

The Law of Defamation in Israel:
A Comparative Study

By Todd Harris Fries

Introduction

Israel is a narrow stretch of land in the Middle-East, on the eastern shore of the Mediterranean Sea.¹ From 1517 to 1917, it was ruled by the Turks as a remote part of the Ottoman Empire.² In 1917 however, it was conquered by British troops and granted to England in 1922 by the League of Nations as a Mandatory Territory for the purpose of establishing a “national home for the Jewish people.”³ Despite constant conflict in the region, dating back to the first Zionist movement in the late 1800s, there has never been a period of lawlessness in the region or a single revolutionary event.

Israel, the Jewish State, was finally created in 1948 following World War Two. After a large influx of Jews during the British mandate years, and mass migrations of Jews into Palestine during the war, the British released the Mandate over Palestine, and the Declaration of Independence proclaiming the establishment of the State of Israel was issued on the 14th of May, 1948. As Israel was heavily influenced by the model of government and content of law imposed by the British during the Mandatory era, much of Great Britain’s governmental ideals and notions were smoothly adopted in 1948 by the state of Israel.⁴

Relying heavily on English law, the Israeli contribution to current Israeli law has been an effort to “fill in the gaps left by the prior British Mandatory rule.”⁵ Israel focused on constructing two types of law, both private law for private individual relations and public law for individuals against the government in a democratic state. Private law

¹ *Introduction to the Law of Israel* (Amos Shapira & Keren C. DeWitt-Arar, 1995) p. 2.

² *Id.*

³ *Id.* see *Balfour Declaration* (1917) (“...establishment in Palestine of a national home for the Jewish people.”).

⁴ *Introduction to the Law of Israel* at 2.

⁵ *Id.* at 5

was accomplished mainly through codification and relied heavily on European and American legal concepts. Public law on the other hand had been “mainly judicial in the best common law tradition.”⁶

Israel has adopted neither a formal constitution nor a Bill of Rights. Although Israel’s Declaration of Independence stated that the constitution would be completed no later than October 1, 1948,⁷ a single unified document has still never been created and the constitution remains a work in progress.⁸ Rather, eleven Basic Laws, formulated by Israel’s version of Parliament, the Knesset, embody the state’s constitution. Israel’s Basic Laws were and still are created with a clear aim of ensuring that their content is accorded some protection against change⁹ and that these fundamental laws are to be incorporated into their constitution.¹⁰

As a burgeoning democratic state, Israel considers the right of an individual to protect their honor and reputation as a fundamental right. The twelfth Knesset passed the Basic Law of Human Dignity and Liberty on March 17, 1992, as a testament to high value that Israel places on upholding its citizens’ dignity. The Basic Law of Human Dignity and Liberty says that “human rights in Israel are based on recognition of the value of man, the sanctity of his life and the fact that he is free.”¹¹ Human freedom in Israel is defined as the right to leave and enter Israel, the right to privacy and to intimacy,

⁶ *Id.*

⁷ Declaration of the Establishment of the State of Israel (1948) (“...the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948...”).

⁸ *Legal System of Israel* (H.E. Baker), p. 11.

⁹ *Introduction to the Law of Israel* at 11 (“Some of these basic laws contain ‘entrenched clauses’ that require a special majority of the Knesset in order to amend or repeal their provisions.”).

¹⁰ *Legal System of Israel* at 91.

¹¹ <http://www.israel-mfa.gov.il/MFA/Government/Branches+of+Government/Judicial/The%20Judiciary-%20The%20Court%20System> (website of Israel foreign ministry).

and avoidance of violations of the privacy of one's speech, writings and notes.¹²

Although several cardinal human rights such as equality, freedom of speech and freedom of religion do not appear in the Basic Laws, these rights are afforded to Israeli residents by general principals that existed before the creation of the Israeli State¹³ and are mentioned in Israel's Declaration of Independence.¹⁴

Sources of Tort Law

“The major part of the tort Law in Israel derives from the Civil Wrongs Ordinance of 1944.”¹⁵ The Civil Wrongs Ordinance was originally enacted by the British Mandate in 1947 and has subsequently been modified by the Knesset numerous times since its enactment. The Ordinance defines both general torts, such as negligence, and specific torts, such as nuisance and trespass. Also, the Civil Wrongs Ordinance contains a number of general tort principles such as causation, defenses and immunities.¹⁶

“Upon the creation of the State of Israel, private law saw the coalescing of a civil codification which was mainly the product of the Knesset as legislative authority with judicial lawmaking between the cracks of legislation.”¹⁷ As tort law in Israel continued to develop, the Knesset began to codify statutes that dealt with specific areas of tort law,

¹² *Id.* (citing *Basic Law of Human Dignity and Liberty* (1992), sec. 2-7.

¹³ <http://www.israel-mfa.gov.il/MFA/Government>

¹⁴ Declaration of the Establishment of the State of Israel (1948) (“... it will be based on freedom, justice and peace as envisioned by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture...”).

¹⁵ *Introduction to the Law of Israel* at 127

¹⁶ *Civil Wrongs Ordinance* (1944).

¹⁷ The Codification of Civil Law and the Law of Torts, 24 *Isr. L. Rev.*, Aharon Barak, p. 1 (1990).

including statutes that dealt comprehensively with defamation¹⁸ and protection of privacy.¹⁹ The general concepts found in the Civil Wrongs Ordinance are complementary to those statutes that deal directly with specific torts.

The Law of Defamation in Israel

“The Israeli civil law of defamation was first embodied in sections 16 to 22 of the Civil Wrongs Ordinance of 1944, which essentially reflected English common law.”²⁰ In 1965, these sections were struck from the Civil Wrongs Ordinance and were replaced by Israel’s Defamation (Prohibition) Law. Defamation in Israel, unlike the United States of America, may constitute both a civil wrong and criminal offense.²¹ As such, the Defamation Law regulates both civil and criminal liability for defamation.²²

Defamation law in Israel “seeks the right balance between two basic values, the freedom of speech on one end of the spectrum and the protection of one’s honor and reputation on the other.”²³ Israeli courts have struggled with creating a hierarchy of value with respect to these two basic rights. Much of the courts’ struggle arises because Israeli law in general, and defamation law in particular, has been modeled after a combination of both English common law and American law.²⁴ In general, American law tolerates a

¹⁸ *Defamation (Prohibition) Law, 5725-1965.*

¹⁹ Protection of Privacy Act, (1981).

²⁰ *The Law of Israel: General Surveys* (Israel Gilead, 1995) p. 380.

²¹ *Defamation Law, 5725-1965*, sec. 5 (“Any person who, with intent to injure, publishes a defamation to two or more persons other than the injured person, will be liable to one year’s imprisonment, while publication of a defamation to one or more persons other than the injured person, constitutes a civil wrong.”).

²² *Defamation Law, 5725-1965.*, sec. 5.

²³ *The Law of Israel: General Surveys* at 380.

²⁴ *Id.* (“[Defamation law in Israel] is closer to the English approach than to the American, yet the American approach has undoubtedly left its mark on the Israeli version of defamation.”)

greater degree of freedom of speech than has been acceptable to English law and its Israeli counterpart.²⁵ While the United States seeks to secure “uninhibited, robust and wide-open”²⁶ debate on public issues, Israeli defamation law has historically valued one’s reputation and dignity over freedom of speech. However, the American approach has affected and helped shape the development of Israeli defamation, especially with respect to fair comment and public officials.

Unlike American defamation, Israeli defamation does not make a distinction between libel and slander, and Israel has only one tort of defamation which covers both the spoken and written word.²⁷ The Defamation Law defines defamation as “anything the publication of which is likely (1) to degrade a person in the eyes of human beings or to make him the object of hatred, contempt or ridicule on their part; (2) to cause a person to be regarded with contempt for acts, conduct or characteristics imputed to him; (3) to injure a person in his office, whether a public office or any other office, or in his business, occupation or profession; (4) to cause a person to be regarded with contempt because of his origin or religion.”²⁸

Israel’s definition of defamation is quite similar to that of the United States which generally defines defamation as an “unprivileged publication . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which cause him [or her] to be shunned or avoided, or which has a tendency to injury him in his [or her] occupation.”²⁹ Like American defamation law, “the publication of defamatory matter to one or more

²⁵ *The Law of Israel: General Surveys* at 380.

²⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁷ *The Law of Israel: General Surveys* at 380 (citing *Diab v. Diab*, 20(ii) P.D. 269 (1966) (holding defamation covers speech and writing)).

²⁸ *Defamation Law*, 5725-1965, sec. 1.

²⁹ *Cal. Civ. Code* § 45 (West 2000).

persons other than the injured party, shall be a civil wrong.”³⁰ Hence, in order to establish a civil wrong, the defamatory material must be published to a third party or likely to reach a person other than the injured party. Israeli law explicitly defines what constitutes publication and specifies that publication “may be spoken in word, or in writing or print, including painting, effigy, gesture, sound or any other means, and, without excluding any other methods of publication, there is deemed to have been a publication of defamation if it was (1) intended for a person other than the injured person and reached that person other than the injured person; (2) in writing and the writing was likely, in the circumstances, to reach a person other than the injured person.”³¹

“Defamation in Israel is actionable per se, meaning no damage is required for liability to arise.”³² Liability for defamation is strict in the sense that good faith or reasonableness is not a defense unless pleaded within the framework of an enumerated statutory circumstance.³³ Like American defamation law, Israeli defamation law protects both individuals and corporations.³⁴ If a defamatory statement refers to a class of people, a court must determine if the plaintiff can be identified within the group. Similar to American courts, Israeli courts look at the size of the group, the generality of the statement and the seriousness of the allegation to determine if the plaintiff can reasonably be recognized amongst other members of the group.³⁵ “This is a very fact

³⁰ *Defamation Law, 1965*, sec. 7.

³¹ *Defamation Law, 5725-1965*, sec. 2.

³² *The Law of Israel: General Surveys* at 382.

³³ *Id.* (citing *Defamation Law, 5725-1965*, sec. 14,15,16,17.

³⁴ *The Law of Israel: General Surveys* at 382.

³⁵ *Id.*

intensive and case sensitive inquiry and cases involving members of a group are always considered according to their circumstances.”³⁶

Similar to American defamation law, the defamatory matter must bear a defamatory meaning or be capable of being understood in a defamatory manner.³⁷ Although Israeli law does not make a distinction between defamation per se or defamation per quod, the concepts are codified in the Defamation law. Section 3 of the of the defamation law deals with innuendo, an apparently innocent statement which bears an inner meaning that is defamatory. It states that defamatory matter “can be understood from the publication or from extrinsic circumstances or partly from the former and partly from the latter.”³⁸ Israeli courts have recognized that criticism of public figures may often be robust and satirical in nature and consistently hold that satirical or hyperbolic language does not constitute defamation.³⁹ To determine if a statement bears a defamatory meaning, Israeli courts use a “right thinking members of society” standard.⁴⁰ The objective “right thinking member of society” standard parallels that of the “reasonable person” standard used in American courts.

Israeli defamation causes of action remain even after the defamed person has died. “The law of defamation of a person published after his death is to be treated as is a defamation of a living person, and the spouse of the deceased person, his child, parent, brother and sister are deemed to be the injured persons.”⁴¹ Also, defamation causes of action survive even if the plaintiff has died after the defamatory statement was made.

³⁶ *Sternhall v. Attorney General*, 6 P.D. 199 (1952) (following English common law with regard to the process of identifying defamation plaintiffs within a group).

³⁷ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

³⁸ Defamation Law, 5275-1965, sec. 3.

³⁹ http://www.tglaw.co.il/communication_e.asp

⁴⁰ “*Informers, Defamation, and Public Policy*” 19 Ga. J. Int. & Comp. L. (1989), p. 503.

⁴¹ *Legal System of Israel* at 88.

Under Israeli law, a defamation action can be brought by the spouse, child or parent of the defamed person even after that person dies so long as the suit is filed within six months after the defamatory publication.⁴² This differs from both English and American law where the cause of action disappears with the death of the defamed person.⁴³ If the injured person himself has filed an action for defamation and dies before a judgment is rendered, the person's family must notify the court within six months after his death of their desire to continue the action. If a family does so, they may then take his place as the plaintiff.⁴⁴

Defamation in the Media and Newspapers

Israeli defamation law carves out specific liabilities with regard to media defendants. However, to qualify as a media defendant, one must qualify as a newspaper within the Press Ordinance of 1933, the Israeli Ordinance which regulates Israel's press.⁴⁵ The Press Ordinance, issued during the Mandate and still in effect today, defines a newspaper as "any publication containing news, intelligence, reports of occurrences, or any remarks, observations or comments, in relation to such news, intelligence or occurrences, or to any other matter of public interest, printed in any language and published in Israel for sale or free distribution at regular or irregular intervals."⁴⁶ The

⁴² *Defamation Law*, 5725-1965, sec. 5.

⁴³ *The Growing Body of Israeli Law: Two New Sources on the Law of Israel* 11 NYILR 97 (1998).

⁴⁴ *Defamation Law*, 5725-1965, sec. 5.

⁴⁵ *Press Law in Modern Democracies* (Pnina Lahav, 1985), p. 270.

⁴⁶ *Press Ordinance* (1933).

definition excludes any publication published by, or for, the government of Israel which enjoys an absolute privilege.⁴⁷

The Israeli government is able to act as a watchdog for the press by requiring that all newspapers and printing presses be licensed as specified by the Press Ordinance. Section 4 of the press Ordinance commands “No newspaper shall be printed in Palestine unless the proprietor . . . obtain a permit under the hand of the district commissioner.” Hence, publication without a license is a criminal offense. In order to obtain a license and qualify as a newspaper, both the publisher and editor of the newspaper must submit declarations under oath listing their qualifications. Editors who qualify for a press license must be at least 25 years old, have a high school diploma, be familiar with the language of the newspaper and have a clean legal record.⁴⁸

In addition to requiring that newspapers be licensed, the Press Ordinance further controls the dissemination of news by requiring that newspapers submit two copies of each issue to the District Commissioner for content supervision.⁴⁹ The Press Ordinance gives the Israeli government discretion to compel newspapers to publish, free of charge, any official commentaries and official denials of factual information previously published by a newspaper.⁵⁰ However, as supervision of daily newspapers is an onerous task and with the Israeli trend toward a freer press, none of these powers has been used by the Israeli government.⁵¹ Although the press is not safeguarded by constitutional or legal provisions, the Israeli press operates freely because the authorities allow it to do so

⁴⁷ *Defamation Law, 5275-1965*, sec. 13.

⁴⁸ *Press Ordinance, 1933*, section 5(1)(b).

⁴⁹ *Press Ordinance, 1933*, section 8(1).

⁵⁰ *Press Ordinance, 1933*, section 10 and 17.

⁵¹ *Press Law in Modern Democracies* at 271 (“The Israeli government has refrained from utilizing aggressively the permit structure; it has thus spared the courts the task of exploring the ordinance’s compatibility with a commitment to free press.”).

through voluntary arrangements worked out by them and the editors of the largest daily newspapers.⁵²

The extent of a newspaper's liability varies according to whether the defamation appears in a licensed newspaper or simply in a print medium other than a newspaper. Under section 11 of the Defamation Law, where the defamation has been published in a licensed newspaper, liability extends to the person who brought the defamatory matter to the newspaper and thus caused its publication, the editor of the newspaper, the author of the defamation in the newspaper, and the publisher of the newspaper.⁵³ However, under section 12 of the law, where a defamation is published in print, except by a newspaper appearing every 40 days or less under a valid permit, liability extends only to the person in possession of the printing press where the publication was printed and any person who sells or distributes the publication.⁵⁴

The Israeli printed press has often tried to escape defamation liability, not only through fair comment, but also by using one of the enumerated statutory good faith defenses which says "when the relationship between him and to whom the publication was addressed imposed on him a legal, moral or social duty to make the publication."⁵⁵ Courts have been hesitant to allow newspapers to use good faith defenses as the press generally has no duty, legally, morally or socially, to report on matters of public interest or on the conduct of public officials.⁵⁶ A newspaper's duty to publish only applies to limited circumstances as when the report is on a danger to life, health or property, or

⁵² *Free Press in Israel* (Alan Arian, 1989).

⁵³ *Legal System of Israel* at 90.

⁵⁴ *Id.* (citing *Defamation Law, 5725-1965*, sec. 12).

⁵⁵ *Defamation Law, 5725-1965*, sec. 15(2).

⁵⁶ *The Law of Israel: General Surveys* at 390. see *Kooper v. Israel Garage Association*, 44(i) P.D. 594 (1990) (holding newspaper had no legal or moral duty to report on the activities of the Israel Garage Association, the official representative of all Israeli auto-garages and their employees).

when competent government authorities are unable to handle the matter such as issues that may affect a vote of forthcoming elections.⁵⁷ Thus, courts refuse to give the press special status or privilege out of fear that giving the press too much freedom might be an invitation to the abuse of discretion in reporting.⁵⁸

Damages and Remedies

“Israeli law presumes that every person has a good reputation, so that the plaintiff is entitled to compensation for general damages without having to prove special damages.”⁵⁹ This notion differs from that of American jurisprudence which presumes general damages only in cases of slander per se or libel per se. In awarding damages, the court may take into consideration for the benefit of the accused or the defendant: “(1) the defamation was but a repetition of what had already been said, and he specified the source upon which he relied (2) he was convinced of the truth of the defamation (3) he did not refer to the injured person (4) he apologized for the publication, corrected or denied the thing constituting the defamation or took steps to stop the sale or distribution of a copy of the publication which contains the defamation, provided the apology, correction or denial was published in the place, to the extent and in the manner in, or to, which the defamation was published and contained no reservation.”⁶⁰ The court may award up to NIS 50,000 (roughly \$12,000) without proof of actual damage.⁶¹

⁵⁷ *The Law of Israel: General Surveys* at 392 (citing *Israel Electric Co. v. Ha'aretz*, 32(iii) P.D. 337, 534 (1978)).

⁵⁸ *Rosenblum v. Katz*, 30(i) P.D. 589 (1976).

⁵⁹ *The Law of Israel: General Surveys* at 392.

⁶⁰ *Legal System of Israel* at 95. (citing *Defamation Law*, 5725-1965, sec. 15).

⁶¹ www.tglaw.co.il/communication_e.asp

Despite finding a plaintiff has been defamed, Israeli courts may also reduce an award if the plaintiff's conduct provoked the defamatory statement.⁶² Also, similar to American courts, a plaintiff's award may be reduced if there is proof the plaintiff already had a bad reputation or objectionable character.⁶³ Unlike traditional English law, which the Civil Wrongs Ordinance reflected, "the defendant may adduce evidence not only that the plaintiff had a bad reputation, but also evidence revealing his character and disposition which has not yet damaged his reputation."⁶⁴ Extrinsic evidence concerning a plaintiff's reputation may not be adduced after a court has decided that a defendant must pay damages unless the court deems it is necessary in the interest of justice.⁶⁵ Hence, a plaintiff's award may be reduced by facts and circumstances unrelated to the defamatory issue before the court. Evidence reducing a plaintiff's award is only admissible after the court finds the defendant liable and is not used to determine a defendant's liability.⁶⁶

The purpose of awarding damages is not only to repair the injured party, but also to draw public boundaries of free speech, to deter further defamation and to punish those who defame others.⁶⁷ If the court finds that the defamation was published with intent to harm, it may award NIS 100,000 (roughly \$24,000) in punitive damages without proof of actual damages.⁶⁸ "Punitive damages, which are more common in cases of defamation than other torts, are usually awarded when the commission of the wrong is based on a

⁶² *Legal System of Israel* at 95. see also *The Law of Israel: General Surveys* at 393 (citing *Bentov v. Kotik*, 5 P.D. 593, 621 (1959)).

⁶³ *Id.* see *Defamation Law*, 5725-1965, sec. 20(22).

⁶⁴ *The Law of Israel: General Surveys* at 393 (citing *Israel Electric Company v. Ha'aretz*, 23(ii) P.D. 87 (1969)).

⁶⁵ *Defamation Law*, 5725-1965, sec. 22(3).

⁶⁶ *Defamation Law*, 5725-1965, sec. 22(4).

⁶⁷ *The Law of Israel: General Surveys* at 393. see *Friedman v. Segal* (1973) 27(ii) P.D. 225 (noting that the scope punitive damages for defamation are not to be limited).

⁶⁸ www.tglaw.co.il/communication_e.asp

calculation that expected damages will be lower than the expected profits of the publication.”⁶⁹ Also, those who intentionally defame public figures may have to pay higher punitive damage sums, justified by the deterrent effect of aggravated damages.⁷⁰

Aside from general, special, and punitive damages, a plaintiff may also seek equitable remedies in response to defamation. Another remedy available to the plaintiff is temporary or permanent injunctive relief. An “injunction may be granted to prevent future defamation as well as continuing defamation.”⁷¹ However, under the ruling of the Israeli Supreme Court in *Avneri v. Shapira*, the courts must avoid, as far as possible, prior restraint of speech. As a result, temporary injunctions are rarely awarded in defamation cases.⁷² Israeli courts place a high value on freedom of speech, and the Courts accordingly have rarely granted a temporary injunction, especially when the commentary or publication reached an issue of public interest or public importance.⁷³

If a court orders a permanent injunction, the law empowers the court to order (1) the prohibition of the distribution or confiscation of the copies of the publication which contains the defamation⁷⁴ or (2) the publication of a correction or denial of the thing constituting the defamation or a publication of the judgment, in whole or in part.⁷⁵ Where the accused or defendant admits that the things published are defamatory or

⁶⁹ *The Law of Israel: General Surveys* at 393.

⁷⁰ *Id.*

⁷¹ *Id.* see *Averni v. Shapira*, 43(iii) P.D. 840 (1989).

⁷² www.tglaw.co.il/communication_e.asp

⁷³ *Id.*

⁷⁴ *Defamation Law, 5725-1965*, sec. 5. (“if it orders confiscation, the order will apply to any person in whose possession there are copies of the publication for sale, distribution or storage, even if that person was not a party in the case;”).

⁷⁵ *Defamation Law, 5725-1965*, sec. 5. (“the publication must be made at the expense of the accused or the defendant, in such a place, to such extent, and in such a manner, as the Court may direct”).

untrue, the Court may at any stage of the proceedings before judgment, order the publication of a correction or denial.⁷⁶

Perhaps the biggest difference between Israeli defamation law and that of American defamation law, is that a defamation suit in Israel may be brought as a civil complaint, criminal complaint, or both.⁷⁷ Unlike American criminal charges which have to be brought by the state, private individuals may bring defamation suits through the criminal process in Israel if the defamation is published with the intent to harm. Despite litigation costs, there are some advantages to bringing a criminal defamation suit. The method is both speedier and more cost effective than a civil suit.⁷⁸ Further, “a criminal defamation suit is an efficient device to vindicate one’s reputation and generate public attention” toward the wrong that has been committed against them.⁷⁹ Although damages are not available to the plaintiff in a criminal defamation suit, a criminal defamation defendant may be punished by up to one year imprisonment.⁸⁰ The initiation of criminal complaint does not preclude a civil action for damages. In fact, bringing a criminal complaint for defamation before a civil complaint can be advantageous to a plaintiff. In a civil defamation case which is tried after the termination of a criminal case against the same person for the same defamation, the Court is empowered by law to rely upon the findings of fact made in the criminal case without having to retake that evidence.⁸¹ Thus, a plaintiff who succeeds in a criminal suit will likely be successful in a civil suit.

⁷⁶ *Defamation Law, 5725-1965*, sec. 5.

⁷⁷ *Press Law in Modern Democracies* at 293.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ www.tglaw.co.il/communication_e.asp

⁸¹ *Legal System of Israel* at 96.

Defenses to Defamation

Aside from disproving a prima facie element of a plaintiff's case, the Defamation Law recognizes three key defenses to defamation: (1) truth if the matter was of public interest; (2) publications in "good faith"; and (3) fair reports of official information. These defenses are all codified in the Defamation (Prohibition) Law of 1965.

Defense of Truth and Public Interest

Originally, the Civil Wrongs Ordinance of 1944 followed the English justification defense which recognized truth of a statement as an affirmative defense to defamation.⁸² However, as Israeli Defamation Law takes a more plaintiff-oriented approach, truth by itself is no longer a full-proof defense against defamation.⁸³ Instead, under section 14 of the Defamation Law, a defendant must show that the statement was true and it was in the "public interest."⁸⁴

The Defamation Law reduced the traditional English Common Law and Civil Wrongs Ordinance approach and made truth a necessary component, but insufficient defense by itself.⁸⁵ The Defamation Law approach also differs greatly from the American view in which one need only prove "substantial truth" as a defense to defamation, but one need not show that the statement was in the public interest.⁸⁶ The

⁸² *The Law of Israel: General Surveys* at 385.

⁸³ *Id.*

⁸⁴ *Defamation Law, 5725-1965*, sec. 14.

⁸⁵ *Press Law in Modern Democracies* at 291.

⁸⁶ See *Defamation Law, 5725-1956*, sec. 14 (similar to the "substantial truth" defense in American courts, the Israeli defamation law provides that the defense of truth may apply if the truth of trivial details which is not damaging themselves was not proven).

Israeli approach recognizes that even the publication of true facts may cause substantial injury to a person. The stipulation of requiring that the statement be of “public interest” is designed to protect human dignity and to prevent the press from publishing sensationalist stories that although true, can unnecessarily damage one’s reputation.⁸⁷ However, one may argue that true facts one does not want disclosed due to the fear they might injure one’s reputation should be protected under privacy and not defamation. Nonetheless, truth of a statement by itself is not a defense to defamation.

Because a statement’s truth is used by the defendant as part of their defense, the burden of proving truth rests with the defendant. This differs from American law where the burden is on the plaintiff to show a statement’s falsity if the statement concerns a matter of public interest.⁸⁸ The defendant’s burden to show a statement’s truth must be done by a preponderance of the evidence, lessening the defendant’s burden to show absolute truth.⁸⁹ However, the amount of corroborating evidence required to show a statement’s truth directly corresponds to the seriousness of the defamation.⁹⁰ The more injurious a statement, the more evidence a defendant must to introduce show the truth of the statement.

Even though the defense of truth and public interest has not been the target of much litigation, Israeli courts have struggled with the definition of public interest; the term public interest may refer to either what should be of public interest, the good of

⁸⁷ *Press Law in Modern Democracies* at 291.

⁸⁸ *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

⁸⁹ *The Law of Israel: General Surveys* at 385. See Defamation Law, 5725-1956, sec. 14 (the Israeli defamation law provides that the defense of truth may apply if the truth of trivial details which is not damaging themselves was not proven).

⁹⁰ *The Law of Israel: General Surveys* at 385. see *Ha’aretz Newspaper Publishing House v. Mizrahi*, 41(ii) P.D. 169 (1987).

society for example, or what actually interests people in society.⁹¹ Courts have noted that both formulations have drawbacks. If the notion of ideal public interest is followed, the basic right to freedom of the press may be hindered as reporters may feel they only should report on issues that a court would feel to be of public interest. Conversely, if “public interest” refers only to society’s actual interest, then the dignified and righteous purpose of the law is hindered.⁹² Further, if courts were to use a “what a reasonable person would find to be of public interest” standard, there is a strong possibility that courts would err toward the side of conventional values.⁹³ Such an objective formulation would hinder free expression, and unconventional interests would not be protected.⁹⁴ The issue has not yet been decided in Israel’s Supreme Court nor codified in Israel’s Defamation Law.

Defense of Good Faith

Another codified defense to defamation is publication in “good faith. Under section 15 of the Defamation Law, the defense of good faith can be used if (1) the publication was made in good faith and (2) it can be shown the circumstances of the publication conforms to one of the eleven categories statutorily enumerated in section 16 of the Defamation Law.⁹⁵ Hence, the defense of good faith is finite in the sense that, if the publication does not into a specific enumerated category, it will not be a valid defense.

⁹¹ *Press Law in Modern Democracies* at 291.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Defamation Law, 5725-1965*, sec. 15.

In order to use the “good faith” defense, a publication must be made in “good faith.”⁹⁶ However, neither the codified Defamation Law nor the Israeli Supreme Court specifies whether one’s “good faith” is evaluated by a subjective or objective test.⁹⁷ Under the Civil Wrongs Ordinance of 1944, the “good faith” test was subjective, in accordance with the English view.⁹⁸ However, the more modern Defamation Law suggests that to use a good faith defense, the publication must also be “reasonable.”⁹⁹ Although this “reasonable” standard implies one’s “good faith” should be evaluated objectively, the good faith test and standard is still an open issue in Israeli courts.¹⁰⁰

As aforementioned, Section 15 of the Defamation Law creates a presumption of good faith, that the publication was reasonable under the circumstances if it was made under an enumerated category of the law.¹⁰¹ However, a defendant may shift the burden of negating good faith to the plaintiff if the defendant can show that the publication did not exceed what was reasonable under the circumstances.¹⁰² A plaintiff can then re-shift the burden back to the defendant to show good faith if the plaintiff proves “(1) the thing that was published was not true and he did not believe it to be true; (2) the thing that was published was not true and before the publication he did not take reasonable steps to ascertain whether it was true or not; or (3) he intended by means of the publication to injure to a greater extent than was reasonable for the protection of the matters protected

⁹⁶ *Id.*

⁹⁷ *The Law of Israel: General Surveys* at 386.

⁹⁸ *Id.* see *Sunders v. Levi-Ulman*, 13 P.D. 787, 797 (1959) (holding one’s good faith should be subjectively viewed).

⁹⁹ *Israel Electric Co. v. Ha’aretz Publishing House Ltd.*, 32(iii) P.D. 337 (1978).

¹⁰⁰ *The Law of Israel: General Surveys* at 386. see *Rymer v. Estate of Ryber*, 36(ii) P.D. 141 (1982) (noting that good faith should be interpreted according to the specific situation and independent of how good faith was decided in other cases).

¹⁰¹ *Defamation Law*, 5725-1965, sec. 15.

¹⁰² *The Law of Israel: General Surveys* at 385. see *Defamation Law*, 5725-1965, sec. 16(a).

by section 15.”¹⁰³ Hence, the presumption and the burden to show good faith or lack thereof may shift back and forth between the parties.

Even if a defendant made the defamatory statement in good faith, good faith defense only apply to statements made within the statutory scheme.¹⁰⁴ Under section 15 of the Defamation Law, it will be a good defense if the defendant made the publication in good faith under one of the eleven enumerated circumstances. Some of the relevant enumerations include: “(1) he did not know, and was not obliged to know, about the existence of the injured person; (2) the relations between him and the person at whom the publication was directed imposed upon him a legal, moral, or social obligation to make the publication; . . . (4) the publication was an expression of opinion on the conduct of the injured person in a judicial, official or public office, in a public service or in connection w/ a public matter, or on the character, past acts or opinions of the injured person in so far as they were revealed in such conduct; . . . (6) the publication was a criticism of a literary, scientific, artistic or other work which injured the person exhibited publicly, or of any act which he did publicly, and in so far as the matter is bound up w/ such criticism, or expression of opinion on the character, past, acts or opinions of the injured person in so far as they are revealed in such work or act; . . . (9) the publication was a correct and fair report of a public meeting or of a meeting of a corporation to which the public had access, and the publication was in the public interest . . .”¹⁰⁵

As many of the enumerated categories require that that the publication constitutes a comment or opinion, Israeli courts have wrestled with how a court should treat the

¹⁰³ *Legal System of Israel* at 94 (citing *Defamation Law, 5725-1965*, sec. 16(1-3)).

¹⁰⁴ *The Law of Israel: General Surveys* at 385 (citing *Defamation Law, 5725-1965*, sec. 15.).

¹⁰⁵ *Defamation Law, 5725-1965*, sec. 15(1,2,4,6,9).

distinction between statements of fact and statements of opinion.¹⁰⁶ In the landmark Supreme Court case of *Israel Electric Company v. Ha'aretz*, the court considered how to discern between fact and opinion.¹⁰⁷ The Court adopted a rigid distinction between fact and opinion, holding that facts be need to be true and clearly distinguished from opinion.¹⁰⁸ Such a construction made it easier to discern when opinion could be privileged by a good faith defense. The decision “tilt[ed] the balance against press freedom” as the press would choose to omit any commentary they thought a court might construe to be a statement of fact.¹⁰⁹ In *Ha'aretz*, the Court interpreted the phrase “in fact, the Electric Company is not interested in selling the car,” as a statement of fact.¹¹⁰ Since the Court could not easily characterize the statement as opinion, and the newspaper could not prove it was a true statement, the Court held a good faith defense could not apply and ruled in favor of the Electric company.¹¹¹

American courts take a much different stance concerning statements of fact and opinion. American jurisprudence looks at a statement in its entire context. A statement “must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader and construed in light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning which may have been fairly presumed to have been conveyed to those who read it.”¹¹² American courts acknowledge that the dividing line between fact and opinion is sometimes subtle and not easily discerned. Consequently, the publication should be

¹⁰⁶ *Press Law in Modern Democracies* at 293.

¹⁰⁷ *Id.* (citing *Israel Electric Company v. Ha'aretz*, 32(iii) P.D. 337 (1978)).

¹⁰⁸ *Id.*

¹⁰⁹ *Press Law in Modern Democracies* at 293.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Corman v. Blanchard*, 211 Cal. App. 2d 126, 131 (1962).

classified as fact or opinion according to its predominant character when read as a whole. The American standard allows for a freer press as the falsity of some facts would not necessarily be actionable if the publication is classified as opinion. In the years since the Ha'aretz decision, Israeli courts have begun to gravitate toward the American approach and have given special weight to the freedom of speech, especially with regard to public figures and public officers.¹¹³

Defense of Fair Comment and the Reputation of Public Figures/Public Officials

While modern Israeli courts have begun to take a more American approach to fair comment, it is still a ripe issue, and one which has vacillated between the English and American approach to fair comment throughout the years. Traditionally, Israeli defamation law did not distinguish between public officials, public figures and ordinary citizens.¹¹⁴ Public officials were considered neither more nor less worthy of protection than the average Israeli resident.¹¹⁵ However, courts have now begun to recognize that the public has a legitimate interest in the acts of public figures and public officials.

Issues concerning public figures' and public officials' reputations were first reached in *Ha'aretz v. Israel Electric Company* in 1977. Ha'aretz, one of Israel's largest newspapers, was sued by the director of the Electric Company, a public utility. Ha'aretz published an article condemning the Electric Company director for allowing the Electric Company to buy him an expensive luxury company car during a recession. As the director said that he would sell the car, and having failed to do so, Ha'aretz commented

¹¹³ *The Law of Israel: General Surveys* at 389.

¹¹⁴ *Press Law in Modern Democracies*, 54 GWLR 434 (1985).

¹¹⁵ *Press Law in Modern Democracies* at 281.

that “in fact, the Electric Company is not interested in selling the car,” implying that the director was being deceitful.¹¹⁶ Ruling in favor of Ha’aretz, the Israeli Supreme Court incorporated the *New York Times v. Sullivan* “actual malice” standard and unwritten constitutional principles of free speech.¹¹⁷ The court accepted Ha’aretz’s plea of good faith although the defaming opinion included injurious false statements of fact. The decision stressed that the democratic nature of Israel required a freer press as a check on those who held power.¹¹⁸

However, the Electric Company appealed for a further hearing in which the decision was overturned in favor of the Electric Company.¹¹⁹ The Court cited the English approach; allowing criticism of public officials “would tend to deter sensitive and honorable men from seeking public positions of trust and responsibility and leave them open to others who have no respect for their reputation.”¹²⁰ The Court argued further that over-protection of speech may endanger democracy. In particular, the Court noted that the rise of Nazism was facilitated by the propagation of defamatory falsehoods about the Weimar republic.¹²¹ In the opinion, Justice Landau noted “I do not slight . . . the importance of the role played by a free press in criticizing the authorities and exposing negative phenomena and bringing them to public knowledge. But I reject the premise

¹¹⁶ *Israel Electric Company. v. Ha’aretz*, 31(ii) P.D. 281 (1977).

¹¹⁷ *Press Law in Modern Democracies* at 281 (citing *Israel Electric Company. v. Ha’aretz*, 31(ii) P.D. 281, 294 (1977)).

¹¹⁸ *Id*

¹¹⁹ *Israel Electric Company. v. Ha’aretz*, 32(iii) P.D. 337 (1978).

¹²⁰ *Press Law in Modern Democracies* at 281 (citing *Israel Electric Company. v. Ha’aretz*, 32(iii) P.D. 337, 345-346 (1978)).

¹²¹ *Id.* at 346-347.

that a responsible press cannot fulfill these sanctions unless it is give the liberty to defame under the pretext of ‘fair comment.’”¹²²

Despite the court’s ruling in Ha’aretz, Israeli courts have now begun to favor the American approach. In 1989, in *Averni v. Shapira*, the Supreme Court “assigned special weight to the freedom of speech with regard to public matters and public officers.”¹²³ The Court justified this special status on the basis of the role that freedom of speech plays in the shaping of social and political concepts.¹²⁴ The Court discussed the assumption of the risk imputed to those holding public positions, the argument that defamatory opinions should be corrected through the marketplace of ideas and that public officials’ and public figures’ enjoy greater access to media.¹²⁵ Today, Israeli law still fluctuates between The English and American approach to fair comment. However, Israeli precedent has made clear that fair comment will not be a valid defense when the purpose of the publication is to defame rather than to criticize.¹²⁶

The Defamation Law details certain circumstances in which fair comment will not apply. Under section 17 of the Defamation Law, the defense of fair comment is specifically removed if the defamed requested and was denied a right of reply.¹²⁷ If such a right of reply is requested, newspapers are required to publish the correction in a timely and similar manner to the defamatory material.¹²⁸ Section 17 says: “The defense of good faith will not be available to the editor, the person responsible for the publication of the

¹²² *Press Law in Modern Democracies* at 281 (quoting *Israel Electric Company. v. Ha’aretz*, 32(iii) P.D. 337 (1978)).

¹²³ *The Law of Israel: General Surveys* at 389.

¹²⁴ *Averni v. Shapira*, 43(iii) P.D. 840 (1989) (relying on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

¹²⁵ *Id.* at 863-864.

¹²⁶ The Israeli standard is now similar to *New York Times v. Sullivan* standard where a media defendant will be liable where a plaintiff can show defamatory statements were made with knowing falsity or reckless disregard for the truth.

¹²⁷ *Press Law in Modern Democracies* at 293 (citing *Defamation Law*, 5725-1965, sec. 17.).

¹²⁸ *Press Law in Modern Democracies* at 293.

defamation in the newspaper or the publisher of the newspaper, if he has been requested by the injured persons to publish a correction or denial by the injured person, and he has not published the correction or denial on a manner as similar as possible to that of the publication of the defamation and within a reasonable time after the receipt of the request, provided that the correction or denial did not contain any defamation or other unlawful content, and its length was not unreasonable in the circumstances.”¹²⁹

However, a newspaper that prints a requested correction or denial of published defamatory material does not become immune to a defamation suit. Rather, a printed correction or denial is a necessary condition to be met before the press can argue that the defense of good faith and fair comment applies.¹³⁰

Defense of Fair Reports of Official Information – Permitted Publications

As Israel begins to recognize that free speech is a necessary component to a healthy democracy, they also recognize that there are occasions when freedom of speech is so important that complete immunity from defamation liability is necessary. Under section 13 of the Defamation Law, special categories of publications “shall not be grounds for criminal or civil action” despite their falsity or malice on the part of the speaker or publisher. The codified Defamation Law recognizes 11 classes of publication which will not be grounds for a defamation case. The 11 classes include publications made by the Knesset, judicial authorities and executive officers. Certain specified fair and accurate reports, and specified publications made under law also enjoy an absolute

¹²⁹ Defamation Law, 5725-1965, sec. 17.

¹³⁰ *Press Law in Modern Democracies* at 293.

privilege.¹³¹ As many of the privileged publications apply to statements made by or on behalf of the government or government officials, the State will never be civilly liable for defamation.

Section 13 affords an absolute privilege to publications of an open meeting of the Knesset, publications of a meeting of the government, publications by the government, and publications upon instruction of the government. Likewise, the State Comptroller will not be liable for publications on his behalf or by virtue of his office.¹³² Section 13 also covers any publication made by a judge, including any person vested w/ judicial or quasi-judicial authority, party representative, or witness in the course of and in connection with the proceedings.¹³³

Specified fair and accurate reports are also covered by immunity. Any publication of what was said or occurred in an open session of a judicial or quasi-judicial tribunal, or a commission of inquiry are absolutely privileged.¹³⁴ Publications of what was said or occurred at an international organization, conference, or tribunal, or elected bodies of the World Zionist Organization or Jewish Agency are also permitted publications.¹³⁵

Certain publications are immune when they are required to be made under any law or are made under a duly empowered authority.¹³⁶ Transcripts or fair and accurate summaries of records kept open for inspection under any enactment are also permitted publications. Finally, fair and accurate publications of anything that has been previously

¹³¹ Defamation Law, 5725-1965, sec. 13.

¹³² Defamation Law, 5725-1965, sec. 13(1-4).

¹³³ Defamation Law, 5725-1965, sec. 13(5).

¹³⁴ Defamation Law, 5725-1965, sec. 13(7).

¹³⁵ Defamation Law, 5725-1965, sec. 13(8).

¹³⁶ Defamation Law, 5725-1965, sec. 13(9).

published under the immunities granted by section 13 of the Defamation Law will never be a ground for a defamation suit and are always permitted under the law.

Conclusion

Defamation law in Israel continues to develop both through codification and Supreme Court decisions as novel issues arise to the forefront of Israeli society. However, even as new issues concerning defamation arise, many questions remained unanswered. Concerns such as whether a “good faith” defense is evaluated through a subjective or objective test and whether “public interest” refers to an ideal or actual public interest remain open issues before the Court. As Israeli defamation law fluctuates between English and American versions of defamation, there is no clear path or direction for Israeli defamation law. While England tends to take a more plaintiff-oriented approach, the United States has opted for a defendant-friendly approach, allowing certain defamatory opinions to correct themselves through the market-place of ideas.

Similar to the American approach, Israel has committed itself to a freer press, allowing for commentaries on the acts of public officials and public figures. While, the government arguably acts a watchdog over the press, mainly as a result of the press’ role in the rise of Naziism, the government has never used its authority to obstruct commentary on issues of public interest or public concern. However, divergent views on the scope of the press’ freedom in *Israel Electric Company v. Ha’aretz*¹³⁷ and *Averni v. Shapira*¹³⁸ show that Israel has not yet committed itself to a completely free press.

¹³⁷ rejected the New York Times v. Sullivan standard

¹³⁸ gave the press leeway when commenting on the acts of public officials and public figures

Further, the Israeli government's ability to deny press licenses or require that newspapers be sent to the District Commissioner for content supervision, show the government is hesitant to completely absolve itself of control of the press.

Israel's defamation law struggles to strike the right balance between protecting one's reputation and allowing for a free press. Although the Israeli government does not use its authoritative power in restraining the press, as long as the government has the power to control the dissemination of news or opinions, the possibility remains of an unchecked Israeli government. However, even as the possibility exists, Israel has made great strides to effectuate a responsible press by allowing for fair comment rather than banning all checks on public officials or public figures altogether. The Israeli government's prospective ability to control the press does not appear to have chilled speech as of yet.

Israel's view of defamation differs greatly from that of the United States mainly because of historical perspective. Israel's frame of reference in regard to the harm caused by defamation stems directly from the atrocities committed against the Jewish people in World War Two. As a result, the Israeli government allows its citizens greater protection from harms against one's honor and dignity than allowed by the United States. Israeli defamation, which places the initial burden on the defendant to prove a statement's truth¹³⁹ and reasonableness, exhibit the plaintiff's advantage in filing defamation suits. Also, the rigid distinction between fact and opinion embraced by Israeli defamation law favors the plaintiff in cases where a statement is not clearly fact or opinion. Perhaps in the future Israel will push closer to American defamation law and relax Israeli law's rigid fact/opinion distinction. Looking at statements in their overall context is just one step

¹³⁹ as opposed to the American view which places the burden on the plaintiff to show falsity

Israel can take to prevent frivolous lawsuits from clogging their judicial system while affording a freer press.

Over the last 60 years, Israeli defamation law has evolved from a duplicate of English common law to a blend of American and British concepts. As Israel continues to develop its own unique defamation law, it exhibits an extreme sensitivity to the individual's reputation and a budding dedication to a free press.