Proportional liability in our school? Graduating in our school?

Abstract

The ***Malul*** case and its various incarnations exposed a debate over whether courts can deviate from the general preponderance of the evidence standard. Undoubtedly, the ***Malul II*** case overrode ***Malul I***, and if ***Malul I*** allowed for deviation, then ***Malul II*** denied any possibility of deviation, except in cases where the test of recurring distortion can be met.

A review of the rulings in the lower courts shows great confusion regarding the understanding of the ruling in ***Malul II***, even more so regarding the relationship between this case and the ruling in the ***Fatach*** case. Examining the approach of court rulings, inidicates that the recognition of proportional liability is not consistent with the rationale of ***Malul II***, and at times not even consistent with ***Malul II****’s* minority opinion, which supports the possibility of recognizing a “single event” in order to apply the proportional liability standard. Therefore, there is no consistency in the outcomes nor the normative rationales for deviating from the preponderance of the evidence standard.

In retrospect, affirming the ***Fatach*** precedent in the foundational ***Malul II*** ruling can be viewed as a case of adhering to the adage that **“it’s not worth the king’s trouble"**;that is,any expected benefit is not worthwhile in light of the costs. Given that the ***Malul I*** ruling made it clear that *Fatach* could not stand, ***Malul II*** provides a comprehensive solution to the question of proportional liability by setting limits for it by applying the recurring distortion test to all cases of proportional liability. As there is no longer any dispute that the compensation awarded in ***Fatach*** for the loss of chance of physical recovery was proportional compensation, and as the question of proportional compensation was comprehensively resolved in the ***Malul II***ruling*,* the inevitable conclusion is that compensation for loss of chance of physical recovery shall be awarded only when the conditions of the test of repeated distortion are met, according to the asymmetrical nature of the proportional compensation, as was determined again in the ***L.D.* case**.

Arguably, this general doctrine should not be limited to medical cases, because the logic of the recurring distortion test does not apply solely to the medical context. Indeed, the fact that the ***Fatach*** ruling orders “ordinary” proportional compensation also explains the tendency of some appellate judges to extend the “loss of chance of recovery” to other areas of life outside the medical sphere, such as recognizing a case brought against a lawyer for harming the chances of success in legal proceedings. However, even a claim filed for loss of chance of success in a legal trial must be subject to the test of recurring distortion to avoid the risk of an inaccurate application of the law.