

# **BETWEEN TORT LAW, CONTRACT LAW, AND CHILD LAW: HOW TO COMPENSATE THE LEFT-BEHIND PARENT IN INTERNATIONAL CHILD ABDUCTION CASES**

**RHONA SCHUZ\* & BENJAMIN SHMUELI\*\***

## *Abstract*

*This Article deals with a unique intersection between civil (tort and/or contract) law, criminal law, family and child law, and international law.*

*Perhaps one of the most traumatic crises that can occur to an individual is having his child abducted by the other parent and taken to another country. The widely ratified 1980 Hague Convention on the Civil Aspects of International Child Abduction is designed to enable the crisis to be resolved as quickly as possible by mandating that the authorities in the state to which the child has been abducted order return of the child to the state of his habitual residence immediately preceding the abduction, unless one of the narrow exceptions in the Convention is established.*

*However, this remedy by itself does not put the left-behind parent in the position he or she was in before the abduction. In particular, the process of recovering the child often places a considerable financial burden on the left-behind parent. For example, he may incur costs in identifying the whereabouts of the child, in traveling to and staying in the state of abduction, and in paying the legal costs of submitting an application for the*

\* Ph.D. 1995 (London School of Economics), L.L.M 1980, M.A. 1979, Cambridge University, Associate Professor (Senior Lecturer) and Co-Director of the Center for the Rights of the Child and the Family, Sha'arei Mishpat Law College, Israel, Visiting Lecturer, Bar-Ilan University (formerly Lecturer in Law, London School of Economics and Bar-Ilan University).

\*\* Ph.D. 2005, L.L.M. 1999, L.L.B. 1998, Bar-Ilan University; Visiting Professor, Duke University School of Law, 2006-2008; Associate Professor (Senior Lecturer) and Director of the Commercial Center, Bar-Ilan University, Israel (formerly Co-Director of the Center for the Rights of the Child and the Family and Director of Legal Clinics, Sha'arei Mishpat Law College).

We want to thank Guy Keinan, Gal Meshulam, and Steve Gross for their invaluable research assistance and Adv. Shmuel Moran, Adv. Leslie Kaufman, Adv. Judith Meisels, and Adv. Louise Borochoy for bringing relevant cases to our attention. We are also grateful to Dr. Marilyn Freeman and Mr. Scott Manderson QC for their help in relation to English law, to Judge Joseph Kaye from Australia for his assistance, and to the students in the seminar on "Family Relations in Torts and Criminal Law," Bar-Ilan University Law School 2010-2011 for fascinating discussions on the issue.

*child's return in the courts of the requested state. Furthermore, the discovery that his child has been abducted together with the uncertainty as to whether and when he will recover the child and the lack of or reduced contact with the child will often cause considerable emotional distress. The issue of compensation for the left-behind parent is not discussed in the existing literature.*

*This Article examines, therefore, the extent to which it is appropriate to require the abductor to compensate the left-behind parent and the preferred framework for the provision of such compensation. We present four alternative models: the tort model (in which the left-behind parent brings a civil tort claim against the abducting parent), the contract model (in which the left-behind parent brings a civil contract claim against the abducting parent when a contract between the parents has been breached), the criminal model (in which compensation is awarded in criminal proceedings against the abducting parent), and the Abduction Convention model (in which compensation is awarded by the court of the state which is requested to return the child, as part of the proceedings under the Hague Convention). We analyze the advantages and disadvantages of each model from both a theoretical and practical perspective. After concluding that the Abduction Convention model is the preferred model, we discuss various dilemmas that arise in implementing this model and consider how to find an appropriate balance between the objectives of tort law and those of child law, as expressed in the Abduction Convention.*

*Among other considerations, this Article examines the delicate question of whether, in determining the compensation, courts should consider the background of the abduction, and in particular, the relationship between the abductor and the left-behind parent, the relationship between the left-behind parent and the child, contributory negligence or comparative fault on the part of the left-behind parent, the social background of the family, any involvement by the authorities, and the possibility that the abductor has acted out of frustration and despair due to mistreatment by the authorities.*

## INTRODUCTION

This article deals with a unique question of an intersection between civil (tort and contract) law, international law, family and child law, and criminal law. The goal is to try to find the most appropriate method of compensating the left-behind parent in cases of international child abduction.<sup>1</sup> While this is an independent issue, separate from the

---

<sup>1</sup> Of course preventing or reducing contact with the child for the other parent may not involve abduction to another country. Questions of compensation in other cases of preventing or reducing contact with the child, such as breach of visitation rights or abduction within the borders of the same country (national abduction cases), are beyond the scope of this article.

question of whether the court should order the return of the child, the context of the proceedings for return of the child is clearly relevant. Indeed, the questions which arise in this situation are far more complex than issues of recovery of costs and expenses which arise routinely in other types of legal proceedings because of the combination of several factors: the international element, the domestic context of the dispute, the need to take into account the impact on the child, and the social background to the abduction, which may involve issues concerning the responsibility of welfare and law enforcement agencies. In fact, it is this combination which makes the issue of compensation for the left-behind parent unique and deserving of discussion and analysis.

The Hague Convention on the Civil Aspects of International Child Abduction<sup>2</sup> [hereinafter AC] mandates the judicial or administrative authorities in the state to which the child has been wrongfully removed or retained [hereinafter “the requested state” or the “state of refuge”] to order immediate return of an abducted child to the state of his habitual residence [hereinafter “the requesting state” or the “state of origin”] prior to the abduction,<sup>3</sup> unless one of the narrow exceptions in the Convention is established.<sup>4</sup> More than eighty countries have ratified the AC, and more than a thousand applications to return abducted children are made under the Convention each year.<sup>5</sup>

One of the primary objectives of the AC is to restore the status quo ante.<sup>6</sup> While return of the child to the state of habitual residence does indeed fulfill this objective in relation to the physical situation of the child, this remedy by itself does not put the left-behind parent

---

2 Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. 11670 [hereinafter AC], available at <http://www.hcch.net/upload/conventions/txt28en.pdf>.

3 Speed is of the essence in AC proceedings and the aim is to complete the proceedings within six weeks. See AC, *supra* note 2, art. 11.

4 See exceptions set out *infra* note 21. Where one of the exceptions is established, the “gate is unlocked,” and the court has discretion regarding whether or not to return the child. This discretion is exercised in accordance with the welfare of the child and the objectives of the Convention. CA 473/93 Leibovitz v. Leibovitz, 47(3) PD 63 [1993] (Isr.).

5 According to information provided by Central Authorities from sixty of the then eighty-one signatories to the Convention, 1,965 applications were submitted under the Convention worldwide in 2008, and return was ordered in forty-six percent of cases. Eighteen percent of the applications were withdrawn, and eight percent were still pending at the cut-off date for the survey. NIGEL LOWE, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2008 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 6, 12 (2011), available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>.

6 See Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, in HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, VOL. III, 426, 429 (1982) (discussing the Acts and Documents of the Fourteenth Session (1980)), available at <http://www.hcch.net/upload/expl28.pdf>.

in the position he was in before the abduction. In particular, the process of recovering the child often requires the left-behind parent to incur considerable financial expense. For example, he may incur costs in identifying the whereabouts of the child, including payments to private investigators, in traveling to and staying in the requested state, in addition to the legal costs involved in bringing an application for return of the child in the courts of the requested state. In addition, the time involved in traveling to the requested state is likely to lead to a loss of earnings. Furthermore, the discovery that his child has been abducted, together with the uncertainty as to whether and when he will recover the child and lack of or reduced contact with the child, will often cause considerable emotional distress and even trauma to the left-behind parent. Sometimes it is necessary for the parent to undergo psychotherapy or other forms of treatment in order to recover psychologically from this harrowing experience.<sup>7</sup>

However, the power to award reimbursement of expenses other than legal costs in AC proceedings<sup>8</sup> is not widely used, and tort actions for damages—the natural framework, within which compensation can be claimed for other financial and non-financial losses—are seldom brought.<sup>9</sup> In two recent Israeli cases, which seem to be unique worldwide, left-behind parents have succeeded in a tort claim brought against the abducting parent and have been awarded compensation for losses which they suffered as a result of the abductions and the need to take legal action.<sup>10</sup>

While the tort model may seem natural and obvious—if harm has been caused by the abduction, there is no reason not to order the abductor to fully compensate the left-behind parent according to tort law for all relevant heads of damages, financial and non-financial—we will see that there are various problems with using this model in the child abduction context.

Accordingly, we think that there is a need to examine the extent to which it is appropriate to provide compensation for the left-behind parent and to consider the

7 See, e.g., Leave for Family Appeal 3241/09 Plonit v. Ploni (Oct. 2, 2009) (unpublished) (Isr.).

8 As provided for in the AC, *supra* note 2, art. 26(4). For details of this provision and the scope of its use, see *infra* Part V.

9 We use the term “compensation” as a general term to include reimbursement of expenses, costs and other damages under the various different heads of damages. We use the terms “expenses” or “reimbursement of expenses” to refer only to recovery of sums which have actually been expended, as currently awarded in some jurisdictions. We also distinguish between financial and non-financial damages, sometimes known as pecuniary or monetary and non-pecuniary or non-monetary damages.

10 FamC (TA) 42273/99 Dr. Z.M. v. R.M.P. (Aug. 9, 2005) (unpublished) (Isr.); Leave for Family Appeal 3241/09 Plonit v. Ploni.

advantages and disadvantages of alternative models for the provision of such compensation. We emphasize at the outset that the possibility of awarding compensation to the left-behind parent should not in any way be seen as derogating from or as an alternative to the central remedy of returning the abducted child. On the contrary, compensation is intended to be an additional remedy awarded after return of the child has been ordered.<sup>11</sup>

Among other considerations, this article examines the relevance of moral blameworthiness, or the delicate question of whether, in determining the extent of compensation, courts should consider the background relationship between the abductor and the left-behind parent, the relationship between the left-behind parent and the child, and the possibility of contributory negligence or comparative fault on the part of the left-behind parent. In particular, in situations where the abductor acted in response to domestic violence, child abuse, or other provocative behavior on the part of the left-behind parent,<sup>12</sup> it seems morally unpalatable to require the victim to compensate the aggressor. On the other hand, complete exoneration from the duty to compensate may be seen as condoning the abductor's illegal action and inconsistent with a policy of encouraging victims of abuse and violence to turn to welfare and law enforcement agencies for assistance rather than to take the law into their own hands. Thus, it may be thought appropriate to also consider the extent to which the abductor had already sought such help, particularly if he only resorted to self-help out of frustration and desperation when the relevant authorities failed to provide him with protection.<sup>13</sup>

We present four models for compensating the left-behind parent and the preferred framework for the provision of such compensation. We analyze the advantages and disadvantages of each model from both a theoretical and practical perspective. Part II presents the tort model. Under this model, the left-behind parent brings a tort claim against the abducting parent. In Part III, we present a similar civil action model, the contract model, in which the left-behind parent brings a claim for breach of contract against the abducting parent. The third model, presented in Part IV, is the criminal model, under which compensation is awarded to the left-behind parent within the framework of criminal proceedings against the abducting parent. The provision of compensation in criminal proceedings is a recognized remedy for victims of criminal offenses in some legal systems. Under the fourth and final model, to be presented in Part V, compensation is awarded as

---

11 For discussion of the possibility of awarding compensation in cases where the child is not returned, see *infra* Part II.A.2.

12 For literature discussing this situation, see *infra* note 57.

13 The issue of whether and in what circumstances a tort action may be brought against welfare and law enforcement agencies is beyond the scope of this article.

part of the AC proceedings by the court of the state which is requested to return the child.<sup>14</sup> A limited version of this model is currently found in art. 26 of the AC, which confers upon a court making a return order the power to award reimbursement of some of the expenses incurred by the left-behind parent. Since the essence of the model is that the compensation is awarded within the framework of the AC proceedings, it will be convenient to refer to this model as the AC model, although we will be considering a broader version of the model currently found in the AC.

In the final section, Part VI, we start with a comparative summary of the advantages and disadvantages of the models presented and conclude that the AC model is the preferred model, largely because it makes compensation an accessible remedy for the left-behind parent in all AC cases, without the need for him to bring a separate civil action and irrespective of whether criminal proceedings are instigated. We then proceed to discuss the various dilemmas which arise in designing the exact contours of the ideal model and to consider what additions or amendments need to be made to the current formulation of that model in article 26 of the AC in order to achieve the optimal balance between the objectives of the various relevant areas of law.

Two of the main parameters for analyzing and bases for discussing the different models to be presented in this article will be compatibility with the objectives of child law—as expressed in the AC, the most comprehensive global instrument governing the law relating to international child abduction—and of tort law, which is the usual and most natural means of obtaining compensation for financial and non-financial harm. Since we are concerned with compensation for harm caused by child abduction, these parameters are relevant even when considering models in which compensation is awarded on a basis other than tort law or AC proceedings. Accordingly, we will begin by briefly explaining the main objectives of the AC and of tort law, along with other substantive and procedural parameters, which will be used both in the analysis of the different models to be presented in Parts II, III, IV, and V, and in designing the appropriate contours of the proposed model in Part VI.

## **I. Parameters for Assessing Models for Compensating the Left-Behind Parent**

In this Part we consider the parameters according to which, in our view, models for compensating the left-behind parent should be assessed. Since the issue is compensation for the left-behind parent in international child abduction cases, there is no doubt that it should be compatible, in so far as possible, both with the objectives of the AC and with

14 The term “AC proceedings” refers to the application made by the left-behind parent to the judicial, or sometimes administrative, authorities in the state of refuge, known as the requested state, for the immediate return of the child under the Abduction Convention.

the theoretical bases for awarding compensation in tort law, which deals with awarding compensation for civil wrongs, and in contract law, where the abduction involves violation of an agreement. Furthermore, since we are concerned with legal liability of parents, we have to consider general principles which underpin legal relationships within the family, such as the doctrine of family autonomy and the best interests of the child. In addition, we will examine a number of other substantive and procedural parameters that arise in the current context, such as the relevance of moral blameworthiness, the burden of separate proceedings, and *res judicata*. Some of these parameters are not clear-cut, and we will briefly set out the dilemmas involved. We will suggest solutions to these dilemmas in Part VI.

### A. The Objectives of the AC

The AC expressly states that its objects are:

- (a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) To ensure that rights of custody and access<sup>15</sup> under the law of one Contracting State are effectively respected in other Contracting States.<sup>16</sup>

The Preamble to the AC explains that the rationale behind these objectives is the belief that “the best interests of children are paramount in custody matters.” The objective of prompt return is based on the premise that the welfare of children is best promoted by reversing the effect of abductions as quickly as possible for three reasons.<sup>17</sup> Firstly, this will negate the harm often caused to children who are suddenly removed from their environment. Secondly, the knowledge that immediate return will be ordered is likely to deter potential abductors. Thirdly, the child’s interests can best be protected by litigating the merits of the dispute<sup>18</sup> in the *forum conveniens*, which will usually be the place of the

15 While discussion of remedies for breach of rights of access (visitation) is outside the scope of this article, it should be noted that Israeli courts have awarded damages to a non-custodial parent who has been denied access to his children by the custodial parent in breach of a court order. *See, e.g.*, FamC (Jer) 13993/02 Ploni v. Plonit, Tak-Mish 2007(1) 516 [2007] (Isr.).

16 AC, *supra* note 2, art. 1.

17 Rhona Schuz, *The Hague Child Abduction Convention and Children’s Rights*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 393, 398 (2002).

18 It is important to keep in mind that the AC is intended to be “First Aid” only, and that the merits of the custody dispute will be decided in the courts of the requesting state after return of the child. *See* Pérez-Vera, *supra* note 6, at 429.

child's habitual residence. Accordingly, the requested state is not permitted to consider the merits of the custody dispute between the parents and its role is limited to determining whether the conditions for application of the Convention are met<sup>19</sup> and, if so, whether one of the exceptions applies. Although it is clear that the premise that prompt return promotes the child's welfare will not be true in every single case, any attempt to ascertain what the child's welfare requires automatically jeopardizes the objective of prompt return in all cases. The drafters, therefore, chose a mechanism of mandatory return, which requires the judicial or administrative authorities in the requested state to order return of a wrongfully removed or retained child without any investigation of the merits of the case,<sup>20</sup> subject to a number of narrowly drawn exceptions.<sup>21</sup>

While the Preamble of the AC leaves little doubt that the central objective of the Convention is the protection of the interests of children, the reference to recognition of rights of custody and access in the objects of the Convention, together with the use of breach of custody rights attributed to a person, institution, or other body as the trigger for the mandatory return mechanism,<sup>22</sup> shows that an additional objective is the protection of the parental rights of the left-behind parent. This is because the question of whether return must be ordered is triggered by the breach of parental<sup>23</sup> custody rights. Restoration of the status quo ante by returning the child is thus also perceived as achieving justice between the parents.

Finally, an additional, albeit subsidiary, objective of the mechanism of mandatory return is to uphold the rule of law. In other words, the abductor is not allowed to gain any

---

19 The conditions are that the child has been wrongfully removed or retained, he is not yet sixteen years old, and his habitual residence immediately prior to the wrongful removal or retention was in a Contracting State. See AC, *supra* note 2, arts. 3–4.

20 AC, *supra* note 2, art. 12.

21 The exceptions apply if (i) twelve months have passed since the date of wrongful removal or retention and the child is settled in his new environment, AC, *supra* note 2, art. 12(2), (ii) the left-behind parent was not exercising custody rights at the time of removal or retention or had agreed to or subsequently acquiesced in the removal or retention, *id.* art. 13(1)(a), (iii) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, *id.* art. 13(1)(b), (iv) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views, *id.* art. 13(2), or (v) return of the child would not be permitted by the fundamental principles of the requested state relating to protection of human rights and fundamental freedoms, *id.* art. 20.

22 AC, *supra* note 2, art. 3.

23 Pérez-Vera, *supra* note 6, at 429–30.

advantage as a result of his wrongdoing.<sup>24</sup>

However, care has to be taken in applying the principles of justice between the parents and the rule of law in the context of child abduction for two reasons. Firstly, even though the act of removal or retention has been held to be wrongful, it is not necessarily morally blameworthy.<sup>25</sup> Abduction does not take place in a vacuum and is usually just one action in a series of actions and words on the part of both parties in a deteriorating intimate relationship. While abduction is, of course, a radical step and so cannot be compared to many relatively minor hurtful acts and words common in such a situation, not infrequently the background to abduction is serious physical, emotional, and verbal abuse of the abductor by the left-behind parent.<sup>26</sup> In such circumstances, the return of the child will usually still be mandated in order to protect the interests of the child, or of children generally<sup>27</sup> (although there has been considerable criticism of this approach),<sup>28</sup> but it cannot be justified on the basis of the need to do justice between the parents. Secondly, the interests of the child must take precedence over the principle of the rule of law, and therefore a child should not be returned where it is clear that this will cause him real harm,<sup>29</sup> however blameworthy the abductor might be and however innocent the left-behind parent might be.

## B. The Theoretical Basis for Compensation and the Goals of Tort Law

The goals of tort law are compensation, corrective justice, distributive justice, and

---

24 *Id.* at 447–48. *See also, e.g.,* Re E, [2011] UKSC 27, [8] (appeal taken from Eng.) (U.K.), available at <http://www.bailii.org/uk/cases/UKSC/2011/27.html>; Leave for Family Appeal 1855/08 Plonit v. Ploni, ¶ 23 (Aug. 4, 2008) (unpublished) (Isr.).

25 *See In re D (A Child) (Abduction: Rights of Custody)*, [2006] UKHL 51, at ¶ 56.

26 PERMANENT BUREAU, DOMESTIC AND FAMILY VIOLENCE AND THE ARTICLE 13 “GRAVE RISK” EXCEPTION IN THE OPERATION OF THE HAGUE CONVENTION 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A REFLECTION PAPER 14 (2009), [hereinafter REFLECTION PAPER], available at <http://www.hcch.net/upload/wop/abduct2011pd09e.pdf>.

27 *See, e.g.,* Schuz, *supra* note 17, at 443–47; Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000). However, the research reported in REFLECTION PAPER, *supra* note 26, does suggest that more courts are refusing to return children in cases of domestic violence, usually by invoking the article 13(b) “grave risk of harm” exception.

28 *See, e.g.,* Schuz, *supra* note 17, at 443–47; Weiner, *supra* note 27.

29 *See In Re D*, *supra* note 25, at ¶ 52 (commenting that “[n]o-one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm”).

deterrence.<sup>30</sup> The goal of compensation, or reparation, is to ensure that the tortfeasor (in this case, the abductor) provides monetary compensation equivalent to the injury suffered by the victim (in this case, the left-behind parent) as an expression of the need to return the situation to the status quo ante.<sup>31</sup> In addition to restoring the status quo, monetary compensation also has psychological, symbolic, and educational effects because the reimbursement to the victim forces the tortfeasor to assist in the recovery and rehabilitative process and declares the unacceptability of the act. If the tortfeasor cannot provide compensation for his tortious act, it is socially important to find others who can provide compensation, such as a deep pocket—an employer, for example—that is close to the tortfeasor. The importance of the goal of compensation stems from the need to compensate the injured party, and the question of who pays is less salient.<sup>32</sup> Therefore, this goal is satisfied even where the direct tortfeasor cannot pay, provided the compensation can be obtained from another source, such as an employer or insurer, or from the state or a public fund.<sup>33</sup> Compensation may therefore be achieved even where the left-behind parent's expenses are reimbursed by a legal aid fund, which is a significant difference from the goal of corrective justice.

The goal of corrective justice is to repair damage done in the past, focusing on the

---

30 For a succinct discussion of the goals of tort law, see generally KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 14–21 (3d ed. 2007); DAN B. DOBBS, *THE LAW OF TORTS* 12–25 (2000); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 1–26 (5th ed. 1984); W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORTS 1–4 (16th ed. 2002); Glanville L. Williams, *The Aims of the Law of Torts*, 4 *CURRENT LEGAL PROBS.* 137 (1951). For a discussion on the goals of tort law in cases of civil action against a spouse, see generally Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 *HARV. NEGOT. L. REV.* 195, 201 (2010) [hereinafter Shmueli, *Tort Litigation Between Spouses*].

31 There are those who see compensation (or reparation), which restores the status quo ante, as an independent aim. See ABRAHAM, *supra* note 30, at 14; KEETON ET AL., *supra* note 30, at 20; Francis H. Bohlen, *Contributory Negligence*, 21 *HARV. L. REV.* 233, 256 (1908); Walter J. Blum & Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem: Auto Compensation Plans*, 31 *U. CHI. L. REV.* 641 (1964); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 466–67 (1990); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 *CALIF. L. REV.* 555, 591 (1985). Others perceive it as an important secondary principle that other goals of tort law seek to achieve. See, e.g., KEETON ET AL., *supra* note 30, at 1; Williams, *supra* note 30, at 137, 172–73. See also Ariel Porat, *Offsetting Risks*, 106 *MICH. L. REV.* 243, 256, 276 (2007) (examining compensation as an independent goal, though awarding more space to optimal deterrence).

32 Williams, *supra* note 30, at 137, 151–53, 173.

33 IZHAK ENGLAND, *THE PHILOSOPHY OF TORT LAW* 13, 18, 220–23 (1993).

tortfeasor and the victim and ignoring any matter or factor external to the incident.<sup>34</sup> Therefore it is the abductor and only the abductor who must rectify the injustice that he has caused to the victim and provide compensation equivalent to the extent of the damage caused.

The next two goals use tort law as an instrument to achieve economic and social achievements. Distributive justice connects all potential parties, not just the tortfeasor and victim, to the distribution of wealth, resources, and benefits in society, based on the criterion of relativity, for the purpose of advancing societal goals.<sup>35</sup> The standpoint is sectorial, but of course this societal goal affects the status of single tortfeasors and victims, after their classification into sectors. In this context, the classification is mainly on the basis of weak versus strong; this refers not only to wealth or lack thereof, but also the divide between individuals and large organizations, women and men, and children and adults. At first glance, it seems that the abductor is the strong party and the left-behind parent is the weak party, so according to this goal, compensation is required in order to change the balance of power between abductors and left-behind parents. However, this may not be true in all cases, given that this goal does not focus on the tortfeasor and the damaged party only, but, for example, on other parties such as the children, and given that sometimes the background suggests a different balance of powers, as in cases in which the left-behind parent abused or maltreated the child or abductor.

As for the goal of deterrence, the threat of litigation and forced compensation will serve as a deterrent for not only the specific tortfeasor being sued, but also potential tortfeasors who might otherwise abduct their children.<sup>36</sup>

---

34 See generally Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002); Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES IN L. (2001), at art. 4; Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277 (1994); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992). For other approaches to an understanding of corrective justice, see generally Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1980); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537-564 (1972).

35 DOBBS, *supra* note 30, at 13-14.

36 See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 107-13 (1970) (presenting an economic approach that considers effective (optimal) deterrence); DOBBS, *supra* note 30, at 19-21; KEETON ET AL., *supra* note 30, (considering the prevention of future damage and the punitive component in the goal of deterrence); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981); Williams, *supra* note 30. See also Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 382-85 (2005) (briefly surveying the law and economics approach).

Finally, some see the prevention of self-help as another goal of tort law—that is, preventing the victim and his relatives and friends from taking the law into their own hands.<sup>37</sup> In addition, there are scholars who see appeasement as one of the goals of tort law.<sup>38</sup>

### C. Autonomy of the Family Unit

The doctrine of autonomy of the family unit is based on the premise that interference by the law in relations between family members, particularly between spouses, is liable to destabilize families to the detriment of the family members and society as a whole.<sup>39</sup> This doctrine explains the common law's traditional reluctance to impose tort liability in disputes between family members, best exemplified by the common law inter-spousal immunity. Accordingly, an apparent substantive difficulty with any model for compensating the left-behind parent which involves a separate legal action between family members is the risk of violation of autonomy of the family unit.<sup>40</sup>

On the one hand, it might seem that this policy is not relevant in the current scenario since the family unit has already broken down<sup>41</sup> and the law has already interfered in the family unit in considering the application under the AC.

On the other hand, however, it is widely recognized that where there is a minor child involved, there is usually a need for a continuing relationship between the parents after divorce and that the nature of this relationship has a significant impact on the child.<sup>42</sup> Thus, the child's welfare<sup>43</sup> will be promoted if the parents can maintain an atmosphere of mutual respect and cooperation, at least for the purposes of making visitation arrangements and coming to joint decisions regarding education, medical treatment, and other important

37 GEORGE C. CHRISTIE ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 5 (4th ed. 2004).

38 CHRISTIE ET AL., *supra* note 37, at 6; Williams, *supra* note 30.

39 See generally Shmueli, *Tort Litigation Between Spouses*, *supra* note 30; Benjamin Shmueli, *Love and the Law, Children Against Mothers and Fathers: Or, What's Love Got to Do With It?*, 17 DUKE J. GENDER L. & POL'Y 131 (2010) [hereinafter Shmueli, *Love and the Law*].

40 Shmueli, *Tort Litigation Between Spouses*, *supra* note 30, at 200; see generally Shmueli, *Love and the Law*, *supra* note 39.

41 Shmueli, *Tort Litigation Between Spouses*, *supra* note 30, at 205.

42 See, e.g., HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES 61–70 (1995); JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP (1980).

43 See *infra* note 54 and accompanying text for discussion of the relevance of the welfare of the child.

aspects of the child's life.<sup>44</sup> Conversely, interference by the law in the relations between parents is likely to lead to bitterness, which would be detrimental to the welfare of the child.<sup>45</sup> While the fact that there has been an abduction will usually have already made it difficult for the parties to cooperate, the instigation of separate tort or contract proceedings against the abductor is likely to make it impossible to restore mutual trust and respect. The continuing tension between the parents and the resentment of an abductor who is being sued in a tort or contract action will make it harder for the child to maintain regular contact and a healthy relationship with both parents.<sup>46</sup>

Thus, the modern approach to disputes concerning children is to encourage parents to come to their own decisions regarding arrangements for their children, assisted by a mediator if necessary, with minimum external interference.<sup>47</sup> Continued civil litigation between the parents that drags on for years after the conclusion of AC proceedings<sup>48</sup> is inconsistent with this policy of private ordering and will invariably prejudice any chance the parents have of maintaining harmonious relations. In contrast, awarding compensation in the context of AC proceedings, which are to be conducted in any event and ought to be determined quickly, should reduce the negative impact of the quest for compensation on the relations between the family members. Once the proceedings are completed, attempts can be made to restore cooperation between the parents for the benefit of the children.<sup>49</sup>

#### D. Material Welfare of the Child

Since we are concerned with an issue relating to children, the overriding child law

---

44 Shmueli, *Tort Litigation Between Spouses*, *supra* note 30, at 225.

45 LAW COMMISSION, *FACING THE FUTURE: A DISCUSSION PAPER ON THE GROUND FOR DIVORCE*, Law Comm'n No. 170, paras. 3.39–42 (1988) (U.K.) [hereinafter "FACING THE FUTURE"].

46 For possible repercussions on the financial position of the child, see *infra* Part II.D.

47 See generally Shmueli, *Tort Litigation Between Spouses*, *supra* note 30.

48 For example, in the case of FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.* (Aug. 9, 2005) (unpublished) (Isr.), the AC proceedings took place in 2000 and the tort case was not decided until 2005.

49 This may not be the case, however, where there are further proceedings regarding the custody of the children after their return.

principle of promoting the best interests of the child must be considered.<sup>50</sup> Accordingly, any model which is likely to result in harm to the welfare of the child appears problematic. Where a child's parents are separated, an order that one parent has to pay compensation to the other may be detrimental to the material welfare of the child. Yet, a model that orders compensation for the left-behind parent on the basis of the harm caused to that parent cannot take into account the financial circumstances of the abductor and the consequent effect on the material welfare of the child.<sup>51</sup> In contrast, a model that allows the court some measure of discretion to reduce the compensation can take these factors into account.

It is important to point out that the exact impact of an award of compensation on the material welfare of the child is complex and depends mainly on which parent is awarded custody after the AC proceedings.

In cases in which the left-behind parent is the custodial parent following the return of the child,<sup>52</sup> the compensation paid to him by the abductor will help in supporting the child. Since the left-behind parent's ability to support the child will usually have been adversely affected by the costs involved in locating the child and in bringing proceedings under the AC in the country of refuge, it is clearly important that he be reimbursed for the expenses incurred so that he can now provide adequately for the child.<sup>53</sup> While the need to pay the compensation may well reduce the non-custodial parent's ability to contribute to the support of the child, it seems preferable that the compensation be paid immediately even if this reduces possible support payments in the future because this will avoid the risk that the payments will not in fact be made. Also, the left-behind parent may well be in debt because of the costs incurred in recovering the child and the compensation will enable him to repay this debt and stabilize his financial situation.

On the other hand, if the abductor is the custodial parent after the decision under the

---

50 The United Nations Convention on the Rights of the Child art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3, requires that the child's best interests should be treated as a primary consideration in any decisions concerning him. While, of course, technically the child is not a party to the proceedings between his parents, since those proceedings arise out of the abduction of the child and since the outcome will clearly impact on him, we would argue that the best interests principle is relevant.

51 However, the effect may be taken into account in enforcing the order by, for example, allowing payment in installments.

52 See, e.g., FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.*

53 Nevertheless, it should be emphasized that this is compensation for the left-behind parent, and not direct compensation for the child. Compensating the child for harms caused by the abduction is beyond the scope of this article.

AC,<sup>54</sup> any money paid in compensation will reduce the resources available to the abductor to support the child.<sup>55</sup> Thus, the child's material welfare will be prejudiced, unless the abductor has more than adequate means to pay the compensation and support the child.

It also has to be borne in mind, however, that the receipt of the compensation will improve the left-behind parent's financial position and thus increase his ability to contribute to the child's support. Thus, from an economic perspective, the payment of compensation does not actually affect the overall financial position of the two parents together.

### E. Moral Blameworthiness

As mentioned above, there are many abduction cases in which the background to the abduction was violence, abuse, or other provocative behavior on the part of the left-behind parent.<sup>56</sup> While it is true that the "correct" response to such provocation would have been to seek assistance from the authorities in the country of origin rather than take the law into one's own hands, there are often understandable reasons why this course of action was not chosen. For example, as a result of the abuse, the abductor may be physically and socially isolated in a country that is foreign to her.<sup>57</sup> Furthermore, in cases of severe violence, the abductor's feeling that the only real assurance of safety is in geographical distance may be justified.<sup>58</sup> Thus, it seems unjust that an abductor would have to pay compensation to the left-behind parent in such a situation.

While in some cases, it will be clear where the moral blameworthiness lies, in other cases the facts will be less clear and any attempt to assess fault is liable to end up with

54 Where the abductor was the custodial or joint parent before the abduction, as in seventy-two percent of cases, he usually returns with the child and retains custody. *LOWE*, *supra* note 5, at ¶ 46. Alternatively, in cases where return is not ordered because one of the exceptions to the AC exists, the abductor will be the custodial parent, whether or not he was so before the abduction.

55 In *Willing v. Purtil*, No. 07-1618-AA, 2008 WL 299073, at \*1, (D. Or. Jan. 31, 2008), the Court held that any award which "unduly limits" the abductor's ability to support his child is clearly inappropriate.

56 See REFLECTION PAPER, *supra* note 26, at 14. See also *In Re D (a child)* [2006] H.L. 51 at ¶ 56 (stating that "[s]ometimes, particularly, when the abductor is fleeing from violence, abuse, or oppression in the home country, they will not [have been morally wicked]"). See also *Weiner*, *supra* note 27, at 615; *Miranda Kaye, The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT'L J.L. POL'Y & FAM. 191, 193-95 (1999).

57 For example, in the case of CA 4391/96 *Ro v. Ro*, 50(5) PD 338 [1997] (Isr.), an Israeli mother living in England was left locked in the house by the English father and did not have any contact with the local community.

58 *Weiner*, *supra* note 27, at 624-26.

a full-scale investigation into the marital life of the parents. The virtual impossibility of determining the respective responsibility of spouses for marital breakdown and the bitterness caused by the process of doing so were among the main reasons for the demise of fault based grounds for divorce. Thus, a model which allows unfettered discretion to the courts is liable to lead to futile and damaging enquiries into the past.

On the other hand, a compensation model which considers only the actual act of abduction and not the underlying history and cause could produce unjust results.

Accordingly, we will seek middle ground between these two extremes and will examine ways of limiting the court's discretion to consider issues of moral blameworthiness.

### **F. The Burden of Separate Proceedings**

The necessity of instituting separate proceedings in addition to the AC proceedings in order to obtain compensation is burdensome for both parties. It will usually lead to duplication of costs because, among other things, it will require new lawyers<sup>59</sup> to become familiar with, and present to the court, the details of the abduction and the facts relevant to the compensation claimed. In addition, where the language in the two countries is different, there may well be a need to translate the decision in the AC proceedings and other documents relating to those proceedings. Furthermore, there will be delay because the separate action will only be started after the AC proceedings have been completed.<sup>60</sup>

Moreover, in addition to the technical inefficiency of separate proceedings, there is a risk of inconsistency between the two sets of proceedings. In other words, different proceedings mean different considerations, since the various models have different goals: AC proceedings are concerned with the question of whether the child should be returned whereas compensation proceedings are concerned with the responsibility of the abductor to compensate the left-behind parent.

This problem is also relevant to evidence law; in particular, if moral blameworthiness is relevant in the compensation proceedings,<sup>61</sup> the court hearing that case may take a

---

59 Sometimes the left-behind parent has received advice from local lawyers in connection with the foreign AC proceedings, and these lawyers may in fact liaise with the lawyers representing this parent in those proceedings. This appears to have been the case in *FamC (TA) 42273/99 Dr. Z.M. v. R.M.P.* (Aug. 9, 2005) (unpublished) (Isr.) and *Leave for Family Appeal 3241/09 Plonit v. Ploni* (Oct. 2, 2009) (unpublished) (Isr.).

60 This is because the second action relies upon the AC proceedings, and it is worthwhile waiting for the end of the process in order to claim maximum damages.

61 See discussion *infra* Part I.E.

different view of the evidence than the court which heard the same evidence in the AC case in relation to a plea that one of the exceptions applied. The doctrine of *res judicata* may not prevent controverted findings of fact, since the findings of fact in AC cases may not actually form part of the decision. Thus, for example, a court in AC proceedings may accept that the left-behind parent abused the abductor, but still hold that the grave risk of harm exception is not established.<sup>62</sup> Accordingly, the finding about abuse is not necessary for the decision and so would not be considered *res judicata*. There is therefore nothing to stop the court hearing the case for compensation from taking a different view of the evidence and find that there has not been any abuse.

Finally, all of the above problems will be exacerbated if the compensation proceedings are prolonged.

### G. *Res Judicata* and Splitting the Damages

If the left-behind parent claims damages in a separate action from the AC proceedings, the abductor is likely to plead estoppel based on *res judicata*.<sup>63</sup> If the left-behind parent has already claimed part of his expenses in the course of the AC action in the foreign country, the abductor is likely to argue that he cannot now claim damages a second time in another country on the basis of the same cause of action. Even if he did not claim the expenses in the AC proceedings, the fact that he could have done so may be used to prevent him from claiming them in later proceedings.<sup>64</sup>

The estoppel plea raises a number of procedural complications. In particular, it would be necessary to determine whether the foreign decision is recognized. In addition, it may be necessary to show that the findings made in the foreign decision would have created an issue estoppel if the subsequent tort or contract proceedings had been brought in that

---

62 See, e.g., CA 4391/96 Ro v. Ro, 50(5) PD 338 [1997] (Isr.).

63 See, e.g., FamC (TA) 42273/99 Dr. Z.M. v. R.M.P. On *res judicata* (which minimizes the burden on the courts, minimizes litigation costs, protects the dignity of the legal system by precluding repeated attempts at obtaining a remedy, and promotes the interest of the parties in not being perpetually involved in the same dispute), see generally GEORGE SPENCER-BOWER & SIR ALEXANDER KINGCOME TURNER, THE DOCTRINE OF RES JUDICATA 20–86 (2d ed. 1969); Zollie Steakley & Weldon U. Howell, Jr., *Ruminations on Res Judicata*, 28 Sw. L.J. 355 (1974). The principle of *res judicata* includes three cumulative conditions: a final ruling on the merits by an authorized court, identity of parties, and a second action based on the same claims as were raised or could have been raised in the first action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

64 See, e.g., Leave for Family Appeal 3241/09 Plonit v. Ploni (holding that the legal fees could not be claimed because they could have been claimed in the AC proceedings in the U.K.).

foreign court.<sup>65</sup>

Furthermore, even where there is no issue estoppel, the question may arise as to whether the foreign law would have allowed damages arising out of the same set of facts to be claimed in two separate sets of proceedings, a result which is called "splitting the damages."<sup>66</sup>

## H. Uncertainty

The nature of the damage likely to be suffered as a result of the abduction will inevitably lead to problems of determining causation and quantification. For example, where the left-behind parent undergoes psychological treatment after the abduction, it may be difficult to assess to what extent the need for this treatment can be attributed entirely to the abduction.

In addition, it may not be always clear to what extent the left-behind parent is obligated to mitigate his loss. For example, should he be required to stay with friends when attending the AC proceedings and to travel by public transport? We think that reasonableness is the name of the game here, as is usually the case in torts, but the uncertainty as to how these issues will be determined, at least unless and until the courts lay down guidelines, may well discourage parties from settling out of court and will increase legal costs.

These problems will be reduced under models which limit the types of compensation which may be claimed or provide ceilings to the sum which may be awarded

We will now proceed to examine the various models.

## II. The Tort Action Model (The Tort Model)

### A. Presenting the Model

#### 1. The Basis of Liability

This model treats the abduction, which is the unlawful removal or retention of the child, as a tort, which gives rise to a right of action for compensation. It is important to emphasize that the tort action is completely separate and independent from the proceedings

65 FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.*

66 *Id.* A request for division of remedies will be accepted if in the first round a certain extent of damages cannot be estimated. See RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982) (allowing the first court to split the claim).

for return of the child under the AC. These are two actions on two different planes, even though the tort action relies on the finding of the court in the AC proceedings that there was a wrongful removal or retention. Invariably, the tort action will be brought in the courts of the requesting state, where the left-behind parent lives, and not in the courts of the requested state, which heard the application under the AC. However, if the abductor has remained and settled permanently in the requested state, rather than return with the child, then the left-behind parent may consider it more efficient to sue him there.<sup>67</sup>

In some countries, it will be possible to rely on the tort of breach of statutory duty,<sup>68</sup> where there is a criminal offense of abduction or where there is a statutory obligation for a parent to make decisions concerning the child in conjunction with the other parent.<sup>69</sup> Alternatively, where there is a breach of a court order concerning custody of the child, this may also be seen as a statutory breach of duty.<sup>70</sup> Another option, in countries where the tort of negligence can include intentional torts, is to rely on the tort of negligence.<sup>71</sup>

First we discuss the tort of breach of statutory duty. This aspect of the model is best illustrated by the Israeli case of *Dr. Z.M. v. R.M.P.*<sup>72</sup> In this case, under the parties' divorce settlement, the mother had sole custody of the child and the father had visitation rights, but

67 This is particularly true if the abductor does not have any assets left in the requesting state.

68 See, for example, Israeli Civil Wrongs Ordinance (New Version), 5732-1972, 2 LSI 12, § 63 (1972) (Isr.). Breach of statutory duty could include commission of a statutory criminal offense of child abduction or a breach of civil law obligation owed towards the other parent such as the duty to make decisions concerning the child jointly.

69 See, e.g., FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.*

70 For example, § 287 of the Israeli Penal Law, 5737-1977, SH No. 864 p. 226 sees as an offense violation of a direction or protective order of any court. Accordingly, breach of a court order regarding custody is a breach of statutory duty (that is, the duty in § 287), and so may constitute the tort of breach of statutory duty by virtue of § 63 of Civil Wrongs Ordinance (New Version), 5732-1972, 2 LSI 12, (1972). This approach has been used lately, for example, in cases of tort compensation for women refused a *get* (the Jewish divorce bill). In some cases the court ordered damages for the women plaintiffs based on § 287 of the Israeli Penal Law, since the husbands breached the Rabbinical court decisions ordering them to divorce their wives. Benjamin Shmueli, *What Have Calabresi & Melamed Got to Do with Family Affairs? Women Using Tort Law in Order to Defeat Jewish and Shari'a Law*, 25 BERKELEY J. GENDER L. & JUST. 125, 138-39 n.56 (2010) [hereinafter Shmueli, *Family Affairs*].

71 In Israel, for example, the tort of negligence can include intentional torts. See, e.g., CF (TA) 1016/88 *Amin v. Amin*, Tak-Mech 97(2) 330, ¶ 117a (1997), *confirmed*, CA 2034/98 *Amin v. Amin*, 53(5) PD 69 [1999], English version is available at [http://elyon1.court.gov.il/files\\_eng/98/340/020/q07/98020340.q07.htm](http://elyon1.court.gov.il/files_eng/98/340/020/q07/98020340.q07.htm) (last visited Jan. 23, 2012).

72 FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.*

neither party was permitted to take the child outside the jurisdiction without the written consent of the other or of the court. The mother had deceitfully told the father that she was taking the child to relatives in Bulgaria for a holiday in order to get his permission to take the child abroad; she instead took the child to Australia with no intention to return. The father's application to the Australian courts under the AC was successful and the child was returned to Israel to the custody of the father. Some time after recovering the child, the father brought a tort action, in which he claimed compensation for all the expenses not recovered in the Australian proceedings and for his non-financial loss due to emotional distress. The mother's main defense was that the ruling of the Australian court constituted estoppel.

The court held that the mother was liable in tort for the losses caused to the father as a result of the abduction and ordered her to reimburse the father for the proven expenses incurred in tracking the minor as well as for legal fees. It was held that the Australian court ruling did not constitute estoppel. Even though some of these expenses could have been claimed in the Australian court,<sup>73</sup> this did not prevent the left-behind parent from claiming wider reimbursement of expenses at a later date. The judge commented that child abduction should be denigrated, that tracing and recovering the child invariably involved considerable expenditure on the part of the left-behind parent, and that there was no reason why the cost of recovery should not be recovered from the abductor.<sup>74</sup>

In the case of *Dr. Z.M.*, the tort relied upon was breach of statutory duty. Section 63 of the Israeli Torts Ordinance provides that breach of a statutory duty may constitute a tort.<sup>75</sup> Israeli case law has recognized that a penal statutory provision may form the basis of the tort of breach of statutory duty where that provision is intended to benefit or protect an individual.<sup>76</sup> The court in *Dr. Z.M.*<sup>77</sup> held that the mother's action in taking the child abroad without the father's consent was a breach of her statutory duty under section 373 of the Penal Law,<sup>78</sup> making it an offense to remove a child from the custody of his lawful guardian

---

73 *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 30 (Austl.) (implementing art. 26(4) of the AC in Australia).

74 FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.*

75 § 63 of the Civil Wrongs Ordinance (New Version), 5732-1972, 2 LSI 12 (1972).

76 CA 145/80 Vaknin v. Local Council Bet-Shemesh 37(1) PD 113, 114 [1982]; CA 245/81 Sultan v. Sultan 38(3) PD 169 [1984]; CA 3559/02 Club of Members of the (Sports Betting) Zahav Toto, Tak-El 2004(3) 2718 [2004].

77 FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.*

78 § 373 of the Israeli Penal Law, 5737-1977, SH No. 864 p. 226.

without the consent of each person having legal custody.<sup>79</sup> The purpose of this provision was not only to uproot the phenomenon of abduction, to act as a deterrent, and to promote public order, but also to protect the specific interest of parents that their children should not be taken from them. Thus, the breach of this statutory duty creates a right of action for the injured parent under section 63 of the Torts Ordinance and may serve as a basis for an action in private law in addition to criminal law.<sup>80</sup>

In the later, similar case of *Plonit v. Ploni*,<sup>81</sup> the mother had taken the child to England without the father's knowledge or consent. The father instituted proceedings in England under the AC, and the child was returned to Israel. The father then brought an action in tort for financial and non-financial loss: the court held that the abductor was in breach of statutory duty without further discussion, and this point was not raised on appeal.<sup>82</sup> The Israeli Supreme Court confirmed the lower court's decision awarding compensation to the father.<sup>83</sup> The expenses that were awarded included the cost of staying in London while he attended the AC proceedings and the cost of psychotherapy and compensation for emotional distress. Again the defense of estoppel, deriving from *res judicata*, was rejected since the AC proceedings and the current tort action were based on separate and different causes of the action, even though they arose out of the same facts. In addition, the issue of compensation for the costs incurred by the left-behind parent was not raised in the English

---

79 The court held that the term "custody" in this section should be interpreted widely to include a parent who had the right to determine the child's place of residence, so as to create uniformity with art. 5(a) of the AC, which defines "custody right" as "... including rights concerning the child itself and in particular the right to determine the child's residence." Courts in most countries have held that the right of a parent to veto removal of the child from the jurisdiction (known as a *ne exeat* right) is a custody right within this provision. See, e.g., *Abbott v. Abbott*, 130 S.Ct. 1983, 1990–91 (2010).

80 The court also discussed the possibility that the tortious liability could be based on the breach of sections 15 and 18 of the Legal Capacity and Guardianship Law, 5722–1962, 16 LSI 106 (1962), which provide that the parents have the right to determine the child's place of residence and that the child's legal guardians should act jointly in exercising their rights and duties as guardians, which include the right to determine the child's place of residence. In FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.*, the mother had unilaterally changed the child's place of residence in breach of this provision. However, the court expressed a doubt as to whether it would be appropriate to treat breach of this duty as the basis of tortious liability, because ultimately the court might approve the change of place of residence if this was in the child's best interests. Since it was not necessary to decide this in the current case, the court left the question open. Note that a breach of section 17 is also possible, where section 17 requires parents to act in the best interest of the child, in a manner in which reasonable parents would act under the circumstances. Legal Capacity and Guardianship Law, 5722–1962, 16 LSI 106 (1962).

81 Leave for Family Appeal 3241/09 *Plonit v. Ploni* (Oct. 2, 2009) (unpublished) (Isr.).

82 FamC (Jer) 15125/02 *Ploni v. Plonit* (Aug. 7, 2008) (unpublished).

83 Family Appeal (Jer) 194/08 *Plonit v. Ploni* (Feb. 25, 2009) (unpublished).

proceedings.<sup>84</sup> The court emphasized that in AC proceedings the court does not usually deal with expenses and harm caused to the left-behind parent as a result of the abduction other than the expenses directly incurred in bringing the proceedings.<sup>85</sup>

Now we move to the tort of negligence, which could be used if this tort includes intentional actions. There is clearly a duty of care owed to the left-behind parent by the abductor, in the light of the relationship between them as parents of the child and the foreseeability that abduction will cause damage to the other parent. A duty of care between spouses was acknowledged in cases of spousal abuse—Israeli courts have held that this duty includes the duty to respect one's spouse and to avoid harming him.<sup>86</sup> That kind of duty of care towards the other parent, even after divorce or separation, has also been acknowledged in cases of tort actions for breach of visitation rights.<sup>87</sup> The violation of the visitation arrangements is a breach of the duty of care owed by one parent to the other and can accordingly form the basis of an action for negligence.<sup>88</sup> Similarly, in the current context, wrongful removal or retention of the child by the abductor is a breach of the duty of care owed to the left-behind parent. Accordingly, the ruling of the court in AC proceedings that the child had been unlawfully removed or retained can form the basis of a subsequent action for negligence.<sup>89</sup> Similarly, it is beyond doubt that the abductor's breach of duty of care will cause the left-behind parent to suffer loss, although of course it is always necessary to confirm that the claimed loss satisfies the principles of causation and remoteness of damage.

However, in most common law countries there is a clear-cut division between intentional and unintentional torts,<sup>90</sup> and thus it will be necessary to rely on the intentional torts, not on negligence, since the abduction is of course intentional.

For example, in cases of emotional harm, at least in the United States, it may be possible

---

84 Leave for Family Appeal 3241/09 *Plonit v. Ploni* at ¶ 5.

85 *Id.*, referring also to CA 1650/00 *Zisser v. The Ministry of Construction and Housing*, 57(5) PD 166, 187–88 [2003].

86 See FamC (Jer) 18551/00 K.S. v. K.M. (July 6, 2004) (unpublished), approved in FamA (Jer) 595/04 *John Doe v. Jane Doe* (Feb. 2, 2005) (unpublished).

87 See FamC (Jer) 13993/02 *Ploni v. Plonit*, Tak-Mish 2007(1) 516 (2007).

88 *Id.*

89 See Shmueli, *Family Affairs*, *supra* note 70, at 142–43.

90 *Litigation between Husband and Wife*, 79 HARV. L. REV. 1650, 1653 n.18 (1966) [hereinafter *Litigation*] (differentiating between intentional and unintentional torts).

to rely on the tort of intentional infliction of emotional distress (IIED), referred to in the Restatement (Second) of Torts (1965)<sup>91</sup> and increasingly accepted throughout the United States.<sup>92</sup> In some states, however, IIED is recognized only in cases of severe emotional distress,<sup>93</sup> or as an outcome of physical abuse or child corporal punishment<sup>94</sup> and therefore would not be applicable to cases of abduction.

## 2. The Heads of Damage and Quantification of the Compensation

There are two main categories of damages—financial and non-financial. Financial damages include the various expenses incurred and loss of income, whereas non-financial damages consist of damages for suffering, both physical and emotional. As mentioned above, a typical case of international child abduction is liable to result in both financial and non-financial losses. However, the situation is complicated by the fact that some of the losses may have been or could have been claimed already in the AC proceedings. In this section, we will consider to what extent the losses should be recoverable in a separate tort action in accordance with the tort model.

The rulings in the two Israeli cases described above illustrate the main problems that are likely to arise in relation to heads of damages and the quantification of damage, the relevance of the fact that costs could have been awarded by the foreign court, the extent of the duty to mitigate damage, and the question of compensation for emotional distress. Thus, these rulings will serve as a convenient starting point for discussion and critical analysis.

In the case of Dr. Z.M.,<sup>95</sup> the issue of quantification of the compensation was

91 RESTATEMENT (SECOND) OF TORTS § 46 (1965), as cited in Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1269 n.1 (1996). The Restatement § 46(1) states: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

92 LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT, AND SEXUAL ABUSE 116 (Rev. ed. 2005); Yuval Sinai & Benjamin Shmueli, *Changing the Current Policy Towards Spousal Abuse: A Proposal Inspired for a New Model Inspired by Jewish Law*, 32 HASTINGS INT'L & COMP. L. REV. 155, 163–67 (2009).

93 KARP & KARP, *supra* note 92, at 116.

94 See Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 647–57 (2003) (expanding on the American case law and studies on emotional neglect and emotional harm arising from child abuse and corporal punishment).

95 FamC (TA) 42273/99 Dr. Z.M. v. R.M.P (Aug. 9, 2005) (unpublished) (Isr.).

complicated by the fact that the Australian court had awarded reimbursement of some of the father's expenses, including his flight, accommodation, and visa. In addition, under the Australian regulations his legal costs<sup>96</sup> and the cost of locating the child could have also been recovered.<sup>97</sup> The court held that it would not reopen the sums awarded for items of expenditure included in the decision of the Australian court, but that there was no reason not to award costs which had not been claimed in the Australian court.<sup>98</sup> In particular, the court made clear that the father's choice to pursue his claim for reimbursement of these expenses in Israel at a later stage was not an abuse of legal proceedings.<sup>99</sup>

In contrast, in the case of *Plonit v. Ploni*, the Israeli Supreme Court held that the father could not claim the cost of representation for the English AC proceedings<sup>100</sup> even though he had not requested this expense in those proceedings, because it was directly connected to and could have been claimed in the English proceedings. On the other hand, the travel, accommodation, and other expenses arising from the four trips to England were not directly connected to the English proceedings and therefore could subsequently be claimed in a tort action in Israel.<sup>101</sup> With respect, this distinction seems artificial because the only reason that the father was in England was to participate in the proceedings and the travel and accommodation expenses could also in theory have been claimed there under Article 26(4) of the AC.<sup>102</sup> Accordingly, the distinction made by the court in the case of *Dr. Z.M.* between costs which were claimed and those which were not claimed seems more logical.<sup>103</sup>

---

96 The legal fees paid to the father's Israeli lawyers included sums which were paid through them to the Australian lawyer. *Id.* at ¶ 19.

97 *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 30 (Austl.).

98 The court relied on an expert opinion on Australian law, according to which this would have been the position if the father had tried to claim the rest of the expenditure in Australia at a later stage. FamC (TA) 42273/99 *Dr. Z.M. v. R.M.P.* at ¶ 15(4).

99 *Id.* ¶ 15(4).

100 Leave for Family Appeal 3241/09 *Plonit v. Ploni* (Oct. 10, 2009) (unpublished) at ¶ 5 (pointing out that the plaintiff had withdrawn this head of claim before the first instance hearing).

101 *Id.* at 2. These expenses included telephone costs and his contribution towards costs of medical treatment while in England.

102 The Supreme Court seems to have assumed that the English court would not have been able to award expenses which were not directly related to the legal proceedings, Leave for Family Appeal 3241/09 *Plonit v. Ploni*, at ¶ 5, and this perhaps explains their position.

103 Nevertheless, the decisions of the Israeli Supreme Court (but not those of the family court, which is in fact a magistrate court) are binding precedent, since Israel is a common law country. See Basic Law: The Judiciary, 5744, 1110 LSI 78, § 20 (1984).

Two of the heads of expenses claimed in the case of *Plonit v. Ploni*<sup>104</sup> raise interesting questions. The first concerns the duty to mitigate damage. The mother claimed that she had suggested that the father stay with the Rabbi of the local Jewish community rather than in a hotel. The father denied this and stated that in any event he would not have felt comfortable staying with the Rabbi. The family court accepted his position and awarded reimbursement of hotel costs. This seems to be a logical outcome, as the left-behind parent cannot be expected to mitigate his losses beyond what is reasonable.

The second head of damage raises the issue of causation. The father requested reimbursement for the costs of telephone calls made while in England in the sum of 35,000 NIS (about \$10,000). He claimed that he needed to speak to his Israeli lawyer because the mother was putting obstacles in the way of his contact with the child and that he needed to remain in contact with his family in Australia. The court accepted these claims, but reduced the sum to 20,000 NIS to reflect the fact that even if he had been in Israel he would have incurred costs of calls to Australia.

The court in *Plonit* also ordered reimbursement of the cost of psychotherapy and rejected the mother's argument that since the father had, on previous occasions, been in need of psychotherapy, it was not possible to prove that the current need for treatment was caused by the abduction. In the court's view, it was reasonable to assume that the abduction was the reason behind the need for the psychotherapy, because many people in such a situation require such treatment. In fact, the court acknowledged causation between the abduction and the therapy, even though the father was in therapy even before the abduction. This Supreme Court case can, therefore, be seen as setting a precedent for reimbursement of the costs of psychological treatment following the abduction.

Another source of financial damage is loss of income caused by the need to devote time to searching for the child and initiating and participating in the AC proceedings. In the case of *Dr. Z.M.*,<sup>105</sup> the court did not order damages for loss of income, since the claim that the father did not work for two weeks and therefore lost income was not proven. In principle, we think that, as in other tort actions, there is no reason why compensation for loss of income should not be awarded for the period of searching for the child and perhaps even for the period of the proceedings under the AC.

Finally, the issue of compensation for emotional distress is discussed in both cases. In the case of *Dr. Z.M.*, the court refused to award damages for emotional distress on the basis

---

104 FamC (Jer) 15125/02 Ploni v. Plonit (Feb. 25, 2009) (unpublished).

105 FamC (TA) 42273/99 Dr. Z.M. v. R.M.P. (Aug. 9, 2005) (unpublished).

that the child had been returned to the plaintiff and was now in his custody.<sup>106</sup> The loss of enjoyment of the child's company during the time he was in Australia and the uncertainty of recovery were not sufficient bases to justify awarding damages.<sup>107</sup> Furthermore, in this case not only was the status quo restored, but the father now had the benefit of having custody of his son.

In contrast, in the case of *Plonit v. Ploni*,<sup>108</sup> damages for emotional distress were recognized and awarded.<sup>109</sup> The court rejected the mother's argument that there was no basis for compensation for emotional distress since the child was returned to Israel, because the implications of this reasoning were that wherever a tortfeasor was forced to cease his tortious conduct by court order, the victim of the tort could not claim compensation for the damages he suffered before that order.

With respect, we think that the approach of the Supreme Court in *Plonit* is preferable to that of the court in *Dr. Z.M.* case. In principle, the fact that the child has been returned does not negate the need to compensate the left-behind parent for the anguish he suffered beforehand. In addition, sometimes the impact of emotional distress may linger, even after the reason for that distress disappears, as in post-trauma syndromes.

However, it should be pointed out that in *Plonit*, the court based its award of compensation for emotional distress mainly on the distress caused by the mother's unsubstantiated accusations that the father had sexually abused the child and the obstacles she put in the way of the father's contact with the child. This basis for compensation would not seem to be of general application and, as a result, the decision cannot be seen as a precedent for awarding compensation for emotional distress in all cases of abduction. It is therefore unclear whether the simple fact of abduction or thwarting contact between the child and the left-behind parent, which is relatively common, would be a sufficient basis for an award of compensation for emotional distress.

However, we argue that, in principle, compensation for emotional distress should be available to left-behind parents. In particular, such compensation is required by the objectives of tort law, set out above in Part I. Furthermore, the child abduction situation cannot be distinguished from other intrafamilial situations, in which damages for emotional

---

106 *Id.* at ¶ 21(c).

107 *Id.*

108 FamC (Jer) 15125/02 *Ploni v. Plonit*.

109 *Id.* at ¶ 50.

distress have been recognized, among them: emotional abuse and neglect;<sup>110</sup> breach or violation of visitation rights;<sup>111</sup> divorcing a Muslim wife against her will;<sup>112</sup> and refusal to give a *get* (Jewish divorce bill) in the Jewish sector.<sup>113</sup>

We agree with the court in *Plonit* that the fact that the child has been returned does not cancel out the emotional distress. This is true even where, as a result of the abduction and return, the left-behind parent's position is "improved" because he becomes the custodial parent. However, in this situation it may be appropriate to reduce the amount of damages to take into account the benefit that accrued to him as a result of the tort. Finally, we would mention that the element of emotional distress is likely to be particularly relevant in cases where the child is not returned in the AC proceedings on the basis of one of the exceptions in the AC. In such a case, the abduction results in a permanent significant reduction in contact between the left-behind parent and the child.

## B. Advantages

The main argument in favor of allowing the left-behind parent to recover compensation from the abductor in a separate tort action is consistency with the objectives of tort law and some of the objectives of the AC.

The damage suffered by the left-behind parent would appear to be within the scope of tort law according to the most widely accepted goals of tort law.<sup>114</sup>

Awarding damages and reimbursement to the left-behind parent is of course compatible with the goal of compensation. The left-behind parent has the right to be reimbursed for the monetary expenses he has incurred as a result of the abduction. By means of this compensation he can also attempt to improve his situation, for example, by funding

110 For a comparative look, see Shmueli, *Love and the Law*, *supra* note 39; Sinai & Shmueli, *supra* note 92. Emotional distress as damage is traditionally acknowledged in Israel. See CA 243/83 Municipality of Jerusalem v. Gordon 39(1) PD 113 [1985]. In regard to emotional damage of a child resulting from his father's emotional abuse, see CA 2034/98 Amin v. Amin, 53(5) PD 69.(1999)

111 See Shmueli, *Family Affairs*, *supra* note 70, at 143–44.

112 *Id.* at 145–48.

113 *Id.* at 148–60.

114 It should be noted that in most of these cases, the insurance mechanism is not relevant. Insurance is generally relevant only in relation to unintentional torts, such as domestic and other accidents; usually it is not possible to insure against intentional torts such as child abduction. Cf. § 26 of Insurance Contract Law, 5741-1981, SH No. 1005 p. 94 (Isr.) (exempting insurer from liability for insured events caused intentionally by the insured or a beneficiary of the policy); Williams, *supra* note 30, at 166.

psychotherapy. Similarly, as discussed above, he should be entitled to compensation for his non-financial losses, such as emotional distress.

Within the framework of corrective justice, compensation serves as a public statement that the action was a tortious wrong, that it should be rectified, and that it is the tortfeasor who should be held responsible for his actions.<sup>115</sup> It may be argued that conducting such a lawsuit in the name of corrective justice may impair the harmony of the family, which in the common law was—and in some countries still is—a basis for inter-spousal immunity, even against an ex-spouse.<sup>116</sup> However, the very filing of a tort lawsuit against a spouse tends to indicate that harmony no longer exists within the family. In many cases, the parents are already divorced or separated and there is no real likelihood that they will live together again. If a tort claim has been filed, it is indicative that the relationship has already deteriorated significantly.<sup>117</sup> Failing to compensate the victim would allow the abductor to avoid responsibility and would not remedy the injustice suffered by the left-behind parent.

However, the conduct of the proceedings or the remedy awarded may have a negative impact on the child, who is likely to suffer as the lawsuit deepens the crisis between his parents.<sup>118</sup> Even if there is no harmony in the family, appeasement is still important for facilitating cooperation between the parents in making decisions concerning the child's upbringing and in relation to visitation arrangements.<sup>119</sup> Because corrective justice focuses only on the two parties to the tort, however, the fact that the child may suffer from the outcome of the tort lawsuit is not considered.

---

115 Cf. FRANK J. VANDALL ET AL., *TORTS: CASES AND PROBLEMS* 668 (2d ed. 2003); G. Steven Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 711–13 (2000).

116 For the principle of family harmony as a basis for spousal immunity, see KARP & KARP, *supra* note 92; William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1052–54 (1930); see generally *Litigation*, *supra* note 90; Sinai & Shmueli, *supra* note 92; Shmueli, *Tort Litigation Between Spouses*, *supra* note 30.

117 *Price v. Price*, 732 S.W.2d 316, 317–18 (Tex. 1987) (discussing precedent stating that “suits for willful or intentional torts would not disrupt domestic tranquility since ‘the peace and harmony of a home’ which had ‘been strained to the point where an intentional physical attack could take place’ could not be further impaired by allowing a suit to recover damages”).

118 See discussion *supra* Part I.C.

119 Shmueli, *Tort Litigation Between Spouses*, *supra* note 30, at 225.

Another option that we suggest is to widen the meaning of corrective justice<sup>120</sup> in the context of civil actions against a spouse in general and in abduction cases in particular, and to consider the impact on the child too,<sup>121</sup> since the child's position is inextricably entwined with that of his parents. Thus, any consideration of corrective justice that only takes into account the parents but not the child is inadequate. In other words, the narrow and strict meaning of this goal, which focuses only on the two direct parties to a tort, is not fully compatible with cases in which the parties are the parents and the children are the subjects of the dispute. Consequently, according to the revised goal of corrective justice, one has to consider the children in these cases. This is particularly true in cases in which the tort is based on an action that is related to the child. In these cases it is not logical to ignore the impact of the lawsuit on the child in assessing the requirements of corrective justice.

However, there may be also positive implications of the lawsuit for the child that should encourage the bringing of a civil action. In cases in which the left-behind parent continues to be the custodial parent, the compensation paid by the abductor will be used to the benefit of the child. This will be significant where the left-behind parent's financial position has been considerably worsened due to the expenses incurred as a result of the abduction.<sup>122</sup>

Another aspect of justice may be the principle that courts frequently reiterate—that the abductor should not be allowed to benefit from his illegal act. This principle is derived both from the need to enforce the rule of law and from the need to do justice between the parents and, as we saw above, is one of the objectives of the AC. Hence, allowing the tort action means that the abductor is not benefiting from the abduction.

Finally, where the tort claim is based on negligence or breach of statutory duty, the possibility of taking into account the left-behind parent's provocative behavior as contributory negligence is also consistent with the concept of corrective justice.<sup>123</sup>

---

120 For a presentation of a narrow and strict meaning of this goal, see, e.g., Weinrib, *Corrective Justice*, *supra* note 34; Weinrib, *The Gains and Losses of Corrective Justice*, *supra* note 34; Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, *supra* note 34; Weinrib, *Corrective Justice in a Nutshell*, *supra* note 34.

121 Indeed it can be argued that in any discussion of a subject that has implications for a child, even where the child is not the subject of the litigation, the impact on his welfare has to be considered. *Cf.* AdminA 10993/08 Ploni v. State (Mar. 10, 2010) (unpublished) (a recent Israeli case where illegal workers were not expelled because this would be detrimental to their children).

122 For discussion of the implications of compensation for the material welfare of the child, see the discussion *supra* Part I.D.

123 See generally Bohlen, *supra* note 31; Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

The goal of distributive justice may be relevant in tort litigation against a spouse, when the tortfeasor and the victim belong respectively to strong and weak groups. In some cases, the spouse who suffered injury at the hands of the other is in a clearly inferior position from the perspective of their sectorial belonging. This is sometimes true, for example, when the victim is the mother. But even in cases in which the abductor is the mother, which is more common,<sup>124</sup> her unilateral and illegal action can be seen as turning her into the aggressor and the left-behind father into the helpless victim. Thus, compensating the left-behind parent—even if he is not the weaker party financially—is compatible with distributive justice. However, this portrayal of the situation may well be too simplistic and may not reflect reality in the light of the social background to the abduction. In a situation where the abductor is really the weaker party or where it is not clear which party is the real victim, the goal of distributive justice may not be attainable and so the emphasis needs to be placed on the other objectives of tort law.

In addition, distributive justice requires considering the interests of weak parties other than the plaintiff victim.<sup>125</sup> Thus, if the child's welfare is harmed as result of the deterioration in the relations between his parents caused by the lawsuit, then allowing tort claims in these cases may not be consistent with distributive justice. However, as mentioned above, the impact of the compensation claim on the child's emotional and material welfare depends on the particular circumstances. In some cases, the further deterioration of the relations between his parents may be damaging to the child, while in other cases, where compensation is paid to the custodial parent, this may have a positive impact on his welfare.<sup>126</sup>

Using tort law would also prevent self-help by the left-behind parent, since he would know that the abductor would compensate his financial and non-financial damages.<sup>127</sup>

Blocking tort claims for abduction seems contrary to the goal of deterrence. Recognition of such claims sends the message that the law will intervene even within the family, liability

---

124 In 2008 the mother was the abductor in sixty-nine percent of the cases in which applications for return were filed under AC, and in eighty-eight percent of these cases she was primary or joint primary carer of the child. *LOWE, supra* note 5, at 15, 55.

125 Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124 (1972).

126 See *supra* Part I.

127 This is important in particular for those who see prevention of self-help as one of the independent aims of tort law. See *CHRISTIE ET AL., supra* note 37, at 5.

will be imposed and the tortfeasors will bear the social cost of their behavior.<sup>128</sup> Tort law sends the message—both to the specific tortfeasor and to potential tortfeasors—that there are certain values that society is not willing to compromise. Similarly, as we saw above, deterrence is one of the objectives of the AC.

According to the economic argument of optimal deterrence and efficiency the abductor is the cheapest and most efficient avoider of harm,<sup>129</sup> and, moreover, the only avoider. Were it not for his actions, no harm would have been done and no tort would have been carried out. In these cases, the cost of preventing the harm—that is, by simply not abducting the child—is significantly less costly, as it has no cost at all, than the expected monetary or emotional harm to the left-behind parent. Therefore, the tortfeasor should be held liable, since he did not prevent the harm.<sup>130</sup> If he cannot accept the court's decision regarding custody,<sup>131</sup> he has the option to appeal or to request variation of the decision if the circumstances are changed. Similarly, where the abductor has custody and wishes to relocate abroad with the child, he can ask the court for permission to do so. Accordingly, self-help and the use of power and aggression should be dealt with by tort law. This means that monetary expenses should not fall on the victims or on society, but on the tortfeasor.

However, a word of caution should be added. Deterrence research shows that while legal sanctions do constitute an effective deterrent against white collar crime, they have little impact on the perpetrators of crimes of violence.<sup>132</sup> One reason for this is that

---

128 Neeley, *supra* note 115, at 711–14 (detailing the deterrence in tort litigation within the family). In American law, the consideration of deterrence is particularly relevant in intentional torts. *See Litigation*, *supra* note 90, at 1653 (positing that the availability of relief might deter a husband from breaking a contract or beating his wife). Regarding English law, see Williams, *supra* note 30, at 143.

129 This is in line with the approach of Guido Calabresi & Jon T. Hirschoff, *Toward a Test of Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

130 This is in line with the approach of Richard Posner, who adopts the Learned Hand Formula,  $B < PL$ , where B is the burden or cost of prevention, P is the probability of harm, and L is the degree of loss. The expectancy of harm is the product of the probability of harm and the degree of loss. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d. Cir. 1947); *Conway v. O'Brien*, 111 F.2d 611, 612 (2d. Cir. 1940). For an overview of the Learned Hand Formula, see generally DOBBS, *supra* note 30, at 338–40; WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85–88, 96–107 (1987). For adoption of the formula in the proposed Restatement, see RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005).

131 Or, if there has not yet been a custody decision, to request one from the court.

132 *See generally* John N. Gallo, *Effective Law-Enforcement Techniques for Reducing Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1475 (1998); Robert Keel, *Rational Choice and Deterrence Theory*, ROBERT KEEL ONLINE, <http://www.umsl.edu/~keelr/200/ratchoc.html> (last updated July 14, 2005).

deterrents are only effective in influencing rational behavior.<sup>133</sup> Often a parental decision to abduct his child is not a decision which is made rationally. Rather, the parent may be influenced by strong emotions, such as a fear of losing his children, resentment against the other party and even a desire for revenge. Legal sanctions will usually have little weight in such circumstances. Similarly, when the abducting parent flees from abuse and violence by the other parent, his major concern is his own and his child's physical and psychological health, and it is extremely unlikely that sanctions will have any impact on him.<sup>134</sup>

Indeed, this hypothesis seems to be borne out by the fact that the number of international abductions seems to have continued to rise since the coming into force of the AC.<sup>135</sup> While lawyers tell about parents who, after consulting with them and being informed about the implications of the AC, decide not to abduct, there are clear limits on the deterrent effect of the AC. Nonetheless, the prospect of having to pay compensation to the left-behind parent, whether or not the child is returned, might tip the balance against abducting for some parents. Thus, allowing left-behind parents to recover tort compensation would strengthen the deterrent effect of the AC.

In summary, the tort model is consistent, in general, with the main goals of tort law. Similarly, the tort model promotes the AC objectives of restoration of the status quo, deterrence, and doing justice between the parents.

### C. Disadvantages

There are several disadvantages of allowing a tort action by the left-behind parent against the abductor.

First, as made clear above, the action in tort is separate from the application under the AC for return of the child and will usually be litigated in a different country, and this will lead to duplication of costs and delays, since the tort action will only be started after the AC proceedings have been completed. There is also a risk of inconsistency between the two sets of proceedings. For example, the court hearing the tort case may take a different view

---

133 See generally Michael Torny, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 282 (2008).

134 See generally Shmueli, *Tort Litigation Between Spouses*, *supra* note 30 (examining interspousal torts in general).

135 See LOWE, *supra* note 5, ¶ 24 (showing that there was an overall rise of forty-five percent in return applications in the 2008 survey as compared with the 2003 survey, taking into account only applications made to and by states which were members of the AC at the time of both of the surveys).

of the evidence than the court which heard the AC case. In addition, as stated above,<sup>136</sup> if the abductor raises the plea of estoppel on the basis of the decision in the AC proceedings (*res judicata*), this will lead to procedural complications.

Another possible problem is uncertainty. The nature of the damage likely to be suffered will inevitably lead to problems of determining causation and quantification of the damage and to questions relating to the scope of the left-behind parent's duty to mitigate his loss.

A substantive difficulty with a separate tort action is the risk of violation of autonomy of the family unit. While the policy of not allowing tort actions between spouses for fear that this might destabilize marriages does appear less relevant where the relationship has already broken down, there is great importance in a continuing reasonable relationship between the parents after divorce because this will enhance the chances that the child will be able to maintain a good relationship with both parents. Thus, the tort action might negatively affect the child's welfare.

Similarly, the fact that the tort model cannot take into account the financial circumstances of the parents means that an award of compensation might have a detrimental effect on the material welfare of the child where the abductor is the custodial parent after the abduction. This argument was raised by the defendant in the case of *Plonit*,<sup>137</sup> but it was rejected since it was only raised at a late stage. However, the court did comment that it would not accept the argument anyway, since the most significant issue is the relationship between the child and left-behind parent and sometimes taking money from the abductor is the best response to abduction.<sup>138</sup> Effectively, the court is saying that the goal of deterrence is more important than the question of the child's material welfare. While this may be correct from the perspective of tort law, the inability to take into account the child's welfare would seem to be a disadvantage from a child law perspective. In particular, it may not be possible to prevent an order for compensation from substantially damaging the material welfare of the child.<sup>139</sup>

Finally, at first sight, the limited relevance of lack of moral blameworthiness in tort actions would seem to be a clear disadvantage of the tort model. As mentioned above, not infrequently the abduction occurs in response to violence or abusive behavior on the part of the left-behind parent. Sometimes this position is exacerbated by the fact that social

136 See *supra* Part I.G.

137 Leave for Family Appeal 3241/09 *Plonit v. Ploni* (Oct. 2, 2009) (unpublished).

138 *Id.*

139 See *infra* Part VI for a discussion on techniques for reducing the impact on the child.

and law enforcement agencies have not responded to the abductor's cries for help. As already mentioned above, these situations present a dilemma. On the one hand, exempting the abducting parent from liability to pay compensation is in fact condoning his resort to self-help. On the other hand, it seems unjust that the abducting parent should have to pay compensation in such cases, especially where the left-behind parent's intolerable behavior was the reason for the abduction.

Under the tort model, there would seem to be very limited scope for exempting the abductor from liability or even reducing the liability in such cases because the tort relates only to the act of abduction; it does not allow for consideration of the acts and omissions of the left-behind parent or the authorities<sup>140</sup> prior to that act. However, where the cause of action is based on negligence—that is, breach of duty of care—or on breach of statutory duty, the actions of the left-behind parent, which in some measure triggered the abduction, may be considered as contributory negligence, which would reduce the liability of the abductor. For example, in cases in which the left-behind parent abused or neglected the child,<sup>141</sup> or if the abductor was the custodian and the left-behind parent did not visit the child, contributory negligence might be relevant. Of course, if the left-behind parent's own behavior itself also constitutes a tort, such as assault, the liability of the left-behind parent to the abductor, established in an independent lawsuit, could constitute a set-off to the liability of the abductor to pay compensation for the damage caused to the left-behind parent as a result of the abduction.

While the result of the two options—the independent lawsuit against the left-behind parent and the claim of contributory negligence—may actually be similar, there is a substantive difference between these two options. In the case of set-off, the abductor has to prove all the elements of a separate tort, such as assault, and the sum which he would have received in compensation is then deducted from the sum he has to pay to the left-behind parent as a result of abduction. It is not necessary to show a direct causal connection between the two torts. In contrast, in the case of contributory negligence, the actual liability of the abductor for the abduction is reduced on the basis that the left-behind parent's behavior contributed towards the damage. Thus, it is necessary to show a direct connection between

---

140 Where the authorities failed to protect the abductor or the child, one option—albeit not a simple or *ex ante* solution—would be to bring a tort action against the authorities for their contribution to the abuse by their omission and failure to intervene. Discussion of such actions is beyond the scope of this article, but it is worthwhile mentioning that while such actions are rare, there is precedent for acknowledging them. *See, e.g.*, CF 3970/98 Goldstein v. State (Jan. 25, 2007) (unpublished) (Isr.), approved in CA (Jer) 9118/07 (Nov. 20, 2007) (unpublished) (Isr.).

141 *Cf.* United States v. Cummings, 281 F.3d 1046 (9th Cir. 2002) (where left-behind parent's spouse abused the child).

that behavior and abduction.

However, in all other circumstances, the abductor would seem to be liable in tort for all the damage caused, despite the lack of or limited moral blameworthiness on his part.

In summary, the tort model suffers from a number of procedural and substantive disadvantages. The need to institute separate proceedings leads to duplication of costs and may lead to inconsistency with the findings made in the AC decision. Similarly, separate tort proceedings are likely to be prolonged and this is inconsistent with the doctrine of family autonomy and the welfare of the child. Most importantly, under the tort model, the court does not have any discretion to take into account the impact of a compensation award on the material welfare of the child or issues of moral blameworthiness, unless the left-behind parent's actions amount to contributory negligence or to an independent tort against the abductor.

### III. The Contract Action Model (The Contract Model)

#### A. Presenting the Model

Where there is an agreement between the parties concerning the custody of the child and visitation arrangements, there may well be a breach of that agreement, which gives rise to an action for breach of contract and to the award of remedies, including compensation for financial and non-financial damages and the cancellation of the contract. The issues involved in awarding compensation to the left-behind parent for breach of contract are largely the same as those involved in awarding compensation in tort.

An example for this model is the case of *Dr. Z.M. v. R.M.P.*, which was discussed above in relation to the tort model.<sup>142</sup> In this case, the parties agreed in their divorce settlement, which was approved by the court, that the mother would have the sole custody of the child and the father would have visitation rights, but neither of them was allowed to take the child outside the jurisdiction without the written consent of the other party or of the court. The mother deceitfully took the child to Australia with no intention to return.

Thus, the contract is in fact the divorce settlement, which settles matters such as custody and visitation. Often such a contract is approved by the court, which means that it also has the force of a judicial decision. This will also be the case in relation to a separation agreement or other custody agreement made in cases where the parents were not married from the outset. It seems that even an oral consent as to visitation and the conditions for

---

142 FamC (TA) 42273/99 Dr. Z.M. v. R.M.P. (Aug. 9, 2005) (unpublished) (Isr.).

leaving the country will be considered as a contract in these cases.

Abduction can clearly be a breach of such contracts, even if the left-behind parent is not the custodian, where the contract clearly forbids a unilateral decision to take the child outside the jurisdiction and also where the removal prevents the realization of visitation rights.<sup>143</sup>

### **B. Advantages**

The main advantage of the contract action compared to the tort action may be that the left-behind parent need not prove breach of duty of care or statutory duty, but only the existence of a contract and the breach of it.

In addition to the right to claim compensation, the left-behind parent can ask the court to change the terms of the contract in light of the breach and the change in circumstances. This is true whether or not the contract was approved by a court.

A contract action clearly promotes the major objective of contract law, which is to ensure that agreements are respected and, where they have been violated, to put the parties in the position that they would have been in if the contract had been performed, so far as possible. In the current context, this means compensating the left-behind parent for all the losses and expenses he has incurred as a result of the breach of the contract.

Furthermore, a contract action is compatible with most of the goals of tort law and some of the goals of the AC in the same way as a tort action, as discussed above.<sup>144</sup>

### **C. Disadvantages**

A contract action, like a tort action, is separate and independent from the proceedings for return of the child under the AC with the attendant disadvantages, outlined above.<sup>145</sup>

Here too, the limited relevance of the abductor's lack of moral blameworthiness discussed above in relation to the tort model is equally relevant. In fact, there may be less scope for taking into account the left-behind parent's contributory fault because it is not

---

143 *Cf. id.* (where the parent having custody was also the abductor).

144 *See supra* Part II.B for a discussion of the advantages of the tort model.

145 *See supra* Part II.C for a discussion of the disadvantages of a separate tort action.

clear that such a defense exists in contract law.<sup>146</sup> In addition, the left-behind parent can claim that if the abductor had complaints against him, he could have gone to court to seek appropriate remedies, such as changing the contract or even voiding it entirely.

The rest of the procedural problems, such as *res judicata*, the splitting of damages, and the uncertainty in relation to heads of damage and quantification of compensation exist in this model too. Here also one may claim that the contract action may violate the autonomy of the family unit, and here too there is lack of consideration of the material welfare of the child. In addition, the abductor may argue that the contract was null and void because of defects in the formation of the contract, such as mistake, misrepresentation and undue influence. However, where the contract has already been approved by a court, it will usually be difficult to prove that it is not valid.

Of course, a clear limitation of the contract model is the *ex hypothesi* pre-condition that there must be a contract between the parents which the abductor has breached. It is not sufficient to point generally to the marriage as a contract,<sup>147</sup> but rather one must look specifically to a divorce or separation agreement. If the couple has not yet separated, in most cases there is neither a written nor oral agreement, and thus this model will not apply.

---

<sup>146</sup> See generally Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397 (2009).

<sup>147</sup> This is particularly relevant due to the fact that in some countries, generally those where there are only religious and not civil, marriages (such as Israel), it is not obvious that marriage is considered a contract. Alternatively, it may be possible to see marriage as a relational contract. See Shahar Lifshitz, *The Pluralist Vision of Marriage*, in MARRIAGE AT A CROSSROADS (Elizabeth Scott & Marsha Garrison eds., forthcoming 2012); Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate*, 22 BYU J. PUB. L. 359 (2008). Regarding relational contracts in general see generally Stewart Macaulay, *Long-term Continuing Relations: The American Experience Regulating Dealerships and Franchises*, in FRANCHISING AND THE LAW: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES 179 (C. Joerges ed., 1991); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000); Ian R. Macneil, *Power, Contract, and the Economic Model*, 14 J. ECON. ISSUES 909 (1980); Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225 (1998).

#### IV. The Compensation via Criminal Proceedings Model (The Criminal Model)

##### A. Presenting the Model

Under this model, a parent who was convicted of the offense of child abduction<sup>148</sup> would be ordered to pay compensation to the left-behind parent<sup>149</sup> within the framework of the criminal proceedings where the legal system in question makes provision for this. Another option, in cases in which there is a violation of a court order relating to custody,<sup>150</sup> is to convict the abductor of the offense of violating a court decision, if the criminal law in the legal system in question contains a provision that treats disobedience of a judicial decision as an offense.<sup>151</sup> The first option, however, is the main one under this model.

Some legal systems make provision for compensation to be paid to victims of crime part of the criminal proceedings. Thus, if the defendant is found guilty of committing a criminal offense, the court has the discretion to order payment of compensation to the victim of the crime in addition to the punishment in the sentence, even though the victim is in no way a party to the proceedings. The compensation available under these schemes is usually more limited than tort compensation.

The compensation may consist only of reimbursement of proven expenses caused

---

148 Many legal systems today provide that abduction of a child is a criminal offense, even by a parent. *See, e.g.*, International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2006). Under this Act, a parent who wrongfully removes or retains his child outside the United States with intent to obstruct the lawful exercise of parental rights is to be convicted of a federal crime; in the U.K., the Child Abduction Act, 1984, c. 37, § 1, available at [http://www.legislation.gov.uk/ukpga/1984/37/pdfs/ukpga\\_19840037\\_en.pdf](http://www.legislation.gov.uk/ukpga/1984/37/pdfs/ukpga_19840037_en.pdf), makes it an offense for anyone “connected with” a child under the age of sixteen to “take or send” that child out of the U.K. without the requisite consent; in Canada, under section 283 of the Criminal Code, R.S.C. 1985, c. C-46), available at <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-129.html>, every parent, guardian or person having the lawful care or charge of a person under fourteen who takes, entices away, conceals, detains, receives or harbors that person with the intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of an indictable offense; and under sections 370 and 373 of the Israeli Penal Law, 5737-1977, SH No. 864 p. 226, if a person conveys another beyond the borders of the State in which that person stays without the consent of a person legally authorized to consent on his behalf, then he is subject to a twenty-year jail sentence, and anyone who takes a minor under sixteen from the custody of his lawful guardian without the guardian’s consent is subject to twenty years in prison.

149 The abductor might also be required to compensate the child, but this issue is beyond the scope of this article.

150 A violation of a court order regarding custody might occur either where the abductor is not the custodial parent or where the custodial parent violates a *ne exeat* clause in the court order.

151 *See, e.g.*, § 287 of the Israeli Penal Law, 5737-1977, SH 864 p. 226.

directly by the offense. An example of this is the United States Victim and Witness Protection Act of 1982 ("VWPA"), which authorizes a district court to sentence a defendant to pay restitution to a victim of his offense.<sup>152</sup> This Act was designed "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant."<sup>153</sup> According to VWPA, a district court may order reimbursement of "expenses related to participation in the investigation or prosecution of the offense."<sup>154</sup> There must be a close connection between the restitution ordered and the injury sustained from the criminal behavior.<sup>155</sup>

Another example is a Connecticut statute, which, describing in more detail the compensation which may be awarded, provides that "[r]estitution ordered by the court pursuant to this subsection shall be based on easily ascertainable damages for injury or loss of property, actual expenses incurred for treatment for injury to persons and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering or other intangible losses, but may include the costs of counseling reasonably related to the offense."<sup>156</sup>

In contrast, in other countries, such as Israel, the relevant statute provides for general compensation according to a general assessment made by the court, without an exact discussion of heads of damages.<sup>157</sup>

The compensation under criminal proceedings may be subject to a ceiling. For example, the Israeli Penal Law<sup>158</sup> allows maximum damages of 258,000 NIS (about \$70,000), for each charge that was proven, while the actual damage may of course be much higher. The award of this compensation will not prevent the victim from bringing a civil action against the offender for the difference between the sum already awarded and the full damages

---

152 Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663(a)(1)(A) (2006).

153 United States v. Cummings, 281 F.3d 1046, 1052 (9th Cir. 2002) (citing Pub.L. 97-291, § 2(b)(2), 96 Stat. 1248 (1982)).

154 18 U.S.C. § 3663(b)(4).

155 United States v. Sablan, 92 F.3d 865, 870 (9th Cir. 1996) ("[R]estitution can only include losses directly resulting from a defendant's offense . . . a restitution order must be based on losses directly resulting from the defendant's criminal conduct.").

156 CONN. GEN. STAT. ANN. § 53a-28(c) (West 2011).

157 See, e.g., § 77 of the Israeli Penal Law, 5737-1977, SH No. 864 p. 226.

158 *Id.*

assessed according to the usual tort measure.<sup>159</sup>

In the United States, there are a number of examples of compensation being granted to the left-behind parent within the framework of criminal proceedings against the abductor, under various federal and state statutes. In *United States v. Cummings*,<sup>160</sup> the court stated that the attorney's fees, which were incurred in an attempt to regain custody of the abducted children, were a direct and foreseeable result of the abduction. In this case, the compensation was based on a former conviction of the father for abduction. The court held that the sums expended by the left-behind mother in trying to recover her children from Germany under the AC proceedings were direct losses within the VWPA.<sup>161</sup> It should be noted that in this case compensation was ordered even though the children were not returned under the AC proceedings. The court also held that a parent who is convicted under the Federal International Parental Kidnapping Crime Act<sup>162</sup> can be ordered to pay restitution to the other parent to reimburse him for legal expenses incurred in trying to recover his child.<sup>163</sup> Moreover, the Supreme Court of Minnesota upheld a decision reimbursing the mother for the costs she incurred in re-abducting her children from Algeria to the country from which the father had unlawfully removed them.<sup>164</sup> It is significant that the Minnesota statutory provisions governing the payment of restitution in criminal proceedings specifically provide that restitution can be awarded for expenses incurred by a parent to recover custody of a child who was the victim of the crime of depriving another of parental rights.<sup>165</sup> However, whether a left-behind parent will be able to claim compensation under restitution schemes in other states that do not make such specific provisions depends on the scope of those

---

159 The civil court may also decide not to reduce the compensation awarded in the criminal proceedings. See *Permission for Crim. Appeal 9727/05 Gliksmann v. State*, Tak-EI 07(3) 2033 (2007) (Isr.). See also CF (Jer) 1751/96 *Gross v. Paz-Gaz* (May 26, 2002) (Isr.) (unpublished), §§ 52–55 (reducing the compensation awarded in the criminal proceedings).

160 *United States v. Cummings*, 281 F.3d 1046 (9th Cir. 2002).

161 The court noted that no expenses had been awarded to the mother by the German court which heard the Hague case. The implication is that if the Hague court does award such expenses/compensation (provided for under art. 26 of the AC), then an award would not be made pursuant to a later criminal prosecution because this would result in duplication of expenses.

162 18 U.S.C. § 1204 (2006). It should be noted that this Act also provides remedies for the left-behind parent to reacquire the child, mostly in cases involving countries with which the U.S. has criminal extradition treaties.

163 *Cummings*, 281 F.3d at 1052.

164 *State v. Maidi*, 537 N.W.2d 280 (Minn. 1995).

165 MINN. STAT. ANN. § 609.26 subdiv. 4 (West 2011).

schemes. For example, it is not clear whether compensation could be claimed under the Connecticut scheme which only applies where a person is convicted of an “offense that resulted in injury to another person or damage to or loss of property.”<sup>166</sup>

As to the left-behind parent as a victim of the offense, an analogy might be drawn with an Israeli case in which a man who killed his wife was ordered, within the framework of criminal proceedings, to pay compensation to the children. The court recognized the children as direct victims of the murder who suffered both financially and emotionally, even though the wife was clearly the most immediate victim thereof.<sup>167</sup> This decision provides support for the claim that the left-behind parent should also be treated as a victim of the child abduction, even though it is more natural to see the child as the main victim of the abduction.

### **B. Advantages**

There are several arguments in favor of the criminal model. The first advantage relates to the issue of the moral blameworthiness of the abductor. In most countries, criminal charges are not brought routinely against abducting parents, but only in cases where there are exacerbating circumstances, such as repeated offenses.<sup>168</sup> Furthermore, since there is discretion as to whether to prosecute, the social background to the abduction will be taken into account by the prosecution authorities. Thus, there is little risk that an abductor who is not morally blameworthy will have to pay compensation.

Secondly, under this model the left-behind parent will be able to obtain compensation without having to institute separate legal proceedings. This has a few advantages: there is no need to prove separately the facts relating to the abduction; the left-behind parent will not have to finance the legal proceedings, since the criminal prosecution is brought by the State; this model may be used even where it is not possible to recover the child

---

<sup>166</sup> CONN. GEN. STAT. ANN. § 53a-28(c) (West 2011). *Cf.* FLA. STAT. ANN. § 775.089(1)(a) (West 2011) (providing for payment of damage or loss caused directly or indirectly by the defendant's offense).

<sup>167</sup> Serious Crimes File (TA) 1178/02 State v. Yair (Apr. 30, 2004) (unpublished) (Isr.), approved in CrimA 7033/04 Yair v. State (Sept. 11, 2006) (unpublished) (Isr.).

<sup>168</sup> In Israel, the Public Prosecutor issued unpublished guidelines which state the parents should only be prosecuted for abducting their children where there are exceptional circumstances. CAL. PENAL CODE § 278.7(a) (West 2011) provides a defense to a custodial parent who abducts his child where he held “a good faith and reasonable belief” that if the child was left with the other person the child would “suffer immediate bodily injury or emotional harm.” *See* People v. Neidinger, 146 P.3d 502 (Cal. 2006).

from the place of refuge;<sup>169</sup> and there is no direct confrontation between the parents in the proceedings to recover compensation as there is in the tort model, since criminal proceedings are conducted by the State. Therefore, there may be less damage to the harmony that can be achieved between the parties for the sake of the child. However, it should be taken into account that where the criminal proceedings are brought pursuant to a complaint brought by the left-behind parent or where that parent testifies against the abductor, this very fact is likely to prejudice the chance of harmonious relations between the parties. Thus, the apparent advantage of avoiding direct litigation between the parties may well be illusory.

Thirdly, since the compensation is dealt with as part of the criminal proceedings, there will not be prolonged litigation between the parties.<sup>170</sup> Indeed, it is important that the model is to be implemented in a way that the proceedings are not significantly prolonged. The purpose is not to combine different actions but to deal with compensating the left-behind parent as an appendix to the criminal procedures that take place anyway.<sup>171</sup>

Fourthly, this model may provide more certainty. Statutes governing restitution in criminal proceedings often define what heads of expenses or damages can be recovered and this will reduce the problem of uncertainty. Similarly, a ceiling on the amount to be awarded provides some degree of certainty.

### C. Disadvantages

The most prominent problem with the criminal model is the rarity of the proceedings. In many countries, parents who abduct their children are not often prosecuted, largely in order to avoid harming the child further.<sup>172</sup> In particular, parents are usually not prosecuted where the child is returned fairly quickly, whether voluntarily or as a result of a court order.

169 Recovery might be impossible because the requested country refuses to return the child under one of the exceptions in the AC or because the country of refuge is not a party to the AC.

170 This assumes that criminal cases are determined relatively quickly. However, in *FamA 1855/08 Plonit v. Ploni* (July 1, 2008), Pador Legal Database (by subscription) (Isr.), where a mother is being prosecuted for the abduction of her son following an order made in AC proceedings, the trial started one year after the date of the alleged offense and has still not been completed more than eighteen months later.

171 Note that for purposes of appeals it is important that the two decisions have a status of a final judgment (or at least a partial judgment) and not an interim decision; this is in order to enable an appeal as of right and not by permission, since in some countries an appeal as of right is possible only in cases of a final judgment and not in cases of interim decisions.

172 See, e.g., the guidelines of Israel Prosecutor, *supra* note 165; in the U.K., prosecutions can only be brought with the consent of the Director of Public Prosecution and are relatively rare. See ANNE-MARIE HUTCHINSON, RACHEL ROBERT & HENRY SETRIGHT, *INTERNATIONAL PARENTAL CHILD ABDUCTION* 187 (1998).

Also, there are some countries, such as Australia, where abduction by a parent is not *per se* a criminal offense.<sup>173</sup> Thus, in most cases there will not be any criminal proceedings within which the left-behind parent can claim compensation. Accordingly, this model will do little to promote the tort law and AC objectives of restoration of the status quo through compensation, deterrence, distributive justice, and corrective justice between the parties which are promoted by the tort model and the contract model. Thus, even if this model has some advantages, in most cases it is impractical. However, there is no reason why this model could not be used in cases where there are criminal proceedings alongside another model for cases where there are no such proceedings.

Another problem with the criminal model, at least as it is implemented in some countries, is that the compensation which is ordered by the criminal court is discretionary.<sup>174</sup> Therefore, there will be cases in which there will be no compensation at all. In such cases, the goals of tort law are not satisfied. In addition, the discretion creates uncertainty.

Similarly, the limited amount of compensation, at least in some countries, means that in practice, this model does not satisfy the compensation objective and will not always avoid the need for a separate civil action. However, in view of the fact that very few left-behind parents initiate such actions, the limited compensation received in criminal proceedings is clearly preferable to not receiving any compensation.

## V. The Compensation via the Abduction Convention Proceedings Model (The AC Model)

### A. Presenting the Model

Article 26(4) of the AC provides that the court hearing the application for return of the child under the AC may, “where appropriate, direct the person who removed or retained

173 HUTCHINSON ET AL., *supra* note 172, at 6. Under Australian law, however, removal of a child from the jurisdiction in breach of an Australian court order or where proceedings are pending is a criminal offense where the abductor was a party to those proceedings. Family Law Act, 1975, §§ 65Y(1), 65Z(1), *available at* [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/).

174 *See, e.g.*, § 77 of the Israeli Penal Law, 5737-1977, SH No. 864 p. 226; MINN. STAT. ANN. § 609.26 subdiv. 4 (West 2011); and the Powers of Criminal Courts (Sentencing) Act, 2000, § 130 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2000/6/contents>. In some jurisdictions, however, the victim appears to have a right to compensation. *See, e.g.*, N.J. STAT. ANN. § 2C:13-4(f)(1) (West 1995) (“[A] person convicted [of interference with custody] shall make restitution of all reasonable expenses and costs, including reasonable counsel fees, incurred by the other parent in securing the child’s return.”); WASH. REV. CODE ANN. § 9A.40.080(1) (West 1995) (“Any reasonable expenses incurred in locating or returning a child shall be assessed against a defendant convicted [of custodial interference].”).

the child . . . to pay necessary expenses incurred by or on behalf of the applicant including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant and, those of returning the child.”<sup>175</sup> It is important to emphasize that the power to award payment of expenses under the AC only applies where a return order is made<sup>176</sup> and that the award is restricted to reimbursement of necessary expenses and does not include other financial or non-financial losses.

In the United States, art. 26(4) has been enacted in section 11607(b)(3) of the International Child Abduction Remedies Act [ICARA].<sup>177</sup> Section 11607(b)(3) of that act provides that “[a]ny court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.”<sup>178</sup>

The purposes of ICARA’s fee-shifting provision is “to restore the applicant to the financial position he or she would have been in had there been no removal or retention” as well as “to deter such conduct from happening in the first place.”<sup>179</sup> It will be noted that while this provision purports to implement art. 26(4) of the AC, it in fact makes a substantive change. Under art. 26(4), the court has the discretion where it thinks it appropriate to order reimbursement of expenses. ICARA reverses the burden of proof and provides that the court shall make the order unless the abductor shows that it is clearly inappropriate to do so. In the following discussion, our reference to the AC model refers to that in the Convention. We will be considering in more detail the advantages of the ICARA version of the model in Part VI.

Perusal of the case law in which this provision was implemented shows that while in some cases only legal costs are awarded,<sup>180</sup> there are cases where other expenses were

---

175 AC, *supra* note 2, art. 26(4).

176 *Id.*

177 42 U.S.C. § 11607(b)(3) (2006).

178 *Id.*

179 *Neves v. Neves*, 637 F.Supp. 2d 322, 339 (W.D.N.C. 2009) (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10511 (Mar. 26, 1986)). *See also* Sullivan v. Sullivan, No. CV-09-545-S-BLW, 2010 WL 1651994, at \*1 (D. Idaho Apr. 21, 2010).

180 *See, e.g., Sanchez v. Caro*, No. 09-61376, 2009 U.S. Dist. LEXIS 123152 (S.D. Fla. Dec. 18, 2009).

allowed, including travel and accommodation costs<sup>181</sup> and telephone and fax expenses.<sup>182</sup>

In countries other than the United States, the power to award expenses seems to be used less frequently.<sup>183</sup> Art. 26(4) has also been enacted in Australia by regulations which provide specifically that the court may make an order directing the abductor to pay any necessary expenses incurred by or on behalf of the applicant, including: (a) travel expenses, (b) costs incurred in respect of locating a child, (c) costs of legal representation of the applicant and (d) costs incurred in relation to the attendance by the child or an interested party at a family consultant for the preparation of a report by that consultant.<sup>184</sup> Indeed, the applicant father in the Israeli case of *Dr. Z.M.* had been awarded the costs of traveling to and staying in Australia during the AC proceedings there.<sup>185</sup> However, we have not been able to locate other Australian cases in which such costs have been awarded.

In the United Kingdom, it is extremely unusual for any expenses, even legal costs, to

---

181 *E.g.*, *Neves*, 637 F.Supp. 2d 322; *Aldinger v. Sedler*, 338 F. Supp. 2d 296, 298–299 (D.P.R. 2004).

182 *E.g.*, *Freier v. Freier*, 985 F.Supp. 710, 713 (E.D. Mich. 1997); *Berendsen v. Nichols*, 938 F. Supp. 737, 739 (D. Kan. 1996).

183 A caselaw search on the International Child Abduction Database (HCCH, INCADAT, <http://www.incadat.com> (last visited July 28, 2011)) of case summaries in which the word “expense” appeared produced only six cases in which there was a reference to expenses being awarded against the abductor. From the INCADAT summary, it is not usually possible to ascertain what expenses were awarded, although one French case mentioned only the costs of the child’s return. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Niort, January 9, 1995, [INCADAT cite: HC/E/FR 63]. Of the other cases, three were from the United States, one was from Finland, and one was from Spain. A further INCADAT search for cases in which article 26 is mentioned produced 29 results, of which half were Swiss cases. Unfortunately, many of the summaries did not reveal how article 26 had been relied upon. Those cases which did explain how article 26 had been applied can be divided into three groups: those that ordered the abductor to pay the costs of return of the child, those that ordered the abductor to pay the legal costs incurred by the left-behind parent, and those which referred to entitlement to legal aid. None of the summaries gave any indication that the abductor had been ordered to pay non-legal expenses of the left-behind parent. It is suggested that the fact that so few cases reported in INCADAT mention expenses or article 26 shows that expenses other than legal costs are not widely awarded, even taking into account the caveats that INCADAT is not fully representative of all the relevant case law, that some summaries may not mention expenses even where they were awarded, and that it is likely that in some jurisdictions, decisions about expenses are made after the decision to return the child. In fact, the first search produced nine cases in which the left-behind parent undertook or was ordered to pay the travel expenses of returning the child.

184 *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 30 (Austl.).

185 *FamC (TA) 42273/99 Dr. Z.M. v. R.M.P.* (Aug. 9, 2005) (unpublished) (Isr.); *In the Matter of the Child: Ariel Madjar* (Unreported, Family Court of Melbourne, 12 Nov. 2002) NO. ML 9066X of 2000 (Austl.).

be awarded to the left-behind parent.<sup>186</sup> Indeed, in the Israeli case of *Plonit*,<sup>187</sup> the applicant father stated that his lawyer in England had advised him not to claim expenses in the AC proceedings there because this would not be to his advantage in trying to recover the child.<sup>188</sup> This advice would seem to reflect the policy of the U.K. courts not to award expenses. However, we did find one case in which Wood J., expressly referring to article 26(4), ordered all the costs mentioned therein on the basis that he could see no reasons why the “father, who has caused all these proceedings and this anxiety and trauma to the mother should not pay the costs.”<sup>189</sup>

In Israel, we are aware of a number of cases in which some expenses were awarded to the left-behind parent in addition to legal costs.<sup>190</sup> In general, it is difficult to obtain a complete and accurate picture of what expenses are awarded because this issue is often dealt with after the main case and is not reported anywhere.<sup>191</sup>

---

186 EC-L v. DM (Child abduction: Costs) [2005] EWHC 588 (Fam.) [64] (Eng.) (stating that an order for costs of in AC proceedings is “very rare”). The attitude of the U.K. courts can also be seen in *Re K. (Abduction: Consent)* [1997] 2 FLR 212, available at <http://www.hcch.net/incadat/fullcase/0055.htm>, explaining that it is exceptional to order that parties attend to give oral evidence in AC cases because of a policy of promptly returning children in such a way that the applicant is not put to the trouble and expense of having to travel long distances in order to give evidence. No suggestion is made that the abductor might have to reimburse the travel and other expenses. The rarity of costs of orders in the U.K. has been corroborated by Mr. Scott-Manderson QC, a leading barrister with wide experience of Child Abduction cases in the U.K. E-mails from Marcus Scott-Manderson, QC, to authors (Apr. 10, 2010, Apr. 26, 2010) (on file with authors).

187 Leave for Family Appeal 3241/09 *Plonit v. Ploni* (Oct. 2, 2009) (unpublished) (Isr.).

188 See, e.g., *FamC (Jer)* 15125/02 *Ploni v. Plonit* (Aug. 7, 2008) at 17 (Isr.). Interestingly, however, the English Court has been prepared to exercise its power to freeze the abductor’s funds in order to enable the left-behind parent to initiate proceedings for the return of the child in the country of refuge. *P.M. v. K.H. & Another*, [2010] EWHC 870, [39], available at <http://www.familylawweek.co.uk/site.aspx?i=ed58412>.

189 *Re D (A Minor) (Child Abduction)* [1989] 1 FLR 97 (Fam.) [103] (U.K.).

190 See, e.g., *FamC (Hi)* 15480/00 *D. v. D.* (Nov. 2, 2000) (unpublished) (Isr.) (awarding travel and accommodation costs for the duration of the trial); *FamC (TA)* 5063/97 *Pekan v. Dolberg* (Apr. 16, 1999), Pador legal database (by subscription) (Isr.) (awarding travel and accommodation costs and income lost for the duration of the trial).

191 E.g., *FamC (TA)* 7300/01 *B. v. B.* (Jun. 20, 2001) (unpublished) (Isr.) (stating that the court would make a decision on expenses after the applicant had submitted a declaration listing the expenses claimed). See also *Kufner v. Kufner*, No. 07-46S, 2007 U.S. Dist. LEXIS 37435, at \*4 (D.R.I. May 23, 2007) (stating that there are very few reported cases on fee and expenses petitions under the fee-shifting provision of 42 U.S.C. § 11607(b)(3)).

## B. Advantages

It is perhaps axiomatic that the AC model is consistent with the objectives of the AC, but given the limited use made of this model, it is important to explain why it promotes those objectives. As mentioned above, a primary objective of the AC is restoration of the status quo. While return of the child achieves this objective in relation to the child, it will often leave the left-behind parent in a significantly worse financial position than he was beforehand. Thus, compensating the left-behind parent for his expenses will enhance the achievement of this objective.<sup>192</sup>

Similarly, compensating the left-behind parent ought to increase the deterrent effect of the mandatory return mechanism.<sup>193</sup> One of the rationales behind this mechanism is the hope that if parents who are contemplating abducting their children know that their children will be returned immediately, without giving the parent the opportunity to obtain custody in a best interests hearing in the state of refuge, they will realize that such action is futile.<sup>194</sup> However, while some parents will still feel that they have little to lose by abducting the child,<sup>195</sup> perhaps the prospect of having to reimburse the expenses of the left-behind parent might make them reconsider. Nevertheless, as stated above, it should be borne in mind that the decision to abduct is not always made rationally and thus there are limits on the possibility of deterring abductions.<sup>196</sup>

Furthermore, awarding reimbursement of expenses will further the objective of doing justice between the parents and promote the rule of law since the abductor has to pay the costs of his wrongdoing.<sup>197</sup> It will be remembered that restoration of the status quo, deterrence and corrective justice are also goals of tort law.

An additional and important advantage of the AC model is its discretionary nature, which allows the court to take into account issues of moral blameworthiness and the material

192 See Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10511 (Mar. 26, 1986) (explaining the rationale behind the fee-shifting position of article 26).

193 *Id.*

194 See Pérez-Vera, *supra* note 6, ¶ 16.

195 This can be seen from the statistic quoted above, *supra* note 135.

196 See discussion *supra* Part II.B.

197 In the Australian case of *In the Matter of the Child: Ariel Madjar* (Unreported, Family Court of Melbourne, 12 Nov. 2002) No. ML 9066X of 2000, the judge, when awarding costs, commented: "It is, in my view, a proper order to make as she, by her conduct, and that alone, caused those expenses incurred by the father to be sought by way of recovery."

welfare of the child in deciding whether and to what extent to award reimbursement of expenses. Discretion enables the court to ensure that the objective of corrective justice is indeed fulfilled, by not awarding reimbursement where the left-behind parent is morally blameworthy, and the abductor is not, for example, as in the case of violence or abuse by the left-behind parent. Similarly, discretion enables the court to take into account the interests of the child, which, as we have seen, underpin the AC's mandatory return mechanism. Accordingly, where awarding reimbursement of expenses would cause significant harm to the child, a refusal to make an award would usually be consistent with the AC's objectives. However, it should be borne in mind that the AC protects the interests of children generally and that sometimes a child is returned even though this does not promote his own welfare, in order to maintain the general policy of prompt return of all children. Similarly, in the current context, the fact that an award for reimbursement of expenses does not promote the welfare of the specific child does not necessarily mean that it should not be awarded, provided that it will not cause him significant harm.

In the light of these clear advantages, it would seem necessary to explain why apparently little use has been made of the power under art. 26 to order reimbursement of expenses to left-behind parents. Firstly, it should be pointed out that the Pérez-Vera Explanatory Report, which has been widely referred to by courts interpreting the AC, did not envisage widespread use of the provision and referred to it as "an optional provision" whose "scope is particularly symbolic, a possible deterrent to behavior which is contrary to the objects of the Convention."<sup>198</sup> The Report does not give reasons for this approach, but we suggest that it should be understood in the context of the pre-existing legal situation, under which parental child abduction was not usually considered to be illegal,<sup>199</sup> and in the light of the fact that the drafters saw the mandatory return mechanism as the main method of dealing with the increasing phenomenon of international child abduction.<sup>200</sup> In any event, the half-hearted attitude of the Pérez-Vera Report to article 26(4) would seem to explain why lawyers representing left-behind parents do not routinely make claims under the provision. It may well be that lawyers and judges in some countries are not even aware that there is a

---

198 Pérez-Vera, *supra* note 6, ¶ 136.

199 See generally Adair Dyer, Report on International Child Abduction by One Parent ("Legal Kidnapping"), in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 12 (1978) (discussing the proposal for a Hague Convention on international child abduction).

200 Pérez-Vera, *supra* note 6, at ¶¶ 16–18.

possibility of awarding expenses other than lawyers' fees.<sup>201</sup>

In addition, it should be remembered that the main concern of left-behind parents, who are often in a state of emotional trauma and bewilderment, is return of their child, so they may not give thought to the financial implications at that point in time. This suggestion is supported by the fact that many left-behind parents actually offer to pay for the costs of returning the child, even though the court could clearly require the abductor to do so.<sup>202</sup> Furthermore, courts sometimes make a return order conditional on the left-behind parent undertaking to waive his rights to reimbursement of costs, on the basis that ensuring financial support for the child and custodial parent in the country of origin is necessary in order to prevent return giving rise to a grave risk of harm for the child.<sup>203</sup> In addition, it may be hypothesized that left-behind parents may not put in claims for reimbursement of expenses when they are aware that the court is likely to consider it inappropriate to make an award, for example, because of provocation on his part or because of the impecuniosity of the abductor who is the custodial parent.

In addition, there are reasons which are specific to certain countries. For example, some countries have not implemented article 26(4) into national legislation. In the case of the United Kingdom, the fact that left-behind parents receive State-funded non-means-tested legal aid<sup>204</sup> means that there are no legal costs to recover<sup>205</sup> and the legal aid scheme may also cover the costs of this parent's participation in the legal proceedings, including

---

201 For example, Justice Arbel in *Plonit v. Ploni* expressed the view that the court in the AC proceedings was not in a position to compensate the left-behind parent for his expenses and other damages, apart from legal costs. Leave for Family Appeal 3241/09 *Plonit v. Ploni* (Oct. 10, 2009) (unpublished) at ¶ 5. It is also significant that the provision is not mentioned in PAUL R. BEAUMONT & PETER E. McELEVAY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* (1990), the leading text on the AC.

202 Of course, this may be because waiting for the abductor to fund the travel costs may result in delay in returning the child. However, it may be noted that article 26(1) of the AC, *supra* note 2, provides that the applicant can be required to pay for the travel costs and that in the U.K. it is standard practice for the court to require the applicant to fund the travel costs. E-mail from Marcus Scott-Manderson, QC, to authors (Apr. 20, 2010, Apr. 26, 2010) (on file with authors). *But see* *Re V v. B* [1991] 1 FLR 266 (in which the court ordered that the abducting father pay the travel costs).

203 Comment made by International Academy of Matrimonial Lawyers at the 6th Special Commission Meeting at the Hague, June 3, 2011.

204 *EC-L v. DM* (Child abduction: Costs) [2005] EWHC 588 (Fam.) [43].

205 This may also be the case in other countries where the left-behind parent is represented by the Central Authority or some other Government Agency. *See, e.g., Family Advocate, Cape Town v. Chirume* 2005 (6090/05) ZAWCHC 94 at para. 40, available at <http://www.saflii.org/za/cases/ZAWCHC/2005/94.pdf>.

travel expenses, where he is required to give evidence.<sup>206</sup> In addition, United Kingdom judges tend to treat abduction cases like other family law cases, in which neither parent is seen as winner or loser and so costs are not ordered.<sup>207</sup> With respect, this approach is misconceived. While the main objective of the Abduction Convention is to promote the welfare of the child by returning him promptly to the country of origin, a return order is also seen as doing justice between the parents and thus there is no reason why an order for the return of the child should not be seen as success for the wronged left-behind parent. Furthermore, the concern that a parent might not participate in proceedings concerning his child for fear of a costs order against him is not relevant here as the abductor does not have any choice but to participate, unless he is prepared to return the child voluntarily.

In our view, none of the suggested explanations for the rarity of orders for reimbursement of expenses under article 26(4) can be seen as providing a good and generally applicable reason for not awarding such expenses or as indicating that requiring the abductor to compensate the left-behind parent is *per se* inconsistent with the objectives of the AC.

There are also a number of procedural advantages to the AC model. The fact that compensation can be awarded as part of the AC proceedings avoids duplication of proceedings. Much of the evidence presented and findings of fact made for purpose of return proceedings will also be relevant to the issue of compensation. Thus, by avoiding the need for separate tort or contract proceedings, the costs will be reduced for both the parties and legal system.

In addition, since the compensation is determined as part of the AC proceedings, the claim for compensation will not significantly increase the interference in the family unit caused by the AC application itself. Furthermore, since the compensation claim is decided at the same time or shortly after the return application, that claim ought not to cause prolonged acrimony between the parties.

### C. Disadvantages

The discretionary nature of the AC model together with the limited heads of damage available under that model mean that in some cases the left-behind parent will not recover all of the loss caused to him by the abductor. Lack of compensation and even partial

206 E-mails from Marcus Scott-Manderson, QC, to authors (Apr. 20, 2010, Apr. 26, 2010) (on file with authors). Similarly, the German legal aid scheme will cover the travel and associated costs of the left-behind parent. A member of German delegation, Remarks at the 6th Special Commission Meeting at the Hague (June 3, 2011) (on file with authors).

207 EC-L v. DM (Child abduction: Costs) [2005] EWHC 588 (Fam.) [60].

compensation are inconsistent with most of the goals of tort law: compensation, corrective justice, and deterrence.

In addition, while we saw above that the AC model is consistent with the main AC objectives of restoring the status quo and corrective justice, the need to consider whether compensation should be awarded and to quantify the compensation seems inconsistent with the summary nature of AC proceedings. In particular, it may be necessary to hear oral evidence and allow for cross-examination where the abductor disputes the liability or measure of compensation on the basis of lack of or limited moral blameworthiness or claims that an award will cause harm to the material welfare of the child. However, it should be remembered that in cases in which the abductor claims exemption from liability to pay compensation on the basis of violence or other problematic behavior by the left-behind parent, these allegations are invariably brought in an attempt to establish the article 13(1)(b) defense of grave risk of harm. Thus, much of the evidence required to determine the compensation issue may already be before the court.<sup>208</sup>

A further possible problem with the AC model is that the state of refuge does not seem to be the appropriate forum for determining liability between two parents who are both residents of a different state. For example, evidence about the background to the abduction will usually be in the state of origin and there may be language differences which require translating receipts and other documents. More substantively, the parties would naturally expect that litigation between them would be in the country where they resided together. As we saw above, one of the rationales for the principle of mandatory return is so that the custody dispute can be litigated in the *forum conveniens*, the country of origin.

Nonetheless, it should be remembered that efficiency and the desire to avoid split proceedings are important considerations in determining the *forum conveniens*.<sup>209</sup> In addition, when the abductor chose to abduct the child to a foreign country, he clearly took the risk that legal action would be taken against him in that country by the left-behind parent and there is no reason such legal action should be limited to the question of the return of the child and not cover the left-behind parent's claim to be compensated for the

208 Courts in AC proceedings may nevertheless avoid determining whether the allegations are true, preferring to put in place measures designed to protect the returning child in the event that they are true. See, e.g., Re E, [2011] UKSC 27, [52] (appeal taken from Eng.) (U.K.), available at <http://www.bailii.org/uk/cases/UKSC/2011/27.html> (stating that when allegations can neither be tried nor verified objectively, the focus should be on reducing the risk of harm to the child); *Family Advocate, Cape Town v. Chirume* 2005 (6090/05) ZAWCHC 94 at para. 32 (S. Afr.).

209 See, e.g., MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE: A COMPARATIVE AND METHODOLOGICAL ANALYSIS OF ANGLO-AMERICAN LAW 209–11 (2004); CA 3144/03 Elbeet v. Jarefuah Servico 2003(2) Tak-El 3342 [2003] (Isr.).

losses suffered as a result of the abduction and need to seek return of the child.<sup>210</sup>

Finally, it should be remembered that globalization has led to a reduction in the use of the doctrine of *forum conveniens* and that in many cases there may be more than one forum which is appropriate for the trial of the case.<sup>211</sup> The situation under discussion would seem to be such a situation.

An additional difficulty which might appear to arise under the AC model is that of enforcing the compensation award in the country where the abductor now lives if it is not the requested state.<sup>212</sup> However, under principles of private international law, a foreign court is usually considered to have international jurisdiction where the defendant is resident in the country where the case is heard at the commencement of the proceedings or submits to that court.<sup>213</sup> Since the abductor is invariably a resident in the country of refuge when the proceedings are commenced and, in addition, usually actively defends himself in those proceedings, there should not be a problem in enforcing the decision in other countries where the abductor has assets.

## VI. The Preferred Model: Principles and Proposed Amendments to the AC Model

### A. The Preferred Model: Comparison of the Models

We have presented four possible models for compensating the left-behind parent and analyzed the advantages and disadvantages of each model. We show that the tort model, which has been adopted in Israel, is consistent with the goals of tort law. However, the model suffers from a number of pitfalls, largely resulting from the need to conduct separate litigation, which is likely to be prolonged and to have a detrimental effect on the relations between the parties and the children and so might not be consistent with the fundamental principle of the welfare of the child. In addition, there is limited scope for taking into account issues of moral blameworthiness and the material welfare of the child. The contract model suffers from the same pitfalls, and can be used only if the parties made an agreement

210 Prejudice to the defendant is one of the bases of the doctrine of *forum non conveniens*.

211 See, e.g., KARAYANNI, *supra* note 209, at 4–9; Permission for CA 2705/97 Hageves A. Sinai (1989) Ltd. v. The Lockformer Co., 52(1) PD 109 [1998] (Isr.) (allowing service abroad on the American defendant, despite a choice of law clause in favor of Illinois, because it had not been shown that Israel was not also an appropriate forum for the trial of the dispute).

212 This might be necessary when the abductor does not have assets in the requested state.

213 JAMES FAWCETT, JANEEN CARRUTHERS & PETER NORTH, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 517–22 (14th ed. 2008).

regarding custody and visitation. While the criminal model solves some of the problems present in the tort and contract models, it is of limited value because criminal proceedings are rarely brought against parents who abduct their children. However, it can be used when the abductor was indeed convicted in criminal proceedings.

The AC model is consistent with the objectives of the AC and with some of the goals of tort law. In addition, this model overcomes many of the disadvantages of the other models. In particular, it avoids all of the problems caused by the need to conduct separate litigation because the AC proceedings are taking place in any event. In addition, the discretionary nature of the model allows the court to take into account issues of moral blameworthiness and the material welfare of the child. On the other hand, the discretionary nature of the model and the fact that it restricts compensation to recovery of necessary expenses in cases where return is ordered mean that this model is not fully consistent with some of the principle goals of tort law. In addition, the unfettered discretion creates uncertainty.

The above analysis leads us to conclude that the advantages of the AC model outweigh the advantages of the other models and that its disadvantages are less fundamental than the disadvantages of the other models. Accordingly, the AC model is the preferred model. In the next section, we will consider what clarifications, amendments and additions could be made to the AC model in order to minimize its disadvantages. At the outset, it should be pointed out that while full implementation of the proposed model would involve amending article 26(4) in a protocol to the AC,<sup>214</sup> there is no reason why courts cannot unilaterally adopt most aspects of the proposed model by exercising the discretion conferred on them by that article in accordance with the amendments and additions set out below.<sup>215</sup> Furthermore, some uniformity could be achieved by publishing the model as guidelines in one of the Hague Conference's Good Practice Guides.<sup>216</sup>

---

214 In relation to the possibility of a protocol to the AC, see PERMANENT BUREAU, CONSULTATIONS ON THE DESIRABILITY AND FEASIBILITY OF A PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2011), available at <http://www.hcch.net/upload/wop/abduct2011pd07e.pdf>.

215 The main limitations would be that there does not seem to be any power to award compensation where return is not ordered and that compensation is limited to reimbursement of expenses. In some countries, however, general national legislation may confer such powers. In any event, these limitations could be overcome by national legislation extending the power in article 26(4), AC, *supra* note 2.

216 HCCH, *Publications*, HAGUE CONF. ON PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2781](http://www.hcch.net/index_en.php?act=publications.details&pid=2781) (last visited June 10, 2011).

## **B. Proposals to Extend and Amend the AC Model**

### **1. The Nature of the Court's Power**

As we noted above, the main disadvantages of the AC model stem from its discretionary nature. Indeed, this would seem to be the main reason that it is not widely used. On the other hand, we also saw that any model which requires compensation to be awarded without allowing the court discretion is liable to run afoul of other parameters, such as the need to protect the material welfare of the child. Accordingly, it is necessary to find an intermediate model which is consistent with compensatory principles and yet has enough flexibility to allow other considerations to be taken into account.

The ICARA model, which provides that an award should be made unless the abductor shows that it is clearly inappropriate, seems to satisfy these criteria. This model effectively imposes the burden of showing why an award should not be made or why the amount to be paid should be reduced on the abductor and makes the court's discretion to refuse or limit compensation subject to a duty to provide reasons. We think that this approach of making an award of compensation mandatory, subject to certain exceptions which involve the exercise of judicial discretion, is the correct balance.<sup>217</sup>

However, in our view, it is necessary to define the exceptions more concretely, so as to give the court clearer guidance and to decrease uncertainty. Below, we consider the appropriate formulation. Similarly, it is necessary to clarify that the court has discretion to refuse or reduce an overall award or to refuse or reduce a particular head of damage. In either case, of course, it will have to provide reasons.

Finally, it should be noted that while our proposed model is based on ICARA's approach of requiring the court to explain why it is refusing or limiting an award, other characteristics of the proposed model, such as the range of compensation and the bases for exercise of discretion, are novel.

### **2. The Two-Stage Proposal**

Article 26(4) of the AC does not discuss the stage at which the court should make a determination concerning reimbursement of expenses, so each court is free to decide for itself. We think that the compensation provision should make it clear that when the time

---

<sup>217</sup> Of course, an award will only be made if the left-behind parent requests compensation. It is to be expected that some left-behind parents will waive their right to compensation in the hope that this will facilitate the making of a return order.

required to determine the award of expenses and damages could be lengthy, for example because additional evidence is required, it should divide the proceedings into two stages; the court should first make a decision as to the return of the child and then subsequently turn to the compensation issue.<sup>218</sup> This approach ensures that there is no delay in returning the child and preserves the summary nature of the return proceedings.

While the continuation of the proceedings after the return of the child may not be very convenient if the abductor returns with the child, it is still preferable to starting a new and separate action.

### 3. Award of Compensation in Cases of Refusal to Order Return

Currently, the power to award payment of expenses under article 26(4) of the AC only applies where a return order is made. However, we suggest that the fact that return is refused because one of the exceptions to mandatory return applies is not per se a reason for denying compensation. In particular, the abductor may well still have been in breach of a statutory duty or a contractual obligation or have been negligent at the time of the removal or retention, even if he is subsequently able to resist returning the child by establishing one of the exceptions. Most of the exceptions relate to the situation at the time of the hearing and thus the establishment of an exception does not necessarily negate the liability of the abductor for his breach of the custody rights of the left-behind parent. In addition, the left-behind parent who does not succeed in recovering his child will incur the same costs<sup>219</sup> and suffer the same damage as the parent that does succeed. Furthermore, he will invariably incur additional travel costs in order to visit the child in the country of refuge and will suffer continued emotional distress as a result of the impact of the abduction on his relationship with the child and in particular the significantly reduced contact with the child.<sup>220</sup>

---

218 In a number of the U.S. cases, the issue of an award for expenses under the fee-shifting provision was decided a considerable time after the decision to return the child. *See, e.g.,* Silverman v. Silverman, No. 00-2274, 2004 U.S. Dist. LEXIS 18439 (D. Minn. Aug. 26, 2004) (where children were returned in September 2003, and the decision regarding expenses was not issued until August 2004); Hirts v. Hirts, No. 03-CV-03156, 2004 U.S. Dist. LEXIS 13512 (D. Pa. 2004) (return order in July 2003 and costs ordered in July 2004). *See also* FamC (TA) 7300/01 B. v. B. (June 20, 2001) (unpublished) (Isr.), (stating upon ordering the return of the child that the judge would later hear the parties pleadings about the expenses).

219 If he has appealed unsuccessfully, his costs will be even greater.

220 One may say that non-custodial parents suffer from this in all or most cases of separation where the parties do not live close to each other, and the law does not recognize any right to compensation. On the other hand, in most cases this harm is not caused by a tortious action.

Moreover, just as application of the AC does not *per se* indicate moral blameworthiness,<sup>221</sup> the fact that one of the exceptions can be established does not *per se* indicate the absence of moral blameworthiness. While some of the exceptions do seem to express a lack of moral blameworthiness on the part of the abductor,<sup>222</sup> this is by no means always the case, especially where the exception applies because of facts occurring after the abduction and where the exception is based on the interests of the child.<sup>223</sup> Thus, the question of the relevance of moral blameworthiness, which will be discussed below, is separate from the question of whether one of the exceptions can be established.

#### 4. Heads and Measure of Damages

The current AC model restricts the compensation available to reimbursement of necessary expenses. We think that this formulation is too limited and that it is necessary to clearly set out what heads of damages should be available and the criteria for quantifying the damage.

Some of the heads of damages should clearly be recognized: the costs of locating the

---

221 See *supra* Part I.D.

222 This would be the case, for example, where the reason that return will cause harm to the child is that the left-behind parent presents a danger to the child, or where the left-behind parent was not exercising his custody rights at the time of the abduction.

223 Some of the exceptions may be seen as recognizing moral justification for the abduction, such as the fact that the left-behind parent had not been exercising his custody rights or consented to the removal or retention. Furthermore, where the child was at risk of harm before the removal, the grave risk exception effectively justifies the abductor's behavior. However, where the grave risk arises from factors which arose after the removal, the application of the exception gives expression to the overriding consideration of the child's safety and does not in any way detract from the moral blameworthiness of the abductor. This is one reason why courts interpret the grave risk exception so narrowly and, where at all possible, will order return subject to undertakings designed to protect the child rather than reward the abductor. For example, in FamA 1855/08, *Plonit v. Ploni* (July 1, 2008), Pador Legal Database (by subscription), the Israeli court recognized that the fact that the child had not seen the father for four years and had been living an ultra-orthodox Jewish life would mean that his return alone to his non-Jewish father in Belgium would expose him to a risk of psychological damage. However, stating expressly that the mother was responsible for creating this situation, return was nevertheless ordered, subject to a variety of conditions.

child, travel expenses, accommodation expenses, and legal costs.<sup>224</sup> However, there are other heads of financial damage which are less direct, such as loss of earnings because of the need to travel and telephone expenses while abroad, and non-financial damage, such as emotional distress and lack of joy and happiness, about which there is less likely to be consensus. In particular, it should be borne in mind that different countries have different approaches to these issues.

We would suggest that the criteria both for determining which heads are available in relation to financial damages and for quantifying the damages should be that of reasonableness and necessity,<sup>225</sup> but these criteria should not be interpreted too strictly. For example, reasonable investigative expenses incurred in locating the child should be recoverable,<sup>226</sup> but the costs of constant surveillance of the abductor to prevent her from fleeing during the trial should not be treated as necessary expenses.<sup>227</sup> The left-behind parent's expenses incurred in attending the AC proceedings should be recoverable,<sup>228</sup> even if he is not required to give evidence in those proceedings. While it could be argued that his presence is not strictly necessary, it is perfectly reasonable for him to want to be at the hearing which determines the fate of his child and in the outcome of which he has such a strong personal interest.<sup>229</sup> Similarly, it seems to us that proven loss of earnings<sup>230</sup> or other necessary expenses, such as childcare for his other children during the period of the

---

224 Legal fees have been awarded even where counsel for the left-behind parent acted pro bono. *Cuellar v. Joyce*, 603 F.3d 1142 (9th Cir. 2010). In the Israeli case of FamC (TA) 26091/09 *G.M. v. Sh.K.* (Nov. 5, 2009), Nevo Legal Database (by subscription), the abductor was ordered to reimburse the state where the left-behind parent had received state legal aid. *But see* FamA (CT) 36054-01-11 A.Y. v. D.Y. (Jan. 25, 2011) Nevo Legal Database (by subscription) (Isr.) (in which the court ordered no costs because the left-behind parent was legally aided). Any reimbursement of legal or other costs will of course be reduced by any financial assistant provided to the left-behind parent by the requested state, as in *Maynard v. Maynard*, No. 07-10155, 2007 WL 1869253, at \*2 (E.D. Mich. June 28, 2007), in which the left-behind parent had received a grant of \$17,000 from the Government of Australia.

225 This is the standard adopted by the U.S. courts in caselaw under ICARA (International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (2006)). *See, e.g.,* *Neves v. Neves*, 637 F.Supp. 2d 322 (W.D.N.C. 2009).

226 *See, e.g., id.*

227 *Kufner v. Kufner*, No. 07-46S, 2007 U.S. Dist. LEXIS 37435, at \*3 n.1 (D.R.I. May 23, 2007).

228 This is not true, of course, if they have been covered.

229 This was the approach taken in Leave for Family Appeal 3241/09 *Plonit v. Ploni* (Oct. 2, 2009) (unpublished) (Isr.).

230 We only found one case where this head of damage was mentioned: FamC (TA) 5063/97 *Pekan v. Dolberg* (Apr. 16, 1999), Pador Legal Database (by subscription) (Isr.).

trial, should normally be recognized. A question which arises is whether, where the AC proceedings are drawn out and the left-behind parent travels in order to see the children, reasonable travel expenses should be recovered.<sup>231</sup> We would suggest that such expenses are a direct result of the original abduction and so should be recoverable. However, under this model it would not be possible to claim reimbursement of future expenses, such as psychological treatment.<sup>232</sup>

In relation to quantification, the issue of which expenses are reasonable is a question for the court's discretion and may depend to some extent on what the norm is in each country.<sup>233</sup> We suggest that it is usually reasonable to claim the costs of a basic hotel<sup>234</sup> and that the left-behind parent should not be required to stay with family or friends of the abductor, but this might be different where he has close family of his own who live in the local area. Whether taxi fares<sup>235</sup> or the cost of renting a car<sup>236</sup> can be claimed or only the costs of public transport may depend on the local circumstances. Where the latter would considerably increase the length of the journey or is particularly inconvenient, it would be reasonable to take taxis or rent a car, but where there is direct and efficient public transport, this might be considered unreasonable. Similarly, necessary telephone calls both for the

---

231 In *Aldinger v. Sedler*, 338 F. Supp. 2d 296, 298–99 (D.P.R. 2004), travel costs other than those incurred in order to attend the evidentiary hearing were not allowed as they were not necessary for resolution of the matter.

232 Cf. *Lebiedzinsky v. Crane*, No. A03-0248 CV (JKS), 2005 U.S. Dist. LEXIS 45787, at \*11 (D. Alaska Apr. 13, 2005) (allowing payment incurred for counseling for the child who was traumatized by the proceedings).

233 Most of the U.S. cases relate mainly to the reasonableness of legal fees. See, e.g., *Neves v. Neves*, 637 F.Supp. 2d 322 (W.D.N.C. 2009); *Sullivan v. Sullivan*, No. CV-09-545-S-BLW, 2010 WL 1651994 (D. Idaho Apr. 21, 2010). But see *Lebiedzinsky*, 2005 U.S. Dist. LEXIS 45787, at \*10–11 (awarding expenses for work done by paralegals and clerks which is not usually allowed so as to better achieve the restorative and deterrence objectives of the AC and ICARA). In addition to the lawyers' hourly charge, other necessary costs involved in the trial may be allowed. See, e.g., *Cuellar v. Joyce*, 603 F.3d 1142, 1143–44 (9th Cir. 2010) (awarding travel and accommodation expenses of lawyer and the cost of shipping briefs); *Kufner v. Kufner*, No. 07-46S, 2007 U.S. Dist. LEXIS 37435, at \*9 (D.R.I. May 23, 2007) (allowing translations and costs of expert witness even though these witnesses did not ultimately testify at the trial because, in the light of the abductor's allegations, it was necessary to act quickly and it was not possible to foresee that their testimony would not be required).

234 See, e.g., *Antunez-Fernandes v. Connors-Fernandes*, 259 F.Supp.2d 800, 816–17 (N.D. Iowa 2003); *Berendsen v. Nichols*, 938 F.Supp. 737, 739 (D. Kan. 1996); *Neves*, 637 F.Supp. 2d at 344. But see *Whallon v. Lynn*, No. Civ.A. 00-11009-RWZ, 2003 WL 1906174, at \*3 (D. Mass. Apr. 18, 2003) (holding that there was no justification for the first class airline ticket and expensive hotel stay).

235 Cab costs of \$110 were allowed in *Neves*, 637 F.Supp. 2d at 344.

236 Car rental costs were allowed in *Lebiedzinsky*, 2005 U.S. Dist. LEXIS 45787, at \*11.

purpose of giving instructions to the lawyer in the court of refuge before the trial<sup>237</sup> and while attending the trial could be covered,<sup>238</sup> but the left-behind parent would be expected to make use of the cheapest packages.

The aspect of heads of damages which we find most problematic is whether compensation can be claimed for emotional distress. On the one hand, emotional distress, as part of non-financial damage, cannot be proven as easily as the sort of financial loss described above. However, emotional distress in the abduction situation is common and reasonably foreseeable and therefore, in principle, ought to be compensated. A possible compromise is to provide a fixed and modest sum for emotional distress in all cases, subject to the court's discretion to disallow this head of damage. This would avoid the difficulty of proving emotional distress while providing some recognition of the need to compensate for this damage. However, the difficulty with this pragmatic suggestion is that it is not consistent with the principle of compensation, since some left-behind parents would be under-compensated and others would be over-compensated, but it may be the best option available.

Finally, the left-behind parent, like any other person claiming compensation, should be under a duty to mitigate his loss and so where the damage he suffers is increased as a result of his own delay in taking action to recover the child, the abductor cannot be held liable for the additional cost. An extreme example would be where, as a result of the left-behind parent's delay, more than twelve months have passed and the child has become settled in his new environment and thus the exception in article 12(2)<sup>239</sup> is established and return is not ordered. While the abductor would seem to be liable for the costs involved in trying to recover the child, any additional costs or damage resulting from the fact that the child is not returned should not be recoverable.

So, we suggest that the AC model should have fixed heads of damage, but, as explained above, the court should have discretion; that is, if it decides not to award a particular head or to reduce the sum awarded for that head, it must justify that decision.

## 5. How to Take into Account Lack of Moral Blameworthiness

As mentioned above, in a significant number of cases, the abduction occurs as a response to violence, abuse or other provocative behavior on the part of the left-behind

237 See FamC (TA) 26313/97 Dagan v. Dagan [1997] Dinim Mishpaha A 139 (Isr.).

238 See, e.g., Leave for Family Appeal 3241/09 Plonit v. Ploni (Oct. 2, 2009) (unpublished) (Isr.).

239 AC, *supra* note 2, art. 12(2).

parent. In circumstances such as these, the abductor's conduct can be understood, albeit not condoned. Justice requires that this background be taken into account in determining whether and how much compensation the abductor should pay to the left-behind parent in such a situation.

Furthermore, it should be borne in mind that while the decision of whether to return the child to the left-behind parent or to leave him with the abductor is an all-or-nothing decision, the liability for the loss and damage caused by the wrongful removal can be split between the parties.<sup>240</sup> Indeed, the law of tort itself recognizes the concept of contributory negligence. In principle, therefore, there is no reason why a court could not assess the extent to which the left-behind parent is responsible for the damage he subsequently suffered as a result of the abduction and reduce the compensation to be paid accordingly.

However, while such an assessment may not be difficult in extreme cases of proven violence and abuse, in the majority of cases it will be very difficult for the courts to allocate liability between the parties. Indeed, the difficulty of determining fault within the intimacy of a marital relationship is one of the reasons why most Western countries have abandoned fault grounds for divorce.<sup>241</sup> Furthermore, the very exercise of allocating liability has the undesirable effect of appearing to give a degree of legitimacy to the act of abduction, which would undermine the objectives of the AC.

Thus, it is necessary to find some middle ground which will prevent clear injustice and yet not open up the floodgates to a wholesale and futile investigation into the history of the parties' relationship. We suggested above that the left-behind parent's behavior could reduce the liability of the abductor where that behavior itself amounted to a criminal offense or an actionable tort. Thus, there is effectively a set-off. The liability of the abductor to the left-behind parent is set off by the tortious liability of the left-behind parent to the abductor. However, there may be situations in which the abductor will find it difficult to prove the existence and measure of tortious liability on the part of the left-behind parent and so it would be preferable to provide a list of circumstances in which the abductor's liability to compensate the left-behind parent would be reduced. These could include proven abuse

240 Thus, in most of the reported U.S. cases, in which the Court found a basis for the abductor's claim that it was not appropriate to require him to make an award against him, the award was reduced rather than eliminated completely. See *Silverman v. Silverman*, No. 00-2274, 2004 U.S. Dist. LEXIS 18439, at \*7 (D. Minn. Aug. 26, 2004).

241 FACING THE FUTURE, *supra* note 45, at 16–18. For discussion on the progress toward “no fault” divorce, characteristic of the western world in the 1970s and 1980s (at least as an alternative to fault-based divorce) and on the fault-based regime in torts, see Harry D. Krause, *On the Danger of Allowing Marital Fault To Re-Emerge in the Guise of Torts*, 73 NOTRE DAME L. REV. 1355, 1364 (1998); Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 FAM. L.Q. 745, 746 (1999).

or violence by the left-behind parent or other behavior which the abductor reasonably considered would be harmful to the child. However, since it is difficult to foresee every possible situation in which compensation should be refused or reduced, it is probably necessary to provide the court with wider discretion to refuse or reduce compensation, although this could be limited to some extent by providing that this discretion should only be exercised where there are special circumstances, which would have to be specified in writing by the court.

Support for allowing general discretion of this nature can be found in the ICARA fee-shifting provision that the abductor should be required to pay the legal fees and other necessary expenses unless the abductor “establishes that such order would be clearly inappropriate.”<sup>242</sup> The limited reported case law on this provision shows that courts are not prepared to allocate blame between the parties and are unlikely to be persuaded that the abductor’s motives will make an award inappropriate.<sup>243</sup> For example, in *Maynard v. Maynard*,<sup>244</sup> the abductor’s claim that an award was inappropriate because there was a legitimate dispute as to whether there was an agreement between the parties to return the children to the United States was dismissed as being an “attempt to rehash the merits of the parties’ dispute,” which did not address why the award was inappropriate. Similarly, in *Neves v. Neves*,<sup>245</sup> even though the court accepted the father’s claim that he abducted the children from Germany in “a good faith effort to protect them from the intense racial division prevalent in German society,” this did not make an award to the left-behind mother inappropriate. In contrast, in the case of *Silverman v. Silverman*,<sup>246</sup> the fact that the mother had been subject to physical and mental abuse by the father was a relevant factor in determining that it was inappropriate to order any award against her.<sup>247</sup>

Thus, the exception in the United States provision which places upon the abducting

---

242 42 U.S.C. § 11607(b)(3) (2006).

243 In all the cases we found in which the award was reduced, this was primarily on the basis of the abductor’s impecuniness or unreasonable conduct by the left-behind parent which unnecessarily increased the costs of litigation. See, e.g., *Wilchinsky v. Wilchinsky*, No. 3:10-CV-63-FKB, 2010 U.S. Dist. LEXIS 25903, at \*35 (S.D. Miss. Mar. 18, 2010); *In re Polson*, 578 F.Supp. 2d 1064, 1072 (S.D. Ill. 2008); *Silverman*, 2004 U.S. Dist. LEXIS 18439; *Hirts v. Hirts*, No. 03-CV-03156, 2004 U.S. Dist. LEXIS 13512, at \*2 (D. Pa. 2004).

244 *Maynard v. Maynard*, No. 07-10155, 2007 WL 1869253, at \*2 (E.D. Mich. June 28, 2007).

245 *Neves*, 637 F.Supp. 2d 322 at 345.

246 *Silverman*, 2004 U.S. Dist. LEXIS 18439.

247 Additional factors included the mother’s financial situation, the father’s failure to fulfill his maintenance obligations to the children, and his unreasonable refusal to participate in settlement negotiations.

parent the burden of proving an award is inappropriate appears to achieve a satisfactory balance between the need to exempt abductors from having to compensate the left-behind parent where this would be morally repugnant without leading to a full scale enquiry into the parties' marital history. Nonetheless, we would recommend qualifying the discretion by providing that the award should be inappropriate because of the behavior of the left-behind parent.

## 6. Material Welfare of the Child

As stated above, even an award against the custodial parent may not affect the material welfare of the child to any significant extent because it does not change the financial position of the two parents together. Thus, payment of compensation to the non-custodial parent will enhance his ability to pay child support. Nonetheless, it is not always easy to enforce child support obligation against non-custodial parents, and so the best way to protect the child might be to set-off at least some of the compensation payable against future child support payments by the left-behind parent. Alternatively, the payment of the compensation could be delayed until the child had grown up<sup>248</sup> or be paid in installments.

However, despite such techniques, there will clearly be cases where the award of compensation will have a negative impact on the welfare of the child. The ICARA's "clearly not appropriate" exception could be used to reduce or even eliminate a compensation award in such cases. However, it seems that a more specific exception would be preferable both in order to direct the court's attention to the issue of the welfare of the child and in order to distinguish between the issues of the moral blameworthiness of the abductor and that of the welfare of the child. Thus, it may be that the abductor is completely at fault, but an award should not be made or should be reduced because of the detriment it would cause to the child. Accordingly, we would suggest adopting a test similar to that in the grave risk of harm exception to return in article 13(1)(b) of the AC;<sup>249</sup> i.e., compensation will not be awarded or will be reduced where there is a grave risk that such an award will expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This formulation has the additional advantage of promoting internal harmony within the Convention. Decisions as to return and to compensation are not made on the basis of the best interests of the child, but in both cases the court will not make a decision

---

248 Similarly, in some countries, the sale of the matrimonial home, which is owned partly by the non-custodial parent, may be postponed until the youngest child has grown up. In England and Wales, such orders are known as Meshers orders. See STEPHEN MICHAEL CRETNEY, *PRINCIPLES OF FAMILY LAW* 412 (Judith Masson et al. eds., 8th ed. 2008).

249 AC, *supra* note 2, art. 13(1)(b).

that is liable to cause significant harm to the child.

### **7. Effect of the Award of Compensation on the Right to Bring a Separate Civil Action**

One question that arises is whether the award of compensation under the AC should automatically bar the left-behind parent from bringing a separate tort or contract action. On the one hand, we saw that the major advantage of the AC model is that it prevents separate and prolonged litigation afterwards. On the other hand, the AC model, even with our suggested amendments, does not cover all possible heads of damage. In particular, it may not cover full compensation for emotional distress. In addition, the full extent of the damage may not be known at the time of the AC proceedings. Furthermore, some left-behind parents may not claim compensation in AC proceedings because they are unable to focus on anything other than the return of the child. Moreover, the abductor may put obstacles in the way of enforcement of the return order, which impose additional expenses upon the left-behind parent and may cause him further damage.

Accordingly, we suggest that the award of compensation in the AC proceedings should not automatically be a bar to a later civil action for damages not recoverable or not claimed in the AC proceedings. Alternatively, it could be provided that the heads of damages which could have been recovered in the AC proceedings cannot be claimed later in a tort action and thus only additional expenses not available in those proceedings, or expenses that were not known at the time of the AC proceedings, could later be claimed in a separate tort action. This would encourage left-behind parents to deal with issues of compensation at the time of the AC proceedings.

In any event, it should not be possible to open up the quantification for heads of damage for which compensation has already been awarded or for which the court has refused to award compensation in the exercise of its discretion, such as in a situation in which the court does not award compensation in the AC proceedings because of lack of moral blameworthiness or damage to the child. In such cases, there should be an issue estoppel on the basis of *res judicata*. Otherwise, the court's discretion would effectively become meaningless because an award could be made by a different court in a later tort or contract action without taking into account the appropriateness of the award and/or the harm that it would cause the child.

Even though the option of a separate action should remain, we would expect that it would only be used in rare cases. In fact, to date, few parents have chosen this course. If reasonable compensation will be awarded in the foreign AC proceedings according to our

proposals, there will clearly not be a need to bring a later tort action.

Finally, it should be mentioned that there may be situations in which the left-behind parent decides not to pursue AC proceedings because, for example, he understands that ultimately this will not serve the best interests of a child who has already settled in the country of refuge or because there is a good chance that one of the exceptions will apply. However, such a parent may have already incurred expenses in locating the child and taking legal advice. Furthermore, he may well have suffered emotional distress as a result of the abduction and reduced contact with the children.<sup>250</sup> As there are no AC proceedings, the only methods of obtaining compensation will be under the tort or contract model. It is undoubtedly preferable if his right to compensation can be taken into account in coming to an agreed or mediated settlement<sup>251</sup> without the need for him to take legal proceedings in order to recover compensation. Again, it may be possible to set off this compensation against future child support payments.

## 8. Certainty and Uniformity

The reduction of the discretion of the court and the definition of fixed heads of damages should reduce the uncertainty in the tort model and in the current version of the AC model. In order to promote uniformity<sup>252</sup> between the different Contracting States, there would be a need to incorporate the proposed model in a protocol to the AC<sup>253</sup> or at least into guidelines to be published in a Good Practice Guide.<sup>254</sup>

---

250 This is also relevant, for example, in cases involving the breach of visitation rights. If visitation rights were denied, the wronged parent may decide not to claim custody or a change in the visitation rights. For example, if he thinks that the situation is irreversible and the children do not wish to see him anymore, he may decide to only bring a civil claim against the custodial parent for his emotional distress. That was the case in *FamC (Jer) 13993/02 Ploni v. Plonit*, Tak-Mish 2007(1) 516 (2007).

251 In relation to use of mediation in child abduction cases, see PERMANENT BUREAU, DRAFT GUIDE TO GOOD PRACTICE UNDER THE *HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION*: PART V – MEDIATION (2011) [hereinafter GOOD PRACTICE GUIDE], available at <http://www.hcch.net/upload/wop/abduct2011pd05e.pdf>.

252 For importance of uniformity of implementation of the Abduction Convention, see BEAUMONT & McELEAVY, *supra* note 202, at 238–240; *Miscellaneous Civil Applications 1648/92 Turna v. Meshulam*, 46(3) PD 38 [1992] (Isr.).

253 Of course, there would inevitably be some differences between the interpretation of such provisions in different countries, as with the other provisions of the AC.

254 GOOD PRACTICE GUIDE, *supra* note 251.

## CONCLUSION

A parent whose child was abducted by the other parent to a different country finds himself in a very difficult situation. He is forced to dramatically and immediately change his daily routine in order to try to locate his child and then, assuming that he finds the child, to initiate legal proceedings in the foreign country in order to secure the return of the child under the Hague Abduction Convention. These efforts take an enormous toll on the parent, both emotionally and financially. To what extent should the law enable him to obtain reimbursement of the expenses he has incurred and compensation for the damage he has suffered? And what legal framework is most appropriate for this purpose?

In our view, recognition of the right of the left-behind parent to be compensated for the losses he suffers as a result of the abduction of his child seems appropriate, necessary, and even natural. In principle, recognition of such a right is consistent with, and even promotes, the objectives of the AC and the goals of tort law. Nevertheless, the power to award reimbursement of expenses under the AC is not often used and the possibility of claiming tort compensation has so far, to the best of our knowledge, been recognized only by one legal system. This article, which is the first to discuss this delicate and multi-faceted issue, examines different frameworks within which such compensation might be awarded and the scope of such awards.

We have presented four possible models for compensating the left-behind parent and analyzed the advantages and disadvantages of each model. We conclude that the preferred model is the AC model under which compensation may be granted within the framework of the AC proceedings. However, this model in its current form has a number of significant drawbacks and so we make a number of novel recommendations to extend and improve this model. Under the proposed model, compensation for recognized heads of damage would in principle be awarded, if requested, in all cases where return is sought under the AC, even where a return order is not made.<sup>255</sup> Thus, the right to compensation is recognized as under the tort model, but since there is no need for a separate procedure, this model is considerably more efficient and reduces the degree of intervention in the family unit.

In mapping out the contours of the proposed model, we have attempted to achieve a reasonable balance between the objectives of tort law and those of the AC. Thus, while the norm ought to be automatic recovery of the necessary and reasonable expenses incurred by the left-behind parent as a result of the abduction, in accordance with the objectives of tort law, courts should have the discretion to exempt the abductor from paying compensation

---

<sup>255</sup> The award of compensation would be subject to the court's discretion and power to not to make an award at all or to make a reduced award in appropriate circumstances.

or reduce the amount of compensation to be paid in special circumstances where, because of the behavior of the left-behind parent, it is inappropriate for an award, or a full award, to be made. This provision would allow courts to take account of the lack of or limited moral blameworthiness of the abductor in a way that is not always possible under the tort model. In addition, the court's discretion to refuse or reduce the compensation payable where this would cause significant harm to the child protects the child's welfare in a way that is not possible under the tort model. Furthermore, the degree of uncertainty inherent in the tort model and the current version of the AC model could be lessened by providing fixed heads of damage, which, if proven, would be awarded automatically, subject to the discretion discussed above.

In order to preserve the goals of tort and contract law, we do not propose that an award in the AC proceedings should bar a separate action brought later to claim compensation that was not claimed or not recoverable in the AC proceedings. However, under the doctrine of *res judicata*, it should not be possible to later claim compensation for damages which were considered by the court in the AC proceedings, even where the court exercised its discretion not to make an award under that head.

Finally, it should be emphasized that this article can be seen as the beginning of a wider discussion, since there are also other aspects of tort liability which might arise in cases of international child abduction, among them the unique and hard case of children suing their parents in general and for emotional distress in particular, and also possible actions against welfare authorities and the police for not dealing adequately with the background situation that led to the abduction. In particular, the fact that this article has focused on the compensation to be awarded to the left-behind parent should not be seen as inconsistent with the view that the AC is primarily aimed to protect children and should be interpreted in such a way as to give effect to their rights.<sup>256</sup> Thus, there is indeed a case for awarding compensation to the child for the violation of his rights and damage caused to him as a result of the abduction, and such compensation may well be compatible with the goals of tort law. However, the scope and extent of the abducting parent's liability to the child

raises a number of complicated issues,<sup>257</sup> the discussion of which is outside the scope of this article. Nonetheless, it is hoped that the analysis in this article provides insights which will be of value in any future discussion of these issues.

---

257 Firstly, the common law parent-child immunity is still widely recognized and only in exceptional cases has compensation been awarded against parents for psychological harm caused to their children. See Shmueli, *Love and the Law*, *supra* note 39; Rhona Schuz, *Child Protection in the Supreme Court: Tortious Parenting, Physical Punishment and Physical Child Abuse*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 165 (Andrew Bainham ed., 2001) [hereinafter Schuz, *Child Protection*]. There are good reasons for this continued immunity and thus care has to be taken in making exceptions to it. In particular, the possibility of a claim for compensation may provide an incentive for the child to be encouraged to dwell on the past rather than attempting to come to terms with what happened and to repair the damage caused by, for example, rehabilitating his relationship with the abductor. Secondly, since the child will not usually have incurred any expenditure as a result of the abduction, the only compensation being sought would be for non-financial loss, in particular, emotional distress and psychological harm. The objective difficulty in assessing emotional distress is even greater in relation to a child than in relation to an adult. In addition, it would be impossible to evaluate whether there is indeed any long-term psychological damage to the child and the extent thereof until many years later, as in the CA 2034/98 *Amin v. Amin*, 53(5) PD 69, (1999) discussed in Shmueli, *Love and the Law*, *supra* note 39, at 157, and Schuz, *Child Protection*, *supra*.