Date of signing: 18 November 2021

 **In the Jerusalem District Court Civil Claim 63995-11-21**

 *In the matter of:*

**1. Keren Kanfo, ID 036207827**

**2. Ino Tamuz, ID 032803678**

**3. Alon Tamuz, ID 224888172**

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By way of their attorney Adv. Dr. Assaf Pozner, Reg. No. 11092 and/or Adv. Ayelet Schwartz Assaf, Reg. No. 58236

POB 45152, 11 Kiryat Mada, Jerusalem

Tel.: 02-6426666 Fax: 02-6795050

- vs –

**Please note that it is prohibited to publish the names and details of the Plaintiffs in this case pursuant to Section 70(C1) of the Courts Act [Consolidated Version], 5744-1984, as well as Section 24(A)(1)(i) of the Youth Law (Care and Supervision), 5720-1960**

**1. Prof. Haim Yaffe**

85 Hashalom St., Mevaseret Zion

**2. Clalit Health Services Corporation Company No. 589906114**

20 Beit Hadfus, Jerusalem 9548323

**3. Dr. Shai Porat**

Department of Obstetrics and Gynecology, Hadassah Ein Kerem, Kalman Ya’akov Man Street, Jerusalem

**4. R.B. Diagnosis – Ultrasound Center Ltd., Company No. 513268698**

1 Agudat Sport Beitar Road, Malkha Mall, 5th Floor Jerusalem

**5. Natera, Inc. Corporation, Company No. unknown**

Pursuant to Regulation 163(C) of the Civil Rules of Procedure, served to the representative on its behalf permanently representing it in connection with its affairs in Israel:

Zer Laboratories Ltd., Company No. 514468362, 21 Habarzel St., Tel Aviv-Yafo 6971029

**6. Daniel Biotech Ltd. Corporation Company No. 512664814**

8 Hamada, Science Park, POB 2417 Rehovot 7670308

**7. Dr. Ofer Tadmor**

Jerusalem Ultrasound and 4D Center, 12 Beit Hadfus, Givat Shaul, Beit Ha’shenhav, Jerusalem

**8. Hadassah Medical Organization Corporation (Public Benefit Company), Company No. 520008095**

Kalman Ya’akov Man, Jerusalem

**9. Prof. Vardiela Meiner**

Genetics Department, Hadassah Ein Kerem, Kalman Ya’akov Man Street, Jerusalem

**STATEMENT OF CLAIM**

Resubmission, Reference No. 8797961

**Type of claim**: civil claim – bodily harm – medical malpractice (145) and a monetary claim in excess of NIS 97,440 for invasion of privacy (134)

**The requested remedies and value of the subject of the claim**: bodily harm and harm for invasion of privacy NIS 110,122

**Fee**: NIS 1,208 pursuant to Detail 35 of the Supplement in the Courts Regulations (Fees), 5767-2007

**There is no additional action in a court or in a tribunal in connection with similar factual content to which the Plaintiffs are or were a party.**

**Subpoena**

Since the Plaintiffs have filed this claim against you, you are invited to file a statement of defense within one hundred and twenty days from the date on which this subpoena was served to you.

**For your information, if you do not file a statement of defense, then pursuant to Regulation 130 of the Civil Rules of Procedure, 5779-2018, the Plaintiffs will have the right to receive a judgment in your absence.**

**Part Two – Summary of the Contentions (Five Pages)**

(All the contentions are being made cumulatively or alternatively, according to the context and their connection.

 (1) Litigants:

 The Plaintiffs:

1. Plaintiff No. 1, born on 22 December 1978, and Plaintiff No. 2, born on 18 June 1978 (hereinafter: “Parents” or “Mother”/“Female Plaintiff”/“Keren” and “Father”/“Male Plaintiff”/“Ino”, respectively) are a secular couple, the parents and natural guardians of Alon Tamuz, ID 224888172 (hereinafter: “Alon”), Plaintiff No. 3, who was born on 21 December 2015 and was diagnosed with Down Syndrome.
2. The Plaintiffs will contend that Alon has grounds for an independent claim against the Defendants, since there is a trustee relationship under the obligation of support, where the Parents are the trustees and Alon is the beneficiary. Alon is entitled to support from his parents under Israeli law and even upon reaching adulthood, since he has a disability, pursuant to Sections 4-5 of the Law for the Amendment of Family Law (Child Support). Therefore, Alon may file a claim directly against the Defendants, a claim resulting from his status as beneficiary and being entitled to support as well as a claim derived from the wrongful birth claim of his parents (similar to a derivative claim under the Companies Law, 5759-1999).
3. Under the Hammer Rule, the Parents are receiving amounts in order to be able to finance the expenses of the birth, i.e. the payments are intended for the reasonable purpose of the needs of the newborn, and his parents are entitled to receive a monetary amount under this claim which is intended to ensure this support.
4. See also Civil Claim (District Court, Haifa) 24136-12-09 **M.K. Minor vs. Leumit Sick Fund**, (unpublished, 1 January 2014) a decision in which Her Honor Judge Vilner ordered the deposit of the compensation money to ensure that the money be used only for the needs of the minor, despite the fact that in the Hammer Affair, the grounds of the newborn were annulled for the “unjust life”, since “**this does not mean that the newborn would give a waiver without compensation which would cover the expenses of his raising, since this compensation, as was ruled there, would be determined for his parents so that they would be able to raise the newborn with his disability – this is the purpose which lies at the foundation of the Hammer Rule**”. Similarly, see Civil Claim (District Court, Jerusalem) 31657-04-13 **John Doe vs. Leumit** (Nevo, 24 February 2016), in which His Honor Judge Winograd explicitly accepted the theory of trusteeship and stated that the compensation which was terminated was for the care of the newborn.
5. Since the independent status of the newborn is derived from his right to financial support, it is not possible to dispute his independent status. And note: the newborn is not contending that it would have been good if he had not been born or that his life is not a life; his contention is that given the condition in which he was born, he is entitled to (increased) financial support which reflects its consequences. Therefore, the status of the newborn as beneficiary must be added as well (and see: Assaf Pozner, “On the Dilemma between Result and Reasoning and the Squaring of the Circle: on the Direct-Derivative Claim of the Newborn for a Wrongful Birth”, **Strasberg Cohen Book** (Aharon Barak, Yitzhak Zamir, Avner Cohen, Moran Savorai, Elad Afari Editors, 2017). In light of the above, Alon has grounds for an independent claim for the malpractice of the Defendants and the damages caused to him as a result thereof.

The Defendants:

1. Defendant No. 1 is a gynecologist (in the field of obstetrics and gynecology) who accompanied the Female Plaintiff in monitoring the pregnancy from its beginning to its end. During the times relevant to the statement of claim, he worked for Defendant No. 2.
2. Defendant No. 2 is the sick fund in which the Female Plaintiff was treated during all the times relevant to the Statement of Claim and in the framework of which the monitoring of the pregnancy which is the subject of the Claim was done. The Defendant is responsible directly and/or by delegation for all the events which are the subject of the Statement of Claim.
3. Defendant No. 3 (hereinafter: Dr. Porat) is a gynecologist (in the field of obstetrics and gynecology) who executed the Non Invasive Prenatal Screening (NIPS) – a DNA test on the blood of the mother – on the Female Plaintiff and the person who took the blood of the Female Plaintiff and sent it to the company which executed the test and the one who gave explanations regarding the test, had her sign the Informed Consent Form and transmitted the test results.
4. Defendant No. 4 is the company on behalf of which Defendant No. 3 carried out the NIPS test for the Female Plaintiff.
5. Defendant No. 5, which is the foreign company Natera, and Defendant No. 6, which is the company representing it in Israel, executed the NIPS test in laboratories abroad. Defendant No. 6 communicates between Defendant No. 5, which executes the test, and gynecologists all over Israel who collect blood from those being examined, and the companies transmit the samples to Defendant No. 5. These companies are signed on the documents connected with the execution of the test; thus, for example, Defendant No. 4 is signed on the Informed Consent Form, the form which accompanies the blood tests and on the report on the results. Defendant No. 6 is signed on the Informed Consent Form, on the form accompanying the blood tests, and it is the one which issued the invoice for the NIPS test.
6. Defendant No. 7 is a gynecologist (in the field of obstetrics and gynecology) who executed the rear transparency test for the Female Plaintiff as well as the early systems screening and the late systems screening.
7. Defendant No. 8 is the hospital in which the Female Plaintiff gave birth to Defendant No. 3, and the doctors, specifically Defendant No. 9, breached and invaded the privacy of the female Plaintiff and/or were negligent in protecting her confidentiality and the details of the Plaintiffs in that they told Defendant No. 3 that the Plaintiff was born with Down Syndrome without the consent and knowledge of the Plaintiffs.
8. Defendant No. 9 is a doctor in the gynecology department in Defendant No. 7 who provided medical care to the Plaintiffs and diagnosed Plaintiff No. 3 as suffering from Down Syndrome and shared with and told this fact to Defendant No. 3 without the consent and knowledge of the Plaintiffs while invading their privacy and/or while being negligent in protecting their confidentiality and details. During the times relevant to the Statement of Claim, the Defendant was working at Defendant No. 8.
9. For the avoidance of doubt, if Defendant No. 2 and/or Defendant No. 5 and/or Defendant No. 6 and/or Defendant No. 8, even by implication, were to deny their liability for all the actions done to the Plaintiffs and/or their liability by delegation, an application will be made to add all the doctors and/or medical staff and/or company managers and/or company shareholders and/or the relevant employees who treated the Plaintiffs during the periods relevant to the Statement of Claim.

(2) The Requested Assistance:

1. Monetary compensation for bodily harm and, in addition, compensation of NIS 100,000 for invasion of privacy.

(3) Summary of the Facts:

1. This Claim deals with a failed monitoring of a pregnancy, the result of which was the absence of the diagnosis of a fetus for a time, a baby who was born and who is Plaintiff No. 3, suffering from Down Syndrome. The failures were not providing correct and complete explanations for the NIPS test which the Female Plaintiff underwent, and as a result the Plaintiffs strictly relied on the results without understanding the risk which was not fully ruled out for a fetus suffering from Down Syndrome, as well as a failure to refer the Female Plaintiff for the execution of sufficient medical tests and clarifications in light of the findings discovered during the pregnancy, and without their raising the suspicion of a fetus suffering from Down Syndrome.
2. To clarify, an NIPS test is an examination carried out on a blood sample taken from the mother (from the serum). During pregnancy, free fetal DNA is released from the placenta into the blood of the mother. In the early weeks of the pregnancy (the first trimester), the source of about 10% of the DNA in the blood of the mother is the fetus. The test is carried out in the following manner: there is no way to separate the fetal DNA from the DNA of the mother, but it is possible to identify it because the fetal DNA is shorter and more truncated (uncertain identification). The quantity of fetal DNA in the blood of the mother is small. Therefore, the DNA is enriched (the quantity is increased) and sequencing is done by means of next generation sequencing (NGS) or deep sequencing, and afterward it is possible to identify the fetal DNA (50% of which is different from the DNA of the mother, because it is from the father). The fetal DNA is compared to the DNA of a healthy fetus: the products of the sequencing are counted, and if there is a surplus, a chromosomal disorder is identified. In the case of a trisomy, there will be 1.5 times more sequences (a total of about 60,000) than in a healthy fetus. An NIPS test is a scanning test similar to a rear transparency test, a systems screening, blood tests (triple and quadruple diagnosis (fetoprotein test) where the tests are based on statistical information) and not a diagnostic test such as chorionic villus and amniocentesis. For this reason, and since at the beginning the test was called an NIPDiagnostic, and afterward an NIPTest, while today it is called NIPScreening so as not to give the misleading impression that this is a diagnostic test. Naturally, the lack of bias applies only where full explanations are given on the difference as opposed to a diagnostic test.
3. The sensitivity of the NIPS test is about 99%, but there is a false negative-positive rate. In other words, it is possible that the result will be that there is no risk of Down Syndrome when the fetus has Down Syndrome (false negative rate) and it is also possible that the result is that the fetus has Down Syndrome when it is healthy (false positive rate). Dr. Asher Eyal, whose expert opinion is attached, see Addendum 23, emphasizes that 8% of the chromosomal disorders diagnosed in an amniocentesis and chorionic villus – in the karyotype – are not diagnosed in an NIPS test. The case of the Plaintiffs fell into that same false negative rate when the Plaintiffs received a “normal” result, i.e. that the fetus did not have any chromosomal syndrome whatsoever, including Down Syndrome, even though it did in fact suffer from Down Syndrome. The biological negative rate occurs due to a mosaic (when only some of the bodily cells or the placenta contain a chromosomal disorder or, of course, due to the test being executed in an incorrect manner). The fetus and the placenta generally are similar from a chromosomal aspect, but not absolutely, when there may be three instances in which abnormal cells are found only in the placenta and not in the fetus (false positive rate); abnormal cells are found only in the fetus and not in the placenta (false negative rate); abnormal cells are found in the placenta and in the fetus. In the case of few free DNA cells of the fetus in the blood of the mother, the result is liable to be normal despite the fact that the fetus has a chromosomal syndrome.
4. In the circumstances of our case, the result of the NIPS test taken by the Female Plaintiff fell under that same false negative rate, where a normal result was received from the test, while in fact the fetus had Down Syndrome. As stated, the only relevant way to **diagnose** whether the fetus has Down Syndrome is by carrying out a chorionic villus or an amniocentesis. The Female Plaintiff was even entitled to have the recommended test at the expense of the state, since during the pregnancy she was 36 years old. Moreover, when the scans executed by Defendant No. 7 showed “soft markers” of Down Syndrome – ecogenetic spots in the heart and an extended renal pelvis – two markers that, pursuant to the Ministry of Health circular and medical literature, justify giving a recommendation – even excluding the question of age – for the execution of amniocentesis, the Female Plaintiff was simply not referred for genetic consultation and were not explained the significance of the findings. Moreover, the increased risk that the fetus which she was carrying in her womb was suffering from Down Syndrome was not explained to the Female Plaintiff. And even more, Defendant No. 1 minimized the seriousness of the markers and even dismissed them and pointed out that they had vanished without any factual basis when the findings were completely contrary to this.
5. In addition, the Defendants failed in providing explanations with regard to the quality of the NIPS test, and primarily its limitations – that it is not a diagnostic test with a false negative rate. Defendants No. 1. and 2 explained nothing to the Female Plaintiff with regard to this test, despite the fact that the accompanying doctor knew that the Female Plaintiff had decided to do the test. Moreover, Defendants No. 3-6 also failed to explain about the limitations of the test, despite the fact that they, first and foremost as those executing the test, were obligated to give these explanations and even had the Female Plaintiff sign a defective Informed Consent Form which does not include these vital explanations. Finally, Defendant No. 7, who carried out the rear transparency test and the systems scan, only allegedly explained the NIPS test to the Female Plaintiff, but he as well did not explain that the test is not diagnostic with a false negative rate, but rather repeatedly emphasized his recommendation to carry out a genetic chip test and that an NIPS test, even combined with an ultrasound examination, does not replace an amniocentesis combined with a genetic chip test. And note: we pointed out that the Defendant “allegedly” explained, since the things were only written and were never transmitted orally to the Female Plaintiff. And the medical record is intended to document the discussion and the explanations given and not be a substitute for them (see General Manager Circular No. 6/96 “The Medical Record” (10 March 1996)).
6. And note: the motivation for providing partial explanations amounting to deception is purely a matter of marketing – the desire to introduce a new test into the market for which the full price is to be paid, since it is not included in the health basket. The company which is executing the test as well as the doctor who takes the blood samples and is the mediating body between the company and the patient receive monetary compensation, and therefore clearly have a financial interest in having the Female Plaintiff take this test, rather than any others instead. Therefore the desire to market the test, even with regard to women above the age of 35 who hold a recommendation to have an amniocentesis financed by the state, causes those involved to conceal information and mislead the patient in favor of the execution of the test. And note: the test is even being marketed as one which can be given as early as the 10th week, despite the fact that for every week that passes, the quantity of fetal DNA in the blood of the mother increases, and the more fetal DNA there is, the more reliable is the test and the lower the risk of a false negative rate. The desire to market it as an early test, we may assume, is with the goal of promoting more scanning tests, since women who begin the standard test “path” may be less inclined to have this expensive test.
7. Therefore, all the medical individuals and bodies accompanying the pregnancy of the Female Plaintiff tasked with her medical treatment in order to ensure a normal course of pregnancy and the birth of a healthy fetus failed to provide the basic and vital explanation regarding the limitations of the NIPS test and did not refer the Female Plaintiff for genetic consultation and an amniocentesis despite the appearance of soft markers which raised the risk of the fetus having Down Syndrome, and despite the age of the mother.
8. Defendants No. 3-6 were also negligent in the way they delivered the results when the results were sent by email, without a doctor or a clinical geneticist explaining the results and their significance, including the limitations of the test pursuant to Section 10 of the Genetic Information Law. Moreover, it was written in the results that the test was “normal”, in a way which created a false impression that this is a certain diagnostic result, and what was not written, as should have been, is that the risk of Down Syndrome is low.
9. In addition, Defendants No. 1 and 2 did not refer the Female Plaintiff and did not inform her regarding additional non-invasive scanning tests found in the health basket for discovering a fetus with Down Syndrome – biochemical blood tests. If the Female Plaintiff had been referred for these tests, it is reasonable to assume that the results would not have been normal, so that it would have been an additional warning sign that the fetus was suffering from Down Syndrome. The above-mentioned failure to act even created (intrinsic) evidentiary damage which lies at the door of the Defendants.
10. Therefore, Defendants No. 1-7 were negligent during the monitoring of the pregnancy in that they did not refer her for any suitable tests which had the ability to lead to a diagnosis that the fetus had Down Syndrome and did not provide full and correct explanations regarding the risk that the fetus had Down Syndrome and what actions could be taken, all with the aim of permitting the Plaintiffs to make an intelligent, autonomic decision regarding the conduct of the pregnancy and decide its fate. Due to all of this and the fact that the Plaintiffs were not referred for genetic consultation and/or having an amniocentesis, the fetus was not diagnosed as suffering from Down Syndrome. If the diagnosis had been received, the mother would have terminated the pregnancy, since this was the very purpose of the NIPS test, namely to know whether the fetus had a chromosomal disorder in order to terminate the pregnancy; and it will be clarified that any reasonable pregnancy termination board would have permitted and made the termination of the pregnancy possible even at the viability stage, when it was a matter of Down Syndrome.
11. In addition, the personal modesty of the Plaintiffs was crushed at the most vulnerable moment when they were informed that their son had Down Syndrome by Defendants No. 8 and 9. The Defendants published the information that Alon was suffering from Down Syndrome despite the results of the NIPS test to Dr. Porat, who was not treating the Plaintiffs during the birth and never had treated them within the walls of Hadassah Hospital Ein Kerem, and in any case, the information was delivered not for the purpose of treatment and without the knowledge and permission of the Plaintiffs (and at that stage, the pregnancy did not need to be treated). This is a breach of the privacy of the Plaintiffs with regard to medical-genetic information which is confidential at the highest degree, regarding which there is a duty pursuant to the Genetic Information Law to transmit a written waiver of specific medical confidentiality for revealing genetic information (Section 22 of the Genetic Information Law) and there is an absolute prohibition against transmitting it to another without the consent of the patient (Section 18 of the Genetic Information Law), and even negligence in protecting the details of the Plaintiffs and the information in their regard.

(4) The Facts which Impart Jurisdiction to the Court:

1. The district court in Jerusalem has the jurisdiction to hear the suit by virtue of substantive jurisdiction – since the damage of the Plaintiffs and the amount of the compensation being claimed is estimated at ore than NIS 2,500,000 – and by virtue of its area of jurisdiction – since the place of business of the Defendants and the location of the act or omission for which they are suing is Jerusalem.
2. Therefore, the honorable court is asked to summon the Defendants to trial and to charge them with all the damages as will be proven in the evidence which will be brought before the honorable court, plus linkage differentials and interest until the actual payment is made in full.
3. Moreover, the honorable court is asked to charge the Defendants with legal expenses, attorney fees (at the rate of 25% of any amount ruled, including from the attorney fees) and VAT, all plus linkage differentials and the maximum interest by law until actual payment is made in full. The Plaintiffs are obligated to pay value added tax on the fees of their attorney, and they are not entitled to deduct input tax.

**Part Three – Details of the Contentions (twenty-five pages)**

**Grounds for Wrongful Birth**

 **Factual Background**

1. Alon is the second child of Keren Kanfu and Ino Tamuz. When she first became pregnant, at the start of the first pregnancy (date of last period: 13 April 2013), Keren had a genetic clarification with an obstetric nurse in the Women’s Health Center of the Klalit Sick Fund in Sha’arei Zedek. No exceptional results appeared. In the early scan on 31 July 2013, which was executed by Dr. Boldes, only four ecogenic foci were found. Dr. Boldes suggested that Keren have an NIPS test – a fetal DNA test in the mother’s womb – and indicated that he does this test in the private clinic (Panorama Institute) which he managed together with Dr. Porat and recommended taking the test. The monitoring of the pregnancy was done by Dr. Shalvi, and in light of the findings of the scan in which the ecogenic foci were observed, he referred Keren for a genetic consultation.

**A copy of the summary of the visit with Dr. Shalvi from 31 July 2013 is attached and marked as Addendum 1.**

1. On 25 August 2013, Keren went for a genetic consultation at the Medical Genetics Center in Sha’arei Zedek, where it was explained to her that a single finding was seen which did not constitute a defect and did not harm the heart function or the development of the heart of the fetus. She was also told that the finding raises the risk of Down Syndrome in the fetus at most by a factor of 3, and therefore, weighing all the tests, it was not recommended to do an amniocentesis. In addition, the limited advantages of a trisomy test in the blood of the mother was discussed.

**A copy of the summary of results of the genetic consultation from 25 August 2013 is attached and marked as Addendum 2.**

1. An additional echo test carried out afterward showed no finding whatsoever and the parents were told that the ecogenic foci had vanished or shrunk. At the 28th week of the pregnancy bleeding began, and in the end her son Ido was born healthy in week 31+3. This pregnancy is not the subject of the claim. Further, it should be emphasized that in this pregnancy, the Plaintiffs did not even consider having an NIPS test and did not carry out a clarification with regard to the test and its significance.
2. In the second pregnancy (date of last period 29 March 2015), which is the subject of the claim, Keren underwent pregnancy monitoring with Prof. Haim Yaffe. On 21 May 2015, Keren visited Prof. Yaffe for the first time and told him about the premature birth in the first pregnancy. In addition, Keren mentioned to Prof. Yaffe that she was interested in having an NIPS test for the early discovery of fetal syndromes in the clinic of Dr. Boldes and Dr. Porat. It should be mentioned that the Plaintiffs understood according to the manner in which the test was being marketed that this was a test with a high level of precision which made an amniocentesis, which involved a risk of abortion, superfluous. Prof. Yaffe praised the decision of Keren and thought that this was a correct and recommended decision.

**A copy of the summary of the visit with Prof. Yaffe from 21 April 2015 is attached and marked as Addendum 3.**

1. This time, the Plaintiffs decided to have an NIPS test, since they recalled the strong hesitation they had to deal with in the previous pregnancy, in which on the one hand in the genetic consultation they were told that there was no justification in undergoing an amniocentesis and on the other that a defect in the fetus could not be ruled out. The genetic consultant emphasized the risks and believed that the risk of an abortion due to the amniocentesis is 1:200 (see Addendum 2 above).
2. Keren applied to the Panorama Institute and there the test was done by Dr. Porat (who is Defendant No. 3) on 14 June 2015. In addition, Dr. Porat referred Keren to have an ultrasound test. After the results of the test were received, he said that there were already heartbeats and the sex of the fetus could be identified.
3. Dr. Porat explained the NIPS test procedure and its purpose to examine DNA segments of the fetus and to verify the absence of specific syndromes. He suggested that Keren have an expanded test that checks a large number of syndromes, but Keren preferred to do the test focusing on Down Syndrome. Keren asked Dr. Porat regarding the timing of the test and whether there was any problem in her having the test in week 11; he replied that the timing was excellent and it was already possible to see the genetic composition.
4. That same day the NIPS test was carried out. Dr. Porat explained to Keren that the test had been sent abroad and they would transmit the results to her a few weeks later by email. Dr. Porat explained that if after the results were received, she saw that they were abnormal, then she should go to him and to the attending physician. The Plaintiffs paid Dr. Porat NIS 3,375 for the test.
5. It should be emphasized that it was not explained to Keren at any stage that there might be a false negative rate, i.e. that the test would be normal despite the fetus suffering from a chromosomal syndrome; in other words, this was not a diagnostic test. Even on the consent form there is no reference to this risk.

**A copy of the Informed Consent Form, an accompanying detail form for blood tests and a receipt for the payment of the cost of the test is attached and marked as Addendum 4.**

1. At the same time, on 21 June 2015, Keren turned to Dr. Ofer Tadmor in the Jerusalem Ultrasound Center to have a rear transparency test done. In a conversation with Dr. Tadmor following the test, which came out normal, Keren said that she had taken the NIPS test, and Dr. Tadmor explained to Keren and her spouse, who was also present, that an amniocentesis test together with a CMA (genetic chip) test is considered to be the most reliable and broadest test in existence today, and the CMA test reveals syndromes which cannot be identified in an amniocentesis without a genetic chip test. Dr. Tadmor explained about the NIPS test (which he called NIFTY – the name of the company with which he worked which executes the NIPS test), that most of the chromosomes are not examined, and that it is not possible to carry out a genetic chip test. At no stage did Dr. Tadmor explain that the test is not diagnostic in general, and specifically with regard to Down Syndrome, but at most does not reveal other anomalies:

|  |
| --- |
| A. A NIFTY test can be doneNoninvasive prenatal testing in the blood of the motherAnd regarding the limitations of the test (most chromosomes are not examined and a CMA test cannot be executed. |

**A copy of the rear transparency report from 21 June 2015 is attached and marked as Addendum 5.**

1. On 25 June 2015, Keren came for a follow-up examination with Prof. Yaffe. Keren showed him the results of the rear transparency test, including the test disk and told him that she had taken the NIPS test and that she was waiting for the results. Despite this, in the summary of the visit from that same day, it is recorded that Keren “decided not to do an amniocentesis”, Prof. Yaffe did not recommend an amniocentesis and did not even speak of the difference between this test and the NIPS test, and generally at that time the pregnancy was at a stage that was too early (week 12+5) for doing an amniocentesis. During that same visit, Keren complained of heartburn, and Prof. Yaffe wrote Keren a prescription for Omepradex. This information was not recorded in the summary of the visit.

**A copy of the summary of the visit with Prof. Yaffe from 25 June 2015 and the prescription for Omepradex is attached and marked as Addendum 6.**

1. On 25 June 2015, Keren read the email sent on 23 June 2015 with the results of the NIPS test. It said that the results were normal. It said in Hebrew that the test was normal, while a very wordy lab report in English on the results was attached with a small and dense font. It was clarified that no one on behalf of Dr. Porat, including Dr. Porat himself, had made contact with Keren to give her the results of the test and/or their significance.

**A copy of the results of the NIPS test sent by email is attached and marked as Addendum 7.**

1. On 10 July 2015, Keren went for an early scan to Dr. Tadmor. In the exam, a low placenta and membrane separation were found. Dr. Tadmor explained that there was nothing to do and that resting would not help, and in cases where the separation is serious an abortion may occur, but that was not the situation in Keren’s case.
2. In that same scan, **hyperecogenic spots** were found in the heart of the fetus. In light of this, Dr. Tadmor asked Keren to insist that Prof. Yaffe refer her for an echo-heart scan and said that Prof. Yaffe tended to avoid referring patients for this test. Dr. Tadmor did not explain – at any time – that this was a (soft) finding for Down Syndrome added to the age of the mother.
3. On the scan report it was written, despite the fact that these matters were not explained to Keren orally, that it was recommended that Keren have a genetic consultation, despite the fact that, as stated, Dr. Tadmor spoke with Keren only on the execution of an echo-heart scan. In addition, a recommendation was written for the execution of a genetic chip test, and the following was written:

A broad discussion was held with the patient. The following was explained:

A. The possibility of NIFTY noninvasive prenatal testing of the blood of the mother and the limitations of the test (most of the chromosomes are not checked, a CMA test cannot be done. It was explained that a NIFTY test + a scan are not a substitute for amniocentesis with a genetic chip test.

B. The possibility was explained of amniocentesis, including a genetic chip test, a test of microdeletion/microduplication syndromes by means of chromosomal microarray or CMA (genetic chip).

In chorionic villus sampling or amniotic fluid with private financing in about 1:200 women with normal tests in a pregnancy an intellectual disability is discovered. There are cases in which an answer is received which has an unclear medical significance.

The possibility was explained of taking additional private genetic scan tests which are not included in the genetic scan tests recommended by the Geneticists Association and are done in Beilinson or Ichilov Hospital.

1. And note: Dr. Tadmor did not explain that the NIPS test is not a diagnostic test, but the limitations of the test are that most of the chromosomes are not checked and it is not possible to conduct a genetic chip test, which Dr. Tadmor recommended firmly. It is further noted that a single NIPS test with a systems scan are not a substitute for amniocentesis and a genetic chip test. In other words, Dr. Tadmor emphasized in what was written that the limitation of the NIPS test is that it is less broad and comprehensive than a genetic chip test (and, for example, will not reveal defects other than Down Syndrome) and did not emphasize that this was not a diagnostic test. And note: in any case, these were things that were written down and it was not stated that the wording of some of the sentences was identical in the two reports with regard to default wording inserted into the test report, a kind of “copy/paste”. Moreover: Dr. Tadmor wrote these things generally, without referring to the age of the Female Plaintiff and the soft findings discovered in the fetus.

**A copy of the early scan report from 10 July 2015 is attached and marked as Addendum 8.**

1. On 13 July 2015, a follow-up check was done by Prof. Yaffe. Keren showed him the results of the early scan and asked him to refer her for an echo-heart scan as Dr. Tadmor had instructed her. Prof. Yaffe pointed out that there was no need to get upset over the results of the test, but in any case gave her the referral as requested. The test was set for 2 September 2015.
2. On 27 July 2015, there was an additional follow-up check by Prof. Yaffe which took place in his clinic (in the documentation it is written that there was a home visit at the initiative of the patient, but that is not the case), and during the visit, Keren asked to receive treatment to prevent preterm birth, and Prof. Yaffe recommended treatment with Utrogestan suppositories and wrote the appropriate prescription. In the documentation of that visit, Prof. Yaffe wrote that “the ultrasound which predicted black spots were as if they had never been”, despite the fact that the hyperechogenic spots had not disappeared at that stage since a fetal echo-heart scan had not yet been done.

**A copy of the summary of the visit with Prof. Yaffe on 13 July 2015 and on 27 July 2015 is attached and marked as Addendum 9.**

1. On 1 September 2015, Keren had a late systems scan done by Dr. Tadmor. In the scan, there were still two ecogenic spots on the heart, and in addition right renal pelvis dilation (another finding for Down Syndrome). Dr. Tadmor clarified that he was not worried by the renal pelvis dilation, but the hyperechogenic spots in the heart should be clarified. Dr. Tadmor wrote in the report that he was referring Keren to the attending physician to consider genetic consultation and a fetal echo-heart scan. He wrote further, but without explanation, that NIPS and ultrasound were not a replacement for amniocentesis with a genetic chip test.

+unfortunately the NIFTY ultrasound test cannot replace the amniocentesis + genetic chip

**A copy of the summary of the visit and the results of the late scan test is attached and marked as Addendum 10.**

1. On 2 September 2015, Keren had a fetal echo-heart scan done by Prof. Amiram Nir. After several unsuccessful attempts of fetal heart imaging in a sufficient manner due to his orientation, Prof. Nir asked her to return in two weeks for a repeat test. In this test, Prof. Nir was unable to rule out a heart defect. Keren asked to move the date up, and therefore an appointment was fixed for the following week.

**A copy of the summary of the visit with Prof. Nir from 2 September 2015 is attached and marked as Addendum 11.**

1. On 9 September 2015, a fetal echo-heart scan was carried out by Prof. Nir. Prof. Nir said that the results of the test show that there were ecogenic foci slightly in excess of what is normal, and therefore a date was set for an additional check in 8 weeks.

**A copy of the summary of the visit with Prof. Nir from 9 September 2015 is attached and marked as Addendum 12.**

1. In a follow-up visit with Prof. Yaffe on 21 September 2015, he referred Keren to have a sugar loading test and recommended not fasting on Yom Kippur (which fell two days later), and in the event of onset of labor pains, she should immediately to go the ER. In the summary of the report, it is written “fetal echo-heart normal after being done following a finding of an echogenic focus in the heart. As recalled, beyond this a scan was normal”, despite the fact that Keren showed him the results of the later scan and updated him and showed him the fetal echo-heart. For the avoidance of doubt, this is documentation which was not transmitted to the Female Plaintiff, and she did not see it until the date of collection of the documents for the filing of this claim.

**A copy of the summary of the visit to Prof. Yaffe from 21 September 2015 is attached and marked as Addendum 13.**

1. On 24 September 2015, Prof. Yaffe referred Keren for blood tests. The results of the test showed a borderline result of sugar loading, and so on 1 October 2015, Prof. Yaffe called Keren and asked her to do a 100 gram sugar loading test and recommended postponing a vaccination to prevent preterm birth.

**A copy of the summary of the visit on 24 September 2015 and the conversation from 1 October 2015 is attached and marked as Addendum 14.**

1. During a visit with Prof. Yaffe on 22 October 2015 after having received the results of the blood test and after one of four values were abnormal, Prof. Yaffe recommended that Keren maintain a balanced diet and referred her for an evaluation of fetal weight. It should be pointed out that during many visits, it was indicated that Keren was not present and that the visit was “in the absence of the patient”, but this was not the case, and as evidence, clinical tests were done during the various visits, such as a cervix examination, for which there would have been “a certain difficulty” in executing them in the absence of the patient.

**A copy of the summary of the visit with Prof. Yaffe from 22 October 2015 is attached and marked as Addendum 15.**

1. On 26 October 2015, labor pains began, and therefore Keren went to the Sha’arei Zedek Hospital Emergency Room. After going over the results of the tests that were carried out, Keren was notified that she had developed pregnancy diabetes. In light of the background of the premature birth in the first pregnancy, she was given one injection of Celestone for fetal lung development and one more on 29 October 2015 at the sick fund.

**A copy of the summary of the visit at Sha’arei Zedek on 26 October 2015 is attached and marked as Addendum 16.**

1. On the same day, Keren was at a follow-up visit with Prof. Yaffe; he did not agree with the diagnosis given at Sha’arei Zedek according to which this was pregnancy diabetes and wrote a prescription for Presolat to delay labor pains if there were any.

**A copy of the summary of the visit with Prof. Yaffe from 29 October 2015 is attached and marked as Addendum 17.**

1. On 4 November 2015, Keren arrived for an additional fetal echo-heart test with Prof. Nir. Prof. Nir told her that the ecogenic spots had vanished. And note: the fact that the hyperecogenic spots had vanished did not reduce the risk to a fetus with defects and the indication for executing amniocentesis had not changed.

**A copy of the summary of the visit with Prof. Nir on 4 November 2015 is attached and marked as Addendum 18.**

1. On 16 November 2015, Keren visited Prof. Yaffe for monitoring and updated him that the fetal echo-heart test was normal. Prof. Yaffe instructed her to continue with the Utrogestan suppository treatments until week 35 and did a GBS test and a blood count.

**A copy of the summary of the visit to Prof. Yaffe from 16 November 2015 is attached and marked as Addendum 19.**

1. On 7 December 2015, Keren visited Prof. Yaffe during which he wrote “Thank G-d that we have arrived and lived”, apparently since he had been concentrating on the goal of preventing Keren from giving birth prematurely as she had in her first pregnancy. In addition, on 17 December 2015, at the request of Keren, Prof. Yaffe issued a doctor’s note starting from 13 December 2015.

**A copy of the summary of the visit to Prof. Yaffe from 7 December 2015 and the doctor’s note is attached and marked as Addendum 20.**

1. On 14 December 2015, the Plaintiffs went to the maternity ward at Hadassah Ein Kerem due to labor pains, but since Keren was not giving birth, she was released to her home.

**A copy of the release letter from Hadassah Hospital is attached and marked as Addendum 21.**

1. On 19 December 2015, the Plaintiffs went again to the maternity ward at Hadassah Ein Kerem because her water had dropped. In the end, Keren gave birth to Alon on 21 December 2015 in week 39+1 of the pregnancy with an Apgar score of 8 in the first and fifth minute and 9 in the tenth minute. The infant was transferred to be cared for in the premature baby ward.
2. The following day, 22 December 2015, Dr. Even-Tov explained to the parents that a suspicion had been raised that the infant had Down Syndrome, and the infant was transferred for clarification to the genetics ward of the hospital. Keren was surprised and believed that it was impossible that he had Down Syndrome, since she had undergone an NIPS test which was normal. However, on 25 December 2015, a conversation took place with the parents together with the medical staff in which they announced that the results of the blood test showed that Alon in fact had Down Syndrome.

**A copy of the documentation of the birth from Hadassah Hospital Ein Kerem, including the chart of the newborn is attached and marked as Addendum 22.**

**The Negligence of the Defendants**

1. Defendants 1-7 were all negligent in the treatment of the Female Plaintiff during her pregnancy, and as a result, the fetus was not diagnosed with Down Syndrome and the Plaintiffs were denied the possibility of terminating the pregnancy as stated by Dr. Asher Eyal, an expert in gynecology and obstetrics whose expert opinion, which constitutes an integral part of the Statement of Claim, is attached herein and is marked as **Addendum 23**. According to the expert opinion, the Defendants were negligent as detailed below.
2. Defendants 1 and 2 were negligent in all of the following:
3. Prof. Yaffe did not explain to the Plaintiffs that due to her age, she was entitled to have amniocentesis at the expense of the state, since at the age of 35 the risk of a child having Down Syndrome is 1:380, while the risk increases with age, and at this age the recommendation of the Ministry of Health is to have the test. When she became pregnant, Keren was 36, so the risk of a fetus with Down Syndrome came to 1:240 (see the rear transparency report). Despite this, this information was not transmitted to the Female Plaintiff, and if it had been transmitted, the Female Plaintiff would simply have undergone an amniocentesis, and after the findings were revealed during the pregnancy. And it is important to emphasize, and as appears from the conduct of the Plaintiffs: they were not stingy in determining the health of their child.
4. Prof. Yaffe did not refer the Female Plaintiff for the tests existing and found in the health basket. The various scanning tests during pregnancy are intended to reveal an increased risk of a fetus with Down Syndrome, since this is the most common chromosomal syndrome as Dr. Asher Eyal wrote in his expert opinion. Thus he did not refer the Female Plaintiff to have blood tests during the first trimester (examination of biochemical markers of the PAPP-A and free beta hCG-1 levels) together with a rear transparency test which have a predictability ability of 80-84% (rear transparency test with a discovery ability of 64-70%). During the second trimester, it is possible to do additional biochemical blood tests (triple test – a blood test of the mother which, among other things, examines the fetal protein level, and an inhibin test), where all the tests together reach a discovery probability of 90%. When the ultrasound findings are combined with the biochemical markers – the scanning tests – the discovery rate rises even more (see: Medical Manager Circular 15/07, Scanning Tests for Revealing Down Syndrome in the Fetus, 2 July 2007 and Medical Manager Circular 4/13, Ultrasound Tests during Pregnancy, 29 January 2013). Prof. Yaffe never explained to the Plaintiffs the possibility of having these tests, which were even in the health basket and permit a discovery rate for Down Syndrome. If Prof. Yaffe had referred them for these tests, it is reasonable to assume, and unfortunately the burden is on the Defendants to prove the opposite, that results would have been received showing the increased risk of a fetus with Down Syndrome, and then the Plaintiffs would have done an amniocentesis which would have given a diagnosis of a fetus with Down Syndrome, and then the Plaintiffs would have terminated the pregnancy.

As Dr. Asher Eyal wrote in accordance with the position paper of the Geneticist Association from 2015, there was no recommendation that the NIPS test replace the biochemical scans. However, in 2018, in a position paper the recommendation was changed, but first, this was a at a time later than the pregnancy which is the subject of the claim and second, in any case, it was emphasized that an NIPS test is unsuitable in the case of pathological findings as were present in our matter. In any event, all of this must be explained, while nothing was explained to the Plaintiffs by Prof. Yaffe.

And note: Medical Manager Circular No. 32/96, “‘Triple Test’ of the Blood of Women in Pregnancy”, 18 April 1996, which states that “**The triple test is a test recommended to be done in every pregnancy**”. In addition, in accordance with the Procedure for the Treatment of the Pregnant Woman No. 1/2001 of 21 January 2001, it is stated in Section 8.2.3.5 that “For each pregnant woman, an informational pamphlet will be given regarding the pregnancy and the various tests which must and may be done during it”. There is no documentation that this pamphlet was given (the duty of documentation is stated in Section 8.2.3.6). Moreover, in accordance with Medical Manager Circular 15/07, “Scanning Tests for the Discovery of Down Syndrome in the Fetus”, from 2 July 2007, **Every pregnant woman will receive a written explanation containing information on all the scanning tests that exist and their significance**. This is repeated as well in Medical Manager Circular No. 6/2013 “Scanning Tests for the Discovery of Women at Risk of Bearing a Fetus with Down Syndrome” of 4 February 2013 and Medical Manager Circular No. 25/2013 “Scanning Tests for the Discovery of Women at Risk of Bearing a Fetus with Down Syndrome” of 29 July 2013 which replaced Circular 6/2013.

1. Prof. Yaffe did not refer the Female Plaintiff for genetic consultation despite her age and during the pregnancy, despite the fact that the scans showed pathological findings – hyperecogenic spots on the heart and a widening of the renal pelvis. If Prof Yaffe had referred the Female Plaintiff for genetic consultation, and assuming that reasonable genetic advice had been given, then the Female Plaintiff would have had explained to her, as Dr. Asher Eyal wrote in his expert opinion, that instead of two soft markers – ecogenic spots and a widening of the renal pelvis (and even without taking into consideration the age of the woman) – there would have been a recommendation for amniocentesis in order to dismiss Down Syndrome, particularly in light of the age of the Female Plaintiff. It would also have been explained to her in accordance with the expert opinion of Dr. Asher Eyal that the frequency of a false negative NIPS is higher in the presence of similar markers as in our case.

This is the place to point out that although the Female Plaintiff was given genetic consultation during the first pregnancy, which apparently referred also to an NIPS test, the Plaintiffs do not remember that at that consultation, they were told about the test, and even the Defendants could not have relied on this explanation, if it in fact was given. A stated, the Female Plaintiff decided to have the test because she remembered the recommendation of Dr. Boldes from the first pregnancy. It must be emphasized: that in the genetic consultation, the Female Plaintiff was very disturbed by the finding of ecogenic foci in the heart, and hesitated about whether or not to do an amniocentesis, and in any case, since they understood that NIPS is a new test as they were told by Dr. Boldes, they did not even consider having the test, and from the point of view of the Plaintiffs, it was irrelevant in the first pregnancy. In any case, this was a different pregnancy about two years before the pregnancy which is the subject of the claim, when at that time, as opposed to the pregnancy which is the subject of the claim, the Female Plaintiff was 33 years old and therefore her age did not constitute an additional risk factor. In any event, the previous consultation does not exempt the Defendants from their obligation to provide the required explanations, and consultation from the previous pregnancy is not a substitute for a consultation which should have been given in the pregnancy which is the subject of the claim. Furthermore, the Female Plaintiff was even supposed to believe that the genetic consultation from 2013 was not up to date and that in 2015 there were innovations in the science, and therefore what was stated then was not precise, a situation which was correct, since the discovery percentages of the test gradually improve with time despite the fact that this is still a scanning test. However, this is more than is required since, as stated, the Plaintiffs do not recall what was said in the consultation in the matter of the NIPS test.

1. At no stage did Prof. Yaffe explain to the Female Plaintiff that the NIPS test is not a diagnostic test and that there is a false negative rate in the results of the test, and therefore the only way to diagnose whether the fetus is suffering from Down Syndrome is by means of a karyotype test by chorionic villus sampling or amniocentesis. These matters should have been explained at the beginning of the pregnancy and prior to having the NIPS test, but even more so when pathological findings were seen in the scans.
2. Prof. Yaffe adopted a calming, even misleading approach when he gave no weight whatsoever to the pathological findings and stated, contrary to the findings, that “all the ultrasound markers which were predicted were as if they had never been”. At the same time, Prof. Yaffe gave the Female Plaintiff a feeling of security that there was no real reason for concern and that the fetus was healthy. However, this was misleading and baseless from a medical viewpoint, while the Plaintiffs were entitled to receive correct, full explanations according to reasonable medicine, so that the Female Plaintiff would have applied for genetic consultation and had amniocentesis, and after the diagnosis of the fetus would even have terminated the pregnancy.
3. Defendants 3, 4, 5 and 6 were negligent in failing to provide the required explanations in the matter of the NIPS test and a failure to deliver the results as required in accordance with the position paper of the geneticists Association from 2015 as stated in the expert opinion of Dr. Asher Eyal and as detailed below:
4. Dr. Porat did not explain orally, and it was not written in the Informed Consent Form which he had the Female Plaintiff sign, that the NIPS test is not considered to be a diagnostic test, but rather only a scanning test, and therefore in any case of an unusual result, it is necessary to verify this with a diagnostic test (amniocentesis or chorionic villus sampling).
5. Dr. Porat did not explain orally, and it was not written in the Informed Consent Form which he had the Female Plaintiff sign, that the NIPS test is not a substitute for a chorionic villus sampling/amniocentesis, since it does not examine all 46 chromosomes and does not permit the identification of all the structural chromosomal changes.
6. Dr. Porat did not explain orally, and it was not written in the Informed Consent Form which he had the Female Plaintiff sign, that if the result shows that there is no increased risk of a chromosomal disturbance, it is possible that the fetus nevertheless suffers from such a disturbance (false negative result), and that in Israel and abroad there are reports of this kind of case). And as stated, if the result shows that there is an increased risk of a chromosomal disturbance, it is possible that the fetus does not suffer from such a disturbance (false positive result). And note: the position paper of the Geneticists Association writes explicitly that this information must be included in the Informed Consent Form.
7. It has not yet been explained to the Female Plaintiff pursuant to Section 13(B)(5) of the Patient’s Rights Act that the test is of an innovative nature.
8. In accordance with a position paper from 2013 as well as its update in 2015 and 2018 of the Geneticist Association, a normal result will be delivered by someone authorized to do according to the Genetic Information Law (Section 10C)(a geneticist, a clinical geneticist, a specialist in his field of expertise, such as a gynecologist treating a pregnancy). While delivering the result, it is necessary to emphasize the limitations of the test as detailed in the addendum and examine whether new findings have been added which were revealed since the test was carried out which require a genetic consultation, as well as the existence of additional tests (such as amniocentesis, genetic chip-CMA, etc.).

In fact, the result was delivered to the Female Plaintiff by **email** directly by Defendant No. 5 – Panorama – without an accompanying explanation of the results to the Female Plaintiff on 23 June 2015, while Dr. Porat again sent the result to the Female Plaintiff – **after the birth** – at her request, and to her astonishment that despite the normal test, she had a child with Down Syndrome – on 27 December 2015. The evidence of the fact that no explanation was given to the Plaintiffs that the child might be born with Down Syndrome despite the normal NIPS tests is that otherwise she would not have taken the trouble to go back and re-examine the results of the NIPS test.

1. The results of the test were received by email in Hebrew, and it was pointed out that the test was “normal”, contrary to the test report in English in which it was mentioned that there is a low risk of a syndrome and not that this was a normal test. When referring to a test as normal, a value reference is stated which could mislead the patient, who does not understand that this is a statistical reference and cause her to understand that there is no risk of the fetus having Down Syndrome. This of course is a misleading presentation of the test and even shows it as diagnostic. And it should be mentioned that the Plaintiffs have no education in statistics and English is not their mother tongue.

And note: the explanation in tiny, crowded letters in English – which is not the mother tongue of the Plaintiffs – does not constitute a proper revealing, especially when it is received after the test has been made. The Female Plaintiff received a letter in her email in box and in green it said that the result was normal. She could not have been expected to begin to burrow through the small print in English which was not comprehensible to the general public in order to learn that in fact the test does not ensure that the fetus is healthy, contrary to the explanations received by the Defendants.

1. Clearly an economic interest is what encouraged the Defendants not to reveal complete information and mislead the patient regarding the quality of the test, all with the aim of marketing it, since this is an expensive test which is not included in the health basket.
2. Dr. Tadmor as well did not provide sufficient and correct explanations regarding the reliability of the NIPS test and its limitations and did not even refer them to genetic consultation himself, as detailed below:
3. Circular No. 18/12 of the Head of the Public Health Services, “Genetic Consultation before Pregnancy or During It” from 21 August 2012, as well as Circular No. 24/13 of the Head of the Public Health Services, “Genetic Consultation for Diagnosing Illnesses or Defects in the Fetus before Pregnancy or During It”, which replaces and annuls Circular No. 18/12, states that “the responsibility for determining the need for genetic consultation, referral of the woman or the spouses to receive genetic consultation, a referral for additional tests and a referral for completion of the consultation (in cases where this is required) rests first and foremost on the doctor carrying out the monitoring of the pregnancy”. It further states that: “The responsibility of the doctor carrying out the monitoring of the pregnancy **does not diminish the responsibility of additional medical bodies** to do so in order to ensure a proper and continuous process of receipt of genetic consultation, in accordance with the information and possibilities existing for them”. In accordance with this obligation, and in accordance with case law, Dr. Tadmor was to have provided the correct explanations, and his explanations were also misleading that the NIPS test is diagnostic, and to refer the Female Plaintiff for genetic consultation. And it should be emphasized: this is not a layman, or in an institute which does technical tests, but rather a leading professional.
4. Dr. Tadmor explained as required that NIPS (while still being called a NIFTY test, which is the name of one of the companies which carries out the test and not the name of the test) is not a diagnostic test, but rather a scanning test, and therefore in order to diagnose the fetus, amniocentesis should be carried out. Moreover, Dr. Tadmor did not explain that in the NIPS test there is a false negative and positive rate. In this way Dr. Tadmor was negligent. Dr. Tadmor explained, and this as well only in writing, when the matters were not explained orally to Keren (something which is definitely lacking in significance) that the NIPS test does not examine all the chromosomal problems and that the genetic chip test is broader. Dr. Tadmor was right in this. In fact, the NIPS test examines disturbances in chromosomes 13, 18 and 21 and the sex chromosomes, and these constitute 83% of all the chromosomal disturbances diagnosed in amniocentesis (where an NIPS test does not examine all 46 chromosomes). Therefore, for this reason amniocentesis together with a genetic chip test is broader than an NIPS test. However, and as stated, this is only one limitation in the test, and not only is this irrelevant in our matter, where the fetus had trisomy 21 – Down Syndrome – but also the Female Plaintiff did not ask to have a broad test, but aske to examine the most common trisomies, including Down Syndrome.
5. Thus in in the rear transparency tests, Dr. Tadmor wrote that the limitations of the NIPS test are that not all the chromosomes are examined and that it is not possible to do a genetic chip test with the NIPS as stated, according to what is written, it appears that these are limitations of the test only. It is not pointed out that it is not a diagnostic test. Furthermore, Dr. Tadmor explains – apparently in writing only – and points out that the possibilities available to the Female Plaintiff are A. an NIPS test and the second possibility which he details: B. amniocentesis. The way he presents the matters gives the misleading impression that the NIPS test is equal to the amniocentesis.
6. This in the early scanning, Dr. Tadmor writes that ultrasound is not a substitute for amniocentesis and does not write that NIPS is not a substitute for amniocentesis. Moreover, he writes that since she took an NIPS, and in light of the ecogenic foci – she is being referred only for a fetal echo-heart test. In other words, it appears – that the overall recommendation is amniocentesis with a genetic chip test; however, in the case of the patient, since she had an NIPS test – a fetal echo-heart test is sufficient. In addition, in the recommendations, the explanations written in the rear transparency – as an indication that this is a default written with the result.
7. Thus in the later scan, it is written that ultrasound + NIPS is not a substitute for amniocentesis + genetic chip. It is not stated that NIPS is not a diagnostic test and is not a substitute for amniocentesis alone.
8. In any case, these explanations were not given orally – and in effect were not given – and there was no discussion with the Female Plaintiff on the subject of the NIPS, but it was only written, “read and forget”. But what was explained to the Female Plaintiff was the advantages in having a genetic chip test, where Dr. Tadmor supported and warmly recommended having the test.
9. In addition, the Defendant did not explain the significance of the findings, which he identified in the test and that the findings which were seen – ecogenic spots in the heart and a broadening of the renal pelvis, raise the risk of the fetus suffering from Down Syndrome.
10. Moreover, it was not explained to the Female Plaintiff that in light of the findings, and particularly in light of her age, that it is recommended, and unfortunately she is entitled to have an amniocentesis at the expense of the state.
11. In light of what is written, the Plaintiffs will contend that the Defendants and/or any one of them and/or anyone on their behalf did deeds which a reasonable doctor would not have done under those circumstances and/or did not do deeds which reasonable doctors would have done under those circumstances and/or did not carry out tests which reasonable doctors would have carried out under those circumstances and/or did not examine the testes in a manner which reasonable doctors would have examined them and did not make use of reasonable expertise in the medical and/or ultrasound and/or echocardiograph profession, and as a result, the defects from which Alon is suffering and/or he would have at the time of the birth were not revealed or delivered to the parents.
12. Therefore, The Plaintiffs will contend that the Defendants are responsible for all their damages, inter alia for the following reasons:
13. In that the Defendants and/or any one of them and/or anyone on their behalf missed the diagnosis of the fetus as having Down Syndrome.
14. In that the Defendants and/or any one of them and/or anyone on their behalf did not recommend and/or did not refer the Female Plaintiff to have additional tests, including biochemical blood tests and amniocentesis, and did not refer her for necessary clarifications, particularly for genetic consultation.
15. In that the Defendants and/or any one of them and/or anyone on their behalf dd not provide the Plaintiffs with explanations and/or full and appropriate explanations and were even misleading regarding the NIPS test and specifically that the test is not diagnostic and with a false negative rate and even had her sign an Informed Consent Form which was lacking and misleading.
16. In that the Defendants and/or any one of them and/or anyone on their behalf did not deliver the results of the NIPS test as required by a geneticist and/or a specialist while providing explanations on the limitation of the test, including, inter alia, that a normal result does not ensure the birth of a healthy child, in general, and with Down Syndrome specifically, and that there is a false negative rate and that this is not a diagnostic test.
17. In that the Defendants and/or any one of them and/or anyone on their behalf mislead by giving the results of the NIPS test when it was written that this is a normal result, which give a presentation of the test as certain and diagnostic instead of writing that there is a low risk of Down Syndrome.
18. In that the Defendants and/or any one of them and/or anyone on their behalf did not tell the Plaintiffs that the Female Plaintiff was entitled to do an amniocentesis paid for by the state due to her age, which demonstrates an increased risk of the fetus having Down Syndrome and about the recommendation to have it done.
19. In that the Defendants and/or any one of them and/or anyone on their behalf did not provide the Plaintiffs with sufficient and appropriate explanations and did not explain the significance of the various findings located in the fetus: ecogenic spots on the heart and a widened renal pelvis in general and when added to her age in particular.
20. In that the Defendants and/or any one of them and/or anyone on their behalf did not provide the Plaintiffs with sufficient and appropriate explanations and did not explain the significance of not having an amniocentesis and regarding the risk of giving birth to a child suffering from Down Syndrome.
21. In that the Defendants and/or any one of them and/or anyone on their behalf mislead and/or prevented the Plaintiffs from receiving full and correct information regarding the condition of the health of the fetus and worked to calm the Plaintiffs when they pointed out that there were no pathological findings and/or that they has passed, contrary to the findings.
22. In that the Defendants and/or any one of them and/or anyone on their behalf prevented the provision of correct genetic consultation and did not refer her to genetic consultation following the defect which was discovered in the system scan and the first and second fetal echo-heart scans.
23. In that the Defendants and/or any one of them and/or anyone on their behalf acted unlawfully in that they did not do sufficient and exact, and even incorrect, recording and recorded things which were not explained and not transmitted orally.
24. In that the Defendants and/or any one of them and/or anyone on their behalf did not make use of expertise and/or did not use a degree of caution which reasonable and correct doctors in the medical profession use under those circumstances.
25. In that the Defendants and/or any one of them and/or anyone on their behalf breached the medical treatment contract which was signed between the Plaintiffs and the Defendants and/or any one of them.
26. In that the Defendants and/or any one of them and/or anyone on their behalf prevented the Plaintiffs from having the natural right to decide on the fate of the family and its character, a decision based, among other things, on a person’s sovereignty over his body and his right to confidentiality and protecting his body.
27. In that Defendants No. 2, 4, 5 and 6 did not instruct anyone on their behalf, inter alia, to give sufficient and correct explanations regarding the NIPS test and the medical findings and manners of treatment and testing which exist both in public medicine and in private medicine; to refer for the required tests; and the conducting of medical recording and documenting in a proper, legal manner.
28. The Plaintiffs will contend that the actions of the Defendants, from the point of view of a breach of legislated duty, and among other things, of the following provisions:
29. The Patient’s Rights Act, 5756-1996, which determines in Section 5 the right to receive suitable medical treatment with regard to professional level and medical quality, and in Sections 13 and later, the duty to give proper explanations to the Plaintiffs, including with regard to the limitations of the tests done on the mother and/or the chances of receiving a permit to terminate the pregnancy.
30. The National Health Insurance Law, 5754-1994, which determines in Section 3 the entitlement of the Plaintiffs to treatment at a reasonable level.
31. The Genetic Information Law, 5760-2000, which states in Section 14 and 10 that the person authorized to give results of genetic tests is a geneticist, a clinical geneticist, a genetic consultant and a medical specialist.

**Causal Connection**

1. The Female Plaintiff had every test that was recommended that she do by her doctors as needed even at her own expense, including NIPS, late and early broad scanning, fetal echo-heart and many ultrasounds. All the tests which the Female Plaintiff had were done with the purpose of ensuring the birth of a healthy newborn. Accordingly, the Female Plaintiff even would have undergone an amniocentesis if it had been explained to her that it was appropriate and as required from full knowledge in order to understand the need for having the test, including the fact that this was a diagnostic test, in contrast with the NIPS and that there was an increased risk – in light of the many findings and in light of her age – that the fetus was suffering from Down Syndrome. And in addition: the Female Plaintiff had the NIPS test with the clear intention of clarifying whether the fetus had a chromosomal syndrome, which shows that she was not interested in an infant suffering from a chromosomal syndrome, and she would have terminated the pregnancy if the fetus had been correctly diagnosed.
2. If the Female Plaintiff had been referred for genetic consultation as needed under the circumstances and she had received advice according to accepted, reasonable medicine, then the Female Plaintiff would have been referred to have an amniocentesis after it had been explained to her that there was an increased risk of a fetus with Down Syndrome and that the NIPS test is not diagnostic and had a false negative rate, particularly with the existence of soft markers. The Female Plaintiff would have had the amniocentesis since she had had the NIPS tests in any case in order to dismiss a chromosomal syndrome in the fetus from the beginning and would have been able to terminate the pregnancy if the fetus in fact was suffering from a chromosomal syndrome.
3. Upon receipt of the results of the amniocentesis, which would have shown that the fetus suffered from Down Syndrome, the Female Plaintiff would have gone to the termination of pregnancy committee, which would have approved the abortion at any week of the pregnancy (even at the viability stage) as stated in the expert opinion of Dr. Asher Eyal, and the Female Plaintiff would have terminated the pregnancy.
4. In light of all of this, and in accordance with the presumption in the Hammer Rule (Civil Appeal 1326/07 **Hammer vs. Amit** (Nevo 28 May 2012) – it is presumed that the parents would have made an application to the termination of pregnancy committee and had an abortion in the pregnancy which is the subject of the claim – if the Defendants and/or any one of them had raised the possibility and the risk to Down Syndrome fetus, the Female Plaintiff would have done an amniocentesis, and according to the results, terminated the pregnancy. **And it should be emphasized**: this matter even arises, cumulatively and beyond the presumption, from the fact that the Plaintiffs did not spare any tests, including expensive tests, all in order to verify that a healthy child would be born, and in light of the fact that there was no religious difficulty of any kind in the termination of the pregnancy.

**Transferring the Burden of Proof to the Defendants:**

1. The Plaintiffs will contend that the negligence of the Defendants and/or their alleged liability are “matters that speak for themselves”, as defined in Section 41 of the Torts Regulation [New Version] and that they were lacking in the knowledge and/or ability to know what in effect were the circumstances which caused the event which led to the damage and that the damage was caused by an asset, including ultrasound equipment and/or in clinics the full control of which was in the hands of the Defendants and/or someone on their behalf, and the occurrence of the incident which caused the damage sits better with the conclusion that the Defendants and/or someone on their behalf did not use reasonable caution than with the conclusion that they and/or someone on their behalf used reasonable caution and that therefore the burden rest on the Defendants to show that there was no negligence in regard to the incident which led to the damage with which they can be charged.
2. The Plaintiffs will contend that the Defendants and/or any one of them did not make full and/or proper and/or acceptable records, inter alia by failing to record their considerations and/or medical data in the file and/or did not fill out proper documents during the tests, such as a pregnancy monitoring ledger and/or in a false and, sadly, falsified record regarding the denied decision of the Defendants not to execute amniocentesis and/or due to the gap between what is written in the record and the real information – such as an entry that the tests were normal when there were pathological findings – and a gap between the written information and that transmitted to the Plaintiffs when some of the documents were not transmitted to the Female Plaintiff in real time and/or due to the contradictions in the medical record, including the absence of an entry with regard to the provision of explanations and/or the significance of the findings and/or a record of explanations not given orally. Therefore it is not possible to rely on the medical record, and it in any case does not constitute an institutional record, and the burden of proof is on the Defendants that they were not negligent and/or that the Female Plaintiff would not have had the tests to diagnose the fetus as having Down Syndrome and/or that it was not possible to discover that the fetus had Down Syndrome.
3. The Plaintiffs will contend that the Defendants and/or any one of them did not refer the Female Plaintiff to have tests such as an amniocentesis and biochemical blood tests and did not refer her for a continued medical clarification such as genetic consultation and did not provide her with the explanations and the information needed in order to understand the medical condition of the fetus and the risks involved, and if they had gone for tests and clarifications and provided the needed explanations, then the Female Plaintiff would have had all the needed tests and the fetus would have been diagnosed with Down Syndrome. Therefore the burden of proof should be placed on the shoulders of the Defendants to prove that they were not negligent and/or that the Female Plaintiff would not have done the tests to diagnose the fetus as having Down Syndrome and/or that it was not possible to discover that that fetus had Down Syndrome, if that should be contended.
4. The Plaintiffs will further contend that since any reasonable termination of pregnancy committee would permit the termination of a pregnancy in the case of Down Syndrome, it can be presumed that the Plaintiffs would have applied to the committee and would have terminated the pregnancy. Moreover, it can be presumed that if the Defendants and/or any one of them had raised the possibility and the risk of Down Syndrome, the Female Plaintiff would have had every necessary test.

**The Medical Condition of Alon:**

1. Alon, presently about 5 years old, suffers from Down Syndrome. Down Syndrome is a genetic syndrome characterized by a combination of birth defects in different bodily systems and developmental delay in many areas. In his expert opinion, Dr. Amichai Brezner, an expert in child rehabilitation, describes the medical condition of Alon and specifically his needs as detailed below. **The expert opinion of Dr. Brezner is attached herein as Addendum 24.**
2. From his birth, Alon has suffered from pulmonary hypertension accompanied by breathing difficulties and was therefore hospitalized for this reason in the premature baby ward and released on 13 January 2016. During his hospitalization, he was respirated and treated with antibiotic medications.

**The summary sheet of the hospitalization is attached and marked as Addendum 25.**

1. Since then, Alon has been undergone many treatments, including physiotherapy, occupational therapy, hydrotherapy and speech therapy, since Alon suffers from general hypertonia (low tonus, muscle weakness) and excess joint flexibility as well as a developmental delay, as is to be expected in patients with Down Syndrome. Alon has slow development in gross and fine motor skills with an intellectual disability as well as a delay in language expression.
2. In addition, Alon is suffering from fluids in his middle ear and buttons were inserted with an improvement, but he remains with a slight decline in hearing. At present, Alon is planned to undergo a second button surgery and a reduction in his adenoids, since the buttons fell, and as a result, a reduction again occurred in his hearing. Moreover, Alon is suffering from chronic rhinitis and a low-level obstructive disorder of the air passages during sleep. Alon is being treat with inhalations and Netilyn during air passage illness and is also suffering from outbreaks of pneumonia. For these reasons, Alon is in EEG monitoring. According to the expert opinion of Dr. Brezner, the occurrences of fluids in the middle ear, obstruction of air passages and congestion in air passages are characteristics of Down Syndrome.
3. Dr. Brezner estimates at the disability of Alon from a disability of 65% for the developmental intellectual disability under Regulation 91(3) as well as 40% for the linguistic delay under Regulation 29(7)(A)(3).
4. Alon is receiving full child compensation at a rate of 100%.

**The Damages of the Plaintiffs**

1. Due to the actions and/or omissions of the Defendants and/or any one of them, the Plaintiffs were caused, inter alia, the damages detailed below:
2. **Special damage**

A. **Medical expenses for medical treatments, drugs and medical assistance in the past:**

Due to the actions and/or omissions of the Defendants and/or anyone on their behalf, Alon in the past needed, and still needs and will also need in the future intensive treatment and monitoring, including among other things developmental, endocrinological, EEG, pulmonary, neurological, optical, orthopedic monitoring, special dental care and frequent monitoring by the family physician and a developmental physician. In addition, Alon is undergoing paramedical treatment such as physiotherapy, hydrotherapy, communication clinics and speech therapy and occupational therapy. Moreover, Alon has been sent to the ER for incidents of high fever and pneumonia. In addition, he underwent “button” surgery.

In infancy, Alon was treated by Dr. Shapiro, a physiotherapist, once a week for one and a half years to learn how to walk, at a cost of NIS 250 per treatment. Presently, Alon is receiving treatment from a communications clinician once a week and occupational therapy once a week from the Ministry of Education in the framework of the kindergarten. However, due to the significant linguistic developmental delay which Alon suffers from, where he speaks individual words in an unclear manner, at the recommendation of the doctors and kindergarten staff he requires additional treatment. Therefore, the Plaintiffs are covering treatment at their own expense with a communications clinician who comes to the kindergarten once a week. The cost of the treatment is about NIS 300 per treatment. Moreover, the Plaintiffs consult with a communications clinician who has been accompanying Alon over the years (from the age of six months approximately) every few months at a cost of about NIS 300 per meeting.

And note: the Plaintiffs cannot receive these treatments at their sick fund since the fund in any case does not approve more than one paramedical treatment in the framework of the supplementary insurance, up to a ceiling of 12 treatments per year, while Alon is being treated once a week. Moreover, the treatments which are being given are given by carers who are not trained to work with children with Down Syndrome. In addition, treatment in the framework of the fund are given during morning hours and require a loss of studies for Alon and work days for the parents (a fact which increases the damages). In any case, despite the fact that the Plaintiffs tried to receive the treatment through the fund or via carers who have an arrangement to work with the fund, they refused.

The treatments Alon receives are not exhausted in the different frameworks and continue with private treatments in the afternoon and in the framework of daily exercising at home. Alon is being treated with private hydrotherapy at Alyn once a week at a cost of about NIS 250 per treatment. The hydrotherapy is being given at the recommendation of the hydrotherapist. In addition, the parents had to purchase a large quantity of professional equipment, including physiotherapy equipment, equipment which assist in the development of motor skills and many special developmental toys such as a special bicycle, a physiotherapy ball and a special computer and computer games suitable to the condition of Alon.

In addition, Alon is being treated with drugs for the treatment of, inter alia, asthma, pneumonia and autoimmune inflammation of the thyroid gland. Moreover, for about two years Alon was being treated with many expensive supplements for the purpose of his nutrition n the framework of a private medical institute on the basis of a method that advocates the treatment of children with special health needs by means of food supplements and in light of digestive problems, and this at a cost of $250-350 every two months in accordance with the recommendation of the medical caregivers.

In addition, Alon, who is a member of Meuhedet Sick Find, is also insured with supplementary insurance called “Meuhedet Si”. For all this insurance, the Plaintiffs spend the sum of NIS 26 per month. In accordance with the ruling of the Supreme Court, the Defendants must compensate the Plaintiff for the supplementary insurance costs (Civil Appeal 4431/17 **John Doe vs. John Doe** (Nevo 3 October 2019)(hereinafter: “**Supplementary Insurance Ruling**”).As stated in this ruling, the injured party is also entitled to refunds for deductible payments made or which are made in future. And note: the significance of this ruling. **An application of an injured party to receive treatment in the framework of the supplementary insurance is a reasonable action where the injured party is entitled to indemnification on the expenses he paid for it**. In any case, the injured party (who is entitled to this from the sick fund) may apply to receive his treatment **in the framework of the supplementary insurance as well**, while receiving compensation for his expenses for this purpose.

The Plaintiffs will contend that due to this, up to the date of filing of the claim, they have incurred damages at a rate of at least **NIS 300,000**.

B. **General Expenses for the Past:**

However, Alon (only) recently grew out of diapers, but despite this, the soils himself very frequently due to a lack of full control of his sphincters and failures and not reaching the toilet in time as well as a lack of awareness of the need to run to the toilet. Therefore, the Plaintiffs frequently use wet-wipes and there are increased laundry expenses. There is a need for a great deal of laundering of bed linen and clothing and purchase of many clothes to replace clothing when it is not possible to remove stains and there is no choice but to throw them away. These situations require showering Alon several times a day.

In addition, the Plaintiffs are accompanied by the Yated charity in order to educate Alon in a reading method adjusted to children with Down Syndrome. Beyond the payment for the consultation, the Plaintiffs are also forced to purchase and prepare various equipment in the framework of the study using the adjusted method.

In addition, the Plaintiffs have expenses for the purchase of prepared food when they are in the medical institutions for treatment and monitoring of Alon, including hospitalizations for surgery and visits in hospitals due to fever diseases, etc. The Plaintiffs will contend that due to this, up to the date of filing of the claim, they have incurred damages amounting to at least **NIS 100,000**.

C. **Education expenses for the past:**

Up to the age of two (in 2016-2017), Alon was learning in the Shalva Rehabilitation Residence. There Alon studied in the full-day framework (including an after-school program). Since then and to the present, he is in a municipal kindergarten. The teacher is a “combination teacher”, i.e. with training in the care of children with special needs, and she works a lot with Alon. In addition, there is an accompanying assistant during the kindergarten hours.

The Ministry of Welfare pays the assistant a minimum wage only, and in order to preserve a good relationship with the assistant and continuity in the treatment by her, the Plaintiffs are forced to supplement her salary to a salary of NIS 40-55 per hour. The Plaintiffs will contend that due to this, up to the date of filing of the claim, they have incurred damages of at least **NIS 200,000**.

D. **Travel expenses for the past:**

The Plaintiffs incurred many expenses for many trips Alon required from his birth to the present, including for visits at hospitals, medical monitoring, medical and paramedical treatments, examinations, purchase of medications, parent training sessions, to the rehabilitation residence and to the kindergarten. The Plaintiffs estimate this expense at **NIS 50,000** as of the date of filing of the claim.

E. **Third party assistance for the past:**

Today Alon is five years old, but due to the actions and/or omissions of the Plaintiffs and/or of anyone on their behalf, he requires increased, trained treatment. Alon suffers from significant developmental, cognitive and motor delays. In addition to the professional treatments Alon receives in the educational frameworks, the parents are guided by the professional staff, and they do “exercises” with Alon daily at home.

The Plaintiffs are forced to accompany Alon to all the treatments and medical examinations. The Plaintiffs try to ensure that Alon receives treatments in the framework of the kindergarten and even with private financing, but visits to hospitals, with doctors in the sick fund and visits to emergency rooms always happen at the expense of work hours. In addition, hydrotherapy treatments are during the afternoon hours, when one of the parents has to make time for the treatment and to employ assistance in the care and supervision of Alon’s siblings.

Alon requires individual aid and assistance in all aspects of life and for every hour of the day. Alon needs full assistance in getting dressed, washed and in feeding him (and generally he does not like eating). Alon is not able to go to the toilet and flush by himself and requires full assistance, and as a result, Alon also frequently misses and is not able to control himself. In addition, Alon takes a long time to eat, and he requires full assistance and encouragement while eating, which takes a long time. Moreover, Alon needs encouragement for all actions in general and particularly in physical activity. In addition, Alon is unaware of dangers, his movements are awkward, his stability is limited and his level of self-control is low, and therefore he cannot be left alone without supervision. Additionally, Alon frequently has fever and inflammation sicknesses. On these many days, one of the Plaintiffs is forced to miss work in order to care for and supervise Alon. The Plaintiffs estimate this head of torts at **NIS 500,000** as of the date of filing of the claim.

F. **Loss of earnings of the parents for the past:**

The difficult condition of Alon significantly affects the earnings of the parents. First of all, after his birth, the Female Plaintiff was forced to be absent from work for 6 months beyond the maternity leave paid for by the National Insurance Institute and went on unpaid leave, in light of the many treatments and medical clarifications required by Alon.

In addition, up to the present, the Plaintiffs have been forced to be absent frequently from their places of work in order to care for Alon, including for accompanying him to the different medical institutions, parent training sessions and in cases when Alon remained at home due to illness. Most of the absences of the Plaintiffs from work were due to illnesses suffered by Alon due to the weak immune systems which are characteristic of children with Down Syndrome. Due to this, advancement opportunities of the Plaintiffs have been hurt. In addition, their salaries have been harmed due to the absences. For example, the Female Plaintiff uses all the sick days and vacation available to her and even beyond the days to which she is entitled to care for Alon. In addition, the Female Plaintiff has not succeeded in reaching the monthly hour quota. As a result, the Female Plaintiff has suffered a loss of earnings when her place of work deducts from her salary the value of the work days which the Female Plaintiff is lacking. Moreover, due to the absences and due to the inability to provide a response to urgent tasks such as injunctions and urgent applications, in January 2020 the Female Plaintiff was transferred to a position which included a loss of status and salary. The Female Plaintiff, who is a lawyer by profession, was transferred form her position as a legal consultant in the legal bureau of the Histadrut to the position of union secretary.

Similarly, the Male Plaintiff suffered harm at work when his advancement opportunities were harmed due to his unavailability and lack of flexibility when he is unable to work many work hours or in positions which require an immediate response outside normal work hours. Similarly, the Male Plaintiff missed many work hours and days and did not reach the required hourly quota. The Plaintiffs will contend that under this head of torts, up to the day of filing of the claim, they incurred damages at a rate of **NIS 500,000**.

G. **Payment for base layer in the past:**

Plaintiffs 2 and 3 will contend that they also have the right to a base layer, i.e. expenses made also for a healthy newborn, since they would not have born this expense. The Plaintiffs estimate their expenses under this head of torts at the sum of at least **NIS 500,000**.

H. **Expenses for the trial:**

For the purpose of filing the claim, the Plaintiffs paid for the collection of documents, receipt of the medical expert opinions and the payment of the court fee. The expenses of the Plaintiffs under this head of torts, as of the date of filing of the claim, comes to about **NIS 30,000**.

I. **Interest for the past:**

The Plaintiffs will contend that the purpose of the duty to add interest to payments in the past, even when the delay in the payment of compensation was done according to law, derives, inter alia, from the fact that not adding it would lead to unjust enrichment by the injuring party against the injured party (compare, for example: Civil Appeal 741/79 **Kalanit Hasharon Investments and Construction (1978) Ltd. vs. Horvitz**, Piskei Din 35(3) 533 (1981)). Or in other words: the payment of interest is intended to compensate the injured party for not having the different sums of money (whether required for actual expenses or that were not earned due to loss of earnings or which were lost in another manner), and return to him what he would have earned if he had held them. Accordingly, when the revenues of the injured party are expected (and/or the level of risk in it was anticipated and/or as a reasonable injured party he had to invest his money, which is a lower level of risk than a reasonable person invests) determined in the framework of the capitalization rate (whether pursuant to the ruling of the Supreme Court in Civil Appeal 3751/17 **Hama’agar Hayisraeli Lebituah Rechev (HaPool) vs. John Doe** (Nevo 8 August 2019), in which it was stated that the injured party earns on his investments a revenue of at least 3%, and whether in any other procedure, including and specifically an additional hearing on the ruling if given), the interest rate for the past should be determined at the same rate and/or level of risk. For the avoidance of doubt, the Plaintiffs will contend that the Defendants and/or any one of them (and at least Defendants 2 and 8) are prevented from contending that the Male Plaintiff would not have earned a revenue of 3% on his investments, as this contention was raised by them in the Supreme Court and was accepted.

1. **General Damage**

**A. General Comments:**

**A.1. Lifespan**

Over the years there has been a consistent and clear increase in lifespan resulting, among other things, from improvements in sanitation, the level of health services (including and specifically preventive medicine), etc. These improvements are expected to continue in future, and together with them, lifespans are also expected to continue to rise. And note: it appears that this matter even constitutes almost judicial knowledge (see for example: Supreme Court 1181/03 **Bar Ilan University vs. the National Labor Court**, Piskei Din 64(3) Para. 35 of the ruling of Her Honor (ret.) Prokachia (2011) (“[…] **even with a glance to the future, the aging of the population in Israel is expected to continue** […]”); Civil Claim (Haifa District) 655/84 **Moskovitz vs. Haifa Municipality**, District Rulings 5749(3) 221, 234 (1989)).

This expected future increase leads to the fact that there is a difference between two types of calculations of lifespan: one, “**static** lifespan”, means a lifespan based on the (incorrect and unrealistic) assumption that there will be no future change in patterns of dying (or in other words: the present patterns of dying will remain as they are in the future as well). The second, “**dynamic** lifespan”, means a lifespan which takes into account the anticipated future growth in lifespan. Dynamic lifespan takes into account the fact that there is a fixed and continuous rise in the lifespan of the population in Israel due to the anticipated improvements in dying (resulting, among other things, as a result of improvements in medicine, technological improvements, improvements in nutrition, health, housing and hygiene, etc.) for the entire anticipated lifespan.

The lifespan tables published by the Central Bureau of Statistics in the framework of the Statistical Abstract of Israel reflects a **static** lifespan. This matter rises in the defining of lifespan as it appears in the Statistical Abstract, which includes an assumption according to which the present rates of dying will not change in the future. But this assumption is not true **even according to the position of the Central Bureau of Statistics**, which even publishes statistical tables in the abstract (for statistical reasons and for the purpose of statistical segments), since **it also publishes dynamic future dying tables which include a forecast of a decline in the rate of dying and a rise in the life tables**.

It results from what is stated, and particularly in light of the aim of the compensation laws in the matter of “restoring the situation to what it was”, **that in the framework of the calculation of compensation, a dynamic lifespan must be determined for the Female Plaintiff, which – alone – is expected to reflect her actual lifespan** (although we will already emphasize now that the experience of the past teaches that the expectations regarding the future increase in lifespan are also lower – in a fixed way – from the actual increase, and in any case, determining a dynamic lifespan according to the present expectations means, generally, a lifespan which is too low (although, we may point out, the difference between the actual future lifespan and the dynamic lifespan is significantly lower than the difference between it and the statistical lifespan)). And note: this matter is materially similar to relying (as it is actually done in each and every case separately) on a lifespan which is as close as possible to the date of termination of the procedure (as opposed to the date of the torts incident or the date of opening of the procedure). This reliance is done out of an attempt, as far as possible, to suit the components of the compensation **to the real damage (and the lifespan)** and restore the situation to what it was fully and as far as possible. In any case, when as in our case clearly the dynamic lifespan is the one which, as far as possible, restores the situation of the Female Plaintiff to what it was in a genuine way. The compensation should be determined according to this. Compensation which is not according to the correct lifespan will necessarily lead in the end of the procedure **to a waiver by the injured party – the Plaintiff – with no real resources** at the level of third party assistance and expenses.

And in fact, reliance on the dynamic lifespan does not create any special difficulty. The reason for this is that there are **dynamic** lifespan tables issued by the National Insurance Institute which appear on page 84 of the Full Actuarial Table from 31 December 2010. And note: even though it is enough that the report was issued by the National Insurance Institute in order to indicate its reliability, as stated on page 76 of the report, the forecast included in it “**is based on a model of the CBS which was transmitted to us**” (and see also Footnote 79 of the report).[[1]](#footnote-1) It appears from this that this is a dynamic lifespan forecast **based on data of the CBS itself**, and in any case, there is no basis for the contentions of the Defendant that the static lifespan of the CBS should be preferred to the dynamic lifespan based also on the CBS. And note: the Supervisor of Insurance (as a part of the regulatory codex published by him) obligates the insurance companies to make use of such a lifespan (by using the future death tables which include an assumption in regard to the future decline in dying) inter alia in the fields of life insurance, pensions, etc.

And see also Civil Claim (Jerusalem District) 30943-12-11 **John Doe vs.** **Hama’agar Hayisraeli Lebituah Rechev (“HaPool”) Ltd.** (published in Nevo, 27 May 2020), there His Honor Judge Yaakobi stated explicitly that lifespan is to be determined on the basis of a **dynamic** lifespan.

In light of all of the above, the Plaintiffs will contend that this head of torts should be calculated for the future according to the real lifespan expected for Alon, where the lifespan of the general population also affects children with Down Syndrome. And note: the improvements in sanitation, in living conditions and improvements in medicine also affect the lifespan of children with Down Syndrome and not only the general population. Consideration of these improvements is in the dynamic lifespan and not in a lifespan calculated by the Central Bureau of Statistics which appears on the CBS website, which is a “static” lifespan based on the assumption that the existing patterns of dying at present (with regard to various ages) will remain identical during the entire life of the injured party.

**A.2. Increase in salaries in Israel and its affect on the other heads of torts**

In recent decades, the average salary rose significantly at a **real** rate (i.e. beyond the rise of the index). This rise is not by chance or a statistical anomaly, but rather a clear and consistent development **expected to continue in the future as well**. The report of the Babad Committee confirms the existence of a real future increase in salaries **and states explicitly that the rate of real increase in salary is 1.5% per year**,[[2]](#footnote-2) and in accordance with the report of the Taub Center **the rate of real increase in salary is 3.8% per year**.[[3]](#footnote-3) The **real** future rise of the average salary rises also from the assumptions of the Supervisor of Insurance, published in the framework of the Regulatory Codex (and as such are found in the judicial knowledge of the honorable court). In this case as well, not only did the Supervisor of Insurance confirm the above-mentioned rise, **but also his instructions obligate the making of the calculations according to the solid assumption of a real increase of salary of 1.2%** (see Sections 1.2.3(A)(1) (in the matter of an old pension fund) and 1.2.4(B)(1) (a new pension fund) of the Regulatory Codex, Gate 5, Part 4, Chapter 1, Mark C).[[4]](#footnote-4)

Similarly, a study of the health cost data, which find expression in the health input and health cost indexes, shows that there is an increase – which is expected to continue in the future as well – in these rates and even more so. These data reflect the change in **medical expenses** (which can be compared to the existing change in the index and out of this to find the **real** increase) **and the various health costs (including self-pay amounts required to be paid by the patients** (and specifically to the health cost index). Finally, it should be pointed out that the fact that the cost of medical expenses is linked to the health cost index (or the health inputs) and not the consumer price index, appears also from the instructions in the circular of the vice president for supervision of the sick funds and additional health services, January 2019 “Update of Payments for Health Services and Drugs for 2019 Following Updates of the Index and Changes in the Collection Plans of the Sick Funds” (19 August 2019)).[[5]](#footnote-5)

Accordingly, the Plaintiffs will contend that this increase should be added to the compensation for loss of earnings for the future, the subsistence allowance, third party assistance and medical expenses. And note: the Plaintiffs will contend that with regard to third party assistance, the higher rate of increase should be taken into account, in light of the significant effect of the increase in the minimum wage – which over the years, as history has proven, is expected to be higher than the increase in the average wage – on this cost. To show that it is necessary to compensate the Plaintiff for said increases, the honorable court is referred to Civil Appeal 2099/94 **Haims vs. Ayalon Insurance Company Ltd.**, Piskei Din 51(1) 529 (1997), in the framework of which his honor Judge Or stated explicitly that these costs should be compensated. Also the honorable court is referred to the ruling of his honor Judge Brenner in Civil Claim (Jerusalem District) 10/95 **Lipo vs. Hadad** (published in Nevo, 18 May 1998).

B. **Medical expenses for the future:**

* Accessories and disability devices and various installations: as Dr. Brezner writes in his expert opinion, Alon needs equipment suitable to activity and sensual stimulation for his use at home, both equipment for improvement of gross motor skills and accessories for promoting language and communication and fine motor skills. Alon will require various accessories and installations, including physical fitness installations for activity and physical training in order to deal with his motor deficiencies and low muscle tonus. In addition, Alon will need means of study accessories, including a computer and special software which will challenge him mentally and will promote his mental and communications development, television and radio and a cable connection in order to provide him with stimulation and interest in finding programs and films suitable to his developmental level. Alon will also require innovative means of communication as exist from time to time, special devices, easy to operate and which do not require motor precision.
* Medical treatments: in accordance with what is written in the expert opinion of Dr. Brezner, Alon needs and will need assistance, treatment and close medical monitoring for his entire life, including medical treatments and follow-up tests in connection with his limitations, including in a dedicated syndrome clinic, EEG and hearing tests and sleep tests, monitoring by a pulmonary physician, eye tests, internal medicine monitoring (family doctor, pediatrician), developmental-rehabilitory, psychiatric and endocrinological. In addition, Alon will need paramedical treatments such as physiotherapy, occupational therapy, hydrotherapy and communications clinic, communications treatment and general stimulation, and it is reasonable to assume that in the future he will require emotional care, including psychological care, animal therapy, music and art therapy. In addition, Alon will need special dental treatment and monitoring by a clinic specializing in children with special needs.

The Plaintiffs will contend that the above-mentioned treatments, and alternately some of them, are not included in the health basket and that in any case, and in light of the condition of the Plaintiff, it is not reasonable to demand that he receive treatments in the framework of ordinary public treatment (which would even increase the damages). The Plaintiffs will contend further that in light of the expected changes in the National Health Insurance Law, 5754-1994, and in light of the fact that Alon will require treatments over decades, the compensation should be fixed without taking into account the present health basket. In any event, and for the avoidance of doubt, the Plaintiffs will contend that if any treatment is not found in the health basket, the Defendants are obligation for the payment with full compensation. In addition, the Plaintiffs should be compensated for the amounts that they are required to pay as the self-pay component of the treatment found in the health basket or under the supplementary insurance. Moreover, the Plaintiffs should be compensated for the monthly payments for purchasing the supplementary insurance pursuant to the above-mentioned Supplementary Insurance Ruling.

In addition, the parents and siblings of the Plaintiff will need training and psychological consultation and/or emotional treatment and emotional support so that they can deal with the difficulties of Alon in the best possible way, as stated in the expert opinion of Dr. Brezner. It should be mentioned that the married life of Plaintiffs 2 and 3 reached a crisis in light of the difficulties and tensions of raising Alon.

* Medications: medications for treating thyroid glands, inhalations, antibiotic drugs for treating respiratory tract infections, etc.

The Plaintiffs will further contend that in the framework of the medical treatments, it should be taken into account that the cost of medical treatments rises more than the linkage to the cost of living (which also can be seen, for example, from the health input index published by the Ministry of Health), and that this matter should be taken into consideration for their calculation.

The Plaintiffs will contend that Alon and/or Plaintiffs 2 and 3 should be credited with these payments, as those who remain with expenses and in the framework of the grounds of wrongful birth and/or as trustees.

C. **Third party assistance for the future:**

Alon suffers from a genetic syndrome characterized by a combination of birth defects in the various bodily systems and a multi-faceted developmental delay and intellectual disability. Furthermore, according to the expert opinion of Dr. Brezner, with people with Down Syndrome, a cognitive decline can be expected over the years as well as an indication of more significant cognitive disabilities, as in the case of Alon. This situation will not permit Alon ever to be independent, and therefore he will need a great deal of assistance from the members of his family, particularly his parents, as well as paid-for assistance. Dr. Brezner refers to this in his expert opinion and writes: “Children and adolescents with the syndrome acquire life skills, but the vast majority of them (90% of adults) remain with a significant need of assistance, i.e. help in the basic activities of daily living (BADL) and a great deal of assistance in the instrumental activities of daily living (IADL) … in other words, we can expect the achievement of independence in the most basic daily functions, but with a continued need of assistance in dressing and grooming and a great, continued need of supervision, accompaniment and direction as well as higher functions such as housekeeping, money management, organizing daily routines, etc. … Alon needs today and will need in the future accompaniment and supervision all day long, taking into account specifically the lack of judgment and unawareness of dangers and communication difficulties.”

Therefore, among other things, Alon will need the assistance detailed below:

* Assistance from his parents and siblings – Alon needs a great deal of assistance, including accompaniment to treatments and tests and in basic activities such as dressing, washing and personal hygiene and eating. Therefore the Plaintiffs need, and will in future need, to invest many hours in the treatment and supervision of Alon. The Plaintiffs are being crushed under the burden, and therefore they need paid help of a nursing caregiver at present. In addition, in the future, at the age of 21 when the educational framework will terminate and the parents will be older, Alon will require a caregiver for the entire day. Alon will require a Hebrew-speaking caregiver due to communication defects from which he suffers in any case, so that they can understand one another, and further: the caregiver must understand the medical instructions and those treating Alon. In addition, the caregiver will constitute companionship for Alon, particularly since he has difficulty making social contact and suffers from isolation. For the avoidance of doubt: the parents are entitled to compensation, inter alia, in the framework of their independent claim, due to the wrongful birth and/or as third party assistance, while the help of the siblings is third party assistance. It should be emphasized further that when the parents reach a mature age (they are about 40 years older than Alon), his siblings are expected to accept the care and treatment and assistance of Alon, with the assumption that the time invested in the assistance and caring of Alon will be at the expense of the personal lives and employment of his siblings, causing a loss of earnings.
* Professional-therapeutic assistance – at present, Alon is at a kindergarten with a close assistant while receiving treatments during the hours of kindergarten, and as he gets older, Alon will need to be in therapeutic frameworks which suit his special needs and provide treatments in physiotherapy, occupational therapy, communications clinic, speech therapy, emotional care including psychological and psychiatric care, animal therapy, music therapy, therapeutic riding, etc.
* Professional-educational assistance – as he matures, Alon will require the assistance of his parents/educational assistants who will provide him with special professional-educational help in order to develop his mental ability up to the maximum possible level, in order to improve his quality of life and to create life skills and social contacts and suitable stimulation in light of his cognitive difficulties, which are expressed in fine motor skills and in the area of language and expression. At present, Alon is being supported by a close assistant; similarly, and in accordance with the expert opinion of Dr. Brezner, “Alon must be provided with safe leisure activity which suits his abilities and difficulties (trips, activity in the pool, horse riding, bicycle activity, physical exercise, riding, creativity and expression, etc.) as recommended for this population and according to the development of the means and programs at a rate of once a week”. And also that “as he matures, a long school day/club or alternatively tutor services should be considered for the afternoon hours”.
* Assistance in housekeeping – Alon will require full assistance in housekeeping, with everything involved in this, including shopping for goods, buying clothing, maintenance, cooking, cleaning, etc., whether he is at his parents’ home or leaves his parents’ home by way of an Israeli caregiver or a foreign workers. Today as well, the family of Alon needs assistance in doing the housekeeping chores due to the intensive care and supervision invested in Alon.
* Alon will require a guardian and/or proxy to manage his financial affairs and to make decisions regarding various questions, including supervision over the assistance he needs and the purchase of services and help for him.
* Alon will require transport services for the purpose of treatments, activities, errands and in fact he will not be able to be independently mobile.

The Plaintiffs will contend that Alon and/or Plaintiffs 2 and 3 should be credited with these payments, as those bearing the expenses and in the framework of the grounds of wrongful birth and/or as trustees.

D. **Housing expenses for the future:**

According to the expert opinion of Dr. Brezner, in light of the condition of Alon and the desire of the Plaintiffs that he continue to be within the family, it will be necessary to adjust the home to his needs, including, the addition of a room with attached toilet and shower for the caregiver. Alternatively, Alon will require an apartment attached to the home of his parents where he will live together with his caregiver. In addition, his place of residence must be near the treatment and/or educational centers and must suit the limitations of Alon (including construction adjustments, inter alia in the areas of safety, including bars, an apartment on the first floor – to prevent falling and/or jumping by Alon – with the possibility of reaching a playground without crossing streets and or busy street). The Plaintiffs should even be permitted to change their place of residence or that of Alon at least three times during the lifetime of Alon, as an ordinary person. When they grow old, the Plaintiffs will have difficulty in continuing to care for Alon, he will need a suitable supervisory and therapeutic framework of “assisted living” which will include, inter alia, medical supervision, assistance in daily functioning as detailed above, assistance in home maintenance and emotional support.

When Alon matures, he will need his own apartment with the needed assistance. And note: pursuant to the Hammer vs. Amit Ruling, when he grows up, there should be compensation for all the amounts, including the “basic layer”.

The Plaintiffs will contend that Alon and/or Plaintiffs 2 and 3 should be credited with these payments, as those bearing the expenses and in the framework of the grounds of wrongful birth and/or as trustees.

E. **General expenses for the future:**

As stated, Alon suffers from diarrhea, vomiting and incontinence, most of which Alon suffers from due to his gastrological condition, and therefore as a result, the Plaintiffs will continue to make increased use of wet wipes and the Plaintiffs will incur increased wear and tear of clothing, and accordingly wear and tear of the washing machine.

In addition, Alon breaks many objects due to a lack of gross and fine motor control and because he enjoys throwing things. The Plaintiffs will incur many expenses for the repair and replacement of spoiled and broken objects.

Similarly, the Plaintiffs will incur expenses for the purchase of prepared food during their says at medical institutions for routine monitoring, treatments, tests, hospitalizations or visits to the emergency room.

Moreover, it is difficult to purchase health insurance for Alon, who suffers from Down Syndrome, travel insurance to go abroad, mortgage insurance, nursing insurance, etc., and as a result, the Plaintiffs will incur many expenses.

The Plaintiffs will contend that Alon and/or Plaintiffs 2 and 3 should be credited with these payments, as those bearing the expenses and in the framework of the grounds of wrongful birth and/or as trustees.

F. **Education expenses for the future:**

Today Alon is in a kindergarten, supported by a close assistant. In the future, at the age of school and until the age of 21, it will be necessary to integrate Alon into an appropriate social-educational framework of a special education school as well as an after-school program and/or personal tutoring services, special extracurricular activities, etc., including enrichment after the hours of activity in the educational institution as mentioned by Dr. Brezner in his expert opinion.

The Plaintiffs will contend that Alon and/or Plaintiffs 2 and 3 should be credited with these payments, as those bearing the expenses and in the framework of the grounds of wrongful birth and/or as trustees.

G. **Travel expenses and car maintenance for the future:**

Due to the many trips to the medical institutions and educational institutions as well as for the purpose of receiving treatments and suitable enrichment, the Plaintiffs will need a car, as today they transport him in a private vehicle. The Plaintiffs will have to change the car frequently and they will incur high expenses for car maintenance, including fuel, changing oil and repairs, as well as payments for parking.

The Plaintiffs will contend that Alon and/or Plaintiffs 2 and 3 should be credited with these payments, as those bearing the expenses and in the framework of the grounds of wrongful birth and/or as trustees.

Beyond this, the Plaintiffs will contend that in this matter, and after he reaches the age of 18, the Plaintiffs should be credited for the expenses for Alon, at the full amount, including the “basic level”.

H. **Loss of earning ability of Alon and/or living expenses:**

According to the expert opinion of Dr. Brezner, Alon cannot support himself.

The Plaintiffs will contend that in light of the direct right of Alon to compensation from the fact of his being a beneficiary, he should be compensated for any loss of earning ability.

Plaintiffs 2 and 3 will contend that they are entitled to these amounts in the framework of the grounds of wrongful birth, as those forced to support Alon. According to the Hammer Ruling, the parents must receive compensation for all “the extra expenses” in the care of Alon, which include the expenses for treatment and nursing (third party assistance, medical expenses, housing expenses, general expenses, education expenses and travel expenses) and living expenses, and after he reaches the age of 18, expenses which are not extra expenses. Living expenses are expenses for the upkeep of Alon imposed on the parents due to the inability of Alon to keep himself. These expenses will be calculated according to the reduction in the earning ability of Alon. In light of the condition of Alon, the loss of earning ability is at the rate of 100% for his whole lifetime. In accordance with the Hammer Ruling, the compensation will be from the age of 18 and for the entire period of his lifetime (and not only for the earning period of an average person, due to the fact that his living expenses and upkeep are needed even after this or that age), according to the average wage in the economy, including loss of pension provisions. It should be emphasized: earning constitutes a criterion for the calculation of the living expenses of Alon. Therefore, the calculation will be done from the age of 18 up to his whole lifespan. In other words, the Plaintiffs are entitled to compensation under this head of torts at the rate of 100% of the average wage in the economy even from the age of 18 to 21 when Alon would have had compulsory military service if not for his state of health (see below), as well as for the years up to the end of his lifespan and after the age of retirement – 67. Alternatively, from the age of 67 until the end of the lifespan of Alon, the Plaintiffs should be compensated at the rate of the provisions of full social benefits to which Alon would be entitled if not for his state of health.

Alternatively, compensation should be added to the compensation for loss of salary and/or living expenses for harm to conditions and social benefits which Alon would have received if he had been able to work. The loss of pension rights will be calculated according to the Expansion Order (Consolidated Version 13) for compulsory pension pursuant to the Collective Agreement Law, 5717-1957, which was approved in the records on 27 September 2011. According to this expansion order, from 1 January 2012, the rate of deposits for a pension will not be less than 12.5% (see Civil Claim (Jerusalem District) 5416-03 **John Does vs. Clalit Health Services**, given on 27 January 2012, Sections 135-136). In addition, the honorable court is referred to the agreements reached between the chairman of the Histadrut and the chairman of the Manufacturers’ Association according to which the pension provisions would rise by one percent, where out of them, one half of one percent would be imposed on the employers. This change is expected to come into effect this coming July, and therefore the rate of provisions according to which the Plaintiffs should be compensated is 13%. Moreover, he will incur a loss of additional benefits such as severance pay and advance study funds which also fall within the range of living expenses.

I. **Loss of earnings of the parents for the future:**

Today, the Plaintiffs are absent from work many hours and days. The needs of Alon as a child with Down Syndrome are expected to increase as he matures. The gap between the physical and cognitive condition of Alon and an ordinary child will increase together with the need for support and care. This support and care will require many hours from the parents, and therefore they will never be able to realize their earning potential and are expected to lose many hours of work and be prevented from advancement in their places of work, a lack of advancement which will affect their earnings for their entire lifetimes. The parents at all times must have “their ear to the phone”, to live next to the places of treatment and certainly not to go for sufficient advance study. And the continuous distress and strain (as will be described below) strongly affects the work ability of the parents. Similarly, the parents will contend that due to the caring for Alon and accompanying him to treatments and medical tests including during frequent illnesses incurred by Alon, due to which the parents need to stay at home with him, will cause them damages and loss of earnings at a full rate and/or at another rate with regard to their salary, as to be determined by the honorable court. The Plaintiffs will contend that in accordance with a study of the Ministry of the Economy, the parents of a child with significant limitations – over their earning period – will lose about NIS 3.8 million on average. For the avoidance of doubt, the Plaintiffs reserve the right to file a specific expert opinion regarding additional loss at the relevant time.

The parents will contend that they are entitled to compensation for this head of torts, whether as benefactors (and as third party assistance) or due to the fact that a direct injustice has been done to them.

J. **Loss of social benefits of the parents for the future:**

In accordance with the loss of salary incurred by the parents, they will also suffer a loss of social benefits such as pension payments, severance pay and provisions for advance study fund.

The parents will contend that they are entitled to compensation for this head of torts, whether as benefactors (and as third party assistance) or due to the fact that a direct injustice has been done to them.

K. **Payment for the basic level for the future:**

Plaintiffs 2 and 3 will contend that they should also be credited for the basic level, i.e. expenses incurred as well for a healthy newborn, since they would not have borne this expense, in general, and specifically after Alon reaches the age of 18

L. **Harm to autonomy:**

The autonomy of the Plaintiffs was harmed seriously when they did not receive and were not explained concerning full and precise information regarding the NIPS test, and the fact that this is not a diagnostic test with a false negative rate, and therefore the informed consent of the Female Plaintiff was not received. And note: this is deliberate harm to her autonomy, unfortunately, on the part of Defendants 5 and 6 who did this for pure economic motives in an attempt to market the test as worthwhile over other tests, and even that it could replace amniocentesis; this matter even clearly constitutes unjust enrichment on the part of these Defendants. This is serious misleading which harmed the ability of the Plaintiffs to make informed decisions and to have the fetus diagnosed and thus to discover that it had Down Syndrome.

Similarly, the Plaintiffs were denied the possibility of reaching a decision whether to do other tests in order to ensure the discovery of a fetus with Down Syndrome in that it was not explained to the Female Plaintiff that she is entitled to have an amniocentesis at the expense of the state and blood tests that improve the percentage of discovery of a fetus with Down Syndrome.

In addition, harms was caused to the autonomy of Plaintiffs 2 and 3 in that they were denied the natural right to decide on the size of their family and its nature. This harm rests on constitutional foundations – the basic rights of man to respect and liberty – when “**To the right of a man to respect and to autonomy there is great importance to the situation of medical treatment. In fact, medical treatment is at the hard core of the quality of life**”. (see Civil Appeal 2781/93 **Daaka vs. Carmel Hospital Haifa**, Piskei Din 53(4) 526 (1999)). This harm is different from emotional damages in that it derives from a denial of the ability to influence, to decide and to choose in a medical situation. Moreover, this is a one-time harm, which is different and separate from the continuous emotional damage incurred by the Plaintiffs (see the Hammer Affair, Section 70 of the ruling of Vice President Rivlin).

M. **Pain and suffering of the parents:**

The Plaintiffs incurred pain and suffering and aggravation due to the difficult condition of their child, where they experience his pain and suffering with him as if it were their pain. The Plaintiffs accompany and support the Plaintiff in undergoing treatments and tests, suffering and remaining many nervous hours outside the surgery wards and next to the hospital bed of Alon or in the emergency room.

The Plaintiffs have great emotional difficulty in caring for Alon, particularly in light of his difficult condition, where he has trouble communicating, is not completely continent, is limited in motor skills and suffers from a mental disability. Caring for Alon is exhausting and is an emotional burden for the entire family, to the point of a crisis in the relationship of the parents. The parents separated in February 2019 due to the burden, the tensions and the unending employment in the care of their son which led to a crisis in the relationship which cannot be mended.

The Plaintiffs believe that they are in need of emotional care and/or mental and emotional support, but they have prevented so far from receiving such assistance due to financial difficulties and a lack of free time, all of which is occupied in caring for Alon. Dr. Brezner also recommends this in his expert opinion. The Plaintiffs retain the right to file an expert opinion in the field of mental health for the damages of the Plaintiffs.

Due to the intensive treatment of Alon, the time and lives of the Plaintiffs is limited; they are suffering from great exhaustion and being worn down, which causes functional difficulties at work, and their organized lives have been harmed.

The Plaintiffs have also had great sorrow from the fact that their family life has been complicated, and they are not able to invest an equal degree of effort and care in their other child, and that the childhood of their healthy son is being wiped out in a way when they are tied to the family effort and giving assistance in the household chores and in caring for Alon.

In addition, the Plaintiffs are dealing with very heavy economic problems when most of their money is invested in caring for Alon, which is an additional emotional weight and the constant concern to satisfy the needs of all their children.

In this matter, the honorable court is referred to the words of Vice President Rivlin in Paragraph 70 of the Hammer Judgment:

“**In cases of wrongful birth, the emotional damage continues for the entire lifetime of the parents – the plaintiffs. This is not one-time damage. This is not damage stretching over a short period. The parents are required to the end to care for the child. They are exposed to his suffering and they are responsible for his welfare. They accompany his pains and agony day and night and they – become their pains and agony. They direct their lifestyle to a path which allows them to maintain their responsibility for the child. Their lives are changed – sometimes from end to end. Actions which once seemed natural and simple to realize become too hard to bear. The need to worry about the future of the child, to the end of their strength, deprives them of sleep and empties their pockets. This is continuous damage. It is different and separate from harm to autonomy, which is one-time harm which occurs the moment they are prevented from choosing. The continuous and difficult emotional damage therefore requires high and significant compensation**”.

N. **Loss of the pleasures of living of the parents:**

Due to the omissions of the Plaintiffs, the parents are confronted on a daily basis with the extraordinary and complex caring of Alon, who can never be an independent adult. The lives of all the members of the family have been turned completely upside-down from the birth of Alon and to the present. Naturally in the future as well, all the members of the family, particularly the Plaintiffs, will invest most of their time to caring for him.

From the day Alon was born, the lives of the parents have revolved around sickness, treatments and medical tests. Today, and since the birth of Alon, the routine of the parents is running from a clinic to a hospital and treatment and constant supervision of Alon. For this reason, the liberty and relationship of the parents was fatally harmed. In addition, the parents have almost no free time for hobbies and meetings with friends and acquaintances, not even family events.

Therefore, the Plaintiffs are suffering and will be suffering from great harm to the possibility of conducting an organized and normal style of life as the family members of a healthy child, and they should be compensated with a high and significant amount for this suffering where this head of torts is separate form the head of torts of pain and suffering as stated in Civil Appeal 4022/08 **Agbaba vs. the Pardes Hanna Karkur Local Council**, of 21 October 2010.

**O. National Insurance deductions**

The Plaintiffs will further contend that there is no place for any deduction whatsoever from the compensation amounts, including for payments made by the National Insurance Institute, in light of the change in the English Rule in the matter (and therefore the existing English Rule should be adopted, and Israeli law in general should be interpreted in accordance with it in general, as well as the Torts Regulations, in particular, see: Civil Appeal 10217/16 **BTB – Binyanei Taasiya Beer-Sheva vs. Giner** (Nevo 17 January 2019)) and in light of the fat that the ruling of the Supreme Court saw fit to deviate from the provisions of Section 82 of the Regulation (see above-mentioned Civil Appeal 3751/17) and in any case, the date was reached to annul it altogether with regard to judicial deductions of the general disability group and/or special services.

The Plaintiffs will further contend that if the honorable court should believe that any amounts whatsoever should be deducted, the net pension amounts should be deducted (which in fact comes to the Plaintiffs) and to avoid the deduction of amounts which did not come and/or will not in fact come to them (and compare: Civil Appeal 7453/12 **Alhabanin vs. Christi** (Nevo, 9 September 2014)). In addition, the Plaintiffs will contend that from the time that, in accordance with the official publications of the National Insurance Institute, the treasury of the institute is expected to empty out by 2045 (i.e., that starting from this date, no pensions whatsoever will be paid), and unfortunately, a cut is expected in the pensions at an earlier stage (in order to prevent the emptying of the treasury as mentioned, the deductions (which in and of themselves are denied) should be calculated for the future up to this date only (and/or any other date to be published by the National Insurance Institute and/or another relevant authority as stated).

For the avoidance of doubt, everything stated above is more than is needed, and nothing in what is stated constitutes a consent to the transfer of the burden in the matter of the deductions imposed on the Defendants from beginning to end.

**Harm to Privacy**

1. As stated, the Female Plaintiff gave birth to Alon in the Hadassah Ein Kerem Hospital, and there he was diagnosed with Down Syndrome. Prof. Vardiela Meiner, Plaintiff No. 9, the manager of the Genetics Department, delivered the result that Alon had Down Syndrome. At the same time, the Female Plaintiff contacted Dr. Porat due to her astonishment that Alon had Down Syndrome despite the normal result of the NIPS test and since she did not find the result of the test in the pregnancy folder with which she had come to the hospital. Then when she contacted Dr. Porat, he said to the Female Plaintiff, “Are you Keren? I heard that you gave birth to a child with Down Syndrome”. The Female Plaintiff answered yes and was shocked that Dr. Porat know about this. The Plaintiffs were very disturbed by the fact that information so personal and intimate, which they themselves had not yet had time to absorb, was already being distributed to others without their permission and without their knowledge. The Plaintiffs were in such a sensitive state in which they had just realized that their son was suffering from Down Syndrome and now, added to the difficult feelings was the feeling that their modesty had been crushed when they had not yet had time to decide if and when to share with their family members that their son had Down Syndrome. And note: it was not the intention of the Female Plaintiff to share with Dr. Porat in regard to the condition of her son, but she only wished to receive the results.
2. Therefore, the Plaintiffs turned to the hospital and demanded to understand who had leaked the information on their son to Dr. Porat. As a result, a meeting was set with Prof. Meiner, who was compelled to admit that she was the one who told Dr. Porat about their son, but she defended herself with the contention that Dr. Porat **also** works in Hadassah Ein Kerem Hospital. However, the Plaintiffs had gone to Dr. Porat in his clinic in Malkha privately and not by way of Hadassah Hospital. But beyond this: with all due respect, Hadassah Hospital may have known about the condition of Alon, but it most certainly was not entitled to broadcast the information among its workers not for the purpose of treatment and the consent of the patients (and let us ask: when a celebrity is being treated in the hospital, can the attending physician broadcast his pictures or the details of his disease “only” among the workers in the hospital?). And note: Prof. Smadar Even-Tov Friedman, the manager of the neonatology ward in Hadassah Ein Kerem, knew about the matter and apologized more than once to the Plaintiffs and even told them that she had transmitted the subject to be handled by and for the information of the manager of the hospital, unlike Prof. Meiner.
3. This is a serious breach of the Patient’s Rights Act, the Genetic Information Law and the Privacy Protection Act. This is also a clear violation of the rules of **ethics** of doctors, which state that a doctor must maintain the confidentiality of the medical information of his patient, must no transmit medical details of a patient to another person except with the consent of the patient. Moreover, the doctor must maintain the confidentiality of the patient and the confidentiality of his medical information even before his professional colleagues and avoid unjustified examination of his medical file. A copy of the rules of ethics is attached herein as **Addendum 26**.
4. Moreover, Prof. Meiner published the information which she had discovered to Dr. Porat and possibly to others, also without the knowledge and without the **consent** of the Plaintiffs. Defendants 8 and 9 also breached the confidentiality of the Plaintiffs when they published the medical information of Alon without their knowledge, without receiving their consent and without having a waiver of medical confidentiality.
5. The Plaintiffs will contend that the **behavior** of the Defendants rises to the level of serious harm to the confidentiality of the Female Plaintiff and Plaintiff No. 1 and to their respect. The harm contradicts Sections 2 and 7 of the Basic Law of Human Dignity and Liberty and the Privacy Protection Act, 5741-1981, Sections 2 (1), (5), (7), (8), (9), (10) and (11). Similarly, this is a breach of Sections 19 and 20 of the Patient’s Rights Act, 5756-1996 and of Sections 18, 19 and 22 of the Genetic Information Law, 5761-2000.
6. The Plaintiffs will contend that the conduct of the Defendant also raises grounds pursuant to Section 63 of the Torts Regulation, due to the fact that the Defendant breached the all of the legislative provisions detailed above – provisions intended, inter alia, to prevent the damages caused to the Female Plaintiff.
7. The Plaintiffs will also contend that the Defendants are indebted to them as well due to the tort of negligence in that the Defendants and/or someone on their behalf did what a reasonable litigant would not have done under those circumstances and thus caused the damage to the Plaintiffs.
8. Due to this, the Plaintiffs are entitled to compensation without proving damage pursuant to Section 29A(b)(1) of the Privacy Protection Act for the sum of NIS 60,122 for informing Dr. Porat. The Plaintiffs reserve the right to amend the Statement of Claim if they should receive information regarding additional publications.
9. In addition, the Plaintiffs suffered aggravation when they discovered the irresponsible and unlawful publication regarding medical, personal and intimate details. The discovery of this breach shook the trust of the Plaintiffs in the medical system, which is responsible for guarding the confidentiality of medical information and in the relationship of trust between them and the doctors. All of these put the privacy of the Plaintiffs in jeopardy for the sake of satisfying personal interests without respecting their rights and without complying with the most basic obligations of the doctors. In light of this, the Plaintiffs estimate their damage for the aggravation they suffered at the sum of NIS 50,000.

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 Dr. Assaf Pozner, Atty. Ayelet Schwartz Assaf, Atty.

**Attorneys of the Plaintiffs**

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**Table of Contents**

|  |  |
| --- | --- |
| **Addendum** | **First page of addendum** |
| Addendum 1 – Summary of the visit to Dr. Shalvi from 31 July 2013 | 33 |
| Addendum 2 – Summary of the results of the genetic consultation from 25 August 2013 | 36 |
| Addendum 3 – Summary of the visit to Prof. Yaffe from 21 May 2015 | 38 |
| Addendum 4 – Informed Consent Form, Details Form accompanying the blood tests and receipt for payment of the cost of the test | 40 |
| Addendum 5 – Report of rear transparency from 21 June 2015 | 44 |
| Addendum 6 – Summary of the visit to Prof Yaffe from 25 June 2015 and the prescription for Omepradex | 48 |
| Addendum 7 – Results of the NIPS test by email | 50 |
| Addendum 8 – Report of the early scan on 10 July 2015 | 54 |
| Addendum 9 – Summary of the visit to Prof. Yaffe on 13 July 2015 and on 27 July 2015 | 61 |
| Addendum 10 – Summary of the visit and results of the late scan test | 63 |
| Addendum 11 – Summary of the visit to Prof Nir from 2 September 2015 | 70 |
| Addendum 12 – Summary of the visit to Prof. Nir on 9 September 2015 | 72 |
| Addendum 13 – Summary of the visit to Prof. Yaffe from 21 September 2015 | 74 |
| Addendum 14 – Summary of the visit from 24 September 2015 and the conversation from 1 October 2015 | 76 |
| Addendum 15 – Summary of the visit to Prof. Yaffe from 22 October 2015 | 79 |
| Addendum 16 – Summary of the visit to Sha’arei Zedek on 26 October 2015 | 81 |
| Addendum 17 – Summary of the visit to Prof. Yaffe from 29 October 2015 | 84 |
| Addendum 18 – Summary of the visit to Prof. Nir from 4 November 2015 | 86 |
| Addendum 19 – Summary of the visit to Prof. Yaffe from 16 November 2015 | 88 |
| Addendum 20 – Copy of the summary of the visit to Prof. Yaffe on 7 December 2015 and doctor’s note | 90 |
| Addendum 21 – Release letter from Hadassah Hospital | 93 |
| Addendum 22 – Documentation of the birth and chart of the newborn  | 96 |
| Addendum 23 – Expert opinion of Dr. Asher Eyal, gynecology and obstetrics specialist | 102 |
| Addendum 24 – Expert opinion of Dr. Amichai Brezner, pediatric rehabilitation specialist | 117 |
| Addendum 25 – Summary sheet of the hospitalization | 124 |
| Addendum 26 – Rules of Ethics of Doctors | 134 |

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