ARTICLES

Informers Defamation and Public Policy

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I. INTRODUCTION

There is no universally recognized standard for determining whether a statement is defamatory. What is defamatory in one society in light of its cultural heritage, moral convictions and social norms is not necessarily defamatory in another society. Thus, a statement alleging a person to be an informer is regarded as defamatory in some legal systems, while most others prefer to deny defamation actions based upon such statements. The wisdom of the latter practice will be explored in this article through the anatomy of a 1985 decision of the Israeli Supreme Court.

The case, Shaha v. Dardiryan,1 referred to a political reality in which informers are exposed to mortal danger. Indeed, a great deal of the blood shed in the recent uprising in the territories occupied by Israel since the Six Day War belonged to local Palestinians murdered by militant organizations for suspicion of collaboration2 with the Israeli authorities.3 These murders cast a new light on Shaha, which examined from the perspective of defamation law the legal ramifications of a statement accusing a member of the local community of collaboration with the Israeli authorities. The case served

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2. This term denoting a criminal offense often has been employed to describe rendering assistance to the enemy to forward its goals. See cri.a. 232/55, Attorney General v. Grinvald, P.D. 12 2017, 2284 (1958). The Hebrew word for collaboration, "shithoof peoula" also means "cooperation." It is not clear whether the Shaha court refers to "collaboration" or to "cooperation" when using this word. The facts seem to indicate that the reference is to "collaboration."
3. This phenomenon is not new, yet in the last months it has intensified tremendously. The lucky ones among those persecuted have been merely harassed or beaten by other Palestinians. See E. YAARI AND Z. SHEIF, THE INTIFIDAH at 268 (in Hebrew 1990).
as a vehicle for setting a standard for determining whether a statement is defamatory. It gave the Israeli Supreme Court ample opportunity to evaluate the role of public policy in judicial decision-making in general, and in adjudicating defamation cases in particular. The theme of Shaha resonates with similar problems encountered by other legal systems faced with corresponding political predicaments.

The uniqueness of the Israeli situation, however, should not be missed. The Court probed the question of the defamatory nature of the term "informer" in the particularly explosive situation in which the cultures in issue conflict. Moreover, the uniqueness of this case is illuminating for an additional reason. The fact that, in this case, the dominant political group of a state was called to pass judgment on what constituted defamation only from an adversary's viewpoint sharpens the present dilemma in a less polarized fashion than in other political and legal situations. In addition to analyzing the Israeli Supreme Court responses to that dilemma in light of other reactions in the Anglo-American legal world, this article suggests alternative avenues the Shaha plaintiff might have tried.

A. The Shaha Case-Facts and Issues

The plaintiff, an Archbishop in the Armenian Church in East Jerusalem, and the defendant, the Patriarch of that church, were both citizens of the Kingdom of Jordan. They have lived and operated, for many years, within the Arab community of East Jerusalem and have had strong ties with the Arab world. Apparently no love was lost between these two spiritual leaders. Rather than solve their differences within their holy community, they crossed swords in the open, involving the Jordanian press and the Israeli courts in the duel.

In a statement made to the Jordanian Government, the defendant accused Archbishop Shaha of collaboration with the Israeli Government in supporting Israeli policy and actions in the occupied territories. The defendant also was responsible for another statement which was published in a Jordanian newspaper and distributed in East Jerusalem, Judea, and Samaria. The statement claimed that the plaintiff, whose picture was displayed in the Hebrew newspaper, had boasted in an interview to a Hebrew newspaper published in West Jerusalem that "He enjoys an Israeli protection and that it is not necessary to mention the rest of the details." This statement, which was republished in other Jordanian newspapers, was tantamount to stating that the plaintiff was "an informer" who had collaborated with the Israeli authorities. After the publication of these statements,
Jordanian authorities decided to deny the plaintiff entry into the Kingdom of Jordan.

In an action brought by the plaintiff against the defendant in the District Court of Jerusalem, the plaintiff claimed that the defendant's statements were false and defamatory, that their publication had lowered him in the estimation of many Arabs, especially those who live in East Jerusalem and other territories occupied by Israel, and that the result was to expose him to the Arabs' hatred. The plaintiff also claimed that these publications injured him in his vocation, which necessitated frequent visits to the Arab states, causing him pecuniary damage since he was unable to enter into the Kingdom of Jordan to exploit or enjoy the Jordanian real estate he owned.

The District Court of Jerusalem decided to accept the defendant's motion to strike the claim for lack of cause of action. It stated that the decision whether a statement is defamatory depends upon norms prevailing in the community (in this case Israel) whose courts are called upon to make that decision.

The District Court explained that the opinions of those who oppose these norms and even deny the right of that community to exist are to be discarded. To win a defamation case, a plaintiff is required to establish the defamatory nature of the statement in question. He must do more than prove that as a result of the statement's publication his reputation is likely to be lowered in the eyes of the members of the particular social group to which he belongs. He also must show that the norms and opinions of that particular group are not rejected by society generally. In this case he failed to do so.

Plaintiff's appeal was unanimously dismissed by the Israeli Supreme Court. The Court addressed itself to two legal questions:

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4. Under Israeli law, the test for striking a claim for lack of cause of action is whether or not the facts described in the claim sheet, assuming they are true, establish a valid cause of action. Courts act cautiously in such matters and usually enable the plaintiff to rewrite his claim in order to save it from being struck down. See, e.g., c.a. 693/83, Shemesh v. Land Registrar, P.D. 40(2) 668, 671 (1986); c.a. 280/84 Ofri v. State of Israel, P.D. 40(3) 358, 359 (1986).

5. It is clearly so in the case of a group of criminals who disapprove of any member who collaborates with the law enforcement authorities. The District Court gave an example: Suppose a Nazi argued before an English court that a false statement alleging that he had saved Jews from the crematories during the Second World War lowered him in the estimation of his Nazi friends. Is it conceivable that such an action would be allowed?

6. In his appeal, the plaintiff offered an example of his own to prove that the "majority vote" rule is wrong: Assume that during the British Mandate in Palestine
(1) What is the right standard for determining the existence or nonexistence of defamatory content in a statement? Is it the standard of the "right-thinking members of society generally" or may there be another standard?; and

(2) What is the role of public policy in defamation cases? Should the courts allow defamation actions for statements that contain allegations which, although commendable by most people, are regarded by certain community segments as defamatory for illegal or anti-social reasons?

The Court also wrestled with the issue of whether readiness on the part of the judiciary to adjudicate such claims might be tantamount to officially recognizing the legitimacy of anti-social views or whether it might be perceived as such by the public. In addition, the Court confronted the question of whether the social interest in avoiding such an interpretation outweighs the public interest in protecting each member in the community from defamation.

B. The Shaha Case - The Supreme Court Decision

The three judges in Shaha clearly disagreed as to the right test for determining whether a statement is defamatory. Levin, J., followed the standard of the "right-thinking members of society generally" and concluded that its application in that case justified the District Court decision to strike the claim for lack of a cause of action. He argued:

Every reasonable person in Israel as well as in any civilized state does not regard as defamatory a statement alleging that a certain person collaborated with a policy aiming at securing the Rule of Law and maintaining security and public order. On the contrary, a person acting this way will be regarded by any reasonable person as someone who deserves to be commended and encouraged.  

Elon, J., rejected the right-thinking man’s test in favor of the following test: "Is the statement likely to injure a person . . . within the segment of the community to which he belongs, according to the common norms prevailing in that group?" A statement is defamatory it was alleged that a Jew informed the British authorities of the hiding places of several Jewish freedom fighters. It is reasonable to assume that such a statement would have been deemed defamatory despite the fact that most members of the Arab community in Palestine, which constituted the majority of the population then, probably would not have regarded it as such.

7. Shaha, at 741.
even when the number of members in that segment of the community is small and even if that statement is not regarded as offensive by the majority of the public. Furthermore, the statement is defamatory even if the "right-thinking" person views the norms of that segment of the community as peculiar. Thus, if the plaintiff is a member of a small group that regards watching television as a sin and avoids any member who commits such a sin by boycotting his business, a false statement alleging that the plaintiff secretly watches television would be defamatory.

Ben-Porath, D.P., also decided to forego the test of the "right-thinking members of society generally" in favor of a more flexible test. In principle, she expressed readiness to extend protection to any person injured as a result of a false statement, including a statement that was defamatory only according to the social norms and beliefs of the community segment within which the statement's target lived. Courts, however, should act cautiously in such cases; otherwise, they are likely to find themselves occasionally compelled to change the legal criteria for determining whether a statement is defamatory. Such ad hoc decision-making might prevent uniformity and introduce uncertainty into this branch of the law.

The decision to find for the defendant in Shaha was justified by public policy considerations. Levin, J., took a firm stand on this matter, stating:

As a matter of judicial policy, it is impossible and inconceivable that an Israeli court will determine that a collaboration with the government of Israel and its policy is an activity that should be regarded, under certain circumstances, as defaming the collaborator. The policy and activities of the government of Israel in Judea and Samaria aim at maintaining law and order, attaining respect for the law, and achieving as far as possible a secure and normal life there. A person who collaborates with the government of Israel for the realization of these goals or enjoys its protection for that reason will not be regarded as doing something wrong just because his activities are regarded disfavorably by the enemies of the State who disagree with its policy in the occupied territories and with its right to rule and operate there. Some matters are supreme and

8. Id. at 750.
9. Id. at 747.
10. Some Israelis, including Knesset members, hold this view. Does that make them enemies of the state of Israel? One may also question whether it was necessary to deal at all with this political question.
overshadow all niceties of ... the usual legal rules. ... Judicial policy may demand denying accessibility to court in certain unworthy matters. Such a policy is indeed irregular and should be pursued carefully yet vigorously in the appropriate exceptional circumstances such as those existing in this case.\[1\]

The views of Ben-Porath, D.P., and Elon, J., on this matter were more equivocal. Ben-Porath asserted that a decision that a statement is defamatory should not be confused with a decision about the desirability of the ideas conveyed in that statement. Allowing a member of a minority group to bring a defamation action for allegations that are offensive merely according to that group's norms, and even giving a judgment in his favor, are not tantamount to an endorsement by the Court of the values and principles of that minority group. Ben-Porath pronounced herself ready, on principle, to adjudge and, in an appropriate case, render judgment in favor of a plaintiff "accused" of conduct desirable from the point of view of society generally. Moreover, she acknowledged that under exceptional circumstances, a court could regard as defamatory a false statement alleging that an Israeli resident, who was a citizen of both Israel and a friendly foreign state, collaborated with the Israeli authorities to the detriment of the interests of that foreign state. Ben-Porath denies, however, that there may be such a cause of action for a plaintiff who is a citizen of a state hostile to Israel, because "[I]t should not be expected of the Israeli judiciary to regard as 'defamatory' a communication (even a false one) according to which an Israeli resident (such as the plaintiff) acts against the interests of the enemies of the State, the fact that such an activity constitutes a breach of trust toward that hostile State notwithstanding ... \[P\]rotection

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11. Levin, J., in Shaha at 739. He added the following example: Assume that it is said about a person that he is a friend of the Jews or protects Zionists. Such statements can be regarded by those factions of the population in Judea and Samaria and the Arab states, who are enemies of the state of Israel, as referring to conduct or acts which cause hatred, deserve condemnation, and demand the outcast of those "infected" by such conduct. It is unthinkable that an Israeli court will regard such expressions as defamatory against one proved to be actually a friend of the Jews. Compare with the spirit of decisions such as h.c. 253/64, Geris v. The Head of Haifa District, P.D. 18(4) 673 (1964) (Every state has an elementary right to preserve its liberty and its existence); h.c. 1/65, Yardor v. Chairman of the Central Election Committee to the Sixth Knesset, P.D. 19(3) 365, 390 (1965) (per Zussman, J., "A state is not bound to be destroyed. Its judges are not allowed to sit idle and when facing a lack of a positive law when encounter a petitioner who asks them to help him put an end to the state." But see e.a. 2,3/85, Nieman and Others v. The Central Election Committee to the Eleventh Knesset, P.D. 39(2) 225 (1985).
given by the Defamation Prohibition Law is not that of an umbrella sheltering every victim of false communications.''

Elon, J., seemed to agree with the stand taken by Ben-Porath regarding the role of judicial policy in this matter. Yet he also examined a broader question: Is it appropriate for the court to open its gates to an action consisting of illegal factual components? He concluded that, in principle, courts should strive to do justice between the parties before them, even though the judges may have to "dirty" their hands in so doing. In defamation cases, justice means enabling the victim to sue the author of the defamatory statement, even though the very decision to allow the action might be erroneously interpreted as an endorsement by the Court of an undesirable opinion. The whole matter, however, is discretionary.

The Court should take into consideration factors such as the conduct of the parties and the gravity of the allegation made. There should be a balancing of the interest in protecting the right to live free of defamation against the interest not to legitimize wrong conceptions or deeds (especially ones which undermine the rule of law) in each case. Referring to the present case, Elon concluded:

> It is true that a view exists within the appellant's circle, according to which collaboration with the Israeli authorities in maintaining law and order in Judea and Samaria is wrong and smells of 'informing.' Yet such a view is so grave and unacceptable in terms of the legal basis of Israel as a state governed by the rule of law and in terms of safeguarding Israel's security and so irreconcilable with basic notions of law and order, that its rejection should be given priority over the goal of protecting the appellant's right not to be regarded in disfavor by those members of his group who hold such a false view.

Before probing the perplexing questions with which the *Shaha* Court was confronted and evaluating the various solutions suggested in this case, this article will survey responses to similar questions by courts and commentators in the Anglo-American legal systems.

**C. The Standard For Determining Whether A Statement Is Defamatory**

Under English law, a statement is defamatory if it is likely to be perceived as such\(^\text{14}\) by the "right-thinking members of society, gen-

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13. *Id.* at 754.
14. The inquiry focuses not upon the intent of the author or the publisher of
This standard, which can be traced to Roman law, has been adopted in Ireland, South Africa, Israel and in the past, the United States. It is an extremely ambiguous standard. Although it appears to relate to the world of objective or factual reality, this test does not refer to an actual group of people but, in fact, serves to mask a subjective, normative evaluation.

Sometimes it is said that this standard refers to the community in general. Such a statement should not be taken at face value. Instead, it is a figure of speech which expresses the view that the defamatory nature of a statement ought to be determined according to the dominant norms in a given society. It is unfortunate, however, that the notion of the "community in general" is employed here. By definition, this notion embraces all members of the community, including the "wrong-thinking" ones. Obviously, the community is not governed by a single normative standard. No single community sentiment prevails with respect to any particular matter.

the statement but rather upon its actual or potential impact upon its recipients. See Dalaige, J., in Berry v. Irish Times Ltd. [1973] I.R. 368, 374.


16. See C.F. Amerasinghe Defamation and Other Aspects of the Actio Ineuriarum in Roman Dutch Law (in Ceylon & South Africa) 22 (1968). The criterion there is the arbitrium boni: the view which would be taken by the ordinary good and worthy subject of the King, the decent sensible persons, or "right-thinking people generally."

17. See, e.g., Quigley v. Creation Ltd. [1971] I.R. 269 (per Walsh, J.)


21. Hence, the test asks not who are these members of society?, what is required to be eligible to be a member of this group?, is the composition of this group changed with the nature of the matter at hand? Obviously, there are no clearly-defined groups officially or unofficially recognized as comprising the "right-thinking members of society generally."


Indeed, "[t]hat which is defamatory in the eyes of one segment of the population may be laudatory in the eyes of another and a matter of complete indifference to a third."24 Most communities are not homogeneous.25 They consist of many diversified sections, whose thinking upon a given subject differs, yet all may be described fairly as "right-thinking."

The designation of one or more sections as "right-thinking" is problematic and undesirable, given the legitimate and often violent differences of opinion in society.26 Assume, for example, a statement which claims that a certain medical doctor performs abortions free of charge. Undoubtedly, this statement would lower this person in the eyes of the "pro-life" groups. At the same time, however, it might raise him in the esteem of various liberal organizations.27 Is the statement defamatory? Courts should avoid describing one of these groups as representing the "right-thinking members of society" in order to escape unnecessarily and unwisely determining which views are "better."

Sometimes the "right-thinking members of society" are equated with the "reasonable men." Some of the expressions used are: "readers of reasonable understanding, discretion and candor"28 or "reasonable and fair minded men."29 The utility of this standard in

24. Note, The Community Segment in Defamation Actions: A Dissenting Essay, 58 YALE L. J. 1387 (1949) [hereinafter Note, The Community Segment]. See also Layne v. Tribune Co., 108 Fla. 177, 182, 146 So. 234, 236 (1933) ("judicial decisions [are] apt to vary with the social and moral views of the different jurisdictions").

25. Professor Post wrote recently, in another context:
Assimilationist law places the force of the state behind the cultural perspective of a particular, dominant group. If a society is relatively homogeneous, so that the values of this group are representatives of the society as a whole, assimilationist law can be said to be expressive of common community conventions or norms. But if the society is heterogeneous, assimilationist law can instead be understood as an attempt, which may be more or less hegemonic in character, to extend the conventions of a dominant group to the larger society.

Post, Blasphemy, The First Amendment and the Concept of Intrinsic Harm, 8 Tel Aviv U. Stud. in Law 293, 295-96 (1988).


determining the defamatory nature of a statement is questionable. Aside from the fact that reasonable men may differ in their opinions and may react differently to the same information, the very notion of the "reasonable man" is hardly less ambiguous than that of the "right-thinking members of society." The "reasonable man" is merely a conception, an abstraction which obscures the role of the decisionmaker as a policymaker. Some writers attribute to this mythical figure features of the "ideal" man, thereby setting too high a standard which departs from the "bonus pater familias." Others equate him with the "average person" or the "average prudent person." Similarly, the "right-thinking member of society" has been equated with the citizen "of fair average intelligence." The reference is to the "right-thinking" person "of average education and normal intelligence," to a "person who is not of morbid or suspicious mind, nor is he supercritical or abnormally sensitive." The emphasis is usually on normalcy; the eccentric or wrong-thinking segments may be considerable, but they are to be disregarded. The inquiry focuses on the effect upon the common rather than the rational.


31. See Linden, CANADIAN NEGLIGENCE LAW 20 (1972).


33. Even when claiming to adopt this standard, the courts do not conduct empirical research as to the hypothetical conduct of the average person in similar circumstances despite the fact that the practice of mankind generally, and particularly in the professional liability field, carries significant weight in determining reasonableness. See Linden, Custom in Negligence, 11 CAN B. J. 151, 169 (1968); P.S. Atiyah, Accidents Compensation and the Law 41 (3rd ed. 1980).

34. The emphasis here is not on the average conduct, but on the average prudence.


37. Devlin, L.J. in Rubber Improvements Ltd. v. Daily Telegraph Ltd. [1964] App. Cas. 234, 285. In his book THE ENFORCEMENT OF MORALS 15 (1965), Lord Devlin wrote: "He is not to be confused with the rational man. He is not expected to reason about anything and his judgement [sic] may be largely a matter of feeling. It is the viewpoint of the man in the street... He might also be called the right-minded man."
it does not necessarily characterize everything the average man does or thinks. It is rather strange, however, to describe an irrational reaction in terms of the reaction of the "right-thinking members of society."

The real question in the search for a viable standard for determining whether a statement is defamatory is not whether courts should evaluate the nature of the alleged defamatory statement according to the views held by the "reasonable person" or the "average citizen" or by a conceptual entity which is an hybrid of those two notions; it is rather, it is whether they should follow actual community norms or apply their own value judgments. What should a judge do when he believes that the actual or expected public reaction to a publication is likely to be irrational, undesirable, or immoral? Should he give the standard of the "right-thinking members of society generally" a normative meaning and find for the defendant, leaving remediless a plaintiff who has in fact been harmed; or should he, instead, base his decision upon actual community norms and decide for the plaintiff?

This gap between the way people ought to react to certain communication and the way they actually do react seems inevitable. There is no reason whatsoever, for instance, to think less of a woman who was raped, yet courts in both England and Ireland have held

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38. More often than not, courts and legal writers use interchangeably the terms "reasonable man" and "average citizen" in the context of libel law and often combine the two and speak of the "reasonable and average citizen." The most recent example in Israeli law is c.a. 740/86, Thomarkin v. Haetzny (unpublished decision of July 31, 1989).

39. For instance, is it defamatory to impute to another extreme poverty? Arguably, sound value judgment dictates a negative answer. Such misfortune should not cause right-thinking members of society to think less of that person. On the other hand, relying on the community's actual or expected reactions is likely to lead the court to answer this question affirmatively.

40. For example, is it defamatory, to call someone "a Jew" in an Arab State, or "a black" in a conservative white community in South Africa? See Speelman, THE LAW OF LIBEL AND SLANDER IN THE STATE OF NEW YORK sec. 62, at 93 (1964).


defamatory a statement erroneously alleging that a woman was ravished. These courts have refused to speculate about what "right-thinking members of the community" would think of such an unfortunate woman, or to determine what they ought to think about her. Instead, they consider how most people do in fact react to such information, suppressing their own preferences in morals or taste and accepting the public as it is, in all its variety.44

In many defamation cases, the courts have focused on what the majority of people actually think rather than on what they ought to think.45 This practice has been justified in terms of the "relational interest" protected by defamation law.46 The description of the standard in such cases as the "right-thinking members of society" is unfortunate, since it suggests that whenever there is a divergence between what most people actually think and the judge's ethical view of the matter, either most people in that community are not "right-thinking," or the judge himself does not belong to that category. In some cases, however, courts have withheld relief based on their own moral standards.47

Such a trend is evident especially in "informers" defamation cases48 which will be dealt with later in this article.

D. Quantitative and Ethical Qualifications of the Standard for Determining the Defamatory Nature of a Statement

Under English law, if a statement disparages someone in the eyes of a section of the community, but does not damage his reputation

44. Holmes, J. in Dorfman v. Afrikanse Pers Publikasies (Edns) Bpk 1966(1) PH J9(AD) at 45 expressed it as follows: "A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such an inquiry the court must eschew any intellectual analysis of the contents of the report and of its implications and must also be careful not to attribute to the ordinary reader a tendency towards such analysis or an ability to recall more than an outline or overall impression of what he or she has just read."

45. Fricke, The Criterion of Defamation, 32 Aust. L. J. 7, 10 (1958); c.c. (Ha) 684/81, Ben Ami v. Kolbo Eiton Haifa, P.M. 5744 (1) 326, 332 (1984); R.W.M. Dias and B.S. Markesinis, Tort Law 320 (1984) 320. Regard to actual community attitudes, right or wrong has been given in South Australia in Murphy v. Platerers' Society (1949) S.A.St.R. 98.


48. See infra notes 99-121 and accompanying text.
in the eyes of "right-thinking members of society, generally," it is not defamatory. Thus, the standard for determining the defamatory nature of a statement includes a quantitative element. In the United States the criterion of the "right-thinking members of society, generally" also embraces cases in which a "substantial and respectable" proportion of society would think less well of a person. The plaintiff is not required, therefore, to show that everyone or almost everyone who knows him thinks less of him as a result of the statement. The statement does not fall short of being defamatory merely because some persons in the community would not be induced thereby to hold the plaintiff in lower esteem. On the other hand, the mere fact that a handful of persons may be led to hold him in low esteem does not serve to qualify the statement as defamatory.

The words "substantial" and "respectable" denote two kinds of qualifications imposed on the standard of "the right-thinking mem-


50. See Prosser and Keeton On Torts 777 (5th ed. 1984). [hereinafter Prosser]. In the leading American case, Justice Holmes said:

liability is not a question of a majority vote. . . No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm..It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case.


51. In Berry v. Irish Times Ltd., 1973 I.R. 368, 381, McLoughlin, J., explained it as follows:

Friends of the plaintiff, if asked what effect the publication had on their minds would probably say . . . I didn’t believe a word of it. But there must be others whom he may not even know but who know him on account of his exalted position and good repute who taking the publication to be true, would look on him with disgust and contempt . . .

bers of society." These are a quantitative qualification and an ethical qualification. The qualitative aspect of defamation law bears upon two different, albeit interdependent inquiries. The distinction between these two inquiries has often escaped courts and commentators. The first inquiry deals with the content of the statement in question and examines whether the statement reasonably can be interpreted as communicating the particular message or information alleged by the plaintiff. The second inquiry deals with the normative evaluation of that message or information, i.e. with the question of whether the statement is defamatory.

In the first inquiry, it is necessary to construe the statement in its ordinary sense, in the way the parties to whom it was addressed, or who have had access to it, would ordinarily understand it. Courts do not conduct empirical studies. They assume that recipients of a statement are likely to construe it as would a reasonable person of ordinary intelligence possessing the recipients’ knowledge of the circumstances. The true meaning of some statements often is hidden behind obscure words, highly technical or professional terms of art, and the like. The average reader would not grasp their meaning and would therefore have no reason to regard them as defamatory.

In cases where the defamatory nature of the statement is indisputable, yet none of its recipients are aware or likely to be aware of its defamatory nature, and no one is likely to transmit it to someone who is aware of its true nature, an action for defamation can hardly be justifiable. However, one recipient’s awareness of the defamatory nature of the statement is enough to establish prima facie the tort of defamation. The number of such recipients is relevant only to

53. In his explication of the substantial and respectable class of society standard in Peck, 214 U.S. at 190, Justice Holmes was describing sufficient conditions, not necessary ones. HARPER, JAMES & GRAY, supra note 52, at 25.

54. This assumption embraces the case in which the recipients are more knowledgeable than the average citizen. Thus it has been held that it is fair to impute to the ordinary reader of a certain publication a “somewhat higher standard of education and intelligence and a greater interest in and understanding of financial matters than newspaper readers in general have.” Channing v. South African Financial Gazette, Ltd., [1966] 3 SA 470, 474 (A).


56. See Note, Developments in the Law: Defamation, supra note 46 at 885-887. Compare with J.H. HENDERSON, JR. & R.N. PEARSON, THE TORT PROCESS 1001 (2d ed. 1981) and Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 167 N.E. 432 (1929). Sometimes, the danger of harm in this situation can be particularly great, such as when the recipients have derived their special information solely as a result of their business or social contacts with the plaintiff.
the issue of damages. Once a statement’s meaning is clear, a court should move to the second inquiry and decide whether this meaning is defamatory. The quantitative aspect of this inquiry is considered in the process of the legal evaluation of the nature of the statement. There should be some correlation between the number of people who would think less of the plaintiff, as a result of a statement and the likelihood that the courts will find the statement defamatory.

The quantitative criterion inherent in or imposed on the standard for determining the defamatory nature of a statement can be explained in terms of expediency. One goal of this test is to save administrative costs, for example, by preventing a proliferation of defamation actions, particularly in cases which should be regarded de minimis, such as where plaintiff’s esteem has been slightly lowered amongst some distant relatives or others whose opinion probably is of no particular importance to him. After all, “... the judiciary cannot concern itself with minor social frictions when serious clashes abound.” The decisive factor here, however, is not the number of recipients but the substantiality of the injury inflicted upon the plaintiff. A person has a genuine interest in his standing in the community. His conduct is conditioned by the regard of those about him, i.e. family, friends, neighbors and prospective acquaintances, no matter what they number. If the statement lowers the plaintiff in the eyes of relatively few recipients, but if their opinion is highly important to him, his defamation action should not be denied on the basis of the small size of this index group.

The ethical criterion within the standard for determining the defamatory nature of a statement demands that the persons in whose estimation the plaintiff sinks must be “respectable”. This rule is


58. In light of the expected consumption of public resources (for example, where the feelings of a mere family unit are mildly offended), the cost to the public is unjustifiable.


61. Note, The Community Segment, supra note 24 at 1388-89 see also J.G. Fleming, supra note 47.
commonly justified in terms of public policy. At least three justifications are sheltered beneath this umbrella:

- Minimizing encroachments on freedom of speech;
- Safeguarding the prestige of the judiciary;
- Discouraging "anti-social" conduct.

The first justification is anchored in public law. Underlying it is the feeling that since the law of defamation, by nature, imposes a limitation on the right to free speech, defamation should not be interpreted broadly so as to avoid jeopardizing the existence of that vital constitutional right. According to this view, in determining what is defamatory, society would be better off disregarding opinions or reactions of outcasts, especially if their number is negligible. Therefore, any limitation on free speech should be confined to statements likely to be regarded as defamatory by most members of that society. In the absence of such a limitation, life in society will be intolerable since almost any utterance might give birth to an action for defamation. Assume, for instance, a society in which a certain political party's platform is regarded by the vast number of the populace as posing a threat to the democratic process and carrying loathsome goals. Is it defamatory to call someone erroneously "an ardent supporter" of that party? It is certainly plausible to assume that such a statement will lower the plaintiff's reputation in the eyes of most people in that society and will therefore regarded as defamatory. Assume now that an active member of that party is described in another statement as a member of the opposing party? Is this statement defamatory? Distinguished writers tend to answer this question in the affirmative, claiming that any statement about a person's politics or even philosophical belief could become defamatory when


63. Restatement of Torts, § 559, comment e (1938).

64. Harper, James & Gray, supra note 52 at 31. In general, the cases tend to find it defamatory to say that one believes in political or sociological principles that are objectionable to the average person in the community.
it is false and could adversely affect reputation even in the view of a small minority.\textsuperscript{65} Although it is quite possible that the plaintiffs in both cases will prevail, there is a basic difference between the two cases. In the first one, the statement is clearly defamatory. In the second case, a false statement according to which a certain person is a member of a particular legitimate and respectable political party is not defamatory. Nonetheless it might be actionable, once a case of "true innuendo"\textsuperscript{66} is established, but this is a different story altogether.

The freedom of expression justification of the ethical criterion standard for determining the defamatory nature of a statement stands on a shaky foundation. This ethical qualification seems to undermine the democratic process rather than strengthen it. Society consists of people of differing and divergent views and reactions. Protection of the interest of the individual in his reputation should not be confined to those members of the community whose views and moral standards conform or are at least seem sympathetic to the majority.\textsuperscript{67} Such a conception discriminates among citizens according to their views and moral convictions.

Moreover, the qualification seems to be unnecessary from a constitutional law viewpoint. To the extent that the right to freedom of expression needs protection against unwarranted encroachments, such protection is provided by the numerous privileges bestowed upon defendants by the legal system. It is unjustifiable to regard the goal of securing freedom of expression as a factor in determining whether a statement is defamatory. This determination should focus exclusively

\textsuperscript{65} Id.
\textsuperscript{66} See Gatley on Libel and Slander § 95 at 49-51 (8th ed. 1981).
\textsuperscript{67} In the landmark decision of Grant v. Reader's Digest Ass'n, Inc., 151 F.2d 733, 734 (2d Cir. 1945), Judge Learned Hand said: "A man may value his reputation even among those who do not embrace the prevailing moral standards . . . We do not believe, therefore, that we need say whether 'right-thinking' people would harbor similar feelings . . . . It is enough if there be some . . . who would feel so, even though they would be 'wrong-thinking' people if they did". Another writer expressed a similar view:

The social purpose underlying the action for defamation is to protect members of society against irresponsible or malicious utterances which are false and damaging to plaintiff's name. Unless some extrinsic policy intervenes, then by definition the action should be available whenever the plaintiff's reputation has been disparaged by a false statement, even in the extreme case where the esteem lost be that of but one man and he is a moron, a lunatic, or a murderer.

Note, The Community Segment, supra note 24 at 1389-90.
upon the statement’s potential and actual impact on the esteem of its target. Plaintiffs should not be required to carry the additional burden of proving that their action does not interfere unduly with the right of the defendants to freedom of expression. The burden of proving the contrary should rest with the defendants. Once a plaintiff proves a substantial loss of esteem as a result of a statement, he ought to be allowed to go on with his action. Yet he still has a long way to go. Overcoming the "defamatory" hurdle is only one of the requirements imposed upon plaintiffs in defamation litigation.

A second justification given for the ethical qualification is the prestige and public image of the judiciary. Maintaining the image of an independent, professional, moral and neutral institution is essential for the judiciary. Some argue that if a plaintiff prevails in a defamation action dealing with utterances which are not defamatory according to the majority of the population, yet which present the plaintiff in a bad light within a specific immoral, illegal, or antisocial minority group, there is a danger that the public will misinterpret that decision as judicial endorsement of the activities of the antisocial group.68 As a result of such a decision, the public esteem of the court may be lowered.69

Courts must preserve their respectability. Respect for the court is instrumental in attaining and maintaining respect for law. That image is so vital that the goal of maintaining it is sometimes given priority

68. Apparently, McLoughlin, J., in Berry v. Irish Times Ltd., [1973] I.R. 368, 381 accepted this argument in principle. In Israel, Barak, J., wrote in h.c. 910/86, Resler v. Minister of Defence, P.D. 42 (2) 441, 495 (1988): "[t]he public is likely to miss the distinction between a judicial review and a political critic and might identify judicial review of a political matter with the matter itself. It may regard a legal decision according to which a certain governmental activity is legal as a judicial statement which endorses this activity."

69. According to Lord Devlin, "A judge's impartiality may be gravely prejudiced by an active judicial role, where there is no community consensus. In controversial areas activism of this kind is bound to seem like taking sides and so impartiality which is the judge's greatest and most important attribute is threatened." Devlin, THE JUDGE, supra note 41 at 3-9. Compare with Atiyah, supra note 41 at 350, 355, 357-58, 362, 368-69. In Baker v. Carr, 82 S.Ct. 691, 737 (1962) Justice Frankfurter asserted: "The Court's authority... ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself unto the clash of political forces in political settlement." See also W. FRIEDMANN, LAW IN A CHANGING SOCIETY at 45. For similar views in Israel, see Landau, D.P., in h.c. 390/79, Duikut v. Government of Israel, P.D. 34(1) 1, 4.
even over the most basic duty of the judiciary, namely, the admin-
istration of justice in the individual case.\footnote{70}

Thus, according to one view:

when the grant of justice would cause public scandal, the merits of
the individual case must yield to the necessities of the law. The law
needs moral support and in return it must be prepared to support
public morality, and where that would be outraged by the use of
the law, then, but only then, should the law refuse its aid.\footnote{71} That
is one of the major reasons why many courts have refused to ""soil
their hands"" by refusing to rectify genuine wrongs. Two principles
seem to be in a constant clash: the principle that ""[e]very one is
entitled to his just deserts whether he has broken the law or kept
it""\footnote{72} and the principle that ""no polluted hand shall touch the pure
fountains of justice.""\footnote{73}

The latter is the main rationale of the doctrine of \textit{ex dolo malo
non oritur actio}; namely, no court will lend its aid to a man who

\footnote{70. The common law courts have recognized a number of community interests
and have allowed them to override demands of fairness which might be said to flow
purely from the relations of the parties inter se. \textit{See} Winfield, \textit{Public Policy, supra
note 62 at 76. One of these interests is the interest in the integrity of public
administration, including the administration of justice. \textit{See generally Lucke, The
Common Law: Judicial Impartiality And Judge-Made Law, 98 LAW Q. REV. 29

71. \textit{DEVLIN}, \textit{supra} note 37, at 59. It does not mean however, that the courts
should hesitate to fulfill their task in the face of stormy public controversy. Thus
Witkon, J., wrote in h.c. 72/62, Shalit v. Minister of the Interior, P.D. 23(2) 477,
522 (1969): ""It is axiomatic for me that the court must at times take up a position
on ideological questions and not be apprehensive about its competence to do so or
about the effect that may have upon its repute . . . even if the court's view on a
controversial ideological question is not acceptable to the public at large but only
to part of it, who would doubt that even then it fulfills a legitimate and important
judicial function?'' Similarly in h.c. 428/89, 429/86, 431/86, 446/86, 448/86, 463/
86, m.a. 320/86 Barzilay v. Government of Israel, P.D. 40(3) 505 (1986). Ben-
Porath, D.P., wrote at p. 584: ""We are obliged to adopt an attitude, even with
regard to matters of public controversy and even though part of the public may
not approve of that attitude"". Barak, J., added at p. 585: ""We are aware of the public controversy that is raging around this matter. In the dynamics of political life our judgment here may
well come to be used as a lever in the struggle between the opposing political forces.
That we regret, but we have to fulfill ""our function"" and our duty as judges.

72. \textit{See} \textit{DEVLIN}, \textit{supra} note 37, at 59. \textit{Compare with} Cohen, D.P., in h.c. 320/
80, Kawasme v. Minister of Defence, P. D. 35(3) 113, 130 (1981) ""It is common
knowledge that the gates of this Court are wide open for every person, be he the
most despicable, dangerous and corrupt criminal."" \textit{But see} Landau, D.P., \textit{id. at
123 and} D. Levin, J., in h.c. 131/86, 24/86, 669/85 Kahana v. Chairman of the
Knesset et al P.D. 40 (4) (1986) 393, 403-06.

73. Collins v. Blantern (1767) 2 Wilson 341, 350 (per Wilmut C.J.).}
founds his cause of action upon an immoral or illegal act. Yet, as Professor Shand lucidly stated: "Our system of justice is not a beautiful garden ornament but is (or should be) a piece of machinery for social engineering which may occasionally require its operators to put on overalls and get their hands dirty."

In defamation cases, however, the courts are not required to dirty their hands. When a court recognizes that a certain imputation is harmful in the minds of the "wrong-minded" recipients of the statement, it does not mean that the court "adopts" as its own the standards of those "wrong-minded" recipients. Neither does it mean that the court endorses the "right-mindedness" of the opinions of such recipients. After all, recognition of fact is not an approval of principle. The potential damage to the courts' image, due to a possible misinterpretation of judicial decisions in defamation cases, should not justify leaving a plaintiff who suffered a substantial loss of esteem without any legal remedy. In many cases, courts can avoid this problem by cleverly drafting their decisions. A judge confronted with innocent yet false statements attributing to the plaintiff praiseworthy conduct that nonetheless lowers him in the eyes of his neighbors and friends, can find for the plaintiff and at the same time emphasize that it is generally not defamatory to make such a statement. A judge could even commend the conduct or opinion in question.

The third common justification given to the ethical qualification of the standard for determining the defamatory nature of a statement rests on the judiciary's ethical and educational foundations.

Judges are repeatedly required to interject their conceptions of what respectable and sound thinking persons should do or think and to disregard the actual or expected reaction of the "wrong-thinking" members of society. According to this view, courts should refuse relief because to allow recovery would encourage wrong beliefs and might be conducive to illegality or immorality in the community.

76. 2 HARPER, JAMES & GRAY, supra note 52 at 32.
77. A judge's main task, according to professor Fiss, is to give meaning to public values. See Fiss, The Supreme Court 1978 Term Foreword: the Forms of Justice, 93 HARV. L. REV. 1, 2 (1979); Note, The Community Segment, supra note 24 at 1393. In h.c. 72/62, Shalit v. Minister of the Interior, at p. 522, Witkon, J., spoke about "the judge's ability to persuade and educate" and described him as "one of the elements that influence public opinion and fashion the image of society".
This logic is flawed. A denial of recovery is likely to have no effect upon the wrong-thinkers, but it will permit intentional harm to go uncompensated. This approach will allow a person who wishes to derogate his rival to publish unfounded and damaging statements regarding the latter with impunity, so long as he carefully tailors the statement to escape the majoritarian defamation standard. Moreover, it seems that the educational role of the judiciary underlying this justification is often overestimated. It is unrealistic to assume that judicial opinions delivered in defamation litigation are widely read and understood or that they significantly influence patterns of social behavior. Furthermore, those few members of society who understand judicial opinions under the ethical standard are likely to derive from them the following unbecoming lessons:

(1) The law of defamation does not provide equal protection for all members of society;

(2) It is legally possible to ruin another with lies provided that one does it cleverly, selecting an allegation which the courts will find difficult to regard as defamatory since the lies comply with the majoritarian view.

(3) “Right-thinking members of society” either do not exist or their thinking is completely detached from reality. For instance, courts have attributed to the “right-thinking members of society” the view that it is appropriate and even commendable to assist the police in bringing one’s best friend or a family member to justice.

The divergence between the actual sentiment prevailing in society and its normative evaluation by the courts stirred one writer to note, “Respect for the law is not enhanced by judicial assumptions that are known to be factually wrong by almost all laymen and most lawyers as well.”

The authors of a leading torts treatise reject the ethical qualification of the standard for determining the defamatory nature of a statement. Harper, James, and Gray claim that what matters in defamation is the existence of community opprobrium, not respectability. Certain kinds of defamation can be protected explicitly by giving specific reasons for the protection without reflections on the

78. In Dorfman v. Afrikanse pers Publikasies (Edns) Bpk, Bpk 1966(1) PH J9 (AD) at 45, it was stated that in view of the mass of material in a newspaper it is in general unlikely that the ordinary reader would pursue and ponder a single report in isolation.
79. See HARPER, JAMES & GRAY, supra note 52 at 35-36, n.45.
80. Id. at 32.
"respectability" of persons or of their views. They conclude with the following persuasive words:

[the courts face a problem of their own making. Because they have defined defamation in terms of "respectable" community opinion, they may imagine that if they recognize the imputation of informing as defamatory, they thereby confer an official finding of "respectability" on the opprobrium. Abandoning this ethical qualification would enable the courts to avoid the absurdity of decisions that deny innocent noncriminal redress for truly harmful falsehoods merely because they involve views or sentiments which can be regarded as not "respectable" or as "anti-social."]

The merit of these words is evident in the informers defamation cases.

E. Informers and Defamation

Is it defamatory to allege that a certain person informed the authorities of the illegal activities of others and thereby assisted the police in bringing these people to justice? In the leading English case,82 the defendant suggested that the plaintiff, a member of a golf club, had informed the police of the existence of gambling machines in that club. The plaintiff argued that the suggestion meant he had been disloyal to the members of the club and devoid of all true sporting spirit. Hilberry, J., allowed the action, but the Court of Appeal accepted defendant's appeal, stating that: "to say of a man that he has put in motion the proper machinery for suppressing crime is a thing which cannot on the face of it be defamatory."

In Ireland, an Irish priest brought an action against a person who had suggested that the priest had informed against a certain class of Irish criminals.84 The court assumed that the class which disapproved of the alleged acts of informing was a minority group. Although the court accepted that the plaintiff had been exposed to great odium amongst that class, the judges stated: "The very circumstances which will make a person be regarded with disfavor by the criminal classes will raise his character in the estimation of right-thinking men. We

81. Id. at 34. The treatise authors point out that courts could, for instance, refuse to protect a criminal's interest in a reputation for professional proficiency, on the ground that if the defamation is injurious to the criminal's career, society's interest in hindering criminal careers outweighs its interest in affording vindication to the defamed.
83. Id. at 840.
can only regard the estimation in which a man is held by society generally.\textsuperscript{85}

A century later, in \textit{Berry v. Irish Times Ltd.},\textsuperscript{86} a newspaper photograph suggested that the plaintiff, a senior civil servant and the head of the Department of Justice, helped in the arrest of two Irish republicans in England. By a 3 to 2 majority, the Irish Supreme Court decided that it is not libel \textit{per se} to say of an Irish citizen that he helped to bring to justice another Irish citizen convicted of breaking the law in another country. It does not matter that the person so convicted was motivated by a desire to resolve, by force of arms, a dispute existing between his country and the country in which the offense was committed when there was no state of war between the two countries.\textsuperscript{87} The minority judges\textsuperscript{88} regarding the statement as defamatory expressed the view that any Irishman of normal experience and intelligence would consider the statement defamatory since it portrayed the plaintiff as a traitor.

The Scottish courts have not followed the same course. In \textit{Graham v. Ray},\textsuperscript{89} the defendant circulated a report that the plaintiff gave information to the excise officers against a distiller in order that he might obtain one half of the penalties awarded. The court found for the plaintiff, asserting: "If you publish on the streets that a man is a common informer, is that not slander? It may be perfectly legitimate to give information, but an informer is by no means a popular character."\textsuperscript{90} One justification given for that decision was that the plaintiff was alleged to be an informer for a reward.\textsuperscript{91}

In the leading South African case,\textsuperscript{92} a student was alleged to be doing espionage work for the police in the university. She claimed that the publication lowered her in the estimation of many students and others. She argued that the appellation "spy" is an opprobrious one. Moreover, to say of a university student that she has deliberately spied upon fellow students whose confidence and trust she may be

\textsuperscript{85} \textit{Id.} at 62.
\textsuperscript{86} 1973 N.Ir. 368.
\textsuperscript{87} \textit{Id.} at 375. Dalaige, J., conceded, however, that in similar cases explicitly calling a person an informer might be actionable.
\textsuperscript{88} \textit{Id.} FitzGerald, J., at 378 and McLoughlin, J., at 379-82.
\textsuperscript{89} 13 Sess. Cas. 634 (1851).
\textsuperscript{90} \textit{Id.} at 636 (per Lord Fullerton).
\textsuperscript{91} \textit{See} Kennedy v. Allen, 10 Sess. Cas. 1293 (1848); Winn v. Quillan, 2 Sess. Cas. 322 (1899).
presumed to enjoy implies disloyalty and is therefore defamatory. The court refused to take a sectional view and held that she had not been lowered in the estimation of members of society generally.

In the leading United States case, the defendant spread the false report that the plaintiff, a gasoline station operator, habitually informed on truck drivers violating the I.C.C. regulations. Despite evidence of a decline in plaintiff's business, the court ruled against the plaintiff, holding he was charged merely with doing that which he had a duty to do. The court justified its decision as follows: "To permit the injured plaintiff to recover would be contrary to the public interest in that it would penalize the law-abiding citizen and give comfort to the law violator. It would impede law enforcement for the benefit of the anti-social." 

This justification makes very little sense. It is difficult to conceive how these results would follow. Since the plaintiff in that case arguably did not help law enforcement, it is dubious at best to describe a judgment in his favor as a victory for the anti-social and a blow to law enforcement. The court in this case unfortunately awarded undeserved protection to the author of the false statement and left remediless the plaintiff whose loss was substantial.

Underlying many of these decisions is the view that informing the appropriate authorities of any kind of illegal activity is commendable or at least does not entail any negative reaction on the part of the majority of the public. This view is extremely difficult to share. Informers seem to be resented by even the law-abiding members of society. McLoughlin, J., supplied one possible explanation: "It may be that one's views on matters of this sort are conditioned by one's up-bringing and education. The school sneak who, however justified, "spills to the head" was regarded with contempt by all his fellows." Courts should not play "legal ostrich" and claim that informers are odious only to those who support crime. This is perfectly true with regard to Shaha.

94. Id. at 687.
95. Harper, James & Gray, supra note 52, at 35-36 n.45.
96. See Riesman, supra note 23, at 1302; 2 Harper, James & Gray, supra note 52, at 35.
97. McLoughlin, supra note 51, at 382.
98. See Note, The Community Segment, supra note 24, at 1393.
F. The Shaha Decision - An Appraisal

The decision of the Israeli Supreme Court in Shaha has two facets. On the one hand, some of the views expressed by judges in this case are daring, original and innovative. On the other hand, the decision itself seems wrong and unfortunate. On the theoretical level, one should praise and welcome the decision of two of the three judges to eschew the standard of “the right thinking members of society generally” in favor of a flexible standard almost free of the quantitative and ethical qualifications usually imposed for determining whether a statement is defamatory.

Elon, J., expressly omitted the notions of “considerable” and “respectable” from his definition of that standard. He expressed his readiness to regard a statement which is not seen as offensive by the majority of the public as defamatory if it is likely to injure a person within a small and even peculiar group. Ben-Porath, D.P., seemed to be in accord with this view. She acknowledged that calling someone an “informer” might be defamatory, even if the alleged informing served the national security interests.

Both judges believed, however, that courts have discretionary power to disallow defamation actions for public policy reasons. This power should be exercised cautiously after conducting a balancing process in which factors such as the conduct of the parties and the gravity of the allegation are taken into account. A drastic decision to disallow otherwise justifiable defamation actions for public policy reasons should be taken only in exceptional cases in which the courts reach the conclusion that the interest in protecting the right to live free of defamation should be sacrificed for the sake of assuring that wrong conceptions or deeds, especially ones which undermine the rule of law, will not be legitimized.

It seems, therefore, that under Israeli law, as it now stands, the requirement that the statement in question be defamatory is prima

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99. It is not altogether clear whether in this context these public policy considerations were employed as an integral component of the substantive law of defamation (and more specifically as an ethical qualification of the standard for determining whether a statement is defamatory) or as an independent matter external to the substantive law of defamation according to which courts are vested with inherent power to deny actions, even seemingly sound ones, for public policy reasons. It is difficult to draw from the various judgments a clear cut answer to this puzzle. In this case, wherein the same outcome is predicted either way, it is unnecessary as well.
facie fulfilled once the plaintiff establishes that the statement is likely to lower him in the estimation of the community members to which he affiliates himself. Nevertheless, in exceptional cases, liability will be denied for public policy reasons. Was Shaha one of those "exceptional" cases? The Israeli Supreme Court thought so. The soundness of this decision is doubtful.

The facts of Shaha are unique. The only case which it resembles is Berry v. Irish Times Ltd.100 Had the plaintiff there decided to bring his action in an English court rather than in an Irish one, the similarity between these two cases would have been more meaningful. At first blush, the very decision of the plaintiff in Shaha to sue in an Israeli court seems somewhat bizarre.

Usually, defamation actions are principally brought to vindicate the plaintiff's reputation. Perhaps the Shaha plaintiff wished to clear his name in the eyes of his Armenian congregation and colleagues. Perhaps he sought compensation for his pecuniary damage or was motivated by revenge. While the plaintiff in Shaha was not an Arab, it is clear that the decision of the Israeli Supreme Court applies with at least equal force to similar actions by Palestinian plaintiffs. Yet the very idea that Palestinians suspected of collaboration with the Israeli authorities will sue for defamation in Israeli courts is odd. It seems a senseless and futile thing to do. The members of their index group are hardly likely to respect or even accept the Israeli court's decision on such matters. At least some of these members are likely to regard a successful action as a final proof of the plaintiff's traitorous behavior.

Actually, the nature of the allegations made in Shaha raises the question whether any court, either in Israel or in the Arab States, can be perceived by all potential litigants as capable of handling the dispute fairly. It is extremely difficult for the defendant to establish the defense of truth in an Israeli court. Potential witnesses are likely to hesitate to testify, even indirectly, against the interests of the Israeli authorities, let alone expose themselves as persons who knew the whereabouts of Israeli agents and "spied" on them. Israeli intelligence officers can hardly be expected to make themselves available for such litigation. In the Kingdom of Jordan, on the other hand, the parties would not be able to call any Israeli officials to the witness stand. The same is true in the local courts in Judea and Samaria. These

100. 1973 I.R. 368.
courts do not exercise authority over the Israeli military or administrative personnel.

To summon any such personnel, the court would need special permission from the Israeli authorities. Such permission is unlikely to be granted in such a case. Since the plaintiff in *Shaha* was denied entry into the Kingdom of Jordan, he did not have much choice in terms of forum shopping. Thus he brought his action in the Israeli courts. The decision to strike it down was unfortunate. It violated the fundamental purpose for which defamation actions are available. It left remediless a plaintiff who had suffered not only pecuniary damage and a substantial loss of esteem but whose very life and health were seriously endangered. It enables wrong-doers to lie with impunity and to endanger life without fear of sanction. The Israeli authorities surely did not benefit from the decision, which certainly did not and could not encourage recruitment of informants.101

The Israeli courts could and should have reached a different outcome. The statements in question were clearly defamatory. They were made in Arabic to Arab ears and eyes. They were published exclusively in Arab newspapers read mostly by Arabs. Since the recipients of the statements were almost exclusively Arabs, it was only natural and logical to determine whether the statements were defamatory according to the reactions and opinions of those recipients. It is artificial and wrong to rely instead on the standard of the Jewish population of Israel. According to the latter standard, stating in a Jordanian newspaper that a certain person in East Jerusalem is a supporter of the PLO is defamatory, though it raises the victim’s esteem in the eyes of the recipients of that information. This way, the whole purpose of defamation law is turned upside down since it denies damages in a case of a substantial loss of esteem and awards damages for a statement which actually increases the plaintiff’s esteem in the eyes of others.

Moreover, the Israeli society itself is not and should not be regarded as homogeneous. It consists of a Jewish majority and a substantial Arab minority. The judges should be sensitive to the possibility that a decision such as *Shaha* might be seen as an one-sided attempt to extend the conventions of the Jewish majority to the larger society. Furthermore, it is not certain that even under the “Jewish standard”

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101. Informants are given no protection. Defendants will defeat defamation claims either by the defense of truth or by the *Shaha* rule.
the statements in question were not defamatory. Some Jews in Israel support, in various degrees of intensity, the Palestinian claim for self determination. At least some of them are likely to regard statements as the one made in Shaha as defamatory.

Many Israelis, though they may support Israel’s policy and activities in the occupied territories and may be fully aware of the vital importance of recruitment of local informers, do not necessarily respect informers, particularly those who inform for reward. These Israelis may regard statements of the kind made in Shaha as defamatory.

G. Alternative Approaches to the Informer/Defamation Dilemma

The fear that allowing the action would validate and encourage wrong beliefs did not justify the decision to deny the plaintiff his right to live free of defamation. The Court could have permitted recovery while decrying the social ethics of the local community. Moreover, the plaintiff could have established a clear case of innuendo.102

The innuendo was that the plaintiff had been portrayed as untrustworthy, treacherous, capable of betraying his friends, a person to be shunned and boycotted. He was actually described as a hypocrite since he had presented himself as a friend of the Arabs, while in fact he had assisted the Jews.103

Courts should exercise a great deal of caution in relying on innuendo to determine the outcome of a defamation action. Thus, even a statement such as: “Mr. X ardently supported the nomination of Justice Y to the Supreme Court, claiming that Y is the greatest jurist in the country” can turn out to be defamatory if Mr. X is known for his view that Mr. Y is a mediocre jurist. By relying on innuendo, the intrinsic content of the statement: “The plaintiff collaborated with the Israeli authorities,” is irrelevant to the decision of whether

102. See footnote 102. The Defamation Prohibition Law, § 3, 5725-1965 Sefef Ha-Chukkim No. 464 of the 1st Av, 5725, p. 240 (30th July 1965); 19 Laws of the State of Israel 254 (authorized translation from the Hebrew prepared at the Ministry of Justice) provides, “It shall be immaterial whether the defamatory matter is expressed directly and completely or whether it and its application to the person who alleges that he is injured thereby can be understood from the publication or from extrinsic circumstances or partly from the former and partly from the latter.”

103. The dissenting judge in Byrne v. Deane, [1937] 1 K.B. 818, 830-31, sidestepped this difficulty by classifying the case as one in which there was an innuendo that the plaintiff was disloyal to the members of the club. From this one can conclude that the plaintiff was pretending to do what he was not and therefore was practicing deceit.
he should be compensated. The court need not express its opinion as to whether that statement is defamatory. What counts is the meaning of that statement in the light of the additional facts. In its totality the message may be that the plaintiff is a hypocrite, an irresponsible person, and an unfit Archbishop of the Armenian Church in East Jerusalem. As such, the statement clearly is defamatory.

Indeed, the plaintiff could have based his action independently on the claim that the statements in question were an attack on his competence or fitness as a public official since they portrayed him as unfit to successfully fulfill the duties of his office in the local church. Such words might be defamatory according to Section 1 (3) of the Defamation Prohibition Law 5725-1965. Under this Sub-Section the plaintiff did not have to prove malice, falsehood and pecuniary damage. If he was able to prove these elements, he could

104. Van Lonkhuyzen v. Daily News Co., 161 N.W. 979, 982 (1917). To say of a minister that he is an interloper, a meddler, and a spreader of distrust, discontent, and sedition is defamatory.

105. Sefef Ha-Chukkim No. 464 of the 1st Av, 5725, p. 240 (30th July 1965). Defamation is defined in Section 1 as follows: "1. Defamatory matter is anything the publication of which may (1) lower a person in the estimation of others or expose him to hatred, contempt or ridicule on their part; (2) bring a person into disrepute because of acts, conduct or qualities attributed to him; (3) injure a person in his office, whether it be a public or any other office, or in his business, vocation or profession; (4) bring a person into disrepute because of his origin or religion; in this section, 'person' means an individual and a body corporate."

The definition of "defamatory matter" is inapt. It is not comprehensive enough. It is based on a list of categories rather than on a broad and general principle. Its application is problematic with regard to statements which do not lower the esteem of another person, such as statements imputing poverty, physical peculiarities, loathsome disease or conveying the impression that a woman had been raped, statements causing neither hatred nor contempt but rather pity or sympathy. The various categories overlap. It seems that section 1 (1) is a general one and sections (2) and (4) refer to two of its applications, and the law could have deleted them or combined them. Section (2) seems dispensable (included in (1)).

106. Despite the seemingly clear language of this subsection, it is questionable whether mere proof that a statement may injure a person in his office, business, vocation, or profession will suffice to establish the defamatory nature of that statement. A literal interpretation of this subsection likely will extend unjustifiably the boundaries of the tort of defamation, encompassing statements which have nothing to do with injury to reputation.

107. However, truth can be a defense when there is public interest in the statement.

probably have resorted to the tort of injurious falsehood.\textsuperscript{109} Under this tort, the statement need not be defamatory, merely false.\textsuperscript{110} It is enough that a small faction of the population would be influenced by the statement to boycott the plaintiff and economically injure him, even though there is nothing wrong in the statement from the perspective of the majority of the population.\textsuperscript{111}

Another alternative worth exploring in order to sidestep the issue of whether a collaboration with the Israeli authorities is "wrong" would have been to resort to choice of law rules. Undoubtedly, the Israeli court had jurisdiction in this case, in light of the fact that the Jordanian newspaper was distributed in East Jerusalem. It was possible, however, to argue that the Jordanian law should have governed the action. The Israeli rules on conflict of laws are basically judge-made law traditionally following English Common Law principles.\textsuperscript{112} In recent years, however, the Israeli courts have demonstrated a tendency to favor the Restatement (Second)'s test of "the most significant relationship to the occurrence and the parties."\textsuperscript{113} Applying this test in defamation cases means applying the law of the jurisdiction with the strongest meaningful link to the publication and to the parties.\textsuperscript{114} In \textit{Shaha}, it was quite appropriate to regard the Jordanian law as the proper law of the tort. Both parties were citizens of

\textsuperscript{109} According to section 58 of the Civil Wrongs Ordinance (New Version) 2 Laws of the State of Israel 19 (English text prepared at the Ministry of Justice), "Injurious Falsehood: (a) Injurious falsehood consists of the publication maliciously by any person of a false statement, whether oral or otherwise, concerning the trade, occupation or profession on the goods or the title to property of any other person, provided that no person shall recover compensation in respect of any such publication unless he has suffered pecuniary damage thereby."

\textsuperscript{110} Jackson v. British Medical Ass'n, [1970] 1 All E.R. 1094, 1104.

\textsuperscript{111} Friedman, \textit{Injurious Falsehood - The Unused Option for the Commercial Competitor's Protection Against False Advertising}, 36 HAPRAKLIIT 425 (1985); Wolff, \textit{Unfair Competition by Truthful Disparagement}, 47 YALE L.J. 1304, 1309-12 (1938).


Jordan, the statements were made in Jordan and at least part of the damage was inflicted in Jordan. Undoubtedly, from a Jordanian perspective, the statements in question were defamatory.

The Israeli courts should have explored the availability of other causes of action. The plaintiff could not avail himself of the debatable tort of placing another before the public in a false light. This tort, which embraces the case of attributing to an individual political or other views which he does not in fact hold, is not recognized under the Israeli law of torts. In any case, such an action would not have enabled the Shaha court to side-step the problem of evaluating the nature of the statements in question. Although this cause of action need not be defamation, it must still be something that would be objectionable to the ordinary reasonable man under the circumstances.

Another alternative avenue totally avoids the question of the defamatory nature of the statements. Defamation is not the only species of injuria verbis. Various legal systems recognize a rule according to which a non-defamatory statement may amount to a good foundation for an action for damages if the plaintiff could show (1) that the statement made by the defendant was false; (2) that it was made with a design to injure; and (3) that it did in fact injure. In Israeli

115. Many false light cases could be brought as "libel per quod" actions. Some scholars regard this action as superfluous. See Kalven, Privacy in Tort Law - Were Warren and Brandeis Wrong?, 31 LAW AND CONTEMP. PROBS. 327, 331-37 (1966).


law, a similar rule prevailed for a while, but the courts eventually decided not to follow it.\textsuperscript{119}

Another possible cause of action is the intentional or negligent infliction of emotional distress.\textsuperscript{120} Under Israeli law, these causes of action now fall within the ambit of the tort of negligence.\textsuperscript{121} If there were no foundation for the allegation that the plaintiff collaborated with the Israeli authorities, it was negligent on the part of the defendant to ascribe to the plaintiff such behavior, thereby inflicting upon him pecuniary damage and substantial loss of esteem. It is submitted that the existence of this cause of action was another good reason not to strike down the action in \textit{Shaha}.

Moreover, defendant's behavior in \textit{Shaha} was not merely negligent. It was also, to say the least, irresponsible. Given the ongoing violent struggle between Jews and Arabs in Judea, Samaria, and East Jerusalem, the publication of statements accusing members of the local community of collaboration with the Israeli authorities is almost an invitation to murder. The long list of people murdered before and particularly after \textit{Shaha} underscores that danger. It is therefore most unfortunate that the Israeli Supreme Court ignored this fateful, realistic aspect of \textit{Shaha}.

\begin{itemize}
\item \textsuperscript{119} c.a. 140/53, Adama v. Levi, P.D. 9, 1666 (1956).
\item \textsuperscript{120} c.a. 416/58, Jadeon v. Suliman, P.D. 13, 916 (1960).
\item \textsuperscript{121} \textit{See} c.a. 243/83, Municipality of Jerusalem v. Gordon, P.D. 39 (1) 113 (1985).
\end{itemize}