

# The Ringworm Case and the Lost Opportunities for the Construction of a Collective Healing Process

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## Abstract

*The issue of apology and disclosure of medical errors in the context of the physician-patient relationship has attracted increasing attention in recent years. On the other hand, it has received little attention in the context of public health activities, thus missing the collective healing potential of apologizing and providing information to the public.*

*The purpose of this paper is to enrich the discussion regarding apologies and disclosure errors in the context of public health. To fulfil this purpose, the paper addresses the ringworm case, which is a well-known episode in the history of Israeli public health policy. More specifically, the paper focuses on a decision handed by the Israeli Supreme Court in the Eibi Case (2015), which recognized a duty to inform ringworm patients about the medical error involved in their treatment and its results. The paper seeks to examine whether this decision succeeded where other legal means failed, in the construction of a collective healing process. The paper concludes that although the Eibi Case provided the court an opportunity to contribute to the creation of a collective healing process of ringworms patients, the decision didn't fully realize this potential.*

**Keywords:** public health, apology, disclosure of medical errors, collective healing process, ringworm case.

## 1. Introduction

The importance of apology and disclosure of medical errors in the context of the physician-patient relationship has been recognized in recent years by legislators,

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medical organizations and scholars.<sup>1</sup> Scholars supporting this practice argue that an apology or disclosure of medical errors has important benefits for the parties to the dispute as well as to society. These include non-pecuniary as well as pecuniary benefits: respecting the patient's autonomy, facilitating healing, increasing self-esteem of both parties, improving doctor-patient communication, improving patient safety, avoiding litigation and increasing the probability of reaching settlements, with the resulting saving in litigation costs (Robbennolt, 2003; Chamberlain et al., 2012; Banja, 2012; Cohen, 2000; Taft, 2005; Phillips-Bute, 2013)

While attracting increasing attention, the question of apologies and disclosure of medical errors as a desirable practice as well as the way they should be promoted, are mostly addressed in the context of the doctor-patient relationship. These questions receive little attention in the context of public health activities, thus ignoring the collective healing potential of apologizing and providing information to the public (Alberstein & Davidovitch, 2011).<sup>2</sup>

The purpose of this paper is to enrich the discussion regarding apologies and error disclosure in the context of public health. To fulfill this purpose, the paper addresses the ringworm case, which is a well-known episode in the history of Israeli public health policy. More specifically, the paper focuses on a decision handed down by the Israeli Supreme Court - CA 1535/13 The State of Israel v. Eibi (2015) (herein after "the Eibi decision")- which recognized a duty to inform ringworm patients about the medical error involved in their treatment and its results. The paper seeks to examine whether this decision succeeded, where other legal means failed, in the construction of a collective healing process.

The paper proceeds in five parts. The first part sets the factual background needed for the discussion. The second part describes the normative framework of the ringworm case, from the early 1990's to the early 21st century. The third part presents the critical discourse regarding this normative framework. In the fourth

1 Approximately 43 states in the US have enacted "apology" or disclosure laws. See: Rothstein, M. A. & Siegal, G. (2012). Health information technology and physicians' duty to notify patients of new medical developments. *Houston Journal of Health Law Policy* 12(2), 93-136, 117; Phillips-Bute, B. (2013). Transparency and disclosure of medical errors: It's the right thing to do, so why the reluctance. *Campbell Law Review* 35(3), 333-[ii], 346-347. These laws often seek to encourage apology, other expressions of empathy and disclosure of medical errors, through protecting such statements from being used as evidence in future litigation. Physicians' organizations also support disclosure of medical errors. See: Council on Ethical and Judicial affairs, code of Medical Ethics of the American Medical Association: Current Opinions with Annotations, §8.6 (2016), <https://www.ama-assn.org/delivering-care/ama-code-medical-ethics>; Israeli Medical association, "A Physician is Ethically Bound to Inform a Patient that a Mistake Occurred During Medical Treatment"(2004) <https://www.ima.org.il/MainSiteNew/EditClinicalInstruction.aspx?ClinicalInstructionId=132>. Several hospitals willingly adopted systems of apology and disclosure. See: Davenport, A. A. (2006). Forgive and forget: Recognition of error and use of apology as preemptive steps to ADR or litigation in medical malpractice cases. *Pepperdine Dispute Resolution Law Journal* 6(1), 81-108, 86-87; Cohen, J. R. (2000). Apology and organizations: Exploring an example from medical practice. *Fordham Urban Law Journal* 27(5), 1447-1482. 1452-1453, 1456, 1464-1465. For other programs that promote full disclosure of medical errors, see: Phillips-Bute, supra note 1, 334, 337, 339-342.

2 See: Michal Alberstein, Nadav Davidovitch, Apologies in the Healthcare System: From Clinical Medicine to Public Health, 71 *Law and Contemporary Problems* [2011]151, 151.

part, the Eibi Case is presented. The fifth part examines whether the Eibi case successfully contributed to the construction of a healing process. The sixth part concludes the paper.

## 2. The Story of Ringworm Patients -- the Factual Framework

Following the mass immigration to Israel in the 1950's, the Israeli medical establishment faced a ringworm outbreak. Although not a life-threatening disease, it was considered to be an infectious disease that endangered public health.<sup>3</sup> In an effort to eliminate the disease, a program of ringworm treatment was instituted. The treatment involved irradiation of the scalp of all persons suspected of having ringworm, which was an acceptable treatment of the disease at the time (Alberstein & Davidovitch, 2010; Modan & Peri, 2002).<sup>4</sup>

Those who were found suspected of having ringworm were sent to ringworm centers, where they were treated for several days to weeks. The treatment included cutting of the hair and shaving of the heads, followed by several consecutive rounds of irradiation to the scalp. Afterwards, the hair was epilated using hot wax and tweezers. The treatment was usually finished by applying iodine on the scalp and covering of the head by a temporary sterile cap. When returning to their families, the children were isolated until no longer considered infected but continued to wear a cap. These facts suggest that the treatment was harsh. It involved painful procedures and had emotionally unpleasant aspects, such as separation from the family and damaging patients' appearance (Davidovitch & Margalit, 2008; Alberstein & Davidovitch, 2011).

Although the exact number of patients is unknown, it is estimated that between 1949 and 1960, approximately 70,000 immigrants were irradiated against ringworm. Most of the patients were children, and many of them emigrated from North African countries.<sup>5</sup> The irradiation treatment for ringworm was officially terminated in the 1960's, and replaced with a new oral treatment (Circular 2/09).

While ringworm cases decreased, the treatments had negative health implications. In the short term, the treatments often caused scars and bald spots. In the

- 3 Ringworm is a very infectious and common skin infection, caused by fungus that grows on the skin. It is especially common among children. The disease carried negative social stigma and was often attributed to primitive life style, lack of hygiene and low socioeconomic class. See: Cherka, M. (2014). The Struggle of Victims of Ringworm Treatment: Is it a struggle that failed. *Maasey Mishpat* 6, 135-156, 136-137; Alberstein, M. & Davidovitch, N. (2010). Therapeutic Jurisprudence and Public Health: An Israeli Study. *Bar-Ilan Law Review* 26(2), 549-588, 581.
- 4 See: Circular 2/09, The Compensation for Victims of Ringworm Law, 1994- Background, Health Implications, Surveillance and Treatment Procedure in Population Exposed to Radiation During the 1950's as a Treatment for Ringworm (5/1/09) [hereinafter Circular 2/09], [http://www.health.gov.il/hozer/mk02\\_2009.pdf](http://www.health.gov.il/hozer/mk02_2009.pdf).
- 5 While most irradiated patients were children that emigrated from countries in the Middle East and North African, the irradiated population also included patients born in Israel, Arabs and adults. See: Modan, B. & Peri, S. (2002). Risks Factors and Compensation Factors: The Policy of the State towards Ringworm Radiated Patients. In R. Cohen (ed.) *Dilemmas in Medical Ethics* (pp. 388-411) Israel: Van Lir Institution, 389.

long term, it was subsequently discovered that the irradiation increased patients' risk of developing head and neck cancer (Circular 2/09; Alberstein & Davidovitch, 2010).

In 1965, a first epidemiology study aiming to investigate the implications of x-ray treatment on ringworm patients was initiated in Israel. The research, conducted by Prof. Baruch Modan, included a long-term follow-up of a cohort of 10,834 previously irradiated children. During the 1970's, the first results of Modan's research were published, in two papers that were mainly targeted to the medical community (Modan,1975;Modan at all, 1974). The findings indicated that irradiated patients presented a higher measure of head and neck malignancies compared to the non-irradiated control group( Circular 2/09). At the time, these findings did not have much impact in the medical community, despite their importance (Alberstein & Davidovitch, 2010).

Considering that it was impossible to prevent the malignancies, and out of fear that disseminating these findings would create panic, Modan believed, at first, that this information should not be published to the public. However, after further consideration, it was decided that irradiated patients would be offered a screening test for early detection of thyroid cancer. Following this decision, a call to be screened, which was directed to "the lost ringworm children", was published in a daily newspaper. Only 800 applicants approached Modan following this call, out of which 350 people were screened (Alberstein & Davidovitch, 2010).

In 1989, a Committee was appointed by the Israeli Ministry of Health (IMH), for the purpose of examining the issue and suggesting solutions. The committee recommended to inform the public that early detection of certain types of cancers might prolong life expectancy and that environmental effects might hasten the development of cancer in a person who had been exposed to x-ray radiation. Following the committee's recommendations, the issue was discussed by government officials. During these discussions, an objection was expressed toward proactively publishing the information to the public or proactively screening all irradiated patients. It was claimed that such steps would cause emotional damage that exceeded their benefits. Finally, in 1992, a letter signed by the IMH, and directed to physicians in Israel, was published in the Medical Association Newsletter and two daily newspapers. The letter informed physicians that patients who had been treated with x-ray for ringworm, were at higher risk of developing malignancy tumors. The letter also instructed physicians to make sure that patients who were known to have been treated with radiation, would perform periodic and routine tests (The Eibi decision, 2015).

In 2006, another committee was appointed, with the purpose of making a recommendation as to whether and how to publish the file known as the Modan file.<sup>6</sup> The committee determined that there was no medical benefit to early detection of the diseases attributed to radiation treatments, except for melanoma of the skin. It also recommended that patients whose details were included in the Modan file should not be individually notified that they were exposed to an

6 The "Modan file" includes the names of 10,834 ringworm patients who were irradiated. See: [https://www.health.gov.il/Subjects/research/tinea\\_capitis\\_institute/Pages/background.aspx](https://www.health.gov.il/Subjects/research/tinea_capitis_institute/Pages/background.aspx).

increased risk of cancer, because of the anxiety and the reduction in quality of life such knowledge was expected to induce. However, the committee recommended that physicians should be instructed to investigate whether patients suffering from symptoms associated with radiation treatments, who were of “Mizrahi” origins and above the age of 46, were exposed to radiation treatments. The committee also recommended that physicians be able to contact the National Center for Ringworm to determine whether a certain patient was included in the Modan file (The Eibi decision, 2015).

In 2009, the IMH published Circulate 2/09, whose aim was to increase physicians’ awareness as to the existence and identification of irradiated patients, to update the medical knowledge and to instruct physicians regarding the proper treatment. Generally, the Circulate adopted the Cohen committee’s recommendations (Circulate 02/09, *supra* note). The Circulate has not been published to the public. While it can be found on the IMH website, which is open to the public, locating it requires former knowledge and a motivation to look for the information. It follows that individual patients were not proactively, directly and clearly informed that they were exposed to increased risks.

To sum up, the ringworm case is first and foremost a case of public health action, which was discovered to be, years later, of injurious nature. It is also a case of a continued, deliberate and paternalistic policy of non-disclosure of newly discovered information about the injurious nature of that action. Finally, it is a case in which the state didn’t clearly, officially or meaningfully apologize to victims, neither as a group nor as individuals.<sup>7</sup>

### 3. The Normative Framework – from the Early 1990s to the Early 21st Century

In the early 1990s, the ringworm matter reached the legal arena. During the 1990’s, approximately 33 claims were filed by plaintiffs who claimed to be injured by radiation treatments (Cherka, 2014; Posner; 2011).

Many of the claims were rejected outright because of the passage of limitation period. Other claims were settled out of courts following the state’s willingness to compensate the injured, notwithstanding the existence of solid defense claims (Cherka, 2014).

7 There are several examples of such public and official apologizes, in the context of public health actions and in other contexts. For these examples, see: Warner, M.R. (2002). Written Statement on the 75th Anniversary of the Buck v. Bell Decision. In Lombardo, P. A. (2003). Taking eugenics seriously: Three generations of are enough. *Florida State University Law Review* 30(2), 191-218, 200, n.56; Alberstein, M., Davidovitch, N., Lombardo, P. & Scott, C. (2007). Saying “I’m Sorry”: The Role of Apology in Public Health. *The Journal of Law, Medicine & Ethics* 35(4\_suppl), 132-134, 134; Cherly Regehr, Thomas Gutheil, Apology, Justice and Trauma Recovery, (2002) 30 the Journal of American Academy of Psychiatry and the Law 425, 425; Australian Human Rights Commission. (2008). Chapter-4 – Beyond the Apology – an Agenda for Healing. In Social Justice Report (pp.147-198). Available at: [https://www.humanrights.gov.au/sites/default/files/content/social\\_justice/sj\\_report/sjreport08/downloads/chap4.pdf](https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport08/downloads/chap4.pdf). (last access 15 May 2018), 177.

The remaining claims met other legal obstacles. Based on the tort of negligence, the plaintiffs had to prove that the course of action taken by the defendants was not reasonable. Two arguments were presented by the plaintiffs to support this claim: First, treating ringworm patients with radiation was a negligent course of treatment. Second, the failure to perform routine screening tests among irradiated patients was negligent (Cherka, 2014; Posner; 2011).

Both arguments were rejected by the courts. Regarding the first argument, it was found that in the 1950's, radiation was an acceptable treatment for ringworm disease. It was also found that at the time, the medical community was unaware of the connection between radiation and cancer. Therefore, treating ringworm patients with radiation was not negligent in and of itself (Damari, 1995).

The second argument was rejected as well, at least regarding hemangiomas. The court found that the only test that could have detected the plaintiffs' hemangiomas at the non-symptomatic stage was CT, which is not recommended as a screening test. It was also found that, in most cases, early detection of the hemangiomas would not have dramatically changed the course of treatment or ended in better treatment results. Moreover, the court believed that although screening tests might have advantages in some cases, they also have disadvantages that should not be ignored. For example, exposure of patients to risky medical procedures or burdening the medical system. It was therefore decided that the failure to routinely screen irradiated patients was also not negligent (Dahan, 1996).

It follows that due to procedural and material limitations inherent to negligence claims, the state was exempted from liability for the harm suffered by irradiated ringworm patients.

Considering plaintiffs' failures in the courts, and following a social and political campaign, the Compensation for Ringworm Victims Law was enacted in 1994 (The Compensation for Ringworm Victims Law, 1994; Charka, 2014; Mimon-Blau, 2013). The law established a procedure for compensation, which was not conditioned on the proof of negligence or causation, thus offering some remedy for some of the injured.

Although establishing a legal arrangement aimed to benefit the injured, the Ringworm Law didn't include a clear acknowledgment of the liability of the state for the harm suffered by irradiated patients. Instead, it focused on the formal and technical aspects of the procedure (Alberstein at all, 2007; Davidovitch & Margalit, 2008; Alberstein & Davidovitch, 2011).

Expressions indicating acknowledgment of liability on behalf of the state were not included in the Compensation for Ringworm Victims Bill either. Although the explanatory notes of the bill described the background for the enactment of the law, and clearly stated that immigrants were treated by radiation, and that radiation was found later to cause various diseases, it didn't clearly admit the state's responsibility for the mistaken treatment and its implications, nor offer explicit expressions of apology or remorse (The Compensation for Ringworm Victims Bill, 1994).

The same approach was adopted by the state in a message published to the public after the enactment of the law, informing patients of their right to com-



compensation. The message, published in daily newspapers, included a description of the entitled population and the procedure of filling a claim. It neither declared state responsibility for the wrong suffered by this population, nor presented the law as an act of remorse by the state (Peleg, 1997).

While the bill, the law and the message that followed its enactment did not explicitly acknowledge the responsibility of the state for the wrong suffered by ringworm patients, expressions of recognition, admission and remorse, as well as empathy for the suffering of the injured, were expressed during the Parliament discussions that preceded the enactment of the law. Thus, when presenting the new law, Israeli Parliament Member Mr. Amir Peretch, who supported and promoted its enactment, stated: "The only thing that the state can provide today for these victims and their families is to say: We acknowledge it, we admit that the State of Israel has made a mistake" (Protocol 246, Labor and Welfare Committee, the 13 Knesset, 1994). Nevertheless, these voices were numbered and doubts were raised as to their symbolic impact.

#### 4. The Critical Discourse Regarding the Legislation and Courts' Decisions

Although accepted at first with joy and hope, the Ringworm Law was severely criticized in the years that followed. Criticism was also aimed at the court decisions. Some of the critics focused on the normative aspects of the legal arrangement and its success in providing the injured fair compensation (Peleg, 1997). Others claimed that the law as well as the court decisions were part of the "objective tools" used to silence the story of ringworm treatments: A story of the effort to eradicate the identity and history of the irradiated population who emigrated from North African and Arab countries and as such was of "Mizrahi" origin (Mimon-Blau, 2013).

Another line of criticism, which stands at the center of this paper, focuses on the failure of the legislature and the courts to express remorse for the wrongs suffered by victims of ringworm treatments, or acknowledge the state's liability for these wrongs. Influenced by the ADR movement, and inspired by ideas of 'therapeutic jurisprudence', 'transitional justice' and the application of apology practices to doctor-patient relations, several scholars claimed that apologies have a significant role in the healing process of collective traumas caused by public health actions. It was further claimed that public apologies could restore public trust in the health system, restore the self-esteem of the individuals within the affected group and rehabilitate the harmed community (Alberstein & Davidovitch, 2011; Alberstein et al., 2007).

Four conditions, which, taken together, would permit the construction of a collective healing process, were proposed in the literature: 1) Recognition of injustice and injury: Proper recognition would include providing information as to the identity of the parties and the details of the wrong; 2) Accepting responsibility for the injustice and injury suffered by the victims; 3) Reconstruction, which requires taking substantial steps towards healing of the social wounds. That is, an apology by the party causing the injury and expression of remorse; and

finally, 4) Reparation through an attempt to heal the victims' material injury. For example, payment of compensation (Ymamamoto, 1999). It was also argued that the construction of the healing process should be sensitive to the social context of the case and the complexity of the cultural perceptions of the parties (Davidovitch & Margalit, 2007).

Based on this theory, Alberstein, Davidovitch and Margalit criticized the Ringworm Law as a lost opportunity for the initiation of a reconciliation process between the state and victims. They claimed that by obligating every person to bring an individual claim and prove entitlement for compensation, the law adopted an individual approach and ignored the collective dimensions of the events. They also claimed that the law did not contain a description of the social and historical context that led to its legislation, thus suppressing the ethnic dimensions of the events. They also criticized the law for ignoring the emotional implications of the events (i.e., shame, social inadaptability, inability to create meaningful intimate relations) (Modan & Peri, 2002), and therefore as failing to convey a message of recognition of the mental trauma suffered by the victims, independently of their physical injuries. Finally, they pointed out the formal and technical nature of the law, as well as the fact that it neither contained words acknowledging the responsibility of the state, nor an apology or expression of remorse.<sup>8</sup> Being of such a nature, they claimed, the law failed to motivate a healing process of the collective trauma suffered by irradiated ringworm patients (Alberstein & Davidovitch, 2011; Alberstein at all, 2007; Davidovitch & Margalit, 2008; Regehr & Gutheil, 2002).

The same line of criticism was presented by these scholars regarding courts decisions. They argued that "regular" tort claims also failed in initiating a collective healing process, because of procedural and material limitations. By dismissing tort claims that were filed against the state, the courts denied irradiated patients the recognition of their suffering a wrong at the hands of the state (Alberstein & Davidovitch, 2010)).

Based on these observations, Alberstein, Davidovitch and Margalit concluded that the traditional patterns of law, which were applied to the ringworm case during the 1990's and the early years of the 21st, had limited potential to heal the collective trauma involved in radiation treatments. The law, so they claimed, should have looked for alternative patterns when approaching the ringworm case. For example, public apologies, public recognition of the victims' suffering, establishment of memorial sites, or providing the victims with opportunities to publicly tell their story. Adopting such procedures could have contributed to the healing process of the collective trauma (Alberstein & Davidovitch, 2010; Alberstein & Davidovitch, 2011).

8 A different approach was adopted by other scholars who claimed that the law expresses an admission and acknowledgment of the mistake by the state. See: Peleg, E. (1997). Lose Out Both Ways. *Medicine and Law* 17, 55-66, 58.



## 5. The Eibi Decision

During the first years of the 21st century, another opportunity to contribute to the construction of a healing process of the collective trauma suffered by irradiated ringworm patients, came into view. A decision handed by the Israeli Supreme Court – the Eibi Case (2015) – held such potential.

The Eibi case addressed the question whether the state had a duty to inform and warn patients treated with radiation that they are exposed to an increased risk to develop tumors.

Addressing the question of disclosure, the Supreme Court accepted the plaintiffs' claim and ruled that the state had a duty of disclosure to patients exposed to radiation and that this duty was infringed. It explained that the state is the official authority responsible for the health and wellbeing of the citizens and was the one who created the risk. The court also believed that the scope of the duty of disclosure should be inspired by standards of disclosure applying to the private sphere of the physician–patient relationship.<sup>9</sup> Therefore, in deciding whether a duty of disclosure existed, consideration should be given to patients' reasonable expectations for information.<sup>10</sup> Considering the interest that irradiated patients showed in the health implications of the treatments they received, the high expectancy of damage associated with radiation, the possibility of early detection through routine and specific follow up tests (some of them simple and inexpensive), and the available means for providing information, the court concluded that the state had a duty to inform irradiated patients that they were exposed to high morbidity risk (the Eibi Case, 2015).

The court rejected the reasons offered by the state for not recognizing a duty of disclosure. The argument that providing such information to patients might cause them anxiety or real damage was found by the court to be an inappropriate paternalistic policy. The court also criticized the state's continuous use of this justification, even after the Supreme Court had already made it clear, in a previous decision, that such a policy was inadmissible and should not deny patients the right to choose whether to perform additional tests and treatments (the Eibi Case, 2015). The court further dismissed the state's fear that recognition of such a duty of disclosure might impose an unreasonable burden on the state to publish, from time to time, information about different diseases, risks or tests. The recognition of a duty to disclose, so the court emphasized, is limited to the specific circumstances of the ringworm case, in which the state initiated the radiation treatments and thus created the increased risk (the Eibi Case, 2015).

Addressing the question whether the state had breached its duty of disclosure, the court found that until the year 2009, when the IMH disseminated circu-

9 According to Israeli law, a physician should provide a patient information that the patient has a reasonable expectation to receive under the circumstances of the case. See CA 1303/09 Kadosh v. Bikur Holim Hosp. 15 (Rivlin, J.), 33 (Amit, J.) (2012) (Isr.). Nevo Legal Database (by subscription).

10 A different approach was presented by Judge Amit who claimed that the scope of the duty of disclosure that applies to the state might be wider or narrower from the one applied to physician toward patient. See: The Eibi case, 2-4 (Amit, J.).

late 2/09 to physicians, it failed to properly inform irradiated patients about the risk to which they were exposed.<sup>11</sup> However, once circulate 2/09 was disseminated to physicians, the state fulfilled its duty of disclosure. Therefore, it was decided that starting from 1991, when a decision was accepted by the IMH to instruct physicians about the health implications of radiation treatments, to 2009, when this instruction was fulfilled through the publication of circulate 2/09, the state had infringed its duty of disclosure (the Eibi Case, 2015).

On the issue of compensation, the court held that once negligence on the part of the state was proved, the plaintiff may be compensated for lost chances of recovery as well as infringement of the right for autonomy (the Eibi Case, 2015).<sup>12</sup> Compensating the plaintiff for lost chances of recovery was stipulated by the court on two conditions: First, a plaintiff that was awarded compensation based on the Ringworm law would not be doubly compensated for the same injuries (the Eibi Case, 2015). Second, a causal connection between the breach of duty of disclosure and lost chances of recovery is proved. For this purpose, the patients should prove that if properly informed, they would have routinely performed the recommended screening tests and would have privately funded them if needed ('decision causation'). In addition, proof should be presented that such screening tests would have enabled early detection of the disease and that following such a detection the patient would have received medical treatment that would have prevented or reduced injuries ('injury causation').<sup>13</sup> Applying these principles to the plaintiffs, the court ruled that four of them failed in proving causation as required. Accordingly, these patients were not compensated for lost chances of recovery.<sup>14</sup>

Compensating the plaintiff for the infringement of the right to autonomy was also limited by the court. Following the approach adopted by the Supreme Court in former decisions,<sup>15</sup> it was made clear that only an injury to the right's core entitled the plaintiff to compensation. Moreover, the compensation was not

11 It is worth nothing that a former decision made it clear that by enacting the Ringworm Law the state didn't fulfill its duty of disclosure. See: CA (District Court Jerusalem) Reuven v. the State of Israel 17 (12.1.2006, Nevo).

12 According to Israeli law, infringement of the right for autonomy entitles the plaintiff to compensation, regardless whether the plaintiff suffered physical injury as a result of such infringement. The compensation for injury to the right of autonomy is substantial. See: Kadosh, *supra* note 9, 48 (Rivlin, J).

13 For the nature of 'decision causation' and 'injury causation', see: Eyal, N. (2016). The right for autonomy, the duty of disclosure and public health considerations the 2013 polio crisis in Israel as case study. *Pace Law Review* 36(3), 908-969, 964.

14 However, one of these plaintiffs was found to be entitled to compensation for the pain and suffering she suffered as a result of the delayed detection of her disease. See: The Eibi case, 69, 72 (Hayut, J.). As for the other three claims that were presented to the court, two of them were rejected because of the passage of the period of limitations. See: The Eibi case, 60-67 (Hayut, J.). The third claim was declined after it was found that the injured was aware of the possible health implications of radiation treatments. See: The Eibi case, 59 (Hayut, J).

15 See: Kadosh, *supra* note 9, 39 (Rivlin, J).

awarded for the infringement itself, but for the resulting and subjective injuries suffered by the patient.<sup>16</sup>

Applying this principles to the ringworm case, the court decided that irradiated patients who were not informed of the increased risk, suffered a severe injury to a fundamental aspect of their right to autonomy. A person informed of an increased risk of developing certain diseases, some of which may be terminal or result in serious disability, may accept meaningful choices not only about the medical procedures but also as to the future course of life. These choices express the right of every free person to control their destiny. Failing to provide irradiated patients with the relevant information, denied them of this right (the Eibi Case, 2015).

The court continued and addressed the issue of compensation. As to three of the plaintiffs, the court concluded that although they suffered consequential and subjective damage, it is reasonable to assume that their damage was not severe. This conclusion was based on two considerations. First, in all cases the plaintiffs would not have been treated differently, even if the state would have fulfilled its duty of disclosure. Second, there was no indication that the plaintiffs would have changed their course of life if they were aware of the risk to which they were exposed.<sup>17</sup> Therefore, the court decided that each of these plaintiffs would be awarded a sum of 50,000 NIS (about \$12,000) for the injury to their right to autonomy (the Eibi Case, 2015). The court also approved the District Court decision to award a fourth patient the sum of 50,000 NIS for the injury to her right to autonomy. However, in contrary to the other three plaintiffs, this plaintiff was also found to be entitled to compensation of 150,000 NIS for the pain and suffering she experienced as a result of the delayed detection of her illness (the Eibi Case, 2015).<sup>18</sup>

A fifth plaintiff was not entitled to compensation for injury to the right to autonomy, because he was found to be aware to the increased risk he was exposed to, before the detection of his head tumor (the Eibi Case, 2015).

Finally, the court addressed a question that it itself presented, whether patients who did not suffer physical injuries should be compensated for injury to the right to autonomy. All judges agreed that in this case, it would be hard to accept the claim that real damage, justifying compensation, occurred. In fact, one of the judges believed that not informing these patients about the increased risk they were exposed to, spared them the need to perform dangerous tests, saved them time and prevented them the feelings of anxiety. Thus, while ex-ante they should have received the right to choose, ex-post the damage they suffered was offset by the benefits of their unawareness. Therefore, these patients should not

16 This ruling was in line with former courts' decisions, in which a subjective approach was adopted regarding the damage of injury to autonomy. See: Kadosh, *supra note* 41, 42 (Rivlin, J).

17 This ruling was in line with former courts' decisions, which assumed that lack of casual connection or of material damage, indicates that the injured didn't experience intense feelings of anger and frustration as a result of injury to the right to autonomy. See: CA 2781/93 Ali Da'aka v. Carmel Hosp. 53(4) PD 526, 620-621 (1999) (Isr.). Nevo Legal Database (by subscription)

18 While approving this decision, the Supreme Court described this compensation as moderate considering the circumstances of the case.

be awarded compensation for the injury to the right to autonomy (the Eibi Case, 2015).

## 6. The Eibi Case: a Step Towards the Construction of a Collective Healing Process or a Lost Opportunity?

### 6.1. General

At the center of this section stands the question of whether the Eibi Case successfully contributed to the construction of a collective healing process of irradiated ringworm patients. Such a discussion requires consideration of at least two preliminary questions.

The first question to be addressed is whether conceptualizing the discussion in terms of collective trauma that requires collective healing process is still accurate and relevant following the Eibi Case. The many years that have passed since the treatments were introduced to immigrants, the enactment of the Ringworm Law and the submission of thousands of individual claims raise doubts, so it may be argued, as to the existence of a collective trauma that needs to be healed.

On the other hand, while thousands of individual claims were filed by irradiated patients, these claims were individual claims filed by individual plaintiffs and discussed as such. In addition, they were submitted based on the Ringworm Law, which was severely criticized as ignoring the collective dimensions of the event. Thus, although thousands of claims were submitted, the total number of these claims is no more than an accumulation of individual claims, and in this aspect lacking the characteristics of a collective healing process.

Moreover, despite the passing of many years and the filing of thousands of claims, current social discourse conceptualizes the ringworm affair in terms of 'collective trauma' suffered by a specific group – immigrants of Mizrahi origin. Thus, for example, in March 2017 an event during which the movie "The Ringworm Children" was broadcast, took place.<sup>19</sup> The movie (2003), explicitly addressed the ethnic aspects of the case and presented radiation treatments as part of a eugenic and prejudiced policy adopted by the health authorities towards immigrants from North Africa. The event was followed by a discussion, with the participation of two Mizrahi social activists, Reuven Avergil and Carmen Elmakiyes-Amos. Few days afterwards, an article called "The Crime against 'Mizrahi people' for which the state of Israel has not yet been punished", was published in one of Israel's daily newspapers. The article presented the ringworm affair as a crime committed by the state, whose victims were immigrants of Mizrahi origins. The article also brings the words of Reuven Avergil – one of the interviewees, who said: "We demand a confession of the intentional crime that was committed here", as well as the words of the second interviewee, Carmen Elmakiyes who said: "The ringworm radiations are not just a personal painful trauma suffered by

19 The Broadcasting of the Movie 'the Ringworm Children' – a Discussion in the Participation of Reuven Avergil and Carmen Elmakiyes – Amos. <https://www.facebook.com/events/1422039114482784>.

thousands of people, they are a collective Mizrahi trauma that the Israeli establishment should consider.” (Elias, 2017; Ziv 2016; Local Conversation, 2016)

The collective nature of the trauma suffered by irradiated patients is further preserved by another affaire- the kidnapping of the Yemenite children (Ziv, 2016). Repeatedly being the subject of public debate every few years, the affair of Yemenite children regained public attention in the years 2016 and 2017.<sup>20</sup> Although the public discourse mainly focused on the disappearance of Yemenite children, the fact that many Yemenite children were also subject to radiation treatments was also often mentioned.<sup>21</sup> I believe that viewing the two affairs together contributes to the perception that the ringworm affair is by its nature a case of collective trauma suffered by immigrants of Mizrahi origin.

The second issue that should be considered relates to the healing potential of decisions handed by the courts in civil litigation.

The traditional paradigm of civil litigation takes the following form: it is an adversarial procedure; it focuses on legal rights and duties; it results in a decision that focuses on fact-finding, determination of the law, and applying the law to the facts of the case (Rosiers, 2000; Yamamoto & Obrey, 2009). Nevertheless, several scholars suggest that civil procedures, and tort litigation in particular, have therapeutic implications on plaintiffs and that principles of restorative justice should be considered by the courts when conducting such procedures and ruling these cases (Greene, 2008; Shulman, 1994).

According to these scholars the receipt of compensation – the traditional redress in tort cases – is not the only objective of people who decide to file a tort claim (Greene, 2008). People pursue tort litigation to be heard and to have their claims dignified by a court (Greene, 2008). Plaintiffs also value accountability by wrongdoers and acknowledgement of the extent of their loss (Greene, 2008). Moreover, they seek public affirmation of the wrong and the loss they have suffered, justice and closure. Underlying many tort claims is the plaintiffs’ desire to be vindicated: that the court make known to them, to the defendant and to the wider community that the harm they have suffered was caused by the defendant and is wrongful in the eyes of the law (Carroll & Witzleb, 2011). In other words, plaintiffs want the community to recognize the harmful conduct of the defendant, its wrongdoing and the enormity of the damage they have suffered (Greene, 2008; Hershovitz, 2017; Hensler, 2013; Bublick, 2009). This approach stresses

- 20 In June 2016, the government of Israel appointed Tzachi Hanegbi to re-examine the evidence collected by three previous committees and decide about the disclosure of the evidence (government decision 1584, 26/6/2016). In Nov. 2016, his recommendations were submitted to the government and approved by its members in a decision called “The Exposure of Documents of the State Investigation Committee Regarding the Disappearance of Yemenite Children in the Years 1948-1954” (government decision 2040, 13/11/2016). Following the decision, 3,500 files that include 210,000 documents, relevant to this affair, were publicly published in the website of the national archive.
- 21 See, for example: Nahum, M. (2017). The Yemenite Children Affair: Dr. Moshe Nahum Tell about human experiments. In *YouTube* Available at: <https://www.youtube.com/watch?reload=9&v=98QhivnPAX8> (last access 15 May 2018); The Testimonies of Georgette Benodiz, Moshe (Musa) and Sarah (Zahara) Mualem, Rachamim Shaker (Shaked) Amram Association in the Yemenite, Eastern and Balkan Children Affair.

the expressive importance of a decision that finds the defendant liable for the loss suffered by the plaintiff (Hershovitz, 2017).

Scholars also point to the healing effects of the narrative applied in courts' decisions, apart from its results. According to this approach, the language used by the courts, as well as the way in which the court reflects the parties, their positions and their stories in the decision, matters. It matters to them, to their community and to society. This is especially important because courts' decisions can convey narratives that exceed the mere recognition in the defendant's liability for the wrong suffered by the plaintiff. They provide an opportunity to present the stories of the parties, to translate the plaintiff's position for the defendant and vice versa, to describe the severity of the wrong and the different dimensions of the loss suffered (Rosiers, 2000; Rosiers, 1998; Carroll & Witzleb, 2011). Aware of the expressive function of courts' decisions and the possible healing effects, scholars have claimed that courts should focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements (Daicoff, 2005). This may include relaxing the rules regarding period of limitation, being creative as to issues of liability, recognizing new types of injuries as compensable, and the adoption of narratives that fully express the nature of the wrong suffered by the plaintiff, the severity of injury and scope of the defendant's wrongfulness (Davidovitch & Margalit, 2007).

Finally, scholars have acknowledged the healing effects of compensation. It was Deborah R. Hensler who claimed in her paper: "Money Talks: Searching for Justice through Compensation for Personal Injury and Death" that "[w]henver money changes hands, it carries with it multiple messages about personal and social relationships and about personal and social worth." (Hensler, 2013; Hershovitz, 2017).

To begin with, obligating the defendant to compensate the plaintiff marks the plaintiff's injuries as the defendant's responsibility. It sends a message to the defendants that the suffering of the defendant is the result of wrongful behavior (Hershovitz, 2017). Compensation may also symbolize commitment on the part of society to not forget or deny the occurrence of a wrong (Waldron, 1992). Moreover, the transfer of money from the defendant to plaintiff empowers the plaintiff to reclaim social standing, by reversing, at least symbolically, the disempowering event (Perry, 2008-2009).

The size of compensation has also been considered to have possible healing or counter-healing effects. By attaching substantial damages to a verdict, the court expresses the view that the wrong done by the defendant and suffered by the plaintiff is serious. It also conveys a message as to the high value of the things the plaintiff has lost (Hensler, 2013). On the other hand, awarding damages that are disproportionately small compared to the injuries suffered, might be conceived by the injured as disregard and disrespect to the real injury suffered. In fact, in these cases, compensation may cause plaintiff to experience a moral injury or affront to personal dignity (Hensler, 2013).

It follows that decisions handed by the courts in adversarial civil procedures can constitute or at least contribute to the construction of a healing process. However, for such contribution to materialize, attention should be paid to at least



three aspects of the decision: the ruling, the narrative of the decision and the size of compensation. Keeping these remarks in mind, the next sections will address the possible healing effects of the Eibi Case.

## 6.2. *The Contribution of the Eibi Case to the Collective Healing Process of Victims of Ringworm Treatments*

Can the Eibi case be presented as a step towards the construction of a healing process of the victims of ringworm treatments? As Alberstein, Davidovitch and Margalit claimed, recognition, responsibility and reparation are three of four conditions permitting the construction of a collective healing process. They also argued that acknowledgment of the wrong suffered by the injured and acceptance of responsibility for its occurrence, are essential parts of these conditions. Applying these principles to the Eibi case seems promising at first.

### 6.2.1. *Acknowledgement of the Wrong Suffered by the Plaintiffs*

As noted above, the court in the Eibi case recognized that the state should have informed irradiated patients that they were exposed to an increased risk to their health. By recognizing the existence of such a duty, the court acknowledged the wrong inflicted on these patients by the state, which failed to provide them with the relevant information.

Moreover, accepting the plaintiffs' claims is in and of itself a fundamental act of recognition, regardless of the specific cause of action. While leaving unchanged former courts' decisions according to which the state was not negligent in treating ringworm patients with radiation or not performing screening tests, the court found a new legal path to impose liability on the state. In this sense, the Eibi decision is a correction of previous decisions that absolved the state from liability and failed to provide the injured means of restoration.

### 6.2.2. *Acceptance of Responsibility for the Wrong*

As the discussion above reveals, the decision specifically and explicitly identified the state as responsible for the creation of the risk. In fact, the main justification for the existence of duty of disclosure was the state's creation of direct risk by ordering, as a matter of policy, radiation treatment for ringworm patients. It follows, that the Eibi decision clearly identified the state as responsible to the wrong suffered by ringworm patients. Considering that the court is an official authority of the state, this decision can be understood as an acceptance of responsibility by the state for the wrong it caused, which is, as noted above, an essential condition for the initiation of a healing process.

Acceptance of responsibility by the state is further reinforced through another aspect of the decision. As noted above, according to the decision, if a breach of duty of disclosure has been proved, the patient should be awarded compensation for the subjective and consequential non-pecuniary results of the infringement of his right to autonomy, such as anger, frustration and emotional distress. Moreover, as opposed to compensation awarded for lost chances of recovery or other material injuries, compensating patients for injury to their right to autonomy was not conditioned on proof of 'decision causation'. It follows, that

the Eibi case enables the award of compensation even if the plaintiff cannot prove that he lost chances of recovery or other material damage as a result of breach of duty of disclosure by the state. Thus, it extends the liability of the state and acknowledges its responsibility to non-material dimensions of the wrong.

### 6.2.3. *Restoration*

As the above discussion suggests, the ringworm case involves two wrongs, both performed by the state. The first: the provision of medical treatment that while not negligent, was of injurious nature. The second: not informing irradiated patients that they were exposed to an increased risk to morbidity, thus denying them the right to know the nature of the treatment that was given to them, and the right to choose whether to perform screening tests or to live their life differently.

In the Eibi case, the court acknowledged the responsibility of the state to the second wrong, concealing information from irradiated patients regarding the increased risks to which they were exposed. Considering that a substantial part of patients' feelings of anger and frustration were aimed at this aspect of the state's conduct,<sup>22</sup> this decision seems to provide the victims of ringworm treatments restoration for an important aspect of their emotional injury. As noted above, this aspect didn't receive recognition in the Ringworm Law, a fact that was criticized by several scholars. In this respect, the Eibi decision completes the missing parts in the Ringworm law and may be conceived as contributing to the healing process.

### 6.3. *Why Isn't It Enough?*

While the above discussion suggests that the Eibi decision has some contribution to the healing process of ringworm patients, other aspects of the decision suggest that its contribution to this process is limited.

#### 6.3.1. *Ignoring the Collective Nature of the Dispute and Its Social and Historical Background*

Similar to the Ringworm law and preceding court decisions, the Eibi case was individualistic and not collective in approach. Being of such a nature does not only follow from the nature of the claims, which were private tort actions filed by individual patients against the state. It is also the result of the content of the decision.

While the Eibi decision recognized the existence of a duty of disclosure, it stipulated that the state could have fulfilled its duty by providing physicians with the relevant information and proper instructions. Thus, the Supreme Court ruled that by publishing circulate 2/09, which was meant for physicians, the state fulfilled its duty of disclosure. It follows, that the court did not obligate the state to directly and expressly inform patients about the increased risk to which they were exposed. It made it clear that the state could have fulfilled its duty by imposing performance on individual physicians. Thus, as much as providing such informa-

22 This argument finds support in the testimonies of the plaintiffs. See: the Eibi case, 67 (Hayut, J).

tion to irradiated patients could have contributed to the acknowledgment and recognition of the wrong they suffered, the court enabled these acts to take place in the individual sphere of the physicians-patient relationship. As such, the decision is lacking in the collective dimension that is part of a collective healing process.

Another aspect of the decision contributing to its individualistic nature is the absence of the social and historical context of the litigation.

To begin with, it ignores the fact that the failure to provide irradiated patients the relevant information, was an inseparable part of the wrong that started with the conducting of injurious treatments to ringworm patients and continuing in the systematic and continued concealment of information regarding the injurious nature of these treatments from the same patients. Notably, the court ruled that the state breached its duty of disclosure from the year 1991, when the IMH decision to instruct physicians about radiation treatments was not implemented. In deciding that way, the court ignored the fact that as early as the 1970's the link between radiation treatments and morbidity was known to the state, and that in 1980's this link was scientifically proven. In other words, the policy of concealment began much before the IMH decision. Thus, the length of time and resulting severity of the wrong suffered by all irradiated patients were not fully recognized or acknowledged.

In addition, while condemning the state's reasons for not providing irradiated patients information and describing these reasons as paternalistic, the fact that the adoption of a paternalistic policy toward immigrants and ringworm patients, in specific, was not new to the medical establishment, was omitted from the decision. The approach that immigrants should not be provided with information as to medical treatments was widespread among medical practitioners in the middle of the 20th century, as immigrants were believed to be mentally and intellectually inept. Not surprisingly, it was also believed that decisions regarding medical issues should be made by medical practitioners who held the necessary information and expertise.<sup>23</sup> It follows that the adoption of a paternalistic policy in the ringworm case was not an exceptional occurrence in the history of the Israeli medical establishment in the mid-20th century. Yet criticism of the state's paternalistic policy towards ringworm patients was presented in the decision out of its historic context. As such, the decision lacks full acknowledgment of the wrong done by the state and suffered by ringworm patients as a collective: the adoption of paternalistic policies towards a specific group- immigrants of Mizrahi origins- with the result of endangering their right for autonomy.

Finally, and most importantly, the Eibi decision totally ignores the ethnic dimension of the ringworm story, notwithstanding its relevance to the issue of disclosure. Thus, the fact that most irradiated patients were of Mizrahi origin,

23 This approach was part of a wider public health policy adopted by the Israeli health system towards immigrants, in the mid-20th century, after the founding of the state. For a description of this policy, see: Davidovitch, N. & Margalit, A. (2007). Public Health, Law and Traumatic Collective Experiences: The Case of Mass Ringworm Irradiations, in Sarat, A., et al. (Eds.), *Trauma And Memory: Reading, Healing, And Making Law* (pp:119-167). Stanford University Press, 119, 127.

and as such often considered to be primitive, was not mentioned in the decision. This fact is surprising considering that the state was often blamed for adopting discriminatory and compulsory policies towards this population, generally, and specifically regarding ringworm patients (Mimon-Blau, 2013). Moreover, although the court condemned the paternalistic policy adopted by the state, it applied a general analysis of the concepts of autonomy and right to choose, as usually done in the context of physician–patient relationship. It did not address the possible connection between the paternalistic policy adopted by the IMH and the characteristics of the population toward which it was aimed. It follows that, like its predecessors, the court suppressed, in both cases, a central aspect of the collective wrong done to victims of ringworm treatment, thus endangering the collective healing process.

### 6.3.2. *Partial Acknowledgment and Recognition of the Wrong Suffered by Irradiated Patients*

Although the Eibi case found that the state had a duty of disclosure towards irradiated patients, and thus acknowledged the wrong done by the state and its responsibility for its materialization, in practice it applied a different approach. As noted above, in addressing the issue of negligence, the court held that the state fulfilled its duty of disclosure by publishing circulate 2/09. However, review of the circulate reveals in its own words that the direct aim was to “increase physicians’ awareness of the existence and detection of irradiated patients, to update the medical knowledge on the subject and to inform physicians as to the recommended tests and treatments.” It follows that the direct aim of the Circulate was not to ensure that this information would be provided to patients, but to inform and instruct physicians as to the appropriate medical treatment these patients should receive. The Circulate specifies that the recipient of the information is *the physician* and does not explicitly instruct physicians to inform patients of the risk to which they were exposed. Such an obligation to inform patients can only be indirectly deduced from circulate instructions.<sup>24</sup> It follows, that while the Eibi decision recognized the state’s duty of disclosure, it believed that the state fulfilled its duty once the relevant information and instructions were provided to physicians. It didn’t articulate the duty of disclosure as obligating the state to directly inform patients (for example, through personal applications to patients). Yet the state was not found to be negligent once the circulate was published. It follows, that while the decision acknowledged the wrong suffered by irradiated patients, it did so only partially.

In addition, the courts failed to address the possible implications of the breach of duty of disclosure on patients’ emotional wellbeing, whether as individ-

24 Some indication for the existence of such duty can be found in the following words of the circulate: “Notwithstanding these general instructions, as is accepted in every medical issue, in making specific decisions, consideration should be given to the general condition of the patient, while paying attention to symptoms that might indicate the existence of one of the relevant diseases. Emphasis should be given to the preference of the patient, after he was presented with the benefit versus the damage that he might suffer as result of performing the tests.” See: Circular 2/09, at 6.

uals or as a collective. No real expression was given to the severe feelings of shock, betrayal and frustration, irradiated patients must have experienced when they discovered that not only they were given injurious treatments, but that this information was concealed from them. Indeed, the court assumed that the plaintiffs must have suffered non-pecuniary injury, in the form of feelings of frustration and anger. Nevertheless, it also assumed that the intensity of these feelings is decreased when the plaintiff can't prove decision causation or physical injury.<sup>25</sup> Thus, it ignored the possibility that concealing such information from patients may result, in and of itself, in severe emotional damage in the form of feeling of anger and frustration, and in increasing the trauma they experienced. Moreover, it failed to acknowledge that the trauma suffered by irradiated patients is of multiple dimensions, which together result in one inseparable damage (short-term emotional implications of radiation treatments, long-term physical and emotional implications of the treatments, and emotional damage experienced once being aware of the concealment of information). It follows, that the Eibi decision does not fully acknowledge the emotional injuries suffered by irradiated patients. Thus, like medical practitioners that ignored the emotional aspects of radiation treatments,<sup>26</sup> and the Ringworm law that neglected to recognize patients' emotional damage, the Eibi decision failed to fully acknowledge the extent of injury suffered by irradiated patients. Being of such a nature, the Eibi decision acknowledged and restored only part of the wrong done by the state and suffered by ringworm patients.

### 6.3.3. *Partial Restoration*

As noted, accepting responsibility and providing restoration to the injured are among the conditions for a successful healing process. Allegedly, the Eibi decision includes these components. However, a careful analysis of the case leads to a different conclusion. To begin with, according to the Eibi decision, a plaintiff claiming compensation for lost chances of recovery or for material injuries (i.e., pain and suffering as a result of a delay in detection) has to prove the existence of a causal connection between the state's failure to provide him information and his injuries. That means that 'decision causation' and 'injury causation' should be proved. As the court itself admitted, proving that such a hypothetical scenario is not an easy task. In fact, the Eibi case demonstrates this difficulty: All plaintiffs for which the question of causation was relevant failed to prove the existence of casual connection, and therefore were not awarded compensation for lost chances of recovery. Hence, the Eibi case can rarely provide the injured recognition or restoration.

Second, by applying a subjective approach toward the issue of compensation for infringement of the right to autonomy, the court linked the amount of compensation awarded to the measure of injury to the patient's feelings. As the Eibi case exemplified, this approach is expected to result in the awarding of moderate

25 See, for example, the Eibi case, 47 (Hayut, J).

26 For the claim that medical practitioners ignored the emotional implications of radiation treatments, see: Modan & Peri, *supra* note 8, 407-408.

sums of money to patients who cannot prove that the state's failure to provide them information resulted in physical injury, loss of chances of recovery or prevented them from changing their lifestyle. In these cases, thus the court assumed, the patient experiences a decreased level of anger and frustration, and therefore should receive a moderate compensation. Considering the difficulty to prove the required causation, it is reasonable to assume that most plaintiffs will be awarded only moderate sums of money. In fact, this was the state of things in the Eibi case, where all four plaintiffs who were found to be entitled for compensation to injury to their right to autonomy, were awarded a sum of 50,000 NIS- compensation which seems relatively small.

As the Israeli Supreme court ruled in the Antabi Case (2011), the compensation awarded for an injury to the right to autonomy should not be symbolic, but should express the importance of the right to autonomy.<sup>27</sup> Accordingly, the amounts of compensation awarded for this type of damage have increased in recent years, and may reach the sum of 300,000 NIS (Eyal, 2015). Moreover, the courts' willingness to award considerable sums of money under this type of damage is not limited to cases where the plaintiff was able to prove physical injury as the result of infringement to the right to autonomy. Considerable sums of money were also awarded when the only injury suffered by the plaintiff was to his right to autonomy, when the circumstances justified such compensation.<sup>28</sup> The circumstances which led to the Eibi case seem to also justify the award of increased compensation: harsh treatments provided to ringworm patients, the treatments' emotional and physical results, the paternalistic policy adopted toward immigrants when providing treatments, and the continued and systematic concealment of information by the state. Considering these circumstances, it is doubtful whether compensation of 50,000 NIS fully expresses the wrong suffered by these patients or offers appropriate restoration for this wrong. In fact, considering the continuous legal and social struggle conducted by ringworm patients striving for recognition and restoration, the awarding of such sums may even be regarded by them as offensive.

Third, as noted above all judges in the Eibi case believed that irradiated patients who did not suffer physical or other material injuries, should not be compensated for the injury to their right to autonomy. According to this approach, in these cases the state will be exempted from liability and plaintiffs will not be entitled to compensation, notwithstanding the fact that the duty of disclosure was breached by the state. In other words, although the state performed a wrong and the victims suffered a wrong. It follows that in these cases, no more than a shallow recognition of the wrong done by the state is offered. Lacking are the material aspect of recognition of the wrong and restoration for the injured.<sup>29</sup>

27 See: CA 9936/07 Ben David v. Antabi (Nevo, 2011), 11-12 (Handel, J).

28 This was the case in the Antabi Case, where the plaintiffs were awarded the sum of 250,000 NIS for the injury to their right to autonomy. See: *Id.*

29 For a similar claim as to the importance of compensation, see: Alberstein & Davidovitch, *supra* note, 2.



## 7. Conclusion – the Lost Opportunities in the Eibi Case

Although by its very nature, tort litigation focuses on the specific litigants and is mainly aimed at providing plaintiffs with redress, it can contribute to the process of collective healing. Finding those liable for the wrong suffered by the plaintiff, the narrative of the decision apart from its results and compensation for the injured, may all contribute to the healing process of the plaintiff as well as of the collective involved.

Apparently, the Eibi Case provided the court with an opportunity to contribute to the creation of a collective healing process in the ringworm case. Considering the failure of former legal procedures to constitute a meaningful healing process, the prolonging of legal proceedings, the continued public criticism toward the IMH policy and the fact that the term ‘collective trauma’ was still relevant in the context of the ringworm affair, this opportunity should have been handled with caution and attention.

Nevertheless, the decision didn’t fulfill its potential to create a collective healing process of the victims of ringworm treatments. Although at first it seems promising, careful reading of the decision reveals that it lacks important aspects needed to heal the collective wrong suffered by victims of ringworm treatments.

To begin with, by describing the duty of disclosure as one which should have taken place in the individual sphere of the physician-patient relationship, the Eibi decision adopted an individualistic approach and suppressed the collective nature of the wrong done by the state and suffered by ringworm patients.

In addition, the court only partly acknowledged the injury suffered by irradiated patients. The decision didn’t express the full scope of the emotional implications of concealing information from irradiated patients, thus failing to fully recognize the wrong they suffered.

Moreover, the social and historical context that led to the litigation was only partly mentioned. More specifically, while the court described in detail the factual background for the decision, it didn’t present the wrong suffered by the specific plaintiffs as the result of a prolonged and ongoing paternalistic policy adopted by the IMH toward a specific ethnic group. Thus, important aspects of the collective wrong done by the state and suffered by irradiated patients were omitted from the decision.

Finally, while the court found the plaintiffs entitled to compensation, they were awarded moderate sums of money. In addition, patients who didn’t suffer physical injuries were not entitled to compensation for the injury to their right for autonomy. It follows that the compensation awarded in the Eibi case does not fully express the severity of the wrong done by the state and suffered by the injured. It provides only partial restoration to the injured.

Like former cases, the court in the Eibi case was subject to procedural and material limitations, which influenced its decision. For example, the obligation to prove causation between the breach of duty of disclosure and lost chances of recovery, or the rule that patients should be compensated for the subjective results of the injury to their right for autonomy. Nevertheless, even under these

limitations the court could have contributed to the construction of a collective healing process.

To begin with, the court should have made it clear that the duty of disclosure existed in the collective sphere, and not just in the individual sphere of physician-patient encounters. To accomplish this result, the court should have applied a direct duty of disclosure on the state toward irradiated patients and insisted on its clear and express fulfilment.

Moreover, the decision should have acknowledged the fact that the systematic concealment of information from irradiated patients contributed, in and of itself, to emotional trauma, which exceeds the boundaries of physical injury suffered by these patients.

In addition, the court should have clearly highlighted the ethnic origin of the injured group, the continued paternalistic policy adopted by the state toward this group, and the possible connection between these facts.

The court should have also awarded the plaintiffs greater compensation and extended the right for compensation to irradiated patients who had not suffered physical injuries. Indeed, the court was bound by former decisions that adopted a subjective approach. Nevertheless, the courts could have considered the unique circumstances of the ringworm case - a continuance and systematic concealment of information by the state, which was a part of a long-lasting paternalistic policy aimed at specific ethnic group. Considering these circumstances, the courts could have found legal as well as moral justification to award the plaintiffs compensation that expresses the severity of the wrong done by the state and the infringement of the right to autonomy suffered by irradiated patients.<sup>30</sup>

Finally, but maybe most importantly, the court should have realized that the Eibi case was not just another tort litigation taking place between individual parties. It should have realized the collective and historic importance of its decision, recognized its expressive power, and considered the possible healing and counter-healing effects of the decision. Such an understanding should have influenced the narrative of the decision. Instead of describing the facts in a somewhat neutral manner and articulating a formal legal rule, the court should have used the opportunity to severely criticize the continuing and long-standing paternalistic policy of intentional concealment adopted by the IMH toward irradiated patients, mostly of Mizrahi origins.

Considering that the Eibi case was part of a continuous struggle for recognition in the wrong suffered by irradiated patients by the hands of the state (whether as individuals whether as a group), it was only appropriate for the court to take the opportunity to articulate a decision that fully expresses the wrongfulness of the policy adopted by the state. Unfortunately, the courts didn't adopt these options, thus leaving the healing potential unfulfilled.

30 This suggestion finds support in Ali Daka decision. Considering the issue of compensation, when a patient's right for autonomy was infringed, the court made it clear that the size of compensation is subject to court's discretion and should be estimated considering all circumstances of the case. See: Ali Daka, *supra* note 17, 583.

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