpreter was **not** present at the hearing that followed, only because there is no special space on the transcript sheet to record the presence and name of the interpreter who attended the hearing. In the opinion of the Plaintiffs' attorney, the entire judicial proceeding that took place in the past can be annulled by the wave of a magic wand, incidentally to this proceeding, only because the Son claims that there was no interpreter at the time of the hearing, even though the Son reached a plea bargain with the prosecutor, the statements of both parties were recorded in the transcript and the Son even served his sentence as agreed and as handed down. In this case, not only does the administrative decision keep its presumption of legality, but as time passes, even had it been conceivable that the judicial proceeding was not duly made, then the evidential damage caused to the Defendants in the filing of the Complaint at such a late timing, stands as an obstacle in the Plaintiffs' path in raising a claim that contradicts what was claimed at the time in the military judicial process. Additionally, in my opinion, one cannot so sweepingly ignore the statements made by the Son in that proceeding and the totality of the circumstances surrounding the case. The fact is that the son served a 5-month sentence and paid the fine that was imposed upon him. These facts indicate that the Son assumed responsibility for his actions.

In addition, nowhere in the Order or in any law have I found anything to indicate that the proceeding is voidable due to the absence of a defence counsel. I therefore dismiss this claim too.

Therefore, it may easily be determined that the Son took part in breaches of the peace, in utter contrast to his statement at the Investigating Military Police and to his testimony before me. Clearly, this determination stands in polar contrast also to the arguments and versions of the Plaintiffs and of their witnesses. Furthermore, I shall state that the mere raising of the claim that the Soldiers' sole desire was to abuse the villagers, and that they fabricated the story about the tires and rocks scattered on the road, the stone-throwing and the severe rioting – is, to my mind, fantastical. The question which, in my opinion, should have been discussed, is whether the Soldiers, nevertheless, used a reasonable degree of force when dispersing the crowd.

The Use of Force by the Soldiers

In fact, I need not discuss the aforementioned question, because once the Plaintiffs and their witnesses denied their participation in the rioting, they are not worthy of the court's trust, and all I need do is endorse the Soldiers' version. However, superfluously, I shall clarify that I am satisfied that the Soldiers acted properly in the circumstances that were created.

It should be kept in mind that this was an IDF force whose function, by definition, was to handle breaches of the peace and prohibited crowding, during a tumultuous period of the Intifada. The army forces face, and during the Intifada faced even more intensely, various and peculiar dangers, and the Soldiers' acts should be examined in view of the facts of the timing, location and specific incident, and in view of the totality of the circumstances, constraints and perils they faced. The test is not that of the reasonable person or even that of the reasonable soldier in times of peace, rather, this behavior should be examined in view of the events themselves and the dangers changing by the minute. It is not always possible to review the actions of soldiers who see themselves in mortal danger, with standards of tranquility or with "hindsight wisdom" (C.A. 751/68 *Ra'ed et. al. v. The State of Israel*, PDI 25 (1) 197). Although the reasonableness of the soldiers' acts is indeed examined by objective standards, the information that is used for the examination is that which the relevant person had before him at the time of the incident, and not the information revealed after the fact (Cr.A. 486/88 *Staff Sergeant Ankonina v. The Chief Military Prosecutor*, PDI 44 (2) 353; C.C. (Jerusalem) 1375/96 *Manel v. The State of Israel*, *Takdin Mehoz*i 99 (1) 3197). It is extremely difficult for the court to "place itself" inside the Jeep in the hostile village, while stones and rocks are being thrown at the Jeep and it is surrounded by a rioting crowd. Is a "peaceful arrest" even conceivable under such circumstances? Can the Soldiers be expected to treat those surrounding them with kid gloves? Are the ordinary standards for the conduct of arrests even relevant under such circumstances? Can the court review the Soldiers' acts while they were in mortal danger? Can the atmosphere of the trial – the quiet and calm atmosphere inside a courtroom – even be suitable for reviewing the Soldiers' acts? Clearly, these questions have to be answered, and cannot be left open. However, in this case it is easy to answer the questions, because I am satisfied that the Plaintiffs' descriptions were exaggerated and that any connection between them and the truth is purely coincidental.

Furthermore, let us not forget the severity of the acts for which the Son was convicted. True, stone-throwing were plentiful in the Intifada, but that is not a mitigating circumstance and does not derogate form the severity of the offenses. The "wholesaleness" of the commission of the offenses does not dwarf their severity, but rather augments it. The court has opined countless times on the severity of the acts for which the Son was convicted, and this issue requires no elaboration (see, only as an example, M.C.P. 162/95 *The State of Israel v. Gorfin*, *Takdin Elyon* 95 (1) 115).

From here, let us turn to the actual testimonies of the Plaintiffs.

The Plaintiffs' Testimonies

As aforesaid, the Plaintiffs relied on their own affidavits, on the affidavits of two others who took part in the incident and on the affidavit of Adawi who is, as aforesaid, the Plaintiffs' neighbor. I shall first discuss the Father's testimony.

The Father is not short of testimonies. There is his statement at the police of 28 April 1990 (D/1); his statement at the Investigating Military Police of 18 June 1990 (D/3); his "affidavit" of 29 April 1990 that was signed by Adv. Muhammad Mussalem (D/5) and his testimony as given in court. The common denominator of all the testimonies is that the Father claims to have been beaten badly by the Soldiers. The Father does not as much as mention that he was trying to prevent his son's arrest. In his testimony at the police (D/1), the Father claims that the Soldiers ordered him to get into the Jeep. Conversely, in the affidavit he filed with the court, the Father claims that he was the one who asked to get into the Jeep but was not allowed to do so, whereas in his affidavit D/5, he claims that he asked to get into the Jeep and that his request was granted without any difficulty. In his testimony at the police he claimed that the Soldiers left him by the outpost. In his affidavit he claims that he remained in the Jeep. In his testimony at the police he claims that he was beaten at the outpost, but there is no mention of this in the affidavit.

In other words, not only do the Father's testimonies contradict one another, it is also clear from his testimony at the police that he tried to aggrandize the Soldiers' role in the breakout

of the riot, and to mitigate his own. The fact is that also in all of his statement at the police, his statement at the Investigating Military Police (D/3) and his affidavit D/5, he claims that there were seven or eight soldiers. In practice, it has been proven beyond doubt that there were only five soldiers in the Jeep. In his statement at the Investigating Military Police (D/3) and in his affidavit (D/5), the Father insistently claimed (twice in D/5) that the Soldiers in the present case were the same soldiers who arrested the Son in his previous arrest. However, it has been proven beyond doubt that the Soldiers did not even know about the Son at the time of the incident, since they were not even in that front, as aforesaid. The Father even went so far as to claim, in D/5, that these were the soldiers who killed his other son. The Father's exaggerations are interwoven into all of his statements. In his statement at the Investigating Military Police he claimed that the Soldiers hit him in the neck with a jack! In his affidavit before Adv. Mussalem he claimed that the Soldiers fired in all directions and even collected the bullets! Clearly, this claim does not stand up to any reason, and it is inconceivable that in the midst of the inferno in which the Soldiers found themselves, they would take the time to collect the bullets, so as not to leave incriminating evidence behind them. The Father testified that the Soldiers used gas "against everyone" (both in his statement at the Investigating Military Police and in his affidavit, in which he even emphasized that they "sprayed" gas around his wife from a canister they carried). This too is unfounded, since not only was there a "zero range" between the opponent parties, but the Soldiers' did not even carry personal gas canisters. In his affidavit (D/5), the Father claims that he was beaten up in the presence of the Officer, but the Officer did not confirm this. In order to vilify the Soldiers, he also claimed in his affidavit in court [sic] that he was beaten up all the way, and in his other testimonies he claimed that the Soldiers beat up "everyone". The Father even went so far as to prepare an "alibi" in advance, claiming that the statement he gave at the Investigating Military Police was inaccurate, and that he signed it for no reason at all. It should also be emphasized that the Defendants' attorney is correct in saying that the Father confirmed in his testimony that he showed the Officer that he was injured in his **right** leg (p. 28 of the transcript), and even documented the injury to the **right** leg in a photograph (D/6). However, the medical certificate he submitted to support his claim (P/2) says that he was injured in his **left** leg.

The picture that emerges from the Father's testimony in its entirety is, therefore, one of unreliability. The Father had plenty of time to prepare for the trial (almost 10 years!), and once he chose to file his Complaint with such great and substantial tardiness, he cannot be

treated with the same degree of forgiveness that is due to the memory shortcomings of the Defendants' witnesses. To my mind, the fact that the Father showed and photographed his right leg, is not trivial, as the Plaintiffs' attorney claimed in her summations. A person filing a complaint so long after the fact, in an attempt to gain an edge over his opponent, should provide a more accurate testimony.

Let us move on to the Son's testimony.

The Son testified that in November 1989 he was under administrative arrest, which proves that his identity was not known to the Soldiers prior to the incident. This witness too, as aforesaid, depicted the Village atmosphere on the holiday as serene and quiet prior to the Jeep's entry into the Village. However, in his testimony he "didn't remember whether he resisted arrest" (p. 24 of the transcript), which under the circumstances is very peculiar. From the Son's affidavit in court [sic], it appeared that he was not taken by the Soldiers in their Jeep to the Administration, but was subsequently transferred to another Jeep in which another man from Kafr Husan was sitting (Section 13 of his affidavit). On this matter, the Soldiers too were not of one opinion. The Soldiers Shafrir, Berger and Agai testified as did the Son, whereas Kusayev and Sasson Sasson did not mention this at all. However, the Son denied that he had taken any part in the stone-throwing both in his statement at the Investigating Military Police (D/4) and in his testimony in court. In view of his admission of the charges against him at the military court, also this testimony of the Son's cannot be accepted.

The testimony of Halil, another son of the Father's, was also consistent with his brother's testimony in that he categorically claimed that he did not throw stones at the IDF forces. This witness too arranged his testimony to suit his interests. In order to prove the claim that the Soldiers had no business entering through the mountain route, he claimed that they could have reached the Village or the military outpost by a shorter route via Yad Kennedy (p. 2 of the transcript). On its face, this testimony is inconsistent with the other evidence submitted. It appears that the trip via Yad Kennedy to Jerusalem was a very long and circuitous route. The witness also said that there was no stone-throwing at the time of the incident. In this respect it should be noted that the Plaintiffs' witnesses were not of a single mind also on the matter that the beating of women in the Intifada was an irregular event. This witness, for instance (p. 9 of the transcript), claimed that this was irregular. Also his friend Mr. Adawi claimed that it was

irregular (p. 19 of the transcript). Also _____ Abu Hassan, another witness of the Plaintiffs, claimed that women-beating was irregular (p. 12 of the transcript). However, the Father and the Son claimed that even women-beatings were a matter of routine. Either way, it is superfluous to say that this witness is not objective due to his being a first-degree relative of the two Plaintiffs, and he added nothing to the testimonies of his father and brother.

The other witness, Abu Hassan, who too is a (distant) relative of the Plaintiffs (p. 10 of the transcript), said that he was with the Son all the time, and that the latter did not throw stones (p. 12 of the transcript). This witness too added nothing to the Plaintiffs' testimonies.

In conclusion, therefore, we may say that the testimonies and affidavits of the Plaintiffs and their witnesses were coordinated in advance, and that the other witnesses not only did not cure the defects that tainted the Plaintiffs' testimonies, but added further obscurity to them.

In her summations, the Plaintiffs' attorney explained the discrepancies between the Plaintiffs' different versions in that these were the result of the fact that the statements were taken in Hebrew and not properly translated into Arabic for the Plaintiffs. If this claim is correct, then why did the Plaintiffs not point out the various discrepancies in their affidavits in advance, but waited for them to be exposed in court? In addition, the Father confirmed that his affidavit (D/5) was taken from him after it was translated from Hebrew into Arabic for him and that he confirmed the translation and its contents. And it is this affidavit (D/5) that contains the most exaggerations and overstatements. This claim is therefore dismissed.

As for the medical documentation, the Plaintiffs rely only on the fact that the Father and the witness _____ arrived at Makassed Hospital, and a medical certificate was submitted as evidence, with a printed transcript thereof (P/1; P/2). Nothing can be learned from this documentation on the cause of the bodily injuries documented therein. The medical findings cannot be refuted on their face, but once the Father fully admitted that he had tried to prevent the Soldiers from arresting his Son, one may reasonably assume that he was injured during such attempts. The Defendants' attorney, in her summations, is justified in claiming that for this the Father may blame no one but himself.

The Plaintiffs' attorney also claimed in her summations that the Father's and the Son's versions were identical, and that they had no opportunity to coordinate their versions. From this she sought to conclude that the Plaintiffs spoke the truth. First, it should be stated that it was not proven to me that the Father and the Son had no opportunity to coordinate their versions. Second, the identical facts asserted in the statements of the Father and the Son at the Investigating Military Police were not facts which can be pointed out as facts requiring coordination. Basically, both Plaintiffs claimed to have been beaten up by the Soldiers. This fact, in itself, was not in dispute. The question of who initiated the beating, and for what it was dealt out, is the one in dispute, and the identical answers given by the Father and the Son are the consequence of the mere investigation and the questions posed by the investigators.

Marginally, I should note that the Plaintiffs' attorney claimed in her summations that one may learn of the calm atmosphere in the Village from the Officer's testimony, who testified that prior to the shooting the Village was quiet. It appears to me that this claim lacks substance. It is true that prior to the Jeep's entry into the Village no explosions or shooting were heard, and that there were no riots or breaches of the peace. After all, what need was there to riot and at whom could stones have been thrown? It is quite clear that it was the Jeep that drew the attention, and that its mere presence at the outskirts of the Village is what motivated the rioting and the stone-throwing. Likewise one might claim that had the IDF forces not been in the region at all, the entire Intifada would not have taken place. I am also dismissing the Plaintiff's attorney's claim in her summations, that the Soldiers' story is not reasonable in view of the fact that the tires and the stones found on the road, according to their version, were on the side entrance to the Village, while there was no reason that it would be there, of all places, where the villagers would bar the security forces' entry into the Village. To that it should be said, first, that we do not know what obstacles were placed at the main entrance. Second, from what actually happened one may conclude that the villagers wanted to prevent the entry of the IDF forces into the Village that day. It should be assumed as a reasonable, if not proven, assumption that had the Jeep arrived from the other direction, it would have met with the same reception. That we shall never know. However, the fact that an attempt was made to prevent the entry of the Jeep via the side road – a road which was in any case frequently used by the security forces – does not rebut the Soldiers' version. Within this framework I should emphasize that also the Plaintiffs' attorney's claim, whereby it is not reasonable that the Plaintiffs' family, which is an educated family, would complain in this

case of all cases, since the family had undergone harsher experiences in the Intifada of which it did not complain, is unacceptable to me. True, I agree with the Plaintiffs' attorney that there is no room to stigmatize the entire family, but only the Son. It was not claimed that the entire family, including the Father, took part in the rioting that day. It was the Son who was caught as a stone-thrower and the Father's attempt to prevent his son's arrest is understandable, to such or another degree. After all, he had already lost one child in the Intifada, and the anxiety he felt when another son was arrested is easily understandable. On the other hand, it appears that it was in this case that the family decided to complain, in order to take advantage of the argument that broke out between the Officer and Kusayev. Nor can we know whether other complaints were filed by the family. In any case, this argument cannot undermine the version of the patrol soldiers, who did not injure the Father and the Son more than was required of them in order to discharge their duties properly.

Refraining from Bringing Additional Witnesses

The Defendants' attorney claimed that the Plaintiffs' refrainment from bringing the women who took part in the incident to the witness stand should be held against them. The Plaintiffs' attorney, on the other hand, claimed that there was no room to bring the mother and the grandmother, who had been beaten in the incident and sprayed with gas, since the grandmother is elderly, around 100 years old, and the mother has bad eyesight.

True, the failure to call a relevant witness to the stand does, naturally, arouse the suspicion that there was reason for doing so, and that the party who refrained from calling him feared his testimony and his exposure to cross examination (C.A. 465/88 *The Finance and Trade Bank Ltd. v. Matityahu*, PDI 45 (4) 651; C.A. 2275/90 *Lima Israeli Industrial Co. v. Rosenberg*, PDI 47 (2) 605). To my mind, it is possible that not calling the elderly grandmother was justified, and I doubt whether she would have had anything to add. However, once a dispute arose between the witnesses – of both parties – with respect to the women's share in the incident and the meaning which should be imparted thereto, I believe that the Plaintiffs **had** to have the woman's testimony. Not bringing the said testimony is, therefore, held against the Plaintiffs – her testimony might have supported that of the Soldiers, which is why she asked not to give testimony which contradicts her view of what happened,

and asked not to take part in attaching the responsibility therefor to the Soldiers. That we shall never know.

The Officer's Testimony

The Plaintiffs relied heavily on the Officer, and attributed to him no few agreements, thoughts and workings of the mind that never actually existed. This is the place, therefore, to recap his testimony. First it should be stated that the Officer was almost twice the age of the Soldiers. There is no doubt that a man of 36 was more mature than the Soldiers who had just recently turned 18. Already at his statement in the Investigating Military Police, he claimed that his goal was to calm things down and to assure the Father that no harm would come to his son. In his testimony in court the Office explicitly said that he saw the task of restoring peace and quiet as one of his duties (p. 43 of the transcript). Already during the Officer's questioning at the Investigating Military Police, he did not criticize the Soldiers on their behavior towards the Father and the Son, but rather, his sole complaint was that the Soldiers had entered the Village without coordinating it with him. He repeated this claim in his testimony in court (p. 43 of the transcript). In his affidavit, the Officer categorically denied the alleged agreement he had with the village dignitaries, if only for the reason that IDF forces had to pass through the Village in order to bring supplies to the outpost under his command. In his affidavit he also emphasized that such an agreement would have been unreasonable and would have disrupted life at the place. As he neither promised nor reached an agreement with the village dignitaries on a suspension of violence, so, he claims, he did not promise the Father to bring his Son back from detention. In his testimony in court he also said that he could not have promised to retrieve the Son from detention, because he was not authorized to do so (p. 44 of the transcript). In both his affidavit and during his questioning at the Investigating Military Police, the Officer claimed that the Son did not complain that he had been beaten **after** he got into the Jeep, but only **beforehand**. The Officer repeated this version in his testimony and adhered to it (p. 44, 45 of the transcript). In any case, the Officer said in unequivocal language that he had no fear for the Son's welfare or that he would be beaten up by the Soldiers, and that everything he told the Father was meant solely to calm the Father down (p. 45 of the transcript). And, indeed, not only did the Officer fill his military duty in calming things down, he also fulfilled his promise and went over to the Administration to find out **for the Father** how the Son was doing. With respect to this visit too, the Officer said that he did not fear for

the Son's welfare (p. 44 of the transcript). From the entirety of the Officer's testimony, one may therefore conclude that the Plaintiffs' whole version as regards the Officer was nothing but a trumped-up story.

The Soldiers' Testimonies

As aforesaid, the Defendants managed to bring all five Soldiers who were on the Jeep and the Officer to the stand. All of the Soldiers who were on the Jeep concurred that at a certain point on the mountain route they came across a pile of tires. The Soldiers' descriptions with regard to this matter were not identical, on the distance of the pile from the Village, the size of the pile and its location on the path. Kusayev testified at the Investigating Military Police that the pile was around 500-600 tires large, and in his testimony in court he claimed that there were approximately 600 tires (p. 66 of the transcript). Sasson, who was the patrol driver, stated at the Investigating Military Police that there was a large pile, but did not specify how large. In his testimony in court, Sasson emphasized that it was hundreds of tires (p. 57 of the transcript). Both Kusayev and Sasson testified that some of the tires were in the middle of the road. Motty Agai, another soldier on the Jeep, claimed in his questioning at the Investigating Military Police that there was a pile, but did not mention how big it was, and his partner, Mr. Guy Shafrir, also mentioned in his questioning at the Investigating Military Police that there was a pile, but did not mention how big it was. However, in court Mr. Shafrir noted that there were only a few tires (p. 73 of the transcript). The last soldier on the Jeep, Berger, claimed at the Investigating Military Police that there were approximately 150 tires, and in his testimony in court he said that there were approximately 100 or 150 tires (p. 48 of the transcript). One might think, due to the said inaccuracies, that the witnesses coordinated their testimonies without paying attention to the size of the pile of tires. However, this conception is ruled out in view of the fact that in the Officer's testimony in court, he remembered that smoke did rise from the direction of Beit Jala (p. 45 of the transcript). This testimony of the Officer's was given in court for the first time and there is therefore no doubt that he did not coordinate it with the other Soldiers. Furthermore, not only did the Officer not belong to the Soldiers' unit, and not only did he complain about Kusayev for having entered the Village without coordination, even the **Plaintiffs** deemed him credible. The Officer's testimony was therefore deemed credible by everyone, and so it is with the court.

The Soldiers also disagreed on the distance of the pile of tires from the outskirts of the Village, but on this matter too I have seen that they found it difficult, now, 10 years later, to indicate where they first came across the tires on the Aerial Photo (Kusayev stated at the Investigating Military Police that the tires were found in the wadi between Har Gilo and Batir; in court he claimed that the tires were approximately two kilometers before the Village (p. 66 of the transcript); the witness Sasson said in his questioning at the Investigating Military Police that the tires were found approximately four kilometers before the Village, as he stated in his affidavit, whereas in court he indicated a place that was approximately one kilometer before the Village (p. 56 of the transcript), but said that it could have been four kilometers as he said in his affidavit and in his statement at the Investigating Military Police (p. 57 of the transcript). The witness Berger testified that the tires were very close to the outskirts of the Village, and that the Jeep stopped right next to them (p. 49 of the transcript). On this matter too, I am satisfied that the distance between the pile of tires and the Village is of no importance, since this is not the major issue.

What did arise from the entirety of the Soldiers' testimonies is that there were, probably, two separate stone-throwing incidents. The one near the pile of tires and the other at the outskirts of the Village. Between the two (between the pile of tires and the outskirts of the village), rocks were scattered on the road. True, the Soldiers disagreed on how far away they were when they first met with stones that were thrown on their vehicle. Kusayev stated, both in his questioning at the Investigating Military Police and in his affidavit in court [sic] that approximately 200 meters before the entrance to the Village, stones were thrown at him. In court he claimed than the distance was approximately 100-200 meters (p. 66 of the transcript), whereas his friend Mr. Sasson testified, at the Investigating Military Police, in his affidavit and in his testimony in court (p. 58 of the transcript) that they first met stones approximately 2 kilometers away from the Village. Mr. Agai testified that the distance was 500 meters. However, except for the witness Shafrir, who claimed that no stones were thrown on the patrol some distance from the Village but only inside it, all of the Soldiers testified that stones were thrown at them twice.

With regard to the second stone-throwing incident, it appears to have taken place at the very outskirts of the Village, as aforesaid (Mr. Sasson's testimony in court, p. 60 of the transcript, and Mr. Berger's affidavit). To my mind, we have before us, again, a clear case of unfairness

in the filing of the Complaint and the hearing of testimonies 10 years after the incident, since there is no doubt that the Soldiers' memory most certainly betrayed them.

Another dispute surrounded the snatching of one of the Soldiers' rifle. According to Kusayev's statements at the Investigating Military Police, the Father tried not only to snatch his rifle, but also that of the other Soldiers. The witness Sasson stated that there was an attempt to snatch a rifle, but in court he emphasized that he claimed what he did in his affidavit after he was shown the Plaintiffs' testimonies on this matter, when he made his affidavit (p. 58 of the transcript). However, the witness was insistent that this did actually happen (p. 59 of the transcript). The witness Shafrir claimed that he had no recollection of such a thing (p. 76 of the transcript), and the witness Berger stated and claimed in court (p. 51 of the transcript) that the Father tried to snatch only Kusayev's rifle.

The women's share in the incident is obscure also according to the Soldiers' version. Kusayev stated that he did not notice that women took part in the incident, and in court he even emphasized that to the best of his knowledge, there were no women in the incident at all (p. 70 of the transcript). The witness Sasson said at the Investigating Military Police that the mother was present, and the soldier Shafrir concurred with him on this point in his statement at the Investigating Military Police. In court, Mr. Shafrir said that he remembered that the mother was there, but that the Soldiers did not push her. Mr. Berger agreed with this, and claimed that both the mother and the grandmother were there, and that other women too surrounded the Jeep (p. 50, 53 of the transcript).

The Plaintiffs' attorney sought to prove, as part of the provocation argument, that the Soldiers claimed to have entered the Village only because they were unable to turn around because of the road conditions. According to the claim, this version of the Soldiers is refuted in light of the fact that it is easily visible on the pictures submitted (D/4, picture 5; D/1, pictures 3-4) that it was possible to turn around on the spot, without any need to enter the Village. Therefore, according to the Plaintiffs' attorney, the Soldiers were looking only for an excuse to enter the Village in order to carry out their bad intentions therein. Even though the driver Sasson testified that technically he could have turned around, he did not do so under the circumstances (p. 57 of the transcript, and Motty Agai's testimony, p. 38 of the transcript), it appears to me that such a view is narrow-minded. True, Kusayev testified that he could not

have turned around with ease without entering the outskirts of the Village until he reached Death Curve (his statement at the Investigating Military Police and his affidavit in court [sic]), but he also emphasized in his affidavit and in his testimony in court that he was guided by **two considerations**. One, the inability to turn around undisturbed – once the incident started developing and stones started being thrown at the Jeep, and the other, his wish to take care of the incident (p. 66-67 of the transcript, and so it appeared from the driver Sasson's testimony on p. 60 of the transcript). It is therefore presumable that were it not for the stone-throwing, the fact that the entrance into the Village was blocked by the pile of tires and the rocks on the road, Kusayev would have turned back. However, once he saw the rioting incident before his eyes, he saw it his duty to take care of it. For this "enthusiasm" Kusayev, who did not deem it fit to coordinate his entry into the Village with the appropriate authorities, was brought to trial. It does not, therefore, reflect badly on Kusayev's acts as pertains the severe acts attributed to him in beating the Plaintiffs up. The deviation from army procedures did not and cannot affect the Plaintiffs' rights.

Furthermore, there is another hue of credibility that is due to Kusayev. In his statement at the Investigating Military Police, his affidavit given in court [sic] and his testimony in court, Kusayev provided information and facts which, on their face, could have been detrimental to him. In his statement at the Investigating Military Police Kusayev admitted that he gave a jab with the butt of his rifle to ward off the Father who wanted to prevent his son's arrest. Kusayev also admitted, both in his questioning at the Investigating Military Police and in his affidavit in court [sic] that he was asked by the Officer to release the Son, and that he refused to do so. The reason for this was that in his opinion, the crime of which the Son was suspected was a serious one. Nor did Kusayev see himself as subject to the authority of and command of the Officer. In addition, Kusayev admitted in Court that the main entrance to the Village was usually through the village El Hader – on the main road, but that in this case he had taken the back route since he was called up for the tire-burning incident (p. 68 of the transcript and Sasson's testimony on p. 61 of the transcript). Furthermore, Kusayev admitted in his cross examination in Court that although he had asked for reinforcements after having seen what was going on[1], he was ordered by the Brigade [command] to exit the Village (p. 70 of the transcript).

[1] Translator's note: It is unclear whether the intended meaning here was "having seen what was going on" or "foresaw what was going to happen".

All of these facts are actually facts that Kusayev would have well concealed, had he sought to lie. There was no reason for Kusayev to volunteer the information whereby he was ordered to exit the Village, had he asked to hide anything. It is therefore true that this man made a reliable impression on the Court.

Furthermore, from Kusayev's statements at the Military Investigating Police it appears that he was unable to name the Soldiers who were with him in the Jeep. This fact precludes any possibility of their having coordinated their testimonies. To emphasize, none of the Soldiers knew at that time, until Kusayev was questioned by the Military Investigating Police, that they were under investigation or that any complaint had been filed against them – either at the police or at the Military Investigating Police, and certainly not by MK Zucker. It is therefore fanciful to think that the Soldiers had coordinated their versions and that each one of them had fabricated the story about the tire-burning, the stone throwing and the breaches of the peace.

These facts are important for another reason. It cannot be denied that the Soldiers stood before the Court now, in their 30's, when they are presumably more composed. Most of them have already started families, are fathers and earn a respectable living for their families. It is possible that the Court's impression would have been somewhat different had it been faced with "grown-up youth", in the midst of their regular service in the IDF and with "young blood flowing through their veins". But I believe, as I have already mentioned several times in this judgment, that this fact should not stand against the Defendants but rather for them, and that the Plaintiffs should bear the consequences deriving from the possibility that the Court may have had a slightly different impression than that which it would have gained, had the witnesses been heard a decade ago.

Moreover, Kusayev emphasized several additional facts which have to be taken into account. First, already during his questioning at the Military Investigating Police, he claimed that he had made a positive identification of the Son throwing stones at him. This fact is important in view of the Plaintiffs' counsel's objection to accept the judgment convicting the Son as evidence in this case. Even had there been room to believe, against my judgment as aforesaid, that the judgment convicting the Son should be ignored, Kusayev's testimony is sufficient in order to implicate the Son in the criminal activity that was attributed to him. Second, I accept Kusayev's testimony that since the unit to which all of the Soldiers belonged was a special

unit whose purpose it was to deal with Intifada events, the Soldiers were well aware that if the detainee would be found to be unfit to be taken into custody due to his health, then he would walk about freely and the Soldiers' attempts to bring the detainee to justice would come to naught (p. 71 of the transcript). I have no doubt that if the Father's and the Son's descriptions of what the Soldiers did to them were true, then marks would no doubt have remained on their body, which would have made the Son unfit for detention.

True, Kusayev claimed in his questioning at the Investigating Military Police that he was brought to trial and given a suspended sentence of 14 days in prison for the offense of entering the Village without coordination and for unreasonable use of force, despite the fact that in practice, he was only given a suspended sentence of two days in prison, and the offense with which he was charged was only entering the Village without coordination. However, this issue is entirely meaningless, since the truth is as Kusayev stated in his affidavit, that he was charged with a **less serious** offense and was given a **more lenient** sentence. Had it not [sic] been the other way around, Kusayev may have been deemed unreliable. Furthermore, Kusayev explained that he answered the investigator as he did in accordance with his questions and in accordance with the offenses which were attributed to him and on which he was being questioned (p. 71 of the transcript). In any case, it should be emphasized that the Investigating Military Police file was closed, Kusayev was not transferred from his unit due to disciplinary problems, but because he was defined at that time as a veteran and long-serving soldier.

Conclusion and Trial Expenses

All of the considerations lead me to the conclusion that the Complaint should be dismissed. The Plaintiffs caused the Defendants evidential damage, and refrained from calling the mother to the stand. The Plaintiffs did not prove the facts underlying their Complaint, and failed to fulfill not only the "enhanced" burden of proof imposed upon them, but also the "ordinary" burden of proof imposed on them in any case.

On the matter of expenses, several factors and considerations have to be taken into account. First, obviously, the winning of the trial. Second, the manner of its conduct, including the dispute between the parties' attorneys on the need to file a motion to expose and disclose

Kusayev's disciplinary sheet (which question I decided on 7 February 1999 and for which a motion to appeal was filed). Another consideration which needs to be taken into account is the laches in filing the Complaint, and the bad faith of the timing of its filing.

As for the first consideration, it is quite obvious. As for the second consideration, it appears in retrospect that the Plaintiffs learned nothing from the exposure of Kusayev's disciplinary sheet, which proves that there was no reason for filing the first petition, let alone the appeal. As for the third consideration, I noted above that the filing of the Complaint at the timing at which it was filed was an act in bad faith. All of the considerations therefore lead to the conclusion that the Plaintiffs should be charged with proper trial expenses. In this respect I should mention the tremendous difficulties which Defendant 2 faced in locating the witnesses who are not under its control. The expenses which it is forced to incur in locating witnesses and bringing them to the stand are huge, and all of this only due to the desire of rioters to gain damages that are not due to them. It is of the Plaintiffs' acts that it is said that they "Act as Zimri and Seek Compensation as Phinehas".

In conclusion, I am dismissing the Complaint and charging each one of the Plaintiffs with payment of NIS 10,000 to Defendant 2 for trial expenses.

Issued today, 21 Adar II 5760, 28 March 2000 in the absence of the parties.

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

_____
Justice David Mintz

[Stamp of the Jerusalem Magistrates Court]