A Unique Challenge to International Corporations

"Breach of Autonomy"—A Unique Israeli Damages Theory

By Ron Peleg and Noam Gilon

The breach of autonomy doctrine, one of the main causes for concern for international defendants litigating in Israel, is constantly changing and evolving; luckily, most potential breach of autonomy claims can be anticipated and mapped out in advance.

Imagine the following scenario: a middle-aged cancer patient, who happens to be severely allergic to peanuts, begins taking a life-saving drug as part of a revolutionary new treatment. A few weeks later, the drug's manufacturer reveals that the drug's formula contains minute traces of peanuts—much lower than can trigger even the slightest allergic reaction. The patient, having suffered no negative side effects while benefitting from the drug's efficacy, rushes to file a class action, claiming a sum of USD 1,000 for every one of the 200,000 class members.

Sound farfetched? Well, with the advent of the "breach of autonomy" doctrine, not in Israel!

In a previous article (In-House Defense Quarterly 34 (Fall 2017)), we showed how Israel, despite its small size, has become one of the world's leading class action breeding grounds. In this article, we will provide a glimpse of another Israeli phenomenon with ramifications that are no less troubling. This is the so-called "breach of autonomy" doctrine: a novel type of damage unique to Israel. A genuine Israeli innovation. But one with potentially significant litigation consequences.

We are all familiar with the traditional types of damages that plaintiffs can claim in litigation. Common law jurisdictions traditionally recognize a defined set of damages, ranging from pecuniary damage (*e.g.*, medical bills, lost wages), non-pecuniary damages (pain and suffering, emotional distress), nominal damages, and even punitive damages. Each of these types of damages has its own criteria and characteristics.

Israel, too, a common law jurisdiction with British roots and heavy American influences, has for many years followed the same path. Recently, this has changed. Over the past several years, Israeli courts have been developing a completely new

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type of damage, unlike any other: "breach of autonomy." This new type of damage has taken Israeli jurisprudence by storm. What started out as a narrow doctrine applied in medical malpractice claims has spiraled out of control. Today it serves as a basis that allows Israeli plaintiffs—both in individual and class action context—to construct claims seeking hundreds of millions (if not billions) of dollars in damages, virtually out of thin air.

Israeli Law: A (Short) Guide for the Perplexed

Before diving into breach of autonomy, a short background on the Israeli legal system is in order.

As mentioned above, Israel has a very well-developed common law legal system, influenced by both the British and American legal traditions. While Israel has no formal constitution, the Israeli legislature has enacted several "Basic Laws" that are interpreted as having constitutional status. These protect a set of fundamental rights, such as freedom, equality, property, and dignity.

Israel has a three-tiered court system, consisting of magistrate courts, district courts, and the Supreme Court. Stare decisis is a fundamental tenet of Israeli law. Almost all recent legal developments in the fields of tort, product liability, medical negligence, and consumer protection have been formulated in extensive Supreme Court decisions and further developed through concrete district court implementations. The breach of autonomy doctrine is no exception.

In terms of procedure, all trials in Israel are bench trials. Unlike in the United States, there are no summary judgments in Israel. The Israeli alternative is dismissal in limine, which is granted very rarely—especially in the class action context—because it is perceived as denying the plaintiff's day in court.

Discovery under Israeli law is relatively modest compared to the United States. There are no depositions in Israel, nor is there large-scale e-discovery.

Class actions are also a very common procedural device in Israel. They are permitted, and indeed, used by plaintiffs in a variety of fields, ranging from personal injury, through consumer protection and product liability, to securities, banking, and insurance. For a claim to be certified as a class action in Israel, the plaintiff must generally show that the merits of his or her claim have a prima facie chance of success, as well as commonality of both cause of action and of damages.

Breach of Autonomy: The Birth of a Doctrine

By now you must be asking, what does "breach of autonomy" actually mean? The underlying notion is that an individual's autonomy, or his or her "right to make his or her own life choices," is a type of damage (called a "head of damage" in Israel) in and of itself—similar to bodily integrity or loss of future compensation, for example.

This head of damage was first established in a landmark decision handed down by the Supreme Court two decades ago: Civil Appeal 2781/94 *Daaka v. Carmel Hospital Haifa*, P.D. 53(4) 526 (1999) (Isr.). In that case, a woman who was about to undergo a medical procedure on her leg was required to sign a form of informed consent while under anesthetic. The consent permitted her physicians to perform a biopsy on her shoulder to explore a finding made during the procedure on her leg. The biopsy was unsuccessful and the woman suffered physical damage as a result.

The Israel Supreme Court held that while the hospital negligently failed to obtain the patient's informed consent (because she was anesthetized), the biopsy itself was not performed negligently. Thus, no causal link was found between the negligently obtained consent and the physical damage, and damages for the physical harm therefore could not be awarded. Nonetheless, the Israel Supreme Court created a new head of damage in the form of "breach of the patient's autonomy." In other words, the damage is the very fact that the patient did not receive proper disclosure of something that was significant to her, and therefore her right to make a meaningful choice was taken away. The Israel Supreme Court then quantified this damage at approximately USD 3,700.

The uniqueness of this head of damage is immediately apparent. Unlike nominal damages, which are available in other jurisdictions in cases of breaches of constitutional rights, the doctrine of breach of autonomy is not intended to compensate for breaches that result in no or negligible damages. The *Daaka* Court explicitly stated that theoretical harm would fall in the ambit of de minimis, and as such, it will not be compensable. Similarly, compensation for breach of autonomy is much higher than the symbolic USD 1 often awarded as nominal damages. In fact, in later medical negligence cases similar to *Daaka*—characterized by serious physical injury together with inability to prove negligence or causation—awards of USD 100,000 and upward were not uncommon.

Damages for breach of autonomy are also unlike punitive damages, which are extremely rare in Israel. Damages for breach of autonomy are fundamentally compensatory damages, and they represent a quantification of the harm caused. In addition, damages for breach of autonomy are not contingent upon the tortfeasor's mens rea, meaning that they are not limited to intentional (or reckless) torts.

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In any case, the original intention of the Israel Supreme Court was clear: *not* to create a new standalone head of damage, but rather to recognize a new secondary head of damage in the specific field of medical negligence. This head of damage serves two purposes: it deters physicians from treating their patients as objects whose wishes need not be considered, while allowing certain compensation for those patients, who, without the ability to prove causation, would otherwise be left with no recovery.

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From an Anecdotal Side Note to a Litigation Menace

Unfortunately, the maxim "hard cases make bad law" was particularly true in this case. The *Daaka* Court did not limit the scope or applicability of its innovation, but rather, it made two important remarks upon the general nature of the novel head of damage that it had just created. First, the Israel Supreme Court clearly stated that this head of damage is *not* dependent upon the presence or absence of physical damage. Second, the Israel Supreme Court added that there is no need to show that the patient would have made a different choice with full information, thus rendering the element of causality practically meaningless.

These two characteristics served as the cornerstone for the future evolution of breach of autonomy. The doctrine was not formally confined to being a "bench player" in the field of medical negligence. Instead, it could potentially serve as an independent basis for claims in almost any area of the law.

Interestingly, what allowed the doctrine to fulfill its alarming potential was a parallel phenomenon that was beginning to sprout simultaneously: the rise of class actions in Israel. A decade and a half ago, when the first few major Israeli class actions came into being, class action plaintiffs were desperately searching for ways to submit larger, more lucrative, class actions. These plaintiffs found their perfect companion in the form of the newly created breach of autonomy head of damage. As breach of autonomy was not bound to the existence of physical damage, it could be freely imported from medical negligence into other legal fields such as consumer protection and pharmaceutical and product liability. Class action plaintiffs could now, at least in theory, create gigantic class actions out of thin air. All they had to do was locate situations in which a defect or hidden attribute of a product or service was not adequately disclosed, and "voila," the consumers' ability to make informed decisions was breached.

Breach of autonomy had additional advantages that made it particularly lucrative in the eyes of class action plaintiffs. It had the potential to relieve plaintiffs from the burden of proving damages and causality, while making it considerably easier to show commonality between class members. Indeed, breach of autonomy and class actions seemed to be the perfect couple.

The groundbreaking case that ushered in the union between breach of autonomy and consumer class actions was a case filed against Israel's leading dairy producer, Tnuva. The claim in the *Tnuva* case was that Tnuva had not disclosed that the milk that it produced contained small traces of silicone. The class action plaintiffs did not argue that the silicone traces caused any physical harm; instead they argued that the undisclosed silicone presence breached consumers' autonomy to refrain from consuming silicone-containing-milk. The court, surprisingly enough, accepted this argument.

Perhaps realizing the potential ramifications of its precedential ruling, the court did add an important caveat: it refused to compensate consumers who were indifferent to the existence of silicone in their milk. The court allowed compensation to only those consumers for whom it was proved—using statistical consumer polls—had negative reactions upon learning of the existence of silicone in the milk. In other words, the court ruled that breach of autonomy would only be compensable when the breach directly resulted in subjective damage, such as emotional stress or feelings of disgust. At the end of the day, the class members in the *Tnuva* case were awarded USD 60 each, for a total of approximately USD 10,000,000. And not one of them suffered any physical damage whatsoever.

Spiraling Out of Control

The effect of the *Tnuva* ruling was immediate and profound. The combination of a new flexible head of damage, a volatile legal environment, and a "green light" from the Supreme Court of Israel led to an unprecedented influx of class actions based solely upon the breach of autonomy doctrine. These class actions can generally be grouped into three categories.

The first category is the closest to the original form of breach of autonomy, and it includes situations in which a consumer was unknowingly exposed to a medical risk, regardless of whether the risk actually materialized. A considerable portion of the category consists of class actions filed against some of the world's leading pharmaceutical companies, claiming that a certain drug, treatment, or medical device had undisclosed adverse side effects. Often claiming multi-million dollar damages (due to breach of autonomy only), such cases are rarely tried, typically settling before class certification. All such settlements ended with a donation to a public cause (rather than compensation to the individual plaintiffs), usually for medical treatments or research related to the subject of the case, in the range of USD 0.5 -5 million. Also included in this category are claims alleging the presence of toxins in food products, which have become quite common.

The second category consists of claims which do not involve the existence of a medical risk but which involve a "risk" that the consumers will consume a product which is not aligned with their personal preferences. One famous example is Civ. App. 8037/06 *Barzilai v. Prinir (Hadas 1987) Ltd.*, p. 30 (Nevo, Sept. 4, 2014) (Isr.). There, religiously observant consumers argued that the defendant, a large food producer, had marketed certain products purporting to be kosher (*i.e.*, compliant with religious dietary laws), when they actually were not. Interestingly, many of the alleged class members had only purchased the relevant products, but did not even have the chance to consume them. After an extensive 100-page discussion, the Supreme Court of Israel decided to certify the claim as a class action.

Another consumer preference used by class action plaintiffs as a basis for breach of autonomy claims is the preference of certain people to consume only low-fat products. In one case, also filed against Tnuva, plaintiffs argued that the marketing of milk with 3 percent fat as skim milk breached consumers' autonomy to refrain from consuming products that contain fat beyond a certain threshold.

The idea of consumer preferences was then taken even further, into the realm of the absurd. In one case, a class action plaintiff claimed that he had purchased chocolate milk branded under the name "Yotvata" (a small kibbutz near Israel's southern tip, renowned for its local dairy products), only to find out that it was in fact produced several hundred miles away. The plaintiff argued that this breached his autonomy to choose products produced in a certain geographical location.

The third category takes things to an extreme. It consists of claims that are no different than ordinary contractual misrepresentation claims. One common example is that in which a consumer has ordered a product or service online, only to find out that the actual cost was 20 percent more than advertised. Another common example is that in which a consumer makes a significant purchase—such as a car—only to find out that some of the promised features were missing. The routine argument in such cases is that consumers were provided with incorrect or insufficient information, which subsequently stripped them of their autonomy to make informed consumer decisions. Of course, unlike with misrepresentation claims, under the breach of autonomy doctrine, plaintiffs are not required to prove that they would have decided differently had they been given full and accurate information.

These examples illustrate the creativity of Israeli class action plaintiffs in using the breach of autonomy doctrine. This creativity expanded breach of autonomy far beyond its original scope, and it ultimately led to a snowball effect: the evolution and expansion of breach of autonomy meant that it would be easier and more rewarding to file class actions in the future, while the growing number of class actions meant that the breach of autonomy doctrine would continue expanding, making a true symbiotic relationship.

Finally, we are well aware that claims along the range between exceptionally creative and borderline absurd are not unique to Israel only. Indeed, an American consumer may decide to file a class action against a major coffee chain because it had allegedly filled coffee cups only four-fifths of the way up. The difference is the nature of the claimed damage. While the American consumer will most likely rely upon statutory damage or a calculation of the price differential compared to what he or she expected to pay, an Israeli consumer would simply have to show that his or her right to know how full his or her cup actually is was taken away. It is the mere "breach of the autonomy"—the deprivation of the power to choose—which justifies compensation. An Israeli court reviewing the coffee cup-filling example above is unlikely to view such a claim as a petty claim, causation need not be proved, and the damage awarded will have nothing to do with the coffee-to-cup ratio.

Taming the Beast

Practically speaking, the continuous evolution of the breach of autonomy doctrine means that multi-million dollar class actions are filed day in and day out, too often without any merit. The immediate implication is that although these class actions lack any material substance, defendants are still forced—both in their financial statements and vis-à-vis the media—to deal with ostensibly significant litigation exposure.

These concerns have not gone unnoticed. In fact, an acting Israel Supreme Court justice (and future chief justice) dubbed "breach of autonomy" a "wild horse" that must be "restrained." Indeed, recent years have marked a subtle reaction-

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ary trend, with the Israel Supreme Court attempting to impose certain limitations in an effort to confine the use of the doctrine only to the most appropriate and justified circumstances.

The first and most important limitation was already mentioned above, in the *Tnuva* case. There, the Israel Supreme Court ruled that compensation for breach of autonomy will only be given if the plaintiff in fact suffered subjective damage, expressed in negative feelings. In the *Prinir* case, the Israel Supreme Court took this limitation one step further: it stated that a breach of autonomy could potentially result in two distinct types of subjective negative feelings. The first type is emotional harm stemming from the removal of the power to choose: "I am upset because my ability to choose vegan food over non-vegan food was taken away." The second type is emotional harm stemming from how the plaintiff relates to the action taken: "I am disgusted by the non-vegan food that I unknowingly consumed." The majority opinion held that only subjective feelings of the second type are usually suitable to be heard as a class

action, but it did not shut the door on the possibility of filing claims based exclusively upon the first type.

The second limitation is the tendency to entertain only those claims which involve the breach of the *core* of a person's autonomy. Examples of the "core" of autonomy include the ability to make informed medical decisions, and to a lesser extent, to adhere to certain ideologies (whether it be religious dietary laws or a vegan diet).

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The third limitation is the tendency to deny claims in which the undisclosed risk did not materialize. In other words, an Israeli court will be more likely to compensate the patient described in the opening paragraph of the article if he or she did in fact suffer from the side effect that he was not warned about. Similarly, if a vegan unknowingly purchased a product containing meat, he or she would be more likely to receive compensation after consuming the product (in other words, if the "risk" of consuming non-vegan food had actually materialized). It should however be noted that this limitation is almost completely absent from the class action context, in which many courts tend to disregard the question of whether or not the risk materialized.

The fourth limitation pertains to those breach of autonomy claims that are little more than contractual claims in disguise. Certain Supreme Court justices have expressed the opinion that the prevention of a consumer's ability to make an informed decision between product A and product B does not give rise to a valid *Breach of Autonomy* claim, due to the fact, among others, that this does not constitute a breach of the core of the consumer's ability to shape his or her own life choices as he or she wishes. Other Supreme Court justices have maintained the contrary, allowing plaintiffs to bring forward breach of autonomy claims that are essentially no more than consumer deception claims.

When discussing these limitations, it is important to note that breach of autonomy—especially in the class action context—is still a young doctrine, which is constantly evolving and changing. The reactionary stances voiced by the Israel Supreme Court, as illustrated by the four limitations set out above, have not been fully developed. Importantly, most of these limitations have not yet trickled down to the district courts, and thus, even to this day, "creative" class actions that disregard these limitations completely are still unfortunately quite common.

Back to the Roots

The continued evolution of the breach of autonomy doctrine in the class action context does not mean that Israeli plaintiffs abandoned the use of the doctrine in its original form as defined in *Daaka*. Indeed, over the past years, many dozens of breach of autonomy claims have been brought forth by individual plaintiffs. Most of the claims share several common characteristics, reminiscent of *Daaka*: the plaintiff has suffered physical injury; the claim is founded upon an argument of insufficient disclosure or uninformed consent; the defendant is a either a medical service provider or pharmaceutical company, depending upon the nature of the specific claim; and the compensation for breach of autonomy is in the range of approximately USD 50,000 and upward. One prominent example is the 2013 ruling in Civil Appeal 1615/11 *Ein Tal v. Finkelstien*. There, seven months after undergoing Lasik eye surgery in both eyes, the plaintiff was diagnosed with Keratoconus, an eye disorder affecting the cornea. The Israel Supreme Court ruled that the eye surgery was not performed negligently, and in any event, causation between the operation and the disorder could not be established based upon the balance of probabilities. However, the Israel Supreme Court added that the full risks of the operation, as well as the full conditions of FDA approval, were insufficiently communicated. This amounted to a breach of the plaintiff's autonomy, for which she was awarded a compensation of USD 70,000.

Another landmark case was the 2011 ruling in Civil Appeal 9936/07 *Ben David v. Antebi*. There, the plaintiff, who gave birth to a baby with Down syndrome, claimed that her gynecologist withheld certain ultrasound results from her, thereby depriving her of the ability to choose to undergo amniotic fluid tests that could identify Down syndrome in the fetus. The Israel Supreme Court found that while the gynecologist was negligent in withholding the information, the plaintiff failed to prove that she would have sought amniotic fluid tests had she received the information that was withheld from her. The only relevant head of damage was therefore breach of autonomy, for which she was compensated approximately USD 75,000.

Breach of Autonomy Today

If you have gotten this far, you are probably thinking to yourself, "OK, those 'enthusiastic' Israeli lawyers have found a way to create claims out of thin air, but why should I care?" The answer is actually straightforward: if you conduct business in Israel, or are considering conducting business in Israel, you *should* care. Dozens of international corporations from a wide array of industries have already been named as defendants in claims, often filed as class actions, in which breach of autonomy plays a key role. The pharmaceutical industry is perhaps most affected, because patients' informed consent is seen as very closely linked to the core of their autonomy. Most alarming are imports of U.S. personal injury claims turned into Israeli class actions in which breach of autonomy is now the *sole* alleged damage. This shift results in a dramatic increase in the size of the potential class because the doctrine eliminates the requirement of any physical injury. Everyone who took the drug can now be a class member. Frankly, given

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Israel's current legal environment, every business exporting goods or offering services in Israel—and above all drugs, medical devices, and medical services—should expect to face a breach of autonomy claim at some point.

This does not mean, however, that the breach of autonomy doctrine should deter international corporations from doing business in Israel. Instead, an international corporation should keep in mind that familiarity with the phenomenon and its possible implications is the key to mitigating the associated risks successfully.

Indeed, despite the fact that breach of autonomy is still changing and evolving, most potential breach of autonomy claims can be anticipated and mapped out in advance. Take for example an international pharmaceutical company that is preparing to conduct clinical trials in Israel. Assuming that the tested drug has certain alleged, undisclosed side effects, there are five different scenarios which may give rise to breach of autonomy claims.

In the first scenario, the patient suffered damage as a result of the side effect, but failed to prove causation. This scenario embodies the original scope of the doctrine as set out in the *Daaka* case, and it may lead to significant monetary damages.

In the second scenario, the side effect did not materialize. The patient may nonetheless file a claim, arguing that his or her right to choose whether or not to participate in a trial which included such a side effect was taken away from him or her. Such a claim would not be considered frivolous, contrary to the basic tort principle that merely putting someone at risk does not justify an award of damages.

In the third scenario, the undisclosed side effect is revealed after the trial, but it turns out that the patient was part of the control group and as such has taken a placebo. While the patient was thus not exposed to any risk, he or she may still attempt to file a breach of autonomy claim, but the plaintiff would be unlikely to be successful.

In the fourth scenario, the undisclosed side effect is revealed several days before the trial was scheduled to begin. While a breach of autonomy claim may be filed here, given the limitations imposed by the Israel Supreme Court, its odds of success would be low.

In the fifth scenario, there is no undisclosed side effect. Instead, some other aspect of the clinical trial was not fully disclosed. Examples may be the price of the treatment or its duration. In such a case, while there clearly is no risk involved, the patient may argue that he or she was stripped of the ability to make an informed decision.

Breach of autonomy claims arising out of each of the five scenarios are filed day in and day out against providers of goods and services, both from the medical field and from other fields. This does not mean that they all have equal odds of success. Naturally, claims based upon the first two scenarios have significantly better chances of success than claims based upon the other three scenarios. A careful case-by-case evaluation can go a long way in determining the exposure associated with each scenario, and in devising an appropriate strategy.

Conclusion

As we have seen, the breach of autonomy doctrine poses a unique challenge to international corporations doing business in Israel, especially pharmaceutical companies. This challenge is threefold. First, we are talking about uncharted territory, a complex legal doctrine found nowhere else, which is constantly changing and evolving. Second, it gives plaintiffs the ability to construct claims out of thin air, while significantly reducing the applicable burden of proof. Third, it is strongly linked with class actions, meaning that what may seem a minor breach could easily lead to a multi-million dollar claim. In the face of such a challenge, the best shield is knowledge. Knowing what to expect in advance can significantly raise both the chances of avoiding litigation and the chances of reaching a positive outcome if litigation has already commenced. We hope that this article will lay the foundation for this knowledge, and (with apologies), prevent Israeli plaintiffs from breaching your autonomy.