

Alan Schwartz/Gilad Schiff<sup>1</sup>

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### **Product Liability Litigation in Israel and the United States**

The following is a fictional conversation between two litigators; Alan from New Haven, Connecticut in the United States and Gilad from Ramat Gan in Israel. They share a client incorporated in Connecticut, with its principal place of business in Hartford, Connecticut.

The client has a world-wide distribution network, including a sales subsidiary in Israel. The client makes toys and the U.S. and Israel are its largest markets. Recently the client issued a global recall of a toy that can be swallowed easily by young children.

**Alan:** Gilad, our mutual client would like us to compare the judicial systems of Israel and the United States given the likelihood of product litigation in both countries. Can you give a high-level description of the Israeli system?

**Gilad:** Sure. A little background: Israeli law is based on the English common law which it inherited from the British mandate. There is no formal written constitution, however the Israeli Parliament, beginning in 1992, enacted several Basic Laws for the protection of fundamental civil rights and liberties.

Israel, unlike the United States, is a single state and does not have separate federal and state court systems. Instead, Israel has a single court system comprised of the Magistrate Courts, the District Courts, and the Supreme Court.

**Alan:** In the United States we have 53 court systems, including the Federal Courts. Each of the 50 states plus the District of Columbia and Puerto Rico has its own court system consisting of

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trial and appellate courts. Also there are courts in United States territories. Each state has its own law, typically based on the English common law, and also found in state statutes and state constitutions. The U.S. Constitution's Supremacy Clause provides that federal law controls when state law conflicts with federal law, including the U.S. Constitution.

**Gilad:** Does the product liability law differ from state to state, and if so, how do you determine which state's law applies?

**Alan:** The product liability law of each state is similar, but there are important differences between states that you must be careful to identify. Generally, any entity in the chain of distribution, from the manufacturer to the retailer, may be liable for personal injuries caused by a product defect. A product is defective if at the time of sale, it contains a manufacturing defect, a defect in design, or has inadequate warnings or instructions. Strict liability is imposed, but the reasonableness of a manufacturer's behavior is relevant to a defective design or an inadequate warnings or instructions claim. Definitions may differ from state to state, and the available defenses, punitive damages, third party practice, contributory or comparative fault, and liability among joint tortfeasors, also may differ.

Conflicts of law principles are employed by courts to determine which state's substantive law applies. Courts employ the conflict rules of the state in which the court is located, but you should be mindful that in a Multidistrict Litigation (MDL), in which cases from different districts with overlapping legal and factual issues are centralized for pretrial activities, the MDL court typically applies the conflict rules of the transferor court. In a product case, the law of the state with the most significant interest in the claim or the place where the injury occurred, are the options most commonly applied, except the law of the forum state will govern to the extent the foreign law is the same. I should note that in most cases, courts apply the statute of limitations of the state in which the court sits. But some states have "borrowing" statutes which permit the application of the statute of limitations of the state where the cause of action arose, thus preventing plaintiffs from engaging in forum shopping to find the longest available statute. For claims asserted in U.S. courts by Israelis injured in Israel, it is likely that the U.S. court will

apply Israeli substantive law to the cause of action, particularly where the product was purchased in Israel. Gilad, please describe product liability law in Israel.

**Gilad:** There are several bases for product liability claims under Israeli law. The main bases are the Defective Products Liability Law-1980 (the “Defective Products Law”), the tort of negligence pursuant to the Torts Ordinance [New Version] (the “Torts Ordinance”) or the Consumer’s Protection Law-1981 (the "Consumer’s Protection Law”). Product liability claims also may be based on contract pursuant to the Contracts (General Part) Law-1973 (the "Contracts Law") and the Contracts (Remedies for Breach of Contract) Law-1970. In specified circumstances certain injured parties may also base their claim on the tort of breach of statutory duty pursuant to the Torts Ordinance on the Sale Law-1968, or on the Sale Law (International Sale of Goods)-1999.

The Defective Products Law imposes strict liability on manufacturers (as defined therein) to compensate consumers who suffered corporal injury as a result of using the manufacturers' defective products and provides the manufacturers with a few limited defences. The Defective Products Law sets limitations on the award and provides that for purposes of calculating loss of earnings and loss of earning ability, the court may not take into account an earning higher than three times the average earnings in Israel. In addition the monetary award for non-pecuniary damage pursuant to this law is limited currently to approximately NIS 50,000 (approximately \$13,200). In light of the above mentioned limitations, product liability claims in Israel are also brought under other laws and mainly on the Torts Ordinance (the tort of negligence), and the Consumer’s Protection Law. Recovery under the Contracts Law is limited to economic losses.

The tort of negligence pursuant to the Torts Ordinance imposes liability on any person or entity that performed a negligent act or omission that caused damage to any person or entity towards which the former owes a duty of care (both conceptual and specific). This tort is general in nature in the sense that it may be applied in various circumstances and relationships and may be filled with specific content by the courts based on proper legal policy considerations. With respect to product liability, this tort was applied, for example, in a claim that was filed against a manufacturer of a resting chair that was defectively designed, and consequently the fingers of a consumer who

used the chair were caught in the chair and injured. Recovery under the Torts Ordinance requires proof of a manufacturer's negligence in designing or making the product. Damages are not capped, and are calculated based on traditional factors such as age, occupation, existing health and pain and suffering.

The Consumer's Protection Law imposes various obligations on dealers of products and services (including manufacturers) toward consumers that purchase their products for personal, family or domestic use with respect to practices of trade and commerce, inter alia, prohibition on misrepresentation, duties of disclosure, duties concerning product labelling and other various duties and prohibitions. The Consumer's Protection Law provides that violation of certain of the prohibitions and duties imposed by it, including the prohibition on misrepresentation and duties of disclosure, constitute a tort pursuant to the Torts Ordinance (as well as a criminal offence in certain circumstances). The Consumer's Protection Law is applicable to product liability cases, particularly with respect to cases involving alleged misrepresentation or violation of duties of disclosure. Claims brought under the Torts Ordinance or the Consumer's Protection Law are not subject to damage limitations and can include damage claims for physical injuries from a product. Claims under the Consumer's Protection Laws require a plaintiff to identify a specific representation or omission and proof that plaintiff would not have purchased the product but for the misrepresentation or omission.

**Gilad:** Can you explain how plaintiff's counsel determines the U.S. court in which to file a case?

**Alan:** Broadly speaking, you can bring a case in any state court provided the court has personal jurisdiction over each defendant. The dispute must have some relationship to that state (e.g. where the wrongful conduct occurred, where the defendant has its principal place of business, where the plaintiff resides, or where the injury occurred). The vast majority of cases filed in state courts are local disputes involving personal injury claims (e.g., slip and fall, motor vehicle accidents), contract disputes, real estate matters, family law matters, and debt collections.

Federal courts have more limited jurisdiction. Cases where plaintiffs and defendants are from different states, and the matter in dispute involves more than \$75,000, can be brought in federal

court. This is called “diversity” jurisdiction. Cases involving federal statutes, including constitutional violations, may be brought in federal court. Usually, if a case can be brought in federal court, the plaintiff can choose between federal and state court, except for a narrow category of federal law claims where federal courts have exclusive jurisdiction. But, where there’s a choice and the plaintiff chooses state court, the defendant can make its own choice to “remove” the case to the local federal court, except in a diversity case where a defendant is a resident of the forum state. The “forum defendant” rule, however, does not preclude removal to a federal court if there is federal question jurisdiction.

Generally, the selection of the proper court in which to file a suit is a simple exercise. But there are instances where parties “forum-shop” and attempt to steer the case to specific state or federal district courts because of favorable local procedural (*e.g.*, statutes of limitation) and substantive laws, sympathetic juror pools, helpful decisions on pertinent legal issues, or the presence of judges with experience with the subject matter. Although jurisdiction in the chosen state or federal district court may exist, defendants are able to seek the dismissal or transfer of a case where there is an obvious, adequate, alternative forum that is more convenient to the parties.<sup>2</sup>

**Gilad:** As I previously mentioned Israel has a three-level court system. The Magistrate Courts hear civil disputes involving up to approximately \$680,000. The District Courts sit as appellate courts for the Magistrate Courts. Also, they are the trial courts for larger civil claims in excess of \$680,000. The Supreme Court primarily hears appeals on decisions and judgments of the District Courts.

In contrast to the U.S., we do not have a choice of fora in which to file cases and the law does not vary depending on where the case is heard. In product liability claims we do not have “forum shopping” issues within the Israeli court system.

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<sup>2</sup> See 28 U.S.C. §1404 (motion to transfer). Defendants often invoke the doctrine of *forum non conveniens* to obtain the dismissal of claims of residents of foreign countries relating to accidents that occur outside the United States. Courts determine whether there exists an adequate, alternative forum outside the United States. Several courts have held that Israel is an adequate forum to litigate tort claims, including products liability claims. See, *e.g.* In re *Factor VIII or IX Concentrate Blood Products Liability Litigation*, 2008 WL 4866431 (N.D. Ill. June 4, 2008); *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328 (S.D.N.Y. 2008), *Miller v. Boston Scientific Corp.*, 380 F. Supp. 2d 443 (D.N.J. 2005).

**Alan:** Do you have statutes of limitations?

**Gilad:** Yes, the general statute of limitation period for civil claims (excluding claims with respect to lands) in Israel is seven years. This period is applicable, inter alia, to claims based on the Torts Ordinance and in Contract Laws. Our statutes of limitations are all discovery statutes, meaning the statutory clock does not begin to tick until the plaintiff is aware of the facts which constitute the cause of action, or the date on which the plaintiff first could reasonably have determined them, whichever is earlier. In addition, under the Torts Ordinance a claim may not be filed after the expiry of ten years from the date on which the damage was caused, meaning that the statute of limitation in torts expires upon the earlier of seven years from the discovery of the damage or ten years from the causation of the damage. In the case of a product liability claim, the statute of limitations under the Defective Products Law is three years and there can be no claim more than 10 years after the product left the manufacturer's control.

**Alan:** Please describe how Israeli courts establish jurisdiction over foreign defendants.

**Gilad:** To serve a party outside Israel, the claim must be based on alleged wrongful acts or omissions, or injury that occurred in Israel. A breach of contract governed by Israeli law, entered into in Israel, or to be performed in Israel, also triggers Israel's jurisdiction. Plaintiffs must present the basis for personal jurisdiction when seeking leave from the court to serve a foreign party. Service must conform to the Hague Convention. The foreign party can raise the lack of personal jurisdiction as a defense in its response to plaintiff's statement of claim. Another option to establish jurisdiction over a defendant not present in Israel, is by serving its agent or representative in Israel.

**Alan:** In U.S. courts, the plaintiff has the burden of proving jurisdiction once challenged by the defendant. To reach non-resident corporations, states generally have "long-arm" statutes for the benefit of state residents that authorize specific jurisdiction over non-resident defendants when the alleged misconduct or resulting injury occurred in the state. Constitutional due process requires the defendant to have minimal contacts with the state, and limits the state's ability to exercise jurisdiction over the defendant. General jurisdiction over the non-resident defendant is

limited to states where the defendant is deemed to be at home.<sup>3</sup> Federal courts apply the personal jurisdiction law of the state in which the court sits, subject to Constitutional due process limitations. Service outside the U.S. must conform to applicable treaties.

**Gilad:** We have not talked about the award of fees and costs. In Israel, courts may award legal fees and expenses. Courts generally order the losing party to pay the legal fees and costs of the prevailing party. The courts are given broad discretion in determining the fees and costs to be paid, and usually make awards that are far less than the actual fees and costs.

**Alan:** The American rule provides that all parties bear their own fees and costs. However there are statutory causes of action, for example, consumer protection laws and civil rights statutes that authorize the recovery of fees by prevailing plaintiffs. Some states have product liability laws allowing an award of fees for a frivolous lawsuit or defense.

**Alan:** It has been my experience that pre-trial discovery in American courts is much broader than that permitted in other countries. Cases in the U.S., for example, will have pre-trial depositions of fact and expert witness. What about Israel?

**Gilad:** In Israeli courts parties are able to engage in document discovery and interrogatories. Depositions are not permitted. Requested documents must be directly relevant to the issues in dispute and thus productions typically are narrower in scope than in the U.S. Similarly, Israeli courts frown upon interrogatories and document requests that are not reasonably relevant, overbroad, too long, or require an unreasonable effort to answer.

**Alan:** In the U.S., either party can request a jury trial where damages are sought. Do trials in Israel have juries?

**Gilad:** No. Israeli law does not provide for juries. The judge is the finder of fact.

**Alan:** How are trials conducted?

**Gilad:** Trials in Israel differ from those in the U.S. Under Israeli civil procedure, the evidence is submitted to court after the pre-trial proceedings. The evidence submitted includes fact witness

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<sup>3</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (key question is “whether that corporation’s affiliations with the State are continuous and systematic as to render [it] essentially at home in the forum state.”)

affidavits in chief, expert opinions, and motions to summon fact witnesses not under the party's control. Following submission of evidence (of both parties) the court will schedule a hearing. In this hearing(s) the summoned fact witnesses will testify (direct, cross and redirect), and the affiants and expert witnesses will be cross examined. Personal injury cases, including product liability claims, are different because the medical expert opinions are served during the pre-trial proceedings, prior to the submission of fact witness affidavits. The procedure is otherwise the same. There is no special hearing to hear the experts, so efforts to preclude an expert must be taken at the hearing.

**Alan:** Do Israeli courts allow class actions for consumers injured by defective products?

**Gilad:** Class actions have become common in Israel, and like American class actions, are traditionally brought in consumer protection matters, unfair trade practices, and discrimination claims. The criteria in Israel for certifying a class generally are the same as the U.S., but in Israel, the movant also must demonstrate that there is a reasonable chance of prevailing on the merits. Class actions generally are not recognized as being appropriate for product liability personal injury cases, where individual issues typically predominate.

A novel product liability class action in Israel is failure to disclose information cases that "breached the autonomy" of plaintiffs. The "breach of autonomy" doctrine is a unique head of damage recognized by the Supreme Court, defined as unlawful harm to the feelings of a person as a result of a failure to respect his fundamental right to fashion his life as he wishes. The damage to the plaintiff is in not receiving proper disclosure of something that was significant to her in fashioning her life. The characteristics of this head of damage are unique themselves - the very claim of failure to disclose information that ought to have been disclosed is intertwined with the element of damage, so that in fact, a search for a causal link becomes almost meaningless.

For example, in a landmark Supreme Court decision<sup>4</sup>, it was held that a milk manufacturer did not disclose to the public that it added Demethyl Poly Siloxane (silicon) as an additive to the long-life

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<sup>4</sup> CA1338/97 *Tnuva Cooperative Center for the Marketing of Agricultural Produce in Israel Ltd. v. Tawfik Rabi & Ors.*, P.D. 57(4) 673

milk that it manufactured, in order to prevent it from frothing. Although the Supreme Court held that the silicon additive did not harm the health of plaintiff, it ruled that non-disclosure of the addition of silicon by the manufacturer had breached the plaintiff's autonomy (i.e. – to decide whether he wishes to consume silicon) causing him negative feelings and feelings of disgust, in such a way as to give rise to damage of breach to his autonomy. Compensation may be awarded for the breach of plaintiff's autonomy to reach informed decisions.

**Alan:** Class actions also are common in the U.S., however, certification of product liability personal injury claims are rare.<sup>5</sup>

**Alan:** Gilad, how are damages calculated in Israel? By whom?

**Gilad:** Judges have broad discretion in determining damages. Punitive damages are available in torts, such as product liability claims, for intentional or reckless conduct, but are rarely awarded, and are much smaller than U.S. awards. Monetary judgments include interest and “linkage differences,” and are typically calculated from the time the cause of action accrued. Linkage differences take into account inflation between the time the cause of action accrued and the satisfaction of judgment.

**Alan:** Punitive damage awards in the U.S. are common and can be very high. The Supreme Court decision in *BMW v. Gore*<sup>6</sup> placed some constitutional limits on punitive damages and held that a \$2 million punitive damages award imposed for a tort that involved \$4,000 in economic harm was constitutionally excessive. According to the Court, due process requires that punitive damages must take into account the degree of reprehensibility of defendant's conduct, the ratio of the punitive damages to compensatory damages, and comparison of the award to penalties and

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<sup>5</sup> Recently consumer class actions have drawn a lot of critical attention. In *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016), the Supreme Court addressed the minimal standing requirements for plaintiffs exercising their explicit right to sue for violations of a federal consumer protection statute. The Court held that statutory standing to bring a class action under the statute required the plaintiff to have an “injury-in-fact” that must be “concrete and particularized.” According to the Court, “a bare procedural violation, divorced from any concrete harm would not satisfy the injury-in-fact requirement.” Courts and parties also have focused on the size of class counsel's requested fee award in relation to the compensation actually paid to class members.

<sup>6</sup> 517 U.S. 559 (1996)

finest that could be imposed for comparable conduct. Nevertheless, punitive damages awards often are awarded, particularly in product liability claims, and can be very large.<sup>7</sup>

**Gilad:** Alan, based on the differences between Israeli and U.S. judicial systems do you think that our client should move for dismissal of personal injury claims resulting from swallowed toys filed by Israelis in the U.S.?

**Alan:** Yes, Israel is a fair and adequate forum in which to litigate these claims. Further, it makes strategic sense for our client. The Israeli judicial system discourages weak claims, may result in lower verdicts, and reduce defense costs, when compared to the U.S. judicial system. The “loser pays rule,” the lack of a jury, the pre-filing of a case in the form of written witness statements, the lack of depositions, and the judicial reluctance to award punitive damages, makes Israel a more attractive forum in which to litigate these claims. I recommend that we move to dismiss cases brought in the U.S. by Israeli plaintiffs on the basis of *forum non conveniens*.

**Gilad:** I agree with you Alan, it is in our client's best interest to have this product litigation in Israel. From my experience settlement sums in Israel are relatively low and many foreign companies prefer to avoid litigation and settle for sums that may be lower than litigation costs.

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<sup>7</sup> For example, Johnson & Johnson was hit with a \$347 million punitive damages award in a California talcum powder products case in August 2017, and in September 2017 a Florida appellate court sustained a jury award of \$12 million in punitive damages in a smoker wrongful death case. Connecticut law, however, limits punitive damages to twice a plaintiff’s actual damages in product liability cases. C.G.S §52-240b.

**Gilad Schiff** is a partner in the firm's Litigation Group. Gilad specializes in civil and commercial litigation and appears regularly before courts of all instances, as well as arbitration and mediation proceedings. Gilad handles large-scale class actions and represents Israeli and international clients in various complex commercial conflicts relating to corporate, commercial, banking, securities and administrative law. Gilad also specializes in the field of pharmaceutical law and represents a number of multinational pharmaceutical companies in matters involving product liability, regulation and class actions.

**Alan Schwartz** is co-chair of the firm's Product Liability practice group (the 2015 recipient of the Connecticut Law Tribune's Litigation Department of the Year Award for Product Liability). He has particular experience in the area of pharmaceutical defense. Representative assignments include being on the national defense teams in the Yaz/Yasmin litigation, the Trasyolol litigation, and in the Baycol litigation. Mr. Schwartz has been involved in key aspects of the defense effort in these cases, preparing and defending witnesses at depositions in the U.S. and overseas, and preparing cases for trial. Other representative pharmaceutical assignments include local and national work for Merck in the Vioxx litigation and for AstraZeneca in the Seroquel litigation. Mr. Schwartz also has represented Eli Lilly and Medtronic in cases pending in Connecticut state and federal courts. In addition to his pharmaceutical and medical device practice, Mr. Schwartz' products practice includes cases involving beer kegs, seatbacks, welding rods, hair dyes, benzene exposure, contaminated IV solutions, and grinding wheels.