LCA 9615/05

Irit Shemesh
v.
Focaccetta Ltd

The Supreme Court sitting as the Court of Civil Appeals
[5 July 2006]
Before Justice E. Rubinstein

Appeal by leave of the judgment of the Jerusalem District Court (Justice B. Okon) on 14 September 2005 in LCA 844/05.

Facts: The applicant, who was pregnant, and her children went to dine at the respondent's restaurant. While dining, another customer of the respondent began to smoke. The applicant complained to the respondent but the customer continued smoking.
The applicant filed a claim in the Small Claims Court on the grounds that the smoking in the restaurant was illegal and caused her damage. The trial court held that the respondent had breached the law, but it only awarded the applicant compensation for the cost of the meal (NIS 112) plus expenses. The applicant applied for leave to appeal to the District Court, but the District Court held that the amount awarded fell within the broad margin of reasonableness. The applicant then applied to the Supreme Court for leave to file a further appeal.

Held: The court recognized the importance of enforcing the Restriction of Smoking in Public Places Law, 5744-1983, by means of civil actions, especially in view of the ineffectiveness of enforcement of the law by the authorities. A breach of the law constitutes a breach of the statutory duty in the Restriction of Smoking in Public Places Law, which was intended to protect the health of persons in public places. Jewish law has also increasingly recognized the dangers caused to the public by smoking in public places.
The Restriction of Smoking in Public Places Law does not contain a provision for awarding compensation without proving damage. But it is very difficult, because of the nature of the case, to prove specific damage from an incident of smoking. In view of the fact that the breach of the statutory duty in this case involved a family with children and a pregnant woman, there are grounds for giving stronger emphasis to the damage, for the purpose of deterrence. The Supreme Court therefore awarded the applicant an additional NIS 1,000 in compensation.

Appeal allowed.

Legislation cited:

Copyrights Ordinance, s. 3A.

Courts Law [Consolidated Version], 5744-1984, s. 64.

Duty of Reporting Health Hazards Caused by the Smoking of Tobacco Products Law, 5761-2000.

Equal Employment Opportunities Law, 5748-1988, s. 10(a)(1).

Prohibition of Defamation Law, 5725-1965, s. 7A.

Prohibition of Discrimination in Products and Services and in Entry to Public Places Law, 5761-2000, s. 5(b).

Restriction of Smoking in Public Places Law, 5744-1983, s. 1(a), schedule: s. 11.

Restriction of Smoking in Public Places (Affixing Signs) Regulations, 5744-1984.

Torts Ordinance [New Version], ss. 63, 63(a), 63(b).

Israeli Supreme Court cases cited:

[1] LCA 8144/04 *Budker v. Bashkirov* (not yet reported).

[2] LCA 3006/05 *Prifer Tiv'i Ltd v. Reuveni* (not yet reported).

[3] HCJ 1809/90 *Society for the Advancement of Health v. Minister of Health* (unreported).

[4] HCJ 3270/91 *Society for the Advancement of Health v. Mayor of Tel-Aviv* (unreported).

[5] HCJ 7013/97 *Mishali v. HaEmek* (unreported).

[6] HCJ 3367/94 *Ginat v. Haifa University* (unreported).

[7] LCrimA 2788/00 *Nameir v. State of Israel* [2000] IsrSC 54(3) 385.

Israeli District Court cases cited:

[8] OM (Jer) 386/98 *Elner v. Hebrew University* (unreported).

Jewish law sources cited:

[9] Babylonian Talmud, Tractate *Sanhedrin*, 8a.

[10] Rabbi Yisrael Meir HaCohen, *Likutei Amarim* 13.

[11] Rabbi Yisrael Meir HaCohen, *Zechor LeMiriam* 23.

[12] Deuteronomy 4, 15.

[13] Rabbi Moshe Feinstein, *Igrot Moshe*, *Yoreh Deah* 2, 49.

[14] Rabbi Moshe Feinstein, *Igrot Moshe*, *Hoshen Mishpat* 2, 18.

[15] Rabbi Moshe Feinstein, 'The Smoking of Cigarettes in the Study-Hall,' 5 *Asia* 248-251.

[16] Rabbi Eliezer Waldenberg, *Tzitz Eliezer* 15, 39; 17, 21-22
[17] Rabbi Ovadia Yosef, *Yehaveh Daat* 5, 39.
[18] Rabbi Avraham Sheinfeld, *Damages* (in the *Hok LeYisrael* series, N. Rakover ed.).
[19] Rabbi Mordechai Halperin, 'Smoking — a Jewish Law Review,' 5 *Asia* 238-247 (1986).

For the appellant — A. Hausner.
For the respondent — E. Vazana.

JUDGMENT

Justice E. Rubinstein

1. This application concerns the Restriction of Smoking in Public Places Law, 5744-1983 (hereafter — 'the Restriction of Smoking Law' or 'the law') and the compensation that should be awarded for a breach of its provisions.

2. On 11 February 2005, the applicant (who was pregnant) and members of her family dined at the restaurant owned by the respondent. After she made her order, other customers appeared in the restaurant and began to smoke. A waitress also smoked. The applicant called the waitresses and asked for the smoking to be stopped. This was not entirely successful. The applicant argued in the Small Claims Court that the smoking was contrary to the law, that there were neither proper signs nor any proper separation in the restaurant, and that she, her children and the embryo in her womb suffered damage. In reply, counsel for the defendant argued that the restaurant has two levels and the upper level is designated for non-smokers, but the plaintiff refused to dine on the upper level.

The Small Claims Court (*per* Justice Lechovitsky) held that the defendant did indeed breach the provisions of the law, because there were no signs concerning smoking or any separation between the levels, and also because the area of the upper level did not satisfy the requirements in the law. With regard to the damage, the court awarded the plaintiff the amount of the meal (NIS 112), together with linkage differentials and interest, the amount of the court fee and expenses in a sum of NIS 150.

3. The applicant applied for leave to appeal in the District Court, on the grounds that the compensation was too little, the attitude of the respondent

toward her was deprecating, and the subject-matter of the claim was irreparable harm to health. The District Court (Justice Okon) held that claims of this kind should be treated seriously, that it was difficult to say that the compensation was satisfactory and that there were grounds to award a higher sum. However, this determination in itself was insufficient to permit an appeal, since the amount awarded did not fall outside the broad margin of reasonableness.

4. (a) In the present application, it is argued that there is a need for a guideline from the court in view of the multitude of breaches of the law, which has become a 'national plague.' In view of this, and in view of Israel's commitment to the World Health Organization Framework Convention on Tobacco Control, there is a basis for granting leave to appeal. There is a question with regard to the amount of compensation when it is not possible to indicate specific damage but 'tortious' compensation is sought.

(b) The respondent argues that there is no basis for considering the matter a third time, that the applicant's claims go beyond what was argued in the lower courts, that there is no basis for 'penal' damages and that, unlike certain laws, the Restriction of Smoking Law does not contain any provision concerning compensation without proving damage. According to the respondent, the applicant should file an administrative petition against the authorities responsible for enforcing the law.

5. (a) I have decided to grant leave to appeal, to consider the application as if an appeal were filed pursuant to the leave granted, and to allow the appeal.

(b) Indeed, in so far as small claims are concerned, the legislature provided a special procedural framework. On the one hand, it sought to allow a quick and inexpensive proceeding for trying these claims. But on the other hand it determined restrictions, such as short times frames and the need to obtain leave to file an appeal. The purpose of these restrictions is, *inter alia*, to prevent the courts, which are already overburdened, from being inundated with proceedings for small amounts of money, and even according to the view of the Talmudic sage Resh Lakish that 'one should regard a case of a penny as a case of ten thousand' (Babylonian Talmud, *Sanhedrin* 8a [9]), meaning that one should regard small and large claims as of equal importance, one should not always apply the law to its strict conclusion. With regard to the question of appeals, leave is required even for a first appeal to the District Court (s. 64 of the Courts Law [Consolidated Version], 5744-1984); leave is required *a fortiori* in order to appeal for a third proceeding in

this court, and in such circumstances leave is granted sparingly (see LCA 8144/04 *Budker v. Bashkirov* [1] and the references cited there, and LCA 3006/05 *Prifer Tiv'i Ltd v. Reuveni* [2]).

(c) In our case, the reason for allowing the appeal is the importance of implementing the Restriction of Smoking Law in civil contexts. The Small Claims Court held that the respondent breached the law, and it was not prepared to accept the respondent's arguments concerning the separation of its premises into a smoking area and a non-smoking area. The court rightly observed, and this was also accepted by the District Court, that s. 1(a) of the Restriction of Smoking Law prohibits smoking in a restaurant (which is defined in s. 11 of the schedule as a public place), and it imposes liability on the person in possession of the restaurant to display signs that indicate that smoking is prohibited. In order to permit smoking, there is a need for an arrangement that provides a separation, and the smoking area cannot exceed one quarter of the restaurant. These conditions were not satisfied, as can be seen from the record of the Small Claims Court. It is not superfluous to mention that the Restriction of Smoking in Public Places (Affixing Signs) Regulations, 5744-1984, provide that, in restaurants, signs concerning the restriction of smoking should be installed in every room apart from the smoking room, with a minimum amount of one sign for each ten metres of wall length or one sign, whichever is the greater. It should also be stated that Israel has ratified the World Health Organization Framework Convention on Tobacco Control. Article 8(1) of this provides that 'scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability'; therefore, each member country is required to adopt legislative and administrative measures providing for protection from exposure to tobacco smoke, *inter alia* in indoor public places. Counsel for the applicant argued that past petitions to implement the law (HCJ 1809/90 *Society for the Advancement of Health v. Minister of Health* [3] and subsequently HCJ 3270/91 *Society for the Advancement of Health v. Mayor of Tel-Aviv* [4]) were denied, even though the court called for the implementation of the law. See also HCJ 7013/97 *Mishali v. HaEmek* [5]. There were also several students' petitions with regard to this law (HCJ 3367/94 *Ginat v. Haifa University* [6], OM (Jer) 386/98 *Elner v. Hebrew University* [8]. In the last-mentioned case, Justice Procaccia extensively surveyed the law and the need to implement it. I will mention that the explanatory notes to the draft law (the draft Prohibition of Smoking in Public Places Law, 5743-1983 (*Draft Laws* 5743, at p. 195), begin by observing: 'Smoking in public places harms and upsets the non-smoking public present

there.' It should be noted that pursuant to the Duty of Reporting Health Hazards Caused by the Smoking of Tobacco Products Law, 5761-2000, a report about smoking in Israel for the years 2004-2005 that was submitted to the Knesset in July 2005 revealed that only three administrative fines were given for smoking in restaurants in Jerusalem in 2005.

(d) Indeed, the authorities should carry out their duties of supervision and enforcement that were imposed on them by the legislature. But the sluggishness and slowness of the authorities' action justifies opening a door for 'civil enforcement,' so that the caring citizen who wishes to protect his health and the health of the public can also have an effect for the benefit of the public. An action for breach of a statutory duty under s. 63 of the Torts Ordinance [New Version] is also a way of doing this, since we are dealing with harm to human beings that is cumulative. It is not superfluous to mention that section 63(b) of the Torts Ordinance provides that —

'Breach of statutory duty

> 63. …
>
> (b) With regard to this section, legislation is regarded as having been made for the benefit or protection of a person, if according to its proper interpretation it is for the benefit or protection of that person or for the benefit or protection of persons in general or of persons of the kind or class that includes that person.'

For our purposes, there is no doubt that this is true of the Restriction of Smoking Law; see also M. Cheshin in *The Laws of Tort, the General Theory of Tort* (G. Tedeschi, I. Englard, A. Barak, M. Cheshin eds., 1977), at p. 106.

(e) When the danger of smoking first became clear, Torah scholars and Jewish law authorities of the previous generation addressed the issue by gradually expressing greater and greater reservations with regard to smoking and pointing out the harm that it causes. It should be noted that in the past smoking in *yeshivot* (rabbinical academies) was almost a matter of course for many people, so that to come and turn the tide was no small step. But already long ago, at the beginning of the twentieth century, even before the categorical medical opinions of our generation, the author of *Hafetz Hayim* (Rabbi Yisrael Meir HaCohen, Russia – Poland, the nineteenth-twentieth centuries) came out against smoking, and noticed already that 'several doctors have said that anyone who is weak should not acquire this habit since it depletes his strength, and sometimes even costs him his life…' (*Likutei*

Amarim 13 [10]; *Zechor LeMiriam* 23 [11]); he based his remarks also on the Biblical verse (Deuteronomy 4, 15 [12]): 'And you shall take great care of yourselves.' Rabbi Moshe Feinstein (Russia – the United States, the twentieth century) in his responsa *Igrot Moshe* (*Yoreh Deah* 2, 49 [13]) was aware of the fact 'that several great Torah scholars of past generations and in our generation smoke' and although he did not prohibit smoking, he points out that 'since there is a concern that one may become ill from it, one ought to be wary of it.' In another place in his responsa (*Hoshen Mishpat* 2, 18 [14]) he said that 'it is well known that it is something that harms many people,' and also (*ibid*.) with regard to cigarettes 'that those people who cannot bear it really suffer; this is not merely that they are particular or delicate, nor does it merely distress them but it also really causes them harm'; see also the letter of Rabbi Feinstein concerning 'The Smoking of Cigarettes in the Study-Hall,' 5 *Asia* 248-251 [15]. Thus we see that smoking has ultimately become regarded as harmful. The issue was discussed more extensively by Rabbi Eliezer Waldenberg (Jerusalem, in our generation) in his responsa *Tzitz Eliezer*, where he describes (15, 39 [16]) his conviction 'that the smoking of cigarettes is like coals that burn the body, because it causes very serious harm to the health of the smoker's body…'. Rabbi Waldenberg adds to the remarks of Rabbi Yisrael Meir HaCohen and says that today when the harm of smoking has become clear —

> '… in the full severity of its poison, and the huge number of people killed by it and its many victims are clearly seen, this applies therefore to everybody, even if they do not appear weak… and therefore a person should note that he should distance himself at all costs from smoking and the fumes from it…'.

Rabbi Waldenberg concludes (*ibid*, 9 [16]):

> 'In summary, this ruling can be seen from our remarks to be the law, for there is a good basis to prohibit smoking under Torah law, and also when people smoke in public places, any person who is afraid that his health may be harmed has a good case to protest against the smokers that they should not smoke.'

See also *Tzitz Eliezer* 17, 21 [16], and also *ibid*., 22, 'that smoking causes [harm] both to the smoker and to anyone near the smoker who becomes a passive smoker and who can be harmed to a certain degree like the smoker himself,' and the author encourages protests against smokers, since the prohibition applies 'only when there is a protest from the public, or even

from the individual.' In our case it can also be said that the legislature constitutes a 'public protest,' and the applicant comes and adds to it an individual protest. See also the remarks of Rabbi Ovadia Yosef in his responsa *Yehaveh Daat* 5, 39 [17], at p. 180:

> 'But how good and pleasant it is to refrain from smoking cigarettes in general all year round, since it has become widely publicized that, according to the opinion of medical and scientific experts in our times, smoking is harmful and very dangerous, and it may lead to terrible illnesses and endanger a person's health. Whoever takes care of himself will keep away from them. And the Torah has already warned: "And you shall take great care of yourselves".'

Admittedly Rabbi Yosef, like Rabbi Feinstein, also did not prohibit smoking, but he did express its harm. See also Rabbi A. Sheinfeld, *Damages* (in the *Hok LeYisrael* series edited by N. Rakover), at p. 246 [18]; Rabbi M. Halperin, 'Smoking — a Jewish Law Review,' 5 *Asia* 238-247 [19] (see the discussion of damage to others and the references; see also note 53 with regard to the development that took place in Rabbi Feinstein's thinking); Dr E. Meltzer, 'The Effect of Smoking on the Cardiovascular System, the Blood Vessels and the Pulmonary System,' *ibid*., at pp. 222-223; Dr B. Herskovitz and Prof. R. Katan, 'Smoking and Cancer — Medical Background,' *ibid*., at pp. 234-237; Prof. M. Adler and Prof. Y. Shenfeld, 'The Harms of Smoking,' *ibid*., 47-48, 90-100 (the authors also discuss the damage from passive smoking). See also the references in the index of the periodicals of the Bar-Ilan University Responsa Project. All of these references speak for themselves, and they are consistent with the approach of the Israeli legislature, which also did not prohibit smoking but placed restrictions on it for the public benefit in the Restriction of Smoking Law.

(6) On the one hand, I do not think there is a place for 'sweeping' guidelines of this court with regard to the amount of compensation that should be awarded for a breach of the Restriction of Smoking Law. Counsel for the respondent rightly pointed out that in laws where the legislature wanted to provide compensation without proving damage, it did so expressly (s. 7A of the Prohibition of Defamation Law, 5725-1965, s. 10(a)(1) of the Equal Employment Opportunities Law, 5748-1988, and s. 5(b) of the Prohibition of Discrimination in Products and Services and in Entry to Public Places Law, 5761-2000 — in all of which the amount was fixed at NIS 50,000 — and in s. 3A of the Copyrights Ordinance, where the amount

ranges from NIS 10,000 to NIS 20,000). There is no similar provision in the law under discussion. On the other hand, because of the nature of the case, in the prevailing circumstances it will be very difficult to prove specific damage from smoking, which tends to be caused over many years. The damage caused — as required by s. 63(a) of the Torts Ordinance — can only be estimated by the 'cumulative likelihood' method. It is clear that the applicant and her counsel are bringing an action that has more of a public character than a personal one. I have also considered the criteria relevant to compensation which were mentioned by learned counsel for the applicant, such as the efforts of the person in charge of a public place to prevent the damage, the degree of profit derived, the seriousness of the breach, etc.. Even though, as stated, I believe that the issue is one that falls mainly in the sphere of the legislature, it seems to me that when a statutory duty is breached, and when we are speaking of a family with children and a pregnant woman, there are grounds for giving stronger emphasis — even if only of a symbolic nature — to the damage, in order to deter the public. This also follows the spirit of the remarks of the learned judge in the District Court, that there was a basis for awarding a higher amount, as well as the spirit of the remarks of Vice-President S. Levin in LCrimA 2788/00 *Nameir v. State of Israel* [7], in a different context, that we are not dealing with an insignificant matter, but with a matter where 'the legislature wanted to provide a normative expression to cultural norms' — in our case in the field of health, within the scope of the culture of providing services.

(7) The appeal is therefore allowed. The respondent shall pay the applicant NIS 1,000 in addition to what was awarded in the trial court, and also the costs of the proceedings in this court together with legal fees in a sum of NIS 1,000.

Appeal allowed.

9 Tammuz 5766.

5 July 2006.