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Editor Introduction	5
<i>Should Defendants Be Notified Prior to Filing Class Action Lawsuits?</i> Chemi Ben Noon & Tal Havkin	7
<i>The Competence to Testify of Mentally Disordered and Mentally Retarded Persons</i> Gabriel Hallevy.....	29
<i>Liability Rules and Insurance: The Special Case of Civil Sanctions</i> Shahar Weller	67
<i>Further Thoughts on Ehud Olmert's Conviction in the Holyland Affair</i> Doron Menashe	107
<i>Res Judicata in Jewish Law</i> Daniel Keinan.....	153
<i>Discovering Europe: Israelis in the European Court of Human Rights</i> Benny Spanier, Israel (Issi) Doron, Faina Milman-Sivan.....	199
<i>Sub Judice and Freedom of Speech Words in the Air and the Dead Letter of the Law</i> Boaz Shnoor	261

ABSTRACTS

Chemi Ben Noon & Tal Havkin, *Should Defendants Be Notified Prior to Filing Class Action Lawsuits?*

The question discussed in this paper is whether plaintiffs should be required to give notice to the defendants prior to filing class action suits against them. The Israeli National Labor Court has recently answered this question in the affirmative. This paper argues that such a requirement is inefficient, as it will decrease the incentive to file efficient class actions, as well as the ability of the class action mechanism to fulfill its purposes. It is further argued that the goal of such a requirement – ensuring that class actions are only filed after a thorough examination of the factual foundation – can be accomplished using other, preferable, means.

Gabriel Hallevy, *The Competence to Testify of Mentally Disordered and Mentally Retarded Persons*

The competence to testify of the mentally disordered and mentally retarded persons was questionable for a long time in most legal systems. This questionability was concentrated on five major factors: incapability to distinguish between reality and imagination, memory problems, insufficient understanding of factual reality, insufficient understanding of the meaning of testimony and high potential to be mentally damaged by the testimony. These were major reasons for incompetence of these persons to testify. Nevertheless, it was not an adequate solution for cases that the victim was mentally disordered or mentally retarded and no one could have testified on the case or when that person was the only witness to the case. This article examines the competence to testify of mentally disordered and mentally retarded persons under modern evidence law and suggests reshaping it according to modern developments.

Shahar Weller, *Liability Rules and Insurance: The Special Case of Civil Sanctions*

This article analyzes the relationship between the rules of legal liability and liability insurance. Specifically, the article concerns the case of insuring the risk of imposing administrative penalties under the Securities Law. Administrative penalties include

monetary sanctions, a ban on serving as a senior officer, confiscation or suspension of a license and more. The Israeli Security Law prohibits the insurance of administrative penalties. This prohibition is unique. It provides a rare opportunity to study the interaction between the objectives of legal norms which seek to discourage a certain behavior and taking out insurance which is designated to protect the insured against bearing sanctions for that behavior. Likewise, the statutory injunction invites a scrutiny of the basic principles of insurance law: When and under what circumstances can a specific risk be prohibited from being insured; Can insuring against a monetary sanction be inherently invalid; How does the exclusion against insuring a specific type of risk affect the behavior of the players in the market; How does the insurance (when it is permitted) affect the players in the market; Does the exclusion of coverage generate the expected results, and so on. These basic questions are normally not matters for discussion since the general rule is that any risk may be covered.

The central thesis of the article is twofold: first, that insurance fills an important role in the behavior and actions of the insured. Thus, the proper starting point is that a system of rules of liability with insurance is preferable over a similar one without insurance. Contrary to popular belief, the insurance is likely to encourage deterrence and improve the level of compliance with the provisions of the Securities Law. In this context the article demonstrates the various ways to regulate the behavior of the insured through such a policy. Second, there is no inherent invalidity in insuring a monetary sanction or other administrative sanctions. Instead of holding an abstract discussion on the question of whether insuring against enforcement sanctions is invalid or not an examination should be held of whether the insurance covers deliberate acts and whether the insurance frustrates the objective of the prohibited norm. As the article will establish, the answer to the latter question is in the negative. The article concludes with a proposal of a legal system in which the risk involved in the imposition of administrative penalties may be insured. The article will posit that this regime is preferable than the current statutory scheme.

Doron Menashe, *Further Thoughts on Ehud Olmert's Conviction in the Holyland Affair*

This article examines the guilty verdict that Judge David Rozen of the Tel Aviv District Court handed down against former Prime Minister Ehud Olmert, in the Holyland Affair. In this article, I will attempt to map the existing evidence and the main points of weakness in this ruling. We maintain that there are fundamental deficiencies in this verdict, which may be summarized as falling into one of three

major categories: (a) a refusal to recognize the unknowns and the inherent evidentiary shortfalls concerning a crime in which the *actus reus* was committed by someone other than the defendant; (b) the unwillingness to weigh alternative exculpatory arguments in a case where the defendant had no direct knowledge of the *actus reus*; and (c) establishing the scope of the facts based on various behavioral assumptions, which though probably logical, are utilized for the interpretation of the evidence without due consideration for possible alternative explanations that indicate innocence. All of the above indicate that a guilty verdict is not the only logical conclusion from the existing evidence, which is why it should be reversed and replaced by a not-guilty verdict.

Daniel Keinan, *Res Judicata in Jewish Law*

This article analyzes the principle of *res judicata* (Latin: a thing adjudged) in Jewish Law, civil and criminal, and its historical development. *Res judicata* means that a final decision once rendered by a court is conclusive. Once made, judges must leave the verdict as is and not consider new, post-verdict evidence even if they might alter the original judgment. Does this apply to Jewish Law as well? Many researchers have claimed that the *res judicata* principle and Jewish Law are mutually exclusive since in religious law, the judges and the court act as God's agents and make pure judgments based on the truth, as much as this is possible. If that is the case, it may be argued that the court should be restricted when attempting to find the truth.

This article focuses on the periods of the *Tannaim* (40 BCE-230 CE) and the *Amoraim* (230-500 CE) during which the main principles of Oral Law were developed. This paper further considers sources from the Middle Ages. Analysis of these written sources shows that the principle of *res judicata* was accepted unquestioningly until the Third Generation of *Amoraim* (circa 300 CE). The Amora Rav Nachman (d. 320 CE), a leading jurist, was the first to break the principle of *res judicata* with a change in decisions even after the initial judgment. According to the Babylonian Talmud, Rav Nachman did so only when judgment was not based on the testimony of two witnesses. Nevertheless, the majority of the *Amoraim* disagreed, included the most senior of them Rav (Abba Arika, d. 247).

Finally, this research examines written sources from the Middle Ages, when the accepted legal principle of the Halacha was already that of Rav Nachman. Surprisingly, even during that period, there were still cases where the principle of *res judicata* was applied and so it appears in the Halachic code the Tur (c. 1340 CE) and later in the fundamental Halachic book, *Shulchan Aruch* (1563 CE).

In conclusion, this research shows that *res judicata* was applied during the period of the *Tannaim* and was accepted by most of the *Amoraim* in both civil and criminal law. Thus, this research enables rabbinic courts to create new rules according to the ancient *Tannaim* and *Amoraim* rules so as to avoid procrastination and complications.

Benny Spanier, Israel (Issi) Doron, Faina Milman-Sivan,
Discovering Europe: Israelis in the European Court of Human Rights

For the most part, Israelis are not familiar with the European Court of Human Rights (ECtHR). Most of them perceive it as a distant and irrelevant institution. It is therefore our objective to point at an emerging reality in international law regarding individual human rights as it materializes in ECtHR. Allowing individuals to adjudicate their grievances in ECtHR, this new reality actually creates an appealing and new legal arena for Israelis. This paper describes the main elements of the court's activity and undertakes to consolidate the argument that this institution is quite pertinent to Israel's residents, lawyers, and scholars.

The first of the article's four sections surveys the way individuals' *locus standi* on human rights evolved into its current form in international law. Contrary to their partial and limited standing around the world, the European Convention on Human Rights (ECHR) allows Israelis and others to bring individual cases before the ECtHR.

In part two we describe the process by which ECHR transformed ECtHR into a significant juridical body whose chief function is to aggregate and adjudicate human-rights cases that are brought by individuals against the states of Europe. In other words, this section constitutes an historical account of ECHR - from its ratification in 1953 to the present day. Moreover, we review the main procedural aspects of ECtHR's activity.

The third and main section takes stock of five ECtHR rulings that involved Israeli citizens. We outline the factual circumstances of each case, present the arguments of the claimants, and analyze the courts' final verdicts. We wish to present the wide variety of legal issues that Israelis may present before ECtHR, and highlight the uniqueness of the five trials under review from the vantage point of the international law's approach to individuals.

In the final section we discuss and draw conclusions from the ECtHR's relations with Israeli litigants. Specifically, we argue that the court has an impact on human rights laws in Israel and worldwide by virtue of its international reach. Furthermore,

we look into the relevance of ECtHR for Israelis who appear before it, and examine the implications of the fact that Israelis are indeed taking advantage of breakthroughs in international law and bringing a wide array of topics before the European Court of Human Rights.

Boaz Shnoor, Sub Judice and Freedom of Speech Words in the Air and the Dead Letter of the Law

In C.A. 409/13 *Keshet v. Cooper* (11.4.2013), the Supreme Court extensively and for the first time discussed a motion to ban media reports that might threaten a defendant's right to fair trial as well as his freedom. The Supreme Court judges were divided on the court's authority to issue such orders and the right way to balance out competing values. The petition was denied due to procedural failings in the motion. In this article I will argue, based on empirical psychological research and comparative law, that the publication of media reports that include testimonies that are yet to be heard in court, that reveal facts and evidence that will not be heard in court, or that might highly influence witnesses and judges should be banned. The subconscious impact that such reports have on judges and witnesses might jeopardize the right of defendants to fair trial and undermine their freedom. Eliminating these threats should precede freedom of speech considerations.

I will also argue that the courts have the power to issue such injunctions; that courts should balance the freedom of speech and the right to a fair trial in a way that protects defendants' rights; that the attorney general should prosecute the media and even file for injunctions against it in appropriate cases; and that the court's decision to deny the motion due to procedural issues was wrong, given the important values it endangered.