THE BIOETHICS OF PERSONAL INJURY: RETHINKING THE MATRIX OF BODY, DISABILITY, AND GENDER IN THE CASE OF ISRAELI PERSONAL INJURY CLAIMS RELATING TO SEX-DEFINING ORGANS

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ABSTRACT

How is the human body conceptualized in tort law? What are the bioethical considerations in determining personal injuries, and how are the constructions of disability and gender affected by these conceptualizations and considerations? These questions are the focus of this article that identifies the tortious area of personal injury law as a significant locus for regulating the body.

Relying on cultural approaches to torts and adopting a sociological perspective toward bioethics, the theoretical ambitions at the basis of this article are examined with respect to a concrete empirical field—Israeli personal injury claims relating to sex-defining organs. Taking into account the exceptional Israeli use of a disabilities book in torts and the uniqueness of Israeli culture, this article studies, for the first time, the conceptualization of the body in a given tortious research field of personal injury claims.

The study shows that the perception of the body is not uniform, coherent, or universal, and that there are multitudinous contradictory constructions of the body. It is argued that all the possibilities for conceptualization of the body can be categorized into two possibilities which contradict one another. On the one hand, law operates in favor of the body's naturalization and presumes that the body is a universally and uniformly given category. On the other hand, this category is deconstructed, reflecting an infinitely changing socially constructed nature. While the law presumes that the body is a given category in order to evaluate bodily damages and grant compensation, this category is constantly changing and being reconstructed. In light of this perceptual paradox, a new paradigm for defining the body in

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tort law is proposed. This paradigm adopts a social approach toward the body and celebrates the pluralism of configurations of bodily existence, while creating a phenomenological definition of personal injury.

I. INTRODUCTION

> "An injury is not just a process of recovery; it's a process of discovery."[1]
>
> —Conor McGregor

What it takes to determine "personal injury" is the focal question of this article. Personal injury is a central concept in the tortious area of personal injury law. Its occurrence justifies compensation if tortious liability is proved. In order to provide a definition of personal injury, a conceptualization of the intact body—from which bodily injuries or physical disabilities are derived—is required. Such a conceptualization concerns various kinds of considerations (e.g., analytical, medical, technological, legal, individual, social, or cultural), which frequently involve moral dilemmas that tie into the area of bioethics.

This article is the first scholarly attempt to explore the conceptualization of the body in the tortious area of personal injury law. Despite its significance for defining personal injuries and granting tortious remedies, the conceptualization of the body in torts has never been studied. In paraphrasing Conor McGregor's words, I aspire to study how the platform of personal injury law can be used not only for recovery, but also for discovery, and, by doing so, offer a new research approach. The conceptualization of the body is tightly linked to the construction of identities defined by bodily attributes (e.g., disabled, sexual, or racial identities). Hence, this article additionally studies how the construction of body-derived identities is influenced by the conceptualization of the body.

The study of the conceptualization of the body in tort law is examined here with respect to a specific empirical field of Israeli personal injury claims relating to sex-defining organs. I identify sex-defining organs as bodily organs that define the biological sex category in current scientific discourse.[2] Obviously, damages to these organs also invite the study of the construction of disability and gender in this field.

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[1] *See* Conor McGregor, *Conor McGregor Quotes,* AZ QUOTES, https://www.azquotes.com/quote/1064103 (last visited Apr. 17, 2021).

[2] Three aspects of the sex category are customarily distinguished in the medical-scientific discourse: chromosomal sex (the genetic difference between males and females), genital sex (the anatomical difference between males and females), and hormonal sex (evident in different secondary sex signs, such as: the female breast or masculine facial hair). *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271–75 (1999); Aeyal M. Gross, *Gender Outlaws Before the Law: The Courts of the Borderlands*, 32 HARV. J.L. & GENDER 165, 184 (2009). Due to its focus on bodily organs, only the genital and hormonal aspects of the sex category will be discussed, and the sex-defining organs, for the purpose of this study, will be identified according to them.

Examining these theoretical questions in a concrete empirical field is in line with the recent developments of cultural approaches to torts[3] and the application of a sociological perspective of bioethics. Doing so acknowledges the contextual, social, and cultural (rather than analytical, medical, and technological) aspects of defining the body, and consequently personal injury, in torts. Indeed, this article investigates the particularities of an Israeli tortious research field. It gives an account both of its exceptional doctrinal use of a disabilities book and its cultural uniqueness.

In a nutshell, the article uncovers a perceptual paradox with respect to the body. On the one hand, I claim that the legal presumption underlying the practice of filing personal injury claims is that the body is universally and uniformly given. On the other hand, I show that the socially constructed nature of the body is repeatedly and variously exposed. In other words, the analysis indicates that tort law has operated in favor of the body's naturalization and presumes that the body is a given category. At the same time, this category is deconstructed, revealing its changing socially constructed nature. This discovery additionally gives rise to competing constructions of disability and gender, and it is these constructions that will also be scrutinized.

Considering the discovery of a perceptual paradox with respect to the body, this Article offers a new paradigm for defining personal injuries. This paradigm adopts a social approach toward the body and enables personal injury claims that are not necessarily organized according to bodily boundaries (or at least not those of the universally given one). It fosters a pluralism of configurations of bodily existence and argues for a phenomenological definition of personal injury. While the proposed paradigm is grounded in an Israeli research field, its relevance goes far beyond it and is relevant for other socio-legal contexts.

The Article is organized as follows: Part II discusses the centrality of the body in tort law, the necessity of conceptualizing it, and the relevance of the bioethics for this purpose. Part III connects the conceptualization of the body with the construction of bodily identities. It emphasizes the benefits of examining the construction of disability and gender in personal injury claims relating to sex-defining organs and describes the research field and method of this article. Part IV presents a perceptual dualism with respect to the body, disability, and gender based on (a) doctrinal law and (b) legal cases. Part V describes a perceptual paradox with respect to the body, based on this perceptual dualism. Part VI introduces a new paradigm for defining personal injuries. Part VII offers some concluding remarks.

II. TORT LAW, CONCEPTUALIZING THE BODY, AND BIOETHICS

Personal injury claims are one of the most far-reaching and influential tortious areas of law. This area of law regulates instances of physical damage

[3] *See, e.g.*, David M. Engel & Michael McCann, *Introduction: Tort Law as Cultural Practice*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 1, 1 (David M. Engel & Michael McCann eds., 2009); MARSHALL S. SHAPO, TORT LAW AND CULTURE (2003).

to a person's body and raises profound questions about the proper body (as opposed to the wrong body) and the amendable body (as opposed to the permanently ruined body). The plaintiff's body is "brought to trial" in personal injury claims and is treated as requiring classification as proper or improper and reparable or irreparable. Therefore, personal injury law can contribute significantly to our understanding of the construction and deconstruction of the body in law. As a legal area determining the line between the proper and the improper body, personal injury law not only attributes social meaning to a given body, but it also defines what is considered to be a "body" at all. In other words, the legal area of personal injury claims is a central platform in the legal field for determining the boundaries of the proper body and examining the ways for its achievement.

Firstly, the plaintiff's bodily damage is identified and defined as such; then the damaged body is signified as incomplete; finally, the possibilities of correcting the deficient body are discussed. In light of the traditional purpose of tort law, to pursue corrective justice and restoration to the original condition (*restitutio in integrum*),[4] it endeavors to reorganize the body in a corrective manner, after its damages have been recognized. Consequently, a rare opportunity for examining the construction and deconstruction of the body is enabled.

The construction and deconstruction of the body in personal injury claims give rise to areas of knowledge concerning the proper body and the possibilities for its achievement. These areas of knowledge can answer a variety of questions: How is a (proper) body defined? When should a body be classified as disabled? What is bodily damage? And how can we determine whether a case of bodily damage is reversible? Although the body is a central term in personal injury claims,[5] and even though these claims are beneficial for studying the conceptualization of the body, the definition of the body in torts has yet to be studied. Considering the massive theorization of the body in the humanities and social sciences,[6] it is surprising that none of these provocative body theories have been examined in regard to tort law. More specifically, the legal locus, which is highly preoccupied with the human body, has never undertaken a theoretical discussion regarding the question of what a body is. The value of a body has remained terra incognita in the tortious literature to date.[7]

Lack of theorization of the body in torts is particularly noticeable in light of the ideas of politics of transgression and their relevance to the focus of

[4] For representative literature on the corrective justice model, *see, e.g.*, Arthur Ripstein, *Tort Law in a Liberal State*, 1 J. TORT L., no. 2, 2007, at 1, 3; Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U.L. REV. 485 (1989).

[5] Anne Bloom asserts, "it is in tort law that the body itself is most closely scrutinized and that bodies act—more so than any other field of law—as material repositories of culture." Anne Bloom, *Irresponsible Matter*, *in* INSIDERS, OUTSIDERS, INJURIES, AND LAW: REVISITING 'THE OVEN BIRD'S SONG' 181, 188 (Mary Nell Trauter ed., 2018).

[6] *See, e.g.*, SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY (1993); JOAN JACOBS BRUMBERG, THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS (1998); THE PHILOSOPHY OF THE BODY (Michael A. Proudfoot ed., 2003); IRIS MARION YOUNG, ON FEMALE BODY EXPERIENCE: THROWING LIKE A GIRL AND OTHER ESSAYS (2005).

[7] Conceptualizing the body is required in order to determine compensation arrangements in tort law. The absence of such a conceptualization reflects the research literature's tendency to focus on tortious liability, rather than on the question of remedies. *See* DAVID KATZIR, REMEDIES FOLLOWING PERSONAL INJURIES 919 (2003).

this study. Personal injury claims are involved with damaged bodies. The plaintiffs in these claims offer us a failed, deviated, and transgressive physical existence. Nonetheless, precisely these claims are exceptionally beneficial for studying the conceptualization of the body. It is precisely the violation of bodily norms that may shed light on their necessity and, consequently, expose their arbitrariness. By taking advantage of the ideas of politics of transgression, I examine the subversive aspects of the personal injury claims area of law and expose how the naturalization of bodily norms are undermined in it.

This Article critically explores how the body is constructed and understood in personal injury claims. It further explores which configurations of knowledge are produced with respect to it. Though discussions relating to the question concerning what kinds of damages should be recognized as personal injuries are very well known,[8] a theoretical discussion about what is the direct and immediate initial physical basis that was injured has never been conducted.

Essentially thinking about inter-sexual differences, the feminist analysis of torts has refrained from challenging the presumption of a pre-discursive existing body, grounding the sexual identity in biology.[9] Also, the relatively new disability studies' criticism of tort law has not challenged torts in this manner.[10] Being loyal to the essentialist thinking about disability, disability studies' criticism of torts aspired to re-rationalize the tortious liability concerning people with disabilities[11] and objected to perceiving people with disabilities as leading tragic lives.[12] However, the construction of the disabled body in torts has rarely been studied. And, disability studies' criticism has, so far, refrained from challenging the presumption of a pre-discursive body, grounding the disabled identity in biology. This Article aspires to study the

[8] These discussions often address (firstly and secondarily) psychological damages, cognitive damages, and discomfort/harassment damages. *See, e.g.*, VIVIENNE HARPWOOD, MODERN TORT LAW 419–65 (2003).

[9] *See, e.g.*, MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010); Leslie Bender & Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI. KENT. L. REV. 313 (1993); Lisa M. Ruda, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197 (1993); Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870–1920*, 19 L. & SOC. INQUIRY 369 (1994).

[10] As opposed to the relatively late adoption of feminist analysis tools in torts, tort law was among the first areas of law to be studied from a disability studies criticism point of view. *See, e.g.*, Darcy L. MacPherson, *Damage Quantification in Tort and Pre-Existing Conditions: Arguments for Reconceptualization*, *in* CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND LAW 248 (Dianne Pothier & Richard Devlin eds., 2006); Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011); Darpana M. Sheth, *Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 TENN. L. REV. 641 (2006).

[11] *See*, *e.g.*, Kristin Harlow, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733 (2007); MacPherson, *supra* note 10; Ralph D. Mawdsley, *Standard of Care for Students with Disabilities: The Intersection of Liability Under the IDEA and Tort Theories*, 2010 BYU EDUC. & L.J. 359 (2010); Jacob E. McKnite, *When Reasonable Care is Unreasonable: Rethinking the Negligence Liability of Adults with Mental Retardation*, 38 WM. MITCHELL L. REV. 1375 (2012).

[12] *See, e.g.*, Sagit Mor, *The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel: A Disability Critique*, *in* 63 STUDIES IN LAW, POLITICS, AND SOCIETY 113 (Austin Sarat ed., 2014); Bloom & Miller, *supra* note 10; Brigham A. Fordham, *Disability and Designer Babies*, 45 VAL. U.L. REV. 1473 (2011); Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L.L. REV. 141 (2005); Sheth, *supra* note 10.

construction of the disabled and gendered body in tort law and aims at developing the feminist analysis of torts and its examination by the disability studies.[13]

Studying the conceptualization of the body in tort law contributes to the development of the cultural approach toward torts, which is still in its very early stages as compared to other areas of law.[14] Studying the conceptualization of the body in tort law is dependent on understanding the culture's influence on the perception of the body on the one hand, and it exposes the role tort law, as a cultural field, plays in organizing the body on the other hand.

Relying on cultural approaches toward torts for studying the conceptualization of the body and its injuries invites the adoption of a sociological perspective toward bioethics.[15] Studying the bioethics of personal injury from a sociological perspective calls attention to the importance of sensitivity to cultural and social nuances in ethical decision-making concerning the definition of personal injuries. In other words, the sociology of bioethics studies the ethical dilemmas connected to defining personal injuries through sociological understandings of health, medicine, law, and the professions, in specific times and places.

III. PERSONAL INJURY CLAIMS RELATING TO SEX-DEFINING ORGANS: THE RESEARCH FIELD AND METHOD

Studying the conceptualization of the body in tort law and challenging the presumption of a pre-discursive existing body regarding this area of law, also invites the examination of the construction of bodily identities. Bodily identities are identities allegedly defined by bodily attributes (e.g., disabled, gender, or racial identities). Specifically, damage to sex-defining organs calls for an inquiry into the construction of disability and gender in torts.

Due to their preoccupation with bodily "deficiencies," personal injury claims construct and form the physical basis of disability. They define the biological elements, based on which a person is labeled as disabled and invite a foundational inquiry of the disability category. Tort law, in general, and personal injury law, in particular, have recently been termed the law of disablement.[16] That is, personal injury law has been signified as a field of law

[13] For an exceptional article that studies the construction of the gendered body in tort law, based on post-structural ideas, and offers a similar approach to mine, *see* Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C.L. REV. 357 (2010).

[14] In a book that offers a series of cultural analyses of torts, the editors clarify, "It is surprising to discover that a rigorous exploration of tort law's cultural dimensions has rarely been attempted . . . . Tort law as a form of cultural practice has remained a terra incognita. Even the pathways into this unexplored territory are but dimly perceived." Engel & McCann, *supra* note 3, at 1. For literature that invites us to adopt a cultural approach to torts, *see* SHAPO, *supra* note 3; Anne Bloom, *Plastic Injuries*, 42 HOFSTRA L. REV. 759 (2014); Anne Bloom, *The Radiating Effects of Torts*, 62 DEPAUL L. REV. 229, 230 (2013); Adi Youcht, *The Plasticity of the Body, the Injury, and the Claim: Personal Injury Claims in the Era of Plastic Surgeries*, 25 WM. & MARY J. RACE, GENDER, & SOC. JUST. 353 (2019).

[15] On the empirical turn of bioethics, *see* EMPIRICAL BIOETHICS: THEORETICAL AND PRACTICAL PERSPECTIVES (Jonathan Ives, Michael Dunn & Alan Cribb eds., 2018); Pascal Borry et al., *What is the Role of Empirical Research in Bioethical Reflection and Decision-Making? An Ethical Analysis*, 7 MED. HEALTH CARE & PHIL. 41 (2004).

[16] *See* Sagit Mor, *The Meaning of Injury: A Disability Perspective*, *in* INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 27, 39 (Anne Bloom, David M. Engel & Michael McCann

that concerns the transformative process of becoming disabled. Following my inquiry into the subversion of the presumption of a pre-discursive existing body, I also examine whether the construction of disability as a naturally given destiny is undermined as well.

Concerning gender, the contribution of my work to the study of its construction stems from my field's involvement with the initial physical basis that defines sexual identity, from which gender is derived. In other words, personal injury claims relating to sex-defining organs focus on damages to biological elements that define whether a person is male or female. Following my inquiry into the presumption of a pre-discursive existing body, I examine whether the necessity of gendered norms is also brought into question and whether their arbitrariness is exposed.

The research field of this study includes all Israeli personal injury claims in relation to sex-defining organs that were published in online legal databases.[17]

Sex-defining organs are bodily organs that define the biological sex category in current scientific discourse. Among the sex-defining organs included in my research are the female breasts, the male chest, the genitalia (i.e., penis or vagina), and the reproductive system (e.g., testicles, ovaries, or uterus). Damages to sex-defining organs examined in my research stem from various causes, including (1) failed plastic surgeries (e.g., breast enlargement or reduction), (2) either negligent diagnosis or treatment, or both, of medical problems or diseases (e.g., breast cancer or cervical cancer), (3) negligently performed fertility treatments, childbirths or abortions, (4) traffic or work accidents,[18] (5) violent incidents, and (6) failed circumcisions. In total, there are 202 cases in this study.[19]

After locating the relevant cases for my study in the online databases, I applied for approval from the Israeli courts' administration to study and copy the cases.[20] Since judicial opinions are very often the sole documents that exist in the online legal databases, approval for studying and copying the rest of the documents relating to the cases (e.g., pleadings, affidavits, summaries, court manuscripts, etc.) was required. This research field broadly, systematically, and thoroughly studies all personal injury claims relating to sex-defining organs that were filed in a given country. In order to understand the doctrinal, social, and cultural context of the cases, I also scrutinized statutes, bills, and other documents relating to the enactment process, legal

eds., 2018); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptions, and Disability*, 60 VAND. L. REV 745 (2007); Bloom & Miller, *supra* note 10.

[17] The cases for my study were drawn from the following online legal databases: Dinim Veod, Nevo, Pador, PsakDin, Takdin, Lawdata, and 4balance. These databases were last accessed in February 2020.

[18] According to Israeli law, road accidents are regulated by the tortious area of law.

[19] There are two possible explanations for the relatively few cases that were located online: (1) the cases are not published in order to maintain the plaintiffs' privacy; and (2) settlement agreements, which include bans on publication in order to protect the reputation of the respondents.

[20] The courts from which the cases were collected included: Tel Aviv Magistrate's Court, Tel Aviv District Court, Tel Aviv Regional Labor Court, Herzliya Magistrate's Court, Kfar Saba Magistrate's Court, Netanya Magistrate's Court, Hadera Magistrate's Court, Nazareth Magistrate's Court, Nazareth Regional Labor Court, Haifa Magistrate's Court, Haifa District Court, Haifa Regional Labor Court, Tiberias Magistrate's Court, Jerusalem Magistrate's Court, Jerusalem District Court, Jerusalem Regional Labor Court, Israel Supreme Court, Rishon Lezion Magistrate's Court, Ramla Magistrate's Court, Ashdod Magistrate's Court, Beer Sheva District Court, Beer Sheva Regional Labor Court, and Dimona Magistrate's Court.

literature, Ombudsman Annual Reports, and press articles.[21] The qualitative methodology of my study is discourse analysis.[22]

The legal discourse on personal injuries relating to sex-defining organs is an effect of human activity, within power relations, that leads to certain regimes of knowledge. These regimes dictate which bodies are properly organized, how to distinguish between these bodies and improperly organized bodies, what are gendered organs, which identities are considered "natural" and "real" (as opposed to "artificial" and "false"), and which bodies and identities can and should be corrected. Legislators, judges, attorneys, plaintiffs, respondents, and medical experts are all legitimate speakers in the legal field. The power relations in this field are not necessarily organized according to the speaker's identity, but rather based on epistemological frameworks (ideas, perceptions, or terms) that were deduced by the research method.

I used Grounded Theory in order to analyze the research materials.[23] According to this method, the research theory or thesis inductively stems from ideas or concepts that appear repeatedly in the data.

IV. THE DUALISM OF THE PERCEPTION OF THE BODY AND IDENTITY IN THE RESEARCH FIELD

I found a dualism related to the perception of the body in this field of research. On the one hand, I identified that the legal presumption underlying the practice of filing personal injury claims is that the body is universally and uniformly given. On the other hand, however, I claim that the socially constructed nature of the body is repeatedly exposed. This dualism is manifested both in Israeli doctrinal law in connection to the research field, including its exceptional use of a disabilities book, and in the studied cases, with respect to sex-defining organs. These two manifestations of the perceptual dualism of the body will be explained and demonstrated now.

A. THE ISRAELI DOCTRINE AND THE ENACTMENT OF A DISABILITIES BOOK

1. Presuming a Universally and Uniformly Given Body

The legal presumption that underlies the practice of filing personal injury claims is that the human body is universally and uniformly given. The body is perceived to be a generically given material organism that has characteristics shared by everybody. It is only the acceptance of this presumption that enables and justifies the practice of filing personal injury claims. The argument is that without a body considered universally and uniformly given, a person could not allege to have a damaged body. On what

[21] All websites, related to my study, were last accessed in April 2021.

[22] As Michel Foucault explains, the term "discourse" describes a structured field of linguistic activity that has no "author" or given identified source. *See* MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION 11 (Robert Hurley trans., Pantheon Books 1978) (1976). On discourse analysis, *see* BRIAN PALTRIDGE, DISCOURSE ANALYSIS: AN INTRODUCTION (2d ed., 2012).

[23] *See* MELANIE BIRKS & JANE MILLS, GROUNDED THEORY: A PRACTICAL GUIDE (2011); KATHY CHARMAZ, CONSTRUCTING GROUNDED THEORY: A Practical GUIDE THROUGH QUALITATIVE ANALYSIS (2006).

basis of comparison would such an allegation be heard? Only adoption of a standard for a proper body, considered universally and uniformly given which can be used as a basis of comparison, can legitimize the legal recognition of bodily damages.[24]

The legal presumption of a universally and uniformly given body is doctrinally most evident in the addition made to National Insurance Regulations (Determination of Level of Disability for Work Injuries), 1956 ("the Disabilities Book").[25] The Disabilities Book includes a long list of "bodily defects" alongside disability rates, which are related to each of the defects.[26] The book includes a disability rate "price list," which relates to different kinds of defects. A disability rate granted to a plaintiff according to the Disabilities Book reflects the plaintiff's medical disability.[27] This medical disability affects the compensation arrangements for both pecuniary and non-pecuniary damages in Israeli tortious law.[28]

As to pecuniary damages, in order to estimate earning (capacity) loss of the plaintiff, Israeli courts use the medical disability rate determined for the plaintiff, following the injury, as a basis of compensation for future earning losses.[29] In the beginning, Israeli courts did not distinguish between medical disability and functional disability.[30] Medical disability expressed the devaluation in the plaintiff's asset – his/her earning capacity. According to this rationale, Israeli courts assumed that the plaintiff's loss of future earning capacity was directly derived from the medical disability and ruled compensation that was equal to the plaintiff's medical disability times the plaintiff's potential income, had the person not been injured.[31] As time went by, courts began stating that medical (physiological) disability alone could not be the basis for the compensation for future earning capacity loss and that there was a need for proof that the plaintiff's medical disability would cause future earning loss.[32] In other words, in order to compensate the plaintiff for future earning capacity loss, courts need to be convinced that the plaintiff's medical disability also has functional aspects. Functional

[24] This logic may be, prima facie, contradicted considering the traditional purpose of the tort area of law of *Restitutio in Integrum*. We could have argued that the pre-tortious incident body should be the standard for the proper body and not a universally and uniformly given standard of a proper body. However, thinking seriously about this argument reveals that it is unconvincing. If the pre-tortious incident body was the proper body, any bodily modification could have justified compensation (if tortious liability was properly proven). Any plastic surgery (including the most successful one), for instance, could justify filing a tortious lawsuit. However, it is clear that, under the current Israeli doctrine, not every bodily modification can justify a tortious lawsuit, but rather only a worsening alteration, based on an estimation of a universally and uniformly given standard of the proper body.

[25] In addition to the fact that the name "Disabilities Book" is frequently used by most of the legal agents (e.g., judges, attorneys, medical professionals, etc.), I prefer it over other names (e.g., "impairments book"), since it also expresses the socio-cultural aspects of the book, rather than merely its physical aspects, as will be explained and illustrated below, *infra* notes 50–83. On the distinction between impairment and disability, *see, e.g.*, MICHAEL J. OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 19–29 (1996).

[26] Despite its offensiveness, I use the term "defects" since it was adopted by the Disabilities Book. *See* National Insurance Regulations (Determining Disability Level for Work Injuries), 5767–1956, KT (Isr.) [hereinafter The Disabilities Book], https://www.nevo.co.il/law_html/law01/039_052.htm.

[27] KATZIR, *supra* note 7, at 226–27, 233–34.

[28] *Id; infra* text accompanying note 36.

[29] KATZIR, *supra* note 7, at 226–27, 233–34.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 235, 237, 239–40.

disability expresses the extent to which the medical disability affects the functionality of the plaintiff, as evidenced in his/her earning capacity.[33] While medical disability is determined by medical professionals, the ruling concerning functional disability is given to the courts.[34]

The medical disability is also the basis of compensation for non-pecuniary damage.[35] The medical condition of the plaintiff serves as a significant criterion for granting compensation for pain and suffering, and in road accidents, the medical disability rate serves as a formal basis for determining the non-pecuniary damage.[36]

The medical disability that affects the compensation of both the requested pecuniary and non-pecuniary damages is deduced, from the Disabilities Book in Israeli tort law. This book adopts a universal approach toward disability which is based on the presumption that the body is universally and uniformly given. According to the universal approach toward disability, disability is an objective matter. It is determined by fixed regulation, systematic conclusions, and professional opinions. The plaintiffs' disability, according to this approach, is determined in an almost technical medico-legal procedure that objectively and systematically measures the deviation of the damaged body from the universally and uniformly given body, which is considered to be proper. This is neither a subjective estimation, nor a social question. It is definitely not a political issue.

This approach is known as the medical model of disability in disabilities studies.[37] According to this approach, disability is a real medical flaw that is bound by destiny. The bodily deviation is measured in a neutral, independent, and unavoidable manner, based on the legal presumption that the body is universally and uniformly given. Therefore, deviation from it (i.e., bodily disability) should be universally and uniformly derived. Measuring the deviation from the considered-to-be proper body is the responsibility of medical and psychiatric professionals, who are supervised by the legal system. Furthermore, the fact that body and mind professionals are responsible for estimating the disability is fed by and feeds the objective character of disability. The professionals are expected to act according to knowledge which is objectively deduced from universal principles. Physicians, psychiatrists, and psychologists pretend to base their opinions and recommendations on general corps of knowledge that are based in valid scientific research in medicine, psychiatry, and psychology.

Inter alia, the disability clauses in the Disabilities Book also grant disabilities for injuries to sex-defining organs. These clauses are used for determining the medical disability of the plaintiffs in the studied cases. Due to their centrality in the researched field and their importance to this study, I present them here:

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[33] *Id.*

[34] *Id.* at 252.

[35] *Id*. at 892–93.

[36] The Israeli Road Accident Victims Compensation Regulations (calculating compensation for non-pecuniary damage), 1976, established objective tests for compensating non-pecuniary damages, based on the number of hospitalization days and disability rate. *See* Road Accident Victims Compensation Law, (1975) § 2(a) (Isr.).

[37] For studies that compare the medical model to the social model in disability studies, *see* SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 117–56 (1998); MICHAEL J. OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990).

24. Testicles and Male Genitalia
    1) Varicocele[38]
        a. One- or two-sided, without or with non-significant disturbances—0%
        b. With significant disturbances—10%
    2) One- or two-sided Hydrocele[39]—0%
    3) Lack of one testicle; the second testicle is intact – 20%
    4) Loss of two testicles
        a. Under the age of 45, accompanied by neuro-endocrinal disturbances—50%
        b. Above the age of 45 and up until the age of 60, accompanied by neuro-endocrinal disturbances—40%
        c. Above the age of 60—25%
    5) Partial loss of the penis—30%
    6) Total loss of the penis—60%
    7) Traumatic Aspermia[40]
        a. Up until the age of 45—20%
        b. Above the age of 45—10%

For the purpose of this sub-clause, disability rate will be determined according to the plaintiff's age on the date the injury occurred.

    8) Impotence (based on a sleeping test in an authorized sleep laboratory)
        a. Weak erections, with low intensity—0%
        b. Intermediate, improper erections in terms of quantity and quality—10%
        c. Harsh, no erection at all—30%

No disability rates will be granted for this sub-clause above the age of 70; the disability rate will not be granted simultaneously for full or partial loss of the penis and this sub-clause.

25. Female Genitalia
    1) Chronic inflammation or post chronic inflammation of the female genitalia
        a. Disturbances exist, the overall condition is fine—0%

[38] An impairment in the valves of the veins responsible for draining the waste from the testicles. The impairment decreases oxygen supply to the testicles and damages the creation of intact sperm cells.

[39] Swollenness in the testicles sack, as a result of accumulation of liquids around it, which may interrupt physical or sexual activity.

[40] Reaching sexual satisfaction without ejaculation.

b. Significant disturbances exist, the overall condition is satisfactory—10%
c. Significant disturbances, the overall condition is poor, with no chances for improvement—20%

2) Hysterectomy—removal of ovaries
   a. Hysterectomy removal of one ovary, with or without partial removal of the second ovary—10%
   b. Hysterectomy—removal of both ovaries
      i. Up until the age of 50—40%
      ii. After the age of 50—20%
3) Hysterectomy—removal of uterus
   a. Up until the age of 50—40%
   b. After the age of 50—20%
4) Panhysterectomy[41]
   a. Up until the age of 50—50%
   b. After the age of 50—30%
5) Prolapsus Vaginae at Uteri—30%
6) Female Genitalia Fistula
   a. Vesico-Genital Fistula—50%
   b. Recto-Genital Fistula—50%

For the purpose of this sub-clause, the age of the plaintiff on the date the injury occurred will be taken into account.

27. Infertility

a. When its causes are unclear—30%

b. When its causes are clear—the disability rate will be granted based on the highest disability rate determined for the impairment causing the infertility, which will not be less than 30%. The disability rate for infertility will not be granted additionally to the disability rate granted for the impairments causing the infertility.

28. Mastectomy
   a. One breast
      i. Up until the age of 30—30%
      ii. Above the age of 30 and up until the age of 45—25%
      iii. Above the age of 45—15%
   b. Two breasts
      i. Up until the age of 30—50%

[41] Removal of uterus, ovaries, fallopian tubes, cervix, or related lymph nodes.

ii. Above the age of 30 and up until the age of 45—40%
iii. Above the age of 45—30%

For the purpose of this clause, the disability rate will be determined according to the plaintiff's age on the date the injury occurred.

75. Scars[42]
1) Scars on the body
a. Do not upset the person or make one uglier—0%
b. Painful or makes one uglier—10%
c. Extensive - located in many areas—20%

Implementing a closed list of disability categories, and their fixed rates, on the entire population signals understandings of the kinds and extents of bodily deficiencies as reflecting a universal and independent truth. Of course, this insight is doctrinally based on the perception of a universally and uniformly given body. Conceptualization of the disability categories in the Disabilities Book, in terms of "lack,"[43] "loss,"[44] or "amputation,"[45] also indicates that the law presumes an intact and proper body, in which different kinds of lacks, losses, and amputations are abstracted in order to determine the universal level of disability.

Like the conceptualization of the disability categories, calculation of the disability rate of each of the deficiencies in the Disabilities Book is also embedded in a universal approach toward disability. The leading principle in calculating the disability rate is the gravity of deviation from the proper and intact body. The greater the "lack," "loss," or "amputation," the higher the disability rate.[46] Using medical terminology in the Disabilities Book, and classifying the disability categories according to areas of expertise in medicine, further support the construction of the Disabilities Book as a medical (rather than a social) book, which uses scientific tools for determining disability. These tools, again, are based on the universal approach toward disability.

It is worthwhile mentioning that the Disabilities Book was originally enacted by the Israeli National Insurance for determining disability for people injured in work accidents.[47] However, over time, the Disabilities Book

[42] While Clauses 24, 25, 27, and 28 of the Disabilities Book are included in a chapter entitled "The Urogenital System," Clause 75 is included in a chapter entitled "Scars, Diseases, and Skin Defects." Clauses 24, 25, 27, and 28 relate to concrete bodily organs, and Clause 75 relates to the entire body. I included Clause 75 in the study since damages to sex-defining organs are sometimes evidenced in scars, or what are perceived as scars.

[43] The Disabilities Book, *supra* note 26, § 24(3).

[44] *Id.* at § 24(4)–(6).

[45] *Id.* at §§ 25(2)–(4), 28.

[46] Loss of both testicles, for instance, grants a higher disability level than loss of one testicle; two-breast or ovary mastectomies grant a higher disability level than one breast or ovary mastectomy; and loss of the entire penis grants a higher disability level than its partial loss. *Id.* at §24(3)–(4); §§25(2), 28; §24(5)–(6).

[47] By the virtue of the Israeli National Insurance Law (consolidated version), 1995, the Disabilities Book was created.

was imported from the social security area of law and was transplanted into the tort area of law, turning it into the major enactment for determining disability in tortious claims. This cross-doctrinal usage of the same disabilities legislation re-emphasizes the universally and uniformly given body perception in which it is embedded: since the body, as well as bodily disability, is perceived as universal, it does not matter for which doctrinal area of law (i.e., social purpose) the disability is determined. The body is presumed to extend beyond any doctrinal (i.e., social) framework of thinking and is regarded as external to it.

Up until now, the Disabilities Book has neither been seriously examined in the tortious scholarly literature, nor has it been included in the Israeli tort law curriculum. Lack of cultural approaches towards tort law and leaving the body terra incognita, with respect to this legal field, led to the disappearance of the Disabilities Book from scholarly discussions on personal injury claims. My interest in the conceptualization of the body in personal injury claims related to sex-defining organs redraws the boundaries of Israeli personal injury law and includes the Disabilities Book. Lack of studies of the hybridization, which combined a tortious area of law and social security Disabilities Book,[48] is especially remarkable in light of the uniqueness of such a hybridization when compared to other common law systems.[49]

In conclusion of this section, it can be argued that the perception of a universally and uniformly given body is well-grounded in the doctrinal context related to the study, due to the central role the Disabilities Book plays in determining medical disability and in light of the significant effect of this disability on tortious remedies.

2. Exposing the Socially Constructed Nature of the Body

As opposed to the universal approach toward disability that supports the perception of disability as a medical flaw and is adopted by the Disabilities Book, a critical examination of the Disabilities Book and its enactment process shows that it is not a purely medical product, but rather part of a social process involving political interests. It turns out that the disability categories' definitions, related to sex-defining organs, are not necessarily grounded in professional criteria, and that they lean on social and cultural perceptions. Understanding disability as a product of social power relations

[48] For several works which propose, in certain contexts, initial critical discussions on the hybridization between a tortious area of law and a social security regulation, *see* KATZIR, *supra* note 7, at 306–07; Daniel Mor, *Compensating Road Accident Victims for Non-Pecuniary Bodily Damages*, 6 TAU L. REV. 397, 406 (1978); Jameel Nasar, *The Disability of Clause 6b of the Israeli Road Accident Victims Compensation Law, 1975*, 5 ALEY MISHPAT 143, 162–63 (2006).

[49] Though fixed figures for assessing personal injuries can be found in other common law countries apart from Israel (e.g., the UK, the US, or Australia), these figures have no legislative power and are not considered the law. *See* JUDICIAL STUDIES BOARD, GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES (13th ed. 2015); Bloom, *supra* note 5; Giovanni Comandé, *Toward A Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, TEMP. INT'L & COMP. L.J. 241, 282–83 (2005); Mohammed Ranavaya & Christopher R. Brigham, *International Use of the AMA Guides to the Evaluation of Permanent Impairment*, AMA GUIDES NEWSL. (Am. Med. Ass'n, Chicago, IL), May/June 2011, at 1, 4. Furthermore, unlike the Disabilities Book, these figures neither measure nor calculate the incompleteness of the body by prescribing disability categories and levels. Instead, they prescribe a range of compensation for personal injuries. *Id*. One more difference between the two kinds of figures is that the Disabilities Book is written, inter alia, by medical professionals and other guidelines are mainly written by social science professionals (i.e., lawyers or economists). *Id*.

and cultural constructions (rather than as an inherent attribute) is perceived as the social model in disabilities studies.[50]

In order to demonstrate that the Disabilities Book does not reflect what is perceived as the correct medical state of affairs, we should return to its historical legislation process and study its legislative mobilization, or lack thereof.

The Disabilities Book was first enacted in 1956. More than sixty years have passed since the Disabilities Book was enacted, but very few changes relating to specific issues have been made.[51] Many acknowledged impairments by the medical sciences are absent from the Disabilities Book, but, on the other hand, other bodily impairments, which can be cured and are no longer considered to be severe injuries, are still included. Political interests of lobbying groups or various professional organizations are the reason that the Disabilities Book has not been updated for a long time.[52] This medico-legal delay has led to severe criticism by the State Comptroller and Ombudsman of Israel on several occasions.[53] Courts levelled similar critiques,[54] and in the little literature relating to the Disabilities Book, scholars refer to the medico-legal delay.[55]

In light of the critiques of legal scholars, judges, and the State Comptroller and Ombudsman of Israel, the Disabilities Book is portrayed as an anachronistic act of legislation which does not reflect current knowledge in the medical sciences, due to various political battles. Adopting this perspective, Israeli Parliament member, Ilan Gilon, cynically remarked, "It seems that it is not the bible . . . but rather the Israeli National Insurance Disabilities Book that is the book of books."[56]

Undermining the medical relevance of the Disabilities Book cannot be summed up by noting its scientific deficiencies. The book is also problematic

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[50] *See* JAMES CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT (1998); Linton, *supra* note 37; OLIVER, *supra* note 37; TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS (2006).

[51] In 1970, the Disabilities Book was comprehensively updated; in 1992 and 1996, the clauses related to visual impairments were corrected; in 1997, the clauses related to diabetes, amputations, or broken ribs, nose, palate, and vocal cords were corrected; in 2008, a few clauses related to AIDS, low blood pressure, obesity, pancreatic conditions, and impotency were added; in 2011, the clauses related to obesity, visual impairments, and eye diseases were corrected; in 2012, the chapter on psychiatry was corrected; in 2014, a chapter on neuropsychiatry syndromes was added and a clause related to diabetes was corrected. In 2015, corrections were made to the chapter on internal diseases, injuries and post-surgery condition; the chapter on the digestive system; the chapter on the spleen; and the chapter on the mouth, jaws and teeth. In 2016, the chapter on heart disease was corrected. In 2018, the chapter on lung disease was corrected, and treatment of transplants of internal organs was added.

[52] Avraham Saar, *Comments on the Article*: Disability Following Bodily Scars, 40 MED. & L. 106 (2009).

[53] The State Comptroller & Ombudsman of Israel, *Annual Report*, no 60B, 2009, at 1120, 1149–50; The State Comptroller & Ombudsman of Israel, *Annual Report*, no. 44, 1994, at 762; The State Comptroller and Ombudsman of Israel, *Annual Report*, no. 41, 1990, at 630.

[54] *See, e.g.*, Court Transcript from Oct. 22, 2003 at 188–89, CivC (DC TA) 2056/01 M.A. v. M.A. (2006) (Isr.).

[55] Aharon Arlozerov, *The Disability Determination Regulations Book and 'the Person as Machine'*, 10 MED. & L. 25 (1994); Dan Meller, *Disability Following Bodily Scars*, 40 MED. & L. 101 (2009); Saar, *supra* note 52, at 106.

[56] Meeting Protocol No. 659, Labor, Welfare, and Health Committee of the 18th Israeli Parliament (Feb. 28, 2012). In recent years, the Israeli National Insurance finally began to comprehensively update the Disabilities Book. However, this welcomed initiative has been accompanied by a sadder and more inappropriate move by the National Insurance, which has abstained from conducting public and transparent discussions on the topic of updating the Disabilities Book. *See id.*

due to other influences concerning the disabilities' categories. Given these social and cultural influences on the designation of disability categories, there is serious disagreement among legal agents as to whether the disability book is a medical book. While some assert that "the rationale behind designating [the Disabilities Book] is the functioning of the organs and this question is given to medicine,"[57] others passionately claim that the "disability book is not a medical book."[58]

Geoffrey Bowker and Susan Star, two of the most important scholars in science and technology studies, argue that although classification systems, such as those in the Disabilities Book's tables, pretend to be neutral and transparent, they are based on social values and prejudices.[59] In light of this argument, I now offer a critical analysis of the Disabilities Book. This analysis aims to expose the social and critical perceptions which designate the disabilities' categories in the Disabilities Book related to sex-defining organs injuries.[60]

The influence of social and cultural perceptions on the designation of disability categories was already clear at the very early stage, when impairments were selected for inclusion in the Disabilities Book, and they were differentiated from impairments that were excluded. Determining which impairment is considered to be a disability is itself, to a large extent, a result of social construction or cultural acknowledgment. A concrete example of such a social construction or cultural acknowledgment relates to the impotence clauses in the Disabilities Book.[61] Up until 2008, the Israeli legislature refrained from granting disability for impotence because it was not considered to be a bodily impairment. As one of the Israeli urologists commented before adding the impotence clauses in 2008,

> In the Ministry of Defense regulations, there is a highly current and professional treatment for impotence. In the [National Insurance regulations], this issue is not included since these regulations were enacted a very long time ago. At that time, impotence was neither considered to be a problem nor a disease.[62]

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[57] CivC (MC Nz) 2670/04 G.P. v. the National Insurance ¶ 3d (2005) (Isr.). Arie Miller also asserts that disability levels are determined, based on pure biological tests. *See* Arie L. Miller, *The Social Security and the Question of Compensation for Pain and Suffering*, 18–19 SOC. SEC. 129, 138.

[58] Court Transcript from July 2, 2008 at 89, CivC (MC Jer) 1440/06 D.A.L. v. Shaare Zedek Med. Ctr. (2009) (Isr.).

[59] GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES 1–6 (1999).

[60] This analysis has both theoretical and practical (materialistic) consequences regarding the inability to manage the entire population's health (rather than the individual's health). This is actually the biopolitics about which Foucault wrote. Biopolitics relates to strategies and mechanisms through which physical bodies are managed by state power. It describes how biological processes are subjected to state power (birthrate, mortality, or level of health care) and endeavor to manage them, increase them, supervise, or regulate them. In the context of the analysis suggested in this article, the term biopolitics describes how the state organizes the disabled bodies of the entire population (who is/is not disabled), classifies them (who is severely/slightly disabled), and regulates them by employing the Disabilities Book. For an explanation and exemplification of the term *biopolitics* in Foucault's work, *see* MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE (1975–1976) 239–65 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003); MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE (1978-1979) (Michel Senellart ed., Graham Burchell trans., 2008) (1997).

[61] The Disabilities Book, *supra* note 26, § 24(8).

[62] CivC (MC TA) 1553/99 Y.P. v. Migdal Insurance Company Ltd. (2004) (Isr.).

Both the determination of the impairments considered disabilities and the definition of impairments selected for inclusion in the book are mediated by cultural tests. Clause 75.1 in the Disabilities Book, for example, distinguishes between "ugly" scars and scars that are "not ugly" for the purpose of determining disability.[63] Using the criterion of ugliness in order to determine the gravity of the scars and making a ruling for the disability level may be problematic due to its clear cultural nature.[64] Furthermore, the question whether a certain appearance is uglier than another is a subjective perception of the observer.[65] It is not a simple and objective criterion, which can be easily measured, such as length, width, or weight, but rather an aesthetic criterion, which extends beyond political or ethical judgment.[66]

As ordered in Clause 75.1 of the Disabilities Book, judges examine the scars on the plaintiffs' bodies and evaluate their aesthetic quality. This is how Judge Mark-Hornchik, for example, described the scars on the plaintiff's breast in the case of *L.B.*:

> Big and ugly scars were left on the plaintiff's breast, as can be seen in the photos . . . . The ugly scars on the plaintiff's breast are outrageous. . . . This is not a temporary problem, but rather a constant and continuous one, since the plaintiff bears and will bear her wounded breast for the rest of her life, and her anger is not transitory.[67]

In addition to using aesthetic tests, Clause 75.1 distinguishes between *painful* scars and *unpainful* scars. Like ugliness, pain is also a subjective criterion, which is measured by personal standards and difficult to prove.[68]

The disability level, which is matched to each disability category and is supposed to reflect the severity of the medical injury, also takes into account social and cultural aspects. In the case of *F.A.*, for instance, Judge Salah noted that the disability percentage for uterus loss was also related to the devaluation of the woman's social status, stating that, "When the legislature determined 40 percent disability for a hysterectomy, it probably also took

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[63] Gaby Admon-Rick claims (based on Meira Weiss' conceptualization) that including the ugliness criterion in the Disabilities Book may be explained by the interrelations between aesthetics, beauty, and normativity in Israeli society. *See* Gaby Admon-Rick, *Impaired Encoding: Calculating, Ordering, and the "Disability Percentages" Classification System*, 39 SCI. TECH. & HUM. VALUES 105, 115 (2014).

[64] *See* Meller, *supra* note 55, at 101. Pointing out the cultural nature of the ugliness criterion, Meller wonders: "Is an ugly scar on a female breast identical to an ugly scar on a male chest?" Meller further suggests that the Disabilities Book relates differently to males and females or adults and infants and takes into account the location of the scar.

[65] Former Israeli Chief Justice, Dorit Beinisch, described the difficulties in implementing the ugliness test, due to its subjective nature. *See* HCJ 8487/03 The Organization of IDF Disabled People v. the Minister of Defense, ¶ 6 (2006) (Isr.). Dan Meller claimed that Clause 75.1 in the Disabilities Book, is medically and professionally lacking and leaves a wide range of subjective interpretations. *See* Meller, *supra* note 55, at 101.

[66] The disability, according to Clause 75.1 in the Disabilities Book, is frequently conceptualized as an aesthetic disability. *See, e.g.*, Plaintiff's Summaries at 20, CivC (DC Hi) 846/01 I.G. v. Dr. R.M (2005) (Isr.); Plaintiff's Damage Calculation at 6, CivC (MC Hi) 17301/07 F.B. v. the Holy Family Hosp. (2010) (Isr.); Plaintiff's Damage Calculation at 9, CivC (MC TA) 57030/08 Y.O. v. Dr. A.R. (2010) (Isr.). On the connection between ethics and aesthetic, *see* ELAINE SCARRY, ON BEAUTY AND BEING JUST (2001).

[67] CivC (MC TA) 44294/95 L.B. v. Dr. D., ¶¶ 68–75 (1999) (Isr.).

[68] *See* ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 3–23 (1985); Arlozerov, *supra* note 55, at 25.

into account the possible psychological aspect, damaging the spousal relationship and destroying the image as a woman."[69]

Taking into account social and cultural considerations, in order to determine disability levels, also led to intricate body politics. Questions, thoroughly infused with body politics, include: Which bodily organ is worth the most, or the least? Does the sexual identity of the plaintiff play a role in the process that determines disability level? And does the plaintiff's age matter?[70] A critical examination of the Disabilities Book reveals that among all the potential bodily injuries relating to sex-defining organs, penile injury grants the highest level of disability.[71] Furthermore, although, with respect to all other sex-defining injuries, the disability level decreases as the age of the plaintiff increases,[72] no similar, opposite correlation exists with respect to penile injuries. Regarding penile injury, the plaintiff's age is not to be taken into account for the determination of the disability level, unless the plaintiff is over the age of seventy.[73]

Similar to the way in which the Disabilities Book expects men to function sexually in old age, it also expects women to be fertile until old age. The age of fifty has been determined to be the border line between different disability levels for uterus and ovaries' loss, and it expresses the high importance related to women's fertility by the Israeli legislature.[74]

Clause 15 of the National Insurance Regulations (Determination of Level of Disability for Work Injuries), 1956, provides a direct channel for taking into account social and cultural considerations at the time of determining the disability level. According to Clause 15, it is possible to grant a higher disability level, up to half of what was determined in the Disabilities Book, based on the plaintiff's occupation and age. This means that the clause enables deviation from the disability level determined in the Disabilities Book due to social or cultural factors.[75]

My analysis demonstrates that the disability levels in the Disabilities Book are multi-dimensional. They do not only reflect medical aspects, but also social-cultural ones. Considering this reality, several scholars have remarked that it is inappropriate to use quantitative measures in a qualitative

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[69] CivC (MC Acre) 3208/99 F.A. v. Galilee Med. Ctr., 15 Nevo Legal Database (2006) (Isr.). For an opposite viewpoint, noting that the disability level for uterus loss is techno-medical, *see* CivC (MC TA) 33095/96 R.O. v. Maayanei Hayeshua Med. Ctr., ¶ 11 (2006) (Isr.). The two opposing viewpoints expose an incoherent implementation of the Disabilities Book.

[70] For analysis of the ways in which gender and age construct the disabilities categories and levels, which pretend to be neutral and objective, *see* Ingunn Moser, *On the Interferences Between Disability, Gender and Class*, 31 SCI. TECH. & HUM. VALUES 537 (2006).

[71] The Disabilities Book, *supra* note 26, § 24(6). This clause grants 60 percent disability rate for penis loss.

[72] *Id.* at §§ 24(4), 24(7), 25(2)–(4), 28.

[73] *Id.* at § 24(8).

[74] *Id.* at § 25(2)–(4). For a discussion on the importance and centrality of women's fertility in Israeli society, *see* ORNA DONATH, MAKING A CHOICE: BEING CHILDFREE IN ISRAEL (2011); YAEL HASHILONI-DOLEV, THE FERTILITY REVOLUTION (2013); SUSAN MARTHA KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL (2000); Larissa Remennick, *Childless in the Land of Imperative Motherhood: Stigma and Coping Among Infertile Israeli Women*, 43 SEX ROLES 821 (2000); Carmel Shalev & Sigal Gooldin, *The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations,* 12 NASHIM 151 (2006).

[75] A person's occupation and his/her earning potential are socially and class-derived characteristics. However, age may be considered a medical matter for calculating the disability rate. Old age, for instance, may predict low chances of recovery. *See, e.g.*, JASON L. POWELL, SOCIAL THEORY AND AGING (2006) for the social construction of age.

context.[76] Hanan David remarked, for instance, that "the term 'disability percentage' . . . is . . . self-contradictory since it supplies a quantitative definition for a fundamentally qualitative matter."[77] Aharon Arlozerov also described the difficulty in using numerical measures for determining disability and remarked,

> Determining the disability level in percentages is done on a routine basis. The [Disabilities Book] is the selected tool for this purpose . . . . The implementation of this [book] involves non-negligible difficulties. Some of them originated due to the complexity of the human machine, whose damages the [Disabilities Book] aspires to define in numerical values. This is a prominent, inherent difficulty.[78]

The complexity of the considerations involved in defining disability have disappeared through the use of numerical values, which express an economic perception of rankings.[79] The body has been transformed into a number, which allegedly reflects a medical measure. As a result, the culturally grounded story of the individual is erased. Limiting the disability percentage to one hundred also reflects the erasure of the personal story, which is grounded in a certain context, since it does not take into account the possible difference between the gravity of the situation in which two people deserve the maximum disability level. The medical disability percentage is, in fact, a "black box" in which the multi-dimensional considerations (medical, social, cultural, and personal) involved in determining disability are placed. The term "black box" is adopted from Bruno Latour's work and expresses the disappearance of the socio-cultural context in the process of constructing scientific knowledge and turning it into "natural fact."[80]

Numerical values are unsuitable for defining disability, not only because the disability is multidimensional, but also due to its instability. Numerical values not only erase the social and cultural aspects of the disability categories, but they also turn these categories into stable ones. As Gabi Admon-Rick remarked, the percentage of disability endeavors to turn the changing human subject into a measurable stable object.[81] Moreover, the system for measuring and classifying the disability percentage constitutes the disability categories themselves. In other words, not only does the

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[76] The invention of the method for calculating the disability percentage is attributed to a French mathematician from the eighteenth century, François Bareme. Bareme translated the German law of the Middle Ages "into mathematical tables for the calculation of compensation." *See* Admon-Rick, *supra* note 63, at 107.

[77] Hanan David, *Psychological, Legal, and Ethical Aspects Concerning Situations of Bodily Disability and 'Handicap'*, *in* PROBLEMS IN PSYCHOLOGY, LAW, AND ETHICS IN ISRAEL: DIAGNOSIS, TREATMENT, AND JUDGMENT 279, 279 (David Yagil et al. eds., 2008).

[78] Arlozerov, *supra* note 55, at 17.

[79] Admon-Rick, *supra* note 63, at 112. Using numerical values for defining disability blurs the distinction between economic and non-economic spheres, and it characterizes neo-liberal practices.

[80] *See* BRUNO LATOUR, SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY (1988).

[81] Gaby Admon-Rick, *What Percentage is Your Eye Worth? The Disability Percentage Level as a Constituting Disability Practice*, ESPANET ISRAEL (Mar. 1, 2012), https://events.aac.ac.il/Conference/rick.aspx. For further writing in the area of disability studies on the changing, fluid, and contextual nature of disability, *see, e.g.*, Lennard J. Davis, *The End of Identity Politics: On Disability as an Unstable Category*, *in* THE DISABILITIES STUDIES READER 263 (Lennard J. Davis ed., 2013); DISABILITY AS A FLUID STATE (Sharon Barnartt ed., 2010).

disability percentage system erase the changing social aspects of the disability categories, turning them into medical impairments, but it also constructs and creates the disability categories themselves through numerical values. Who is considered disabled? Who is severely disabled? And, who is slightly disabled? These are all questions which can be answered by measuring, classifying, and accounting management practices.[82]

Critically examining the Disabilities Book and its enactment process shows that designating the disability categories related to sex-defining organs (selecting, defining, and determining disability level) does not reflect current medical knowledge and is affected by social, cultural, and subjective aspects.[83]

B. CASES RELATING TO SEX-DEFINING ORGANS

So far, I have discussed the dualism of the perception of the body in the Israeli doctrinal context and the Disabilities Book clauses which are relevant to my study. This Section discusses and analyzes the perceptive dualism regarding the body in the cases included in this research. This perceptive dualism is exposed in the cases relating to sex-defining organs through the discussion of the following three questions: (1) What is personal injury (or bodily disability)? (2) What is a (proper) body? (3) What is the appropriate remedy for the injury? The conceptualization of personal injury (or bodily disability) is examined based on the implementation of the Disabilities Book. The definition of the (proper) body is deduced from the bodily baseline: that the injuries are derived from a comparison of the plaintiff's body condition to this baseline. Tortious remedies are finally examined by matching the remedy to the identified injuries. Exposing the perceptual dualism of the body through these three questions will be discussed now.

1. What is Personal Injury, or the Implementation Politics of the Disabilities Book

Social considerations impact not only the regulation of the disability categories relating to sex-defining organs but also their implementation. The

[82] In Israel, the method for determining the disability percentage was created, together with the legislation of the Disabilities Book, in 1956. It replaced another method for calculating compensation for work accidents, which had been accepted by the Land of Israel under the British Mandate and was based on income differences. The historian Admon-Rick argues that adopting a method for measuring and encoding disability through numerical values, immediately after the establishment of the State, helped solidify the governability of the young Israeli State, by enabling it to define different population groups and to carry out a new social agenda. *See* Gaby Admon-Rick, *The Rise of Percentages: Encrypting Disabled Bodies in British Mandate Palestine 1930-1956*, *in* THE IMPERFECT HISTORIAN: DISABILITY HISTORIES IN EUROPE 167 (Sebastian Barsch et al. eds., 2013); Admon-Rick, *supra* note 81. For an explanation of how State power operates on biological processes, and aspires to manage them, through the use of biopolitics, *see* FOUCAULT, *supra* note 60.

[83] Additional evidence, external to my research field, of the social nature of the Disabilities Book is the existence of several Israeli Disabilities Books, which have different goals. For example, in addition to the Israeli National Insurance Disabilities Book, there is the Ministry of Defense's Disabled People Regulations (tests for determining disability level), 1969 ("Ministry of Defense Disabilities Book"). While the National Insurance Disabilities Book is used for determining disability following a work accident, the Ministry of Defense Disabilities Book is intended to determine level of disability as a result of injuries that occurred during military service. The existence of two competing Disabilities Books, which determine different disability categories and levels, undermines the universal approach towards disability and conceives disability as being socially and doctrinally contextualized. It turns out that the social and doctrinal context of the disability affects its definition and level.

task of matching a given personal injury to the suitable disability category in the Disabilities Book is not summed up by the medical diagnosis of the personal injury, technical identification of the relevant clause in the book, and automatic determination of the suitable disability level. Applying the Disabilities Book to a given incident is also based on cultural presumptions, social contexts, and subjective discretion. Matching disability categories related to sex-defining organs to alleged personal injuries is neither conducted in a systematic manner nor in an ongoing one, and it is subject to diverse manipulations and politicization of medicine.

The ambiguity and unclearness of some of the medical terms that define the disability categories in the Disabilities Book require intensive interpretation for clarification. Social, cultural, and political considerations frequently influence the proposed interpretations. The various interpretations proposed for the term "infertility" can serve as an example of this kind of influence. According to the Disabilities Book, infertility grants disability.[84] Four major possibilities for understanding infertility have been suggested. The first relates to the inability to spontaneously become pregnant.[85] The second focuses on the inability to carry a pregnancy to term and the need for a surrogacy service.[86] The third relates to the impossibility of genetically becoming a parent due to lack of an intact ovum, and the fourth emphasizes the time required in order to become pregnant.[87] The four possibilities of understanding "infertility" neither reflect medical disagreement nor scientific controversy; they are deeply grounded in competing social constructions of fertility or parenthood. They are significantly based on different cultural conceptions of the relationship between nature and technology, and they offer either a binary or fluid understanding of the term "infertility."[88]

In addition to understanding given disability categories (e.g., infertility) by social and cultural tools, there are also examples of social and cultural considerations that exceed, and even contradict, the letter of the law. The

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[84] The Disabilities Book, *supra* note 26, § 27.

[85] On the question whether In-Vitro Fertilization (IVF) treatments, following the removal of Fallopian tubes, is conceptualized as infertility, *see* CivC (MC Hi) 1042/02 N.N. v. Laniado Hosp. (2008) (Isr.); CivC (MC TA) 102464/01 N.D. v. Assaf Harofeh Med. Ctr., ¶ 48 (2007) (Isr.). For a viewpoint supporting the conceptualization of infertility as the inability to become spontaneously pregnant, *see, e.g.*, Statement of Claim at 4, CivC (DC TA) 2168/07 Sh.L. v. Sapir Med. Ctr. (2009) (Isr.); CivC (DC Jer) 622/91 R.H. v. Dr. Sh.T.N., ¶ 10 (1993) (Isr.); CivC (MC Hadera) 4157/05 K.R. v. Ministry of Health, ¶¶ 10–15 (2009) (Isr.). For a viewpoint opposing the conceptualization of infertility as a need for IVF treatments, *see, e.g.*, Respondents' Summaries at 39, CivC (DC TA) 2168/07 Sh.L. v. Sapir Med. Ctr. (2009) (Isr.); Court Manuscript from Oct. 10, 2003, at 190, CivC (DC TA) 2056/01 M.A. v. Medinvest International (1985) Ltd. (2006) (Isr.); CivC (MC Hi) 16552/91 N.A.Sh. v. the State of Israel, ¶ 9 (1998) (Isr.).

[86] For a viewpoint supporting the conceptualization of uterus removal as infertility, *see, e.g.*, CivC (DC Hi) 10118/97 Jane Doe v. Clalit Health Services (2000) (Isr.). For a viewpoint opposing the conceptualization of uterus removal as infertility, due to the possibility of using surrogacy services, *see, e.g.*, Respondents' Summaries at 30, CivC (MC Acre) 3208/99 F.A. v. Galilee Med. Ctr. (2006) (Isr.).

[87] For a discussion of the question of whether infertility is absolutely defined or dependent on the duration of time that pregnancy is avoided, *see, e.g.*, Court Transcript from Dec. 3, 2007, at 17, 30, CivC (MC TA) 30812/03 M.C. v. Ministry of Health (2010) (Isr.); Court Transcript from Nov. 1, 2009, at 63, M.C. v. Ministry of Health; Respondent's Damage Calculation at 3–4, M.C. v. Ministry of Health; Court Transcript from Aug. 11, 2007 at 15–16, CivC (MC Jer) 1770/03 A.S. v. Al-Mukasad Hosp. (2008) (Isr.); Statement of Claim at 3, CivC (MC Acre) 3208/99 F.A. v. Galilee Med. Ctr. (2006) (Isr.).

[88] On the social construction of fertility, parenthood, and infertility in Israeli society, *see* DONATH, *supra* note 74; RONITH LIBERMANSH, DEFECTIVE (2005); KAHN, *supra* note 74; Remennick, *supra* note 74; Shalev & Gooldin, *supra* note 74.

clause which enables increasing the disability level by half due to the plaintiff's occupation and age has also been implemented, for instance, in cases in which the personal injury involved sexual implications.[89] Although the legislature treated deviations due to occupation and age, this clause was implemented in additional cases.

An additional tool of the manipulative matching of disability categories to personal injuries is Clause 14 of the National Insurance Regulations (Determination of Level of Disability for Work Injuries), 1956. According to this clause, if the Disabilities Book does not refer to the plaintiff's impairment, the most suitable disability category among the existing disability categories included in the Disabilities Book will be tailored to the plaintiff. In the absence of such a category, the determination of a plaintiff's disability level will be based on a medical expert's opinion.

Although Clause 14 was intended for use in exceptional situations—in which a certain bodily impairment was not included in the Disabilities Book—it is frequently used. The archaic nature of the Disabilities Book, and the fact that it has not been updated for over six decades, has led to the absence of many impairments from the Disabilities Book and extensive use of the matching clause. Moreover, the development of medical technologies (e.g., plastic surgeries), which cause new kinds of bodily impairments, has led to intensive use of the matching clause. As one of the plastic surgeons, testifying in court, clarified,

> As plastic surgeons, when we give an opinion on the results of surgeries . . . , we . . . use the clause on scars for other purposes, since the legislature does not provide us with an appropriate clause. . . . Take, for example, failed liposuction. . . . Though there is no scar, there . . . is a deformity of the legs. So . . . I need to make the adjustment.[90]

According to the plastic surgeon's testimony, since the possible bodily deformities following plastic surgeries do not appear in the Disabilities Book, the clause related to scars is fitted to these injuries.[91]

According to Clause 14, the medical expert may exert wide discretion when fitting the most suitable disability category or level to the plaintiff's injury. This practice has been severely criticized, being seen as contaminating the medical standpoint with social-political stances. One of the medical experts testifying in court sarcastically compared the process of defining a bodily injury, which does not appear in the Disabilities Book, to employing criteria for the definition of a horse in order to define a camel. He warned the inattentive judge, "This is medical politics!"[92]

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[89] Statement of Claim at 9, CivC (MC Hi) 12122/07 Y.S. v. A.F. (2009) (Isr.).

[90] Court Transcript from Mar. 27, 2003 at 24, CivC (DC Hi) 846/01 I.G. v. Dr. R.M. (2005) (Isr.).

[91] For a similar professional's testimony, *see also* Court Transcript from Jan. 28, 2004 at 24, CivC (MC Jer.) 14901/01 L.M. v. Dr. M.R. (2005) (Isr.).

[92] Court Manuscript from Oct. 22, 2003 at 216–17, CivC (MC TA) 2056/01 M.A. v. Medinvest International (1985) Ltd. (2006) (Isr.). There was a disagreement between the medical expert and Judge Sirota, and the latter mentioned: "It is not political . . . . They [the professionals] should supply a professional decision." *See* Court Manuscript from Oct. 22, 2003 at 216.

A typical example of the social politics reflective in the fitting practice concerns injuries related to male sexual dysfunction. Up until 2008, the Disabilities Book did not include any clauses regarding erectile dysfunction. In cases of male impotence, disability was recognized, according to the fitting policy, based on clauses relating to penis loss.[93] Judge Kasirer's ruling in the case of *Y.S.* helps us understand the rationale used for fitting these clauses to cases of impotence.

> The . . . plaintiff suffers from impotence . . . . [He] lost . . . his potency and therefore he lost an essential part of the purpose of his penis. Hence, we can treat this injury as a partial loss of penis since the plaintiff lost the required potency necessary for sexual intercourse. . . . I grant the plaintiff 30% medical disability in the area of urology for partial loss of the penis, according to [C]lause 24(5) of the [Disabilities Book] . . . . Clause 24(5) prima facie relates to physical damage. However, . . . we should remember that the goal of bodily organs is to function. . . . Therefore, the plaintiff's disability should be granted, based on the fitted [C]lause 24(5) . . . .[94]

According to Judge Kasirer's ruling, an essential purpose of the male penis is sexual functioning. Therefore, a plaintiff suffering from impotency should be granted (fitted) the disability level for partial penis loss. A similar rationale has been used in subsequent cases.[95]

However, what about female sexual dysfunction? Which clause in the Disabilities Book fits this damage? Unfortunately, there is no medico-legal answer.

In 2002, a historical discussion on female sexuality was held in the Israeli Knesset (parliament). This discussion related, inter alia, to the compatibility of the Disabilities Book for female sexual dysfunction. A medical expert discussed the absence of clauses concerning female sexual dysfunction in the Disabilities Book and testified in the discussion, "With regard to men, there are clauses of partial penis loss which can be fit to other categories, but women have nothing to lose and, therefore, their sexual dysfunction is not covered."[96] He continued and explained, "A male erectile dysfunction is a disease, but a female orgasmic dysfunction is a condition."[97]

The expert's testimony shows that the anatomic structure in the woman's body continues to serve, even today, as a means for preserving her

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[93] The Disabilities Book, *supra* note 26, § 24(5).

[94] CivC (MC Petach Tikva) 981/94 Y.S. v. Hamagen Ins. Co. Ltd., 7–8 Nevo Legal Database (2001) (Isr.).

[95] As seen in the Court Manuscript from Jan. 31, 2005 at 12–14, 26–27, CivC (MC BS) 2374/02 I.G. v. M.H. (2005) (Isr.), a fitted disability rate for partial penis loss was ruled for the plaintiff following sexual dysfunction. An identical fitted disability clause was also used by the parties' experts in CivC (DC Jer) 1359/99 M.A. v. I.B., ¶ 4 (2003) (Isr.) and the Court Manuscript from Oct. 26, 2006 at 13–14, CivC (MC Jer) 1440/06 D.& D.A. v. Shaare Zedek Med. Ctr. (2009) (Isr.).

[96] Meeting Protocol No. 173, Committee on the Advancement of Status of Women of the 15th Israeli Parliament (Feb. 4, 2002).

[97] Id.

inferiority.[98] Signifying female genitalia as lacking prevented fitting of the female sexual dysfunction to the Disabilities Book and discriminately enabled only the acknowledgment of male sexual dysfunction.[99] In 2008, a disability category of male impotence was added to the Disabilities Book,[100] but no similar change has been made, to date, with respect to women, who are not granted disability due to sexual dysfunction.

Signifying bodily impairments by fitted disability categories became an accepted practice among medical experts, who were requested to evaluate plaintiffs' disabilities. Through the mechanism of fitting, based on social considerations, the experts fit disability categories to the plaintiffs. These categories did not reflect the plaintiffs' physical conditions, and disability percentages were granted based on imagined bodies. Experts pretended that existing bodily organs were absent, due to cultural norms, and plaintiffs were granted a disability percentage for their imagined loss.

> An example of such an imagined loss comes from the case of T.P. In this case, a medical expert granted disability for breast mastectomy to a plaintiff whose breasts were destroyed in a failed breast surgery. He explained in court why he decided to grant disability for loss of organs, which, in fact, still existed: "The plaintiff's distorted breasts cannot be considered as being a secondary sex characteristic . . . the nipples lack sensitivity and the breasts will never function for the purpose of their creation: breastfeeding. Breasts, which neither look nor function as breasts, should be considered as breasts after mastectomy!!!" (Emphasis in origin).[101]

Since the plaintiff's breasts were no longer culturally perceived as having secondary sex characteristics due to the failed plastic surgery, the medical expert asserted they should be considered to be breasts after mastectomy and granted the plaintiff a fitted disability percentage.[102]

While the breasts of some plaintiffs were considered lost, despite still physically existing, the lost breasts of other plaintiffs were surprisingly perceived as existing. In the case of *F.B.*, for instance, the plaintiff was granted disability for the distortion and ugliness of her breast, even though she lost it in a mastectomy.[103] Since F.B.'s lawsuit was conceptualized in aesthetic terms from the very beginning, the medical expert testifying in her

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[98] For a critical discussion on the interrelations between female anatomy and female sexuality, *see, e.g.*, Jane Gerhard, *Revisiting "The Myth of the Vaginal Orgasm": The Female Orgasm in American Sexual Thought and Second Wave Feminism*, 26 FEMINIST STUD. 449 (2000).

[99] Signifying the female sex organ as a lack of a structure is reminiscent of the sexist Freudian presumption, according to which, the female body is lacking since it lacks the male sex organ. According to Freud's conceptualization, little girls perceive themselves as boys with defects and their development is driven by "penis envy." *See* Sigmund Freud, *Introduction to Psychoanalysis: New Series of Lectures. The Thirty Third Lecture: The Femininity*, *in* UNCANNY CULTURE AND OTHER ESSAYS 267 (Arie Bar trans., 1968).

[100] The Disabilities Book, *supra* note 26, § 24(8).

[101] Plaintiff's Affidavit at 12, CivC (MC Kfar Saba) 1219/06 T.F. v. Dr. E. O. (2009) (Isr.).

[102] For similar cases of non-functional uterus that were granted a fitted disability level for uterus loss, *see* Statement of Claim at 4, CivC (MC BS) 1475/05 N.A.N. v. Soroka Med. Ctr. (2009) (Isr.); CivC (MC Acre) 3208/99 F.A. v. Galilee Med. Ctr. (2006) (Isr.); Court Transcript from Oct. 20, 2004 at 8, CivC (MC Hi) 20357/02 I.E. v. Clalit Health Servs. (2005) (Isr.).

[103] Statement of Claim at 5, CivC (MC Hi) 17301/07 F.B. v. the Holy Family Hosp. (2010) (Isr.).

favor preferred to grant her disability fitted to cases of failed plastic surgeries, rather than disability for cases of mastectomy following breast cancer.[104] It appears that absent bodily organs pretended to be present and existing bodily parts were considered lost in the imaginary game that was enabled by fitting given disability categories to alleged impairments.

Moreover, an artificial prosthesis also served as the basis for granting a fitted disability percentage. In the case of *B.Sh.O*, for example, the plaintiff was granted a disability percentage for the silicone implants put into her body without her knowledge.[105] According to the medical expert's testimony in the plaintiff's favor, the fact that the natural borders of the plaintiff's body were undermined and non-organic materials were inserted into her body both justified awarding her a fitted disability percentage.

The mechanisms of fitting disability categories to alleged damages have not only been applied on the bases of social constructions (not considering a distorted breast as a secondary sexual characteristic, as in the case of *T.P.*), discursive practices (conceptualizing the discourse in terms of aesthetics, as in the case of *F.B.*), or cultural perceptions (preserving the distinction between natural and artificial, as in the case of *B.Sh.O*). Additionally, totally subjective sensations have justified the ruling of fitted disability percentages. In the case of *A.H.*, for instance, the plaintiff was granted disability for fitted varicocele due to chronic pain in his testicles.[106] Though an organic reason for the plaintiff's pain was not found, he was granted a fitted bodily disability based on his subjective feelings, which could neither be proven nor measured.

It seems that the art of implementing the Disabilities Book in the studied cases was not a simple, technical mission. Political justifications, social aspects, cultural perceptions, and subjective considerations are taken into account in the process of interpreting the disability categories and fitting them to alleged injuries.[107]

2. What is a Proper Body?

Since, in many ways, the proper body is a mirror image of the damaged or disabled body, bodily damage or disability are also determined according to how the proper body is defined. In other words, the proper body serves as the basis of comparison for determining bodily damages or disability. Like bodily damage or disability, the basis of comparison for determination of

[104] Granting a disability rate, according to Clause 75, instead of Clause 28 of the Disabilities Book.

[105] Statement of Claim at 9, CivC (MC Rishon Leziyon) 1565/05 B.Sh.O. v. Dr. G.F. (2009) (Isr.).

[106] CivC (MC Herzilya) 24154-11/09 A.H. v. Israel Motor Ins. Database (Pool) (2010) (Isr.). Disability for Varicocele is granted according to Clause 24(1) of the Disabilities Book.

[107] Transplanting the Disabilities Book into tort law and using it in personal injury claims for determining disability exposes the intricate politics involved in the implementation of the Disabilities Book. As long as the Disabilities Book is used by the Israeli National Insurance, we have no access to the implementation politics of the Disabilities Book due to the immunities imposed on medical committees' reports. However, examining the implementation of the Disabilities Book's unique transplantation into tort law enables the exposing of the intricate implementation politics of this book. Similar implementation politics probably also exist in relation to the medical committees of the National Insurance. This speculation is strengthened considering the fact that most of the medical experts who testify in personal injury claims serve as arbitrators on the medical committees of the National Insurance. As a result, the significance of the analysis employed here is greater.

damages or disability turns out to be an artificial construction, grounded in social, cultural, and subjective perceptions.

A fascinating example of the artificial construction as the basis for comparison of evaluating bodily damages is the case of *R.G.*[108] In this case, the plaintiff's breasts were enlarged by a surgery. Following the surgery, an inflammation developed in the left breast and the skin around the surgery scar opened, leaving the breast implant exposed. With no other choice, the silicone implant was removed and the plaintiff was left with one (right) breast enlarged by a silicone implant while the other one (left) was not enlarged and remained its "natural" size. This was the plaintiff's condition until she had the courage to undergo corrective surgery, in which the right silicone implant was removed, and two new breast implants were transplanted into her body.

After the plaintiff filed a medical malpractice lawsuit, a disagreement between the sides arose regarding the disability rate that should be granted for the time the plaintiff had one enlarged breast and one naturally sized breast. An extensive debate focused on which body should be used as a basis for comparison in the determination of the disability after the failed breast surgery. While the defense expert asserted that the natural and non-operated-upon body should be considered as the basis for comparison, the prosecution's expert claimed that the operated-upon and technologically enhanced body should be treated as the proper body for purposes of comparison. On that basis, therefore, he perceived the removal of the implant after the failed breast surgery as a loss of a breast and astonishingly granted the plaintiff disability status based on mastectomy clauses in the Disabilities Book.[109] In other words, this expert perceived removal of a silicone implant following failed plastic surgery as being identical to a mastectomy following breast cancer. Who would have anticipated that medical experts would adopt such a postmodern approach toward the body, and that this approach would be evidenced in tort law?

The debate between experts in the *R.G.* case did not reach a conclusion since the court dismissed her case and ruled that the defendants were not responsible for her damages. However, the prosecution's expert opinion, which supposedly reflected a medical and semi-judicial standpoint, offered an artificial construction as the basis of comparison for estimating bodily disabilities and defining bodily damage as the lack of the artificial body.

Additional examples of the artificial construction as the basis of comparison for determining bodily damages come from the cases of *T.A.* and *A.L.*[110] Bodily damage was defined as a natural addition in these two cases. The plaintiffs, parents of newborns, filed these lawsuits following alleged negligent circumcisions, which left the newborns with an extra foreskin and required, in the opinion of the plaintiffs, corrective surgery. The definition of the proper body, which served as a basis of comparison in evaluating the newborns' damages, was the focus of the legal discussion in the cases of *T.A.*

[108] CivC (MC Hi) 16981/07 R.G. v. Shoresh Med. Servs. (2010) (Isr.).

[109] Court transcript from Feb. 16, 2010 at 49, CivC (MC Hi) 16981/07 R.G. v. Shoresh Med. Servs. (2010) (Isr.).

[110] CivC (DC Jer) 1414/98 A.L. v. State of Israel (2002) (Isr.); CivC (MC Petach Tikva) 1424/99 T.A. v. Rabbi N.K. (2000) (Isr.).

and *A.L.* Based on cultural practices and religious traditions, the plaintiffs assumed that the natural male-given body, which includes a foreskin, is not a proper body and that the socially constructed circumcised body should serve as a basis of comparison for evaluating the plaintiffs' damages.

The circumciser's attorney in the case of *A.L.* refused to acknowledge a natural addition as damage. Objecting to the use of the circumcised body as a basis for comparison and preserving the distinction between the natural and the artificial, the plaintiff's lawyer declared in court, "There is no rationale for this lawsuit. This is an extra foreskin rather than lack of it."[111] The disagreement between the prosecution and the defense in the case of *A.L.* was never resolved since the lawsuit was dismissed after the plaintiff did not submit a medical opinion that could prove damages. In the case of *T.A.*, Judge Kasirer dismissed the lawsuit. He ruled that there was no need to perform the corrective surgery on the newborn's penis, and he implicitly accepted the argument that the circumcised body was a basis for comparison for evaluating the plaintiff's damages. Bodily damage was defined as an unwelcomed addition in the socially constructed body that is perceived as being a proper one.[112]

In this section, I have shown how a lack in the artificial body (a silicone implant removal from the plastic body) was conceptualized as a disability and how an addition to the socially constructed body (a foreskin left on the circumcised body) was perceived as damage. However, bodily "lacks" or "additions" are unstable, and they depend on the changing social construction of the proper body.

Remarkable examples of the instability of the basis for comparison for estimating bodily damages are malpractice lawsuits filed following sterilization procedures performed on women. There have been two kinds of these lawsuits: (1) lawsuits filed because there was damage to the plaintiffs' fertility organs, destroying their fertility capability and turning them infertile;[113] and (2) lawsuits filed after doctors performed failed sterilization procedures, leaving the women fertile.[114] Placing these two kinds of lawsuits side-by-side shows that the same body condition can be considered as either

[111] Court Transcript from May 4, 2009 at 7, CivC (DC Jer) 1414/98 A.L. v. State of Israel (2002) (Isr.).

[112] An opposite perception of the basis for comparison for evaluating the plaintiff's damages relating to the practice of circumcision is in the case of *K.* In this case, the plaintiff was circumcised when he was a 21-year-old new immigrant to Israel, from the former USSR. The plaintiff argued in his lawsuit that, since his mother was not Jewish, "the circumciser could not have circumcised him, from the very beginning, according to Jewish law and he performed the circumcision without explaining to him that this act had no meaning, from a religious perspective." *See* Statement of Claim at 1, CivC (MC Rishon Leziyon) 7266-04/10 K. v. A. (2011) (Isr.). The Magistrate Civil Court dismissed the plaintiff's lawsuit since it had already been discussed by the Regional Rabbinical Court, which had ruled that the problem pointed out by the plaintiff was discovered after the circumcision had been performed. Even though the Regional Rabbinical Court and the Civil Court confirmed the state of the plaintiff's body, they both principally agreed that the bodily baseline for estimating the plaintiff's damages derived from his cultural background (i.e., not being Jewish). The existence of two opposite perceptions concerning the bodily baseline for evaluating the plaintiffs' damages following circumcision (i.e., with/without foreskin) strengthens the social construction of the body, due to religious traditions and cultural considerations.

[113] *See, e.g.*, CivC (DC Jer) 605/94 R.M. v. State of Israel (2000) (Isr.); CivC (MC Herzilya) 507/05 H.K.T. v. Laniado Hosp. (2006) (Isr.); CivC (MC TA) 159827/02 N.M. v. Ministry of Health (2004) (Isr.). These cases involved questions connected to removal of the uterus.

[114] *See, e.g.*, CivC (DC Jer) 1315/97 O.A. v. Clalit Health Servs. (2004) (Isr.); CivC (MC TA) 1724/92 Jane Doe v. Clalit Health Servs. (1996) (Isr.); CivC (DC Jer) 733/94 Jane Doe v. Clalit Health Servs. (1996) (Isr.). These cases involved failed attempts at tying the fallopian tubes.

proper or improper, according to the basis of comparison for estimation of damage.[115] Damage to fertility organs, or absence of the organs, will grant bodily disability if the fertile body serves as a basis of comparison for the proper body. However, full functioning of the fertility system will be conceptualized as bodily damage if infertility serves as the basis of comparison. Changing and exchanging the basis of comparison for estimating plaintiffs' damages exemplify its social construction.

In one of the lawsuits, which was filed after a physician did not tie the plaintiff's fallopian tubes, the defendant's lawyer had difficulties accepting the fluidity of the basis for comparison for evaluating bodily damage. Therefore, he objected to acknowledging a condition of infertility as a basis of comparison. He claimed,

> The lawsuit should be dismissed out of hand since the rationale of the lawsuit is not causing damage . . . , refraining from making the plaintiff infertile and causing her disability of 30%, according to [C]lause 27(b) of the [Disabilities Book] . . . . The plaintiff was not damaged and, therefore, there is no rationale for this lawsuit.[116]

Despite the difficulty in acknowledging infertility as a basis of comparison for evaluating damages, courts have refrained from dismissing these lawsuits out of hand and have discussed them alongside lawsuits identifying the fertile body as the proper one.[117]

The examples presented above show that the artificial body is constructed in law by defining the basis of comparison for the evaluation of plaintiffs' damages. It turns out that the standard for a proper body is a social construction grounded in cultural perceptions and arbitrary subjective standpoints. Surprisingly, both a lack in the technologically invented body or an addition to a body, designated by religious traditions, have been conceptualized as damaged, and the border between the proper and the improper body has been found to be unstable.[118]

3. What is the Appropriate Remedy?

The subversion of the universal approach to disability and the exposure of the socially constructed nature of the body is also evidenced in the process of rulings concerning tortious remedies. These remedies are tightly linked to,

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[115] An additional example for the instability of the basis for comparison for estimating bodily damages relates to the existence/absence of foreskin after circumcision. *See supra* notes 110–12.

[116] Statement of Claim at 1, 4, CivC (MC Hadera) 4157/05 K.R. v. Ministry of Health (2009) (Isr.).

[117] *See, e.g.*, CivC (DC Jer) 1315/97 O.A. v. Clalit Health Servs. (2004) (Isr.); CivC (DC Jer) 733/94 Jane Doe v. Clalit Health Servs. (1996) (Isr.); CivC (MC Hadera) 4157/05 K.R. v. Ministry of Health (2009) (Isr.); CivC (MC TA) 1724/92 Jane Doe. v. Clalit Health Servs. (1996) (Isr.). Since the baseline for the intact body was changed and overturned in these cases, the cause for these lawsuits is "Wrongful Conception." This title was coined by a Minnesota Supreme Court judge in the case of *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 174–75 (1977). The cause for lawsuits following a birth of a child, after there was a failed attempt at sterilization of the mother, was entitled "Wrongful Pregnancy." These lawsuits raise the question of whether giving birth to a healthy child can be conceptualized as damage. This question has been extensively discussed in the research literature. However, estimating the intactness of the sterilized body is absent from this literature. On the cause of Wrongful Pregnancy, *see, e.g.*, Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT'L COMP. L.J. 535 (1995).

[118] The instability of the border between the proper and the improper body stems not only from its changeable nature, but also from its arbitrariness.

and directly stem from, the ways that courts define disabilities and conceptualize proper bodies. First, the plaintiff's damaged body needs to be classified as proper or improper and reparable or irreparable in order to determine which remedy is most suitable. The courts aspire to estimate the extent to which the plaintiff's bodily damages are reversible and thus attempt to determine whether the plaintiff's disability is permanent and stable or temporary and variable. In other words, the courts assess whether the plaintiff's body can be fixed or will remain damaged forever.

Two main remedies are offered by courts after evaluating the possibility of the body's reparation: either (1) the plaintiff's body will be signified as being permanently ruined and, therefore, compensation will be ordered for the disability, or (2) the plaintiff's body will be perceived as reparable and, therefore, correctable by court remedies (e.g., compensation in order to perform corrective surgery).

While one may have thought that the choice between these two performative alternatives—stabilizing the disability or correcting the body—would be grounded in a "real" (medical, technological, or scientific) difference, I claim that this judicial decision is frequently derived from discursive (and ultimately socially constructed) distinctions. A typical example of such a distinction affecting the process of tort remedy choice relates to the discursive distinction between bodily deformity or function and bodily loss. While bodily deformity and function are frequently perceived as changeable and reparable,[119] bodily loss is understood as irreversible and irrevocable.[120] Consequently, the same condition could be conceptualized differently and treated in two opposite ways. This is the reason a mastectomy, for instance, is sometimes perceived as irreversible and in other instances considered reparable.[121]

It turns out that the proper body's range of sizes—the one from which a deviation is signified as being a disability—is arbitrary and socially constructed and it appears that able-bodied-ness is compulsory, in Robert McRuer's words.[122] Implementing the disability categories is also influenced by social and cultural factors, and the stability of bodily disability is

[119] For conceptualizing bodily deformities as changeable and reparable, *see, e.g.*, CivC (MC Hi) 16981/07 R.G. v. Shoresh Med. Servs. (2010) (Isr.); Respondent's Damage Calculation at 9, CivC (MC TA) 57030/08 Y.O. v. Dr. A.R. (2010) (Isr.); CivC (MC Hi) 12122/07 Y.S. v. A.F. (2009) (Isr.); Plaintiff's Affidavit at 2, CivC (MC Rishon Leziyon) 1565/05 B.Sh.O. v. Dr. G.F. (2009) (Isr.); CivC (MC Rishon Leziyon) 708/05 E.M. v. Clal Ins. Co. Ltd. (2008) (Isr.). For conceptualizing bodily dysfunctionality as changeable and reparable, *see, e.g.*, CivC (MC Petach Tikva) 981/94 Y.S. v. Hamagen Ins. Co. Ltd. (2001) (Isr.).

[120] *See, e.g.*, CivC (DC TA) 394/98 A.A. v. B.N., ¶ c (2006) (Isr.); CivC (DC Jer) 1359/99 M.A. v. I.B. (2003) (Isr.); CivC (DC Jer) 1013/06 John Doe. v. Rabbi N.Z. (1999) (Isr.); CivC (MC Jer) 676/95 R.A. v. Hadassa Med. Ctr., ¶ c.1 (1998) (Isr.).

[121] *Compare* CivC (MC Jer) 676/95 R.A. v. Hadassa Med. Ctr. (1998) (Isr.) *with* Statement of Claim at 5, CivC (MC Hi) 17301/07 F.B. v. the Holy Family Hosp. (2010) (Isr.), *or* CivC (MC Hi) 16981/07 R.G. v. Shoresh Med. Servs. (2010) (Isr.), Respondent's Damage Calculation at 9, 13, CivC (MC Hi) 12122/07 Y.S. v. A.F. (2009) (Isr.), *and* Plaintiff's Affidavit at 2, CivC (MC Rishon Leziyon) 1565/05 B.Sh.O. v. Dr. G.F. (2009) (Isr.), *with* Statement of Claim at 11, CivC (MC Kfar Saba) 1219/06 T.F. v. Dr. E. O. (2009) (Isr.).

[122] Robert McRuer, *Compulsory Able-Bodiedness and Queer/Disabled Existence*, *in* DISABILITY STUDIES: ENABLING THE HUMANITIES 88, 89 (Sharon L. Snyder, Brenda Jo Brueggemann & Rosmarie Garland-Thomson eds., 2002).

questioned due to corrective mechanisms and the socially constructed distinction between the reparable and irreparable disability.[123]

Obviously, the perceptual dualism toward the plaintiffs' bodies in Israeli personal injury claims relating to sex-defining organs also affects the construction of their disability and gender. Since disability is derived, inter alia, from the intactness or perfection of the body (or its lack thereof) and is related to people with "deviations" or "defective" physical existence, we can easily recognize how the competing alternatives for conceptualizing the body also affect the possibilities for classifying the plaintiffs as disabled people. The perceptual dualism of the body constructs the plaintiffs as people with disabilities on the one hand, and simultaneously undermines their classification as such on the other. While perceiving disability as determined in an objective manner supports the labeling of the plaintiffs as people with disabilities, the conceptualization of disability as socially constructed undermines the stability of the category and makes it more fluid.[124]

Just like disability, the plaintiffs' gender is also influenced by the perceptual dualism of the body and could be understood in two competing ways in the discourse. Either the plaintiffs' gender is essential to their bodies or it is socially constructed and does not necessarily stem from their sexual identity. Two representative and non-exhaustive examples of the perceptual dualism concerning gender in the discourse relate to women's fertility and men's sexual function. On the one hand, women's motherhood is understood as grounded in their biology. When considering old age, the Disabilities Book expects women to be fertile.[125] On the other hand, biological women report their unwillingness to become mothers and their wish for sterilization, which confirms the understanding of motherhood as socially constructed.[126] Moreover, male sexual function is constructed in two competing ways. On the one hand, the intense male sexual function is understood as grounded in men's biology. When considering old age, the Disabilities Book expects men to continue to function sexually.[127] On the other hand, up until 2008, male impotence was not included in the Disabilities Book, since it was not considered a problem, according to social perceptions at the time.[128] This fact confirms the socially constructed nature of male sexual function and once again exposes the perceptual dualism relating to gendered identities in the discourse.

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[123] The disabilities studies' critique showed that technology offers various new possibilities for "correcting" the body and "erasing" the disability in a way that exposes the fluidity of the disability category. *See, e.g.*, Ingunn Moser, *Disability and the Promises of Technology: Technology, Subjectivity and Embodiment Within an Order of the Normal*, 9 INFO. COMM. & SOC'Y 373 (2006).

[124] Bradley Areheart claims that bodily disability is socially constructed as a biological matter. *See* Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347 (2011). In this context, *see also* Ellen Samuels, *Critical Divides: Judith Butler's Body Theory and the Question of Disability*, 14 NAT'L WOMEN'S STUD. ASS'N J., Autumn 2002, at 58. Undermining the classification of the plaintiffs as people with disabilities is in line with the third wave of disability studies ideas, which offered an anti-essential and contextual understanding of the disability category. *See, e.g.*, DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY (Marian Corker & Tom Shakespeare eds., 2006).

[125] *See* The Disabilities Book, *supra* note 26, § 25.

[126] *See supra* notes 113–15.

[127] *See* The Disabilities Book, *supra* note 26, § 24(8).

[128] *See supra* notes 61–62.

V. THE PERCEPTUAL PARADOX WITH RESPECT TO THE BODY

So far, I have pointed out two opposite tendencies in the conceptualization of the body in Israeli personal injury claims relating to sex-defining organs. On the one hand, I argued that the legal presumption underlying the practice of filing personal injury claims is that the body is universally and uniformly given. I explained and demonstrated how this presumption is doctrinally adopted and is evidenced in the cases that were studied. On the other hand, however, I claimed that the socially constructed nature of the body is repeatedly exposed in the Israeli tortious doctrine, as demonstrated in the cases presented above. I showed how both the enactment and implementation of the disability categories in the Disabilities Book are affected by social considerations. I pointed out the artificial nature of the body, used as a basis of comparison for evaluating bodily damages, and exposed the discursive (and, ultimately, socially constructed) distinctions that affect the tortious remedies ruling procedure.

Despite the legal presumption of a universally and uniformly given body, and contrary to the universal approach toward disability that is derived from this presumption, the concept of the body is repeatedly deconstructed in Israeli personal injury claims relating to sex-defining organs. Its conceptualization, as a given, is undermined, and its social construction is exposed. The presumption of a universally and uniformly given body is replaced by the exposure of multitudinous artificial bodily regimes.[129] These regimes can, alternatively, be interpreted as rejection or denial of any bodily regime. If there are countless bodily constructions, in which each construction can be changed at any given moment due to its artificial nature, this fluid, unnecessary, and perhaps temporary multitude of bodily regimes may also be considered as a rejection or denial of any particular bodily regime. In other words, we can argue that there are either countless bodily regimes or that there is no body. However, we cannot presume that there is one universally and uniformly given body.

The built-in tension between the universally and uniformly given body, on the one hand, and the undermining existence of multitudinous bodily regimes, on the other, uncovers a perceptual paradox with respect to the body. As a result, law operates in favor of the body's naturalization and presumes that the body is a given category, while at the same time, this category is deconstructed, revealing its changing socially constructed nature.

After presenting the perceptual paradox with respect to the body in the tortious area of personal injury claims, I now turn to two serious problems in relation to this paradox.

The first is a structural problem, which refers to connections between the institutional mechanism of personal injury claims in general, and the interpretation of its units. Challenging the presumption of a universally and uniformly given body could undermine the conceptual justifications and the

[129] Adopting the word "regimes" to demonstrate the multitude of bodily constructions in law emphasizes the compulsory nature of these constructions, as well as the set of adjudications involved in these constructions.

practical feasibility of the legal institution of personal injury claims. If the body is not universally and uniformly given, and if it is constantly, infinitely, and dynamically socially constructed, how can bodily damage be identified? How can we estimate bodily disability in such a case? What could be the basis of comparison for deciding what needs to be repaired, and how damage should be repaired? It is conceptually and practically difficult, if not impossible, to claim bodily damage if it is unclear what is a proper body, if there are countless, changing definitions of bodily intactness, and when the definitions of the proper and the improper body collapse into each other.[130] Simply put, I am wondering whether the existence of countless socially constructed and constantly changing bodily regimes do not "pull the rug out" from under the conceptual justification, and the practice of, personal injury claims.[131] Another way to introduce the structural problem is by asking the following: can we imagine a tortious system which does not aspire to cure the body and embraces the failure in the absence of the stable, uniform, and necessary standard for proper body?[132] This structural question not only reflects an analytical intra-legal contradiction between the absence of the (universally and uniformly) given definition of "body" and the conceptual justifications and practice of personal injury claims. It also uncovers the deep social and cultural problem of not acknowledging bodily damages, which are not derived from the definition of the given proper body, although this definition is repeatedly deconstructed.

The second problem is an ethical one. It relates to the complex relationship that exists between the individual point of view and the construction and deconstruction of structural categories. Apparently, the plaintiffs neither accept nor identify with the proposed analysis of the body. They neither consciously nor intentionally challenge the notion of a universally given body, and, in most cases, their viewpoints do not support the deconstruction of the body. The plaintiffs adopt an essentialist understanding of the body and experience their bodies as failed bodies.[133] Therefore, a troublesome ethical question is whether the proposed insights concerning the social nature of the body are at the expense of silencing the plaintiffs' voices, and whether they take the plaintiffs' understandings into account. Another way to put it is as follows: why should we undermine, from the very beginning, the essentialist understanding of the body if plaintiffs do not identify with this move, and it does not serve them from their point of

[130] Although claims for compensation for pain and suffering, which are subjectively and individually measured in Israeli tort law, can still be filed, whenever compensation for physical personal injury is requested (for determining pecuniary and non-pecuniary damages), the absence of a stable standard for bodily intactness may be problematic.

[131] Prima facie, the daily filing of personal injury claims, and the existence of this area of law itself, confirm the conceptual justification and the practical feasibility of personal injury claims. However, I aspire to show that the legal rationale for operating this area of law (i.e., the presumption of given body) is contradicted and illogical, and currently suffers from a conceptual and practical anomaly.

[132] Based on Foucauldian analysis tools, Fiona Kumari Campbell explains the role of law in constructing and preserving bodily disabilities as negative ontologies. *See* Fiona Kumari Campbell, *Legislating Disability: Negative Ontologies and the Government of Legal Identities*, *in* FOUCAULT AND THE GOVERNMENT OF DISABILITY 108 (Shelley Tremain ed., 2005).

[133] The plaintiffs can refer to themselves only through the compulsory norms of society. As Judith Butler explains, "The 'I' who begins to tell its story can tell it only according to recognizable norms of life narration. We might then say: to the extent that the 'I' agrees, from the start, to narrate itself through those norms, it agrees to circuit its narration through an externality, and so to disorient itself in the telling through modes of speech that have an impersonal nature." *See* JUDITH BUTLER, GIVING AN ACCOUNT OF ONESELF 52 (2005).

view? How can we support the deconstruction of the body without ignoring the plaintiffs' viewpoints, feelings, and experiences? Moreover, not acknowledging the plaintiffs' understandings of the body also has normative consequences. What is the meaning of the proposed conceptualization of the body for the plaintiffs? Will they be comforted by learning that the body is socially constructed when they are not granted the desired compensation? Should they be deprived of some of the requested remedies since the body is socially constructed? [134] These are only some of the ethical issues that need to be addressed.

VI. TOWARD A NEW PARADIGM FOR DEFINING PERSONAL INJURIES

In light of the perceptual paradox with respect to the body and the two problems discussed above, I now propose a new paradigm for defining the body—and consequently personal injuries—in the tortious area of personal injury claims.

Considering the exposure of the artificial nature of the body embedded in personal injury claims, I suggest enabling personal injury claims that are not necessarily organized around the body—or at least not the universally and uniformly given one. Instead of presupposing a given natural, stable, and majority-shared body, I suggest adopting a social understanding of the body. Adopting a social understanding of the body is needed in light, and as a result, of the body's complex relationships with the social, cultural, technological,[135] and ecological environment. The rigid distinction between the body and its environment is repeatedly undermined, and the two regularly blend into one another. As Gowri Ramachandran states, "The body and the world around it have begun to bleed into each other: extreme body modification is on a more visible rise, [and] clothes and other objects seem more and more like parts of our bodies and extensions of ourselves . . . ."[136]

There are many examples that demonstrate the expanding of the morphology of the body and its merging with the environment in the studied field. The silicone placed in the female breasts (mentioned above) is only one example of the hybrid character of the body and its unification with the environment.[137]

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[134] Post-structural approaches were criticized for leaning on linguistic monism and perceiving the body as a textual platform. *See, e.g.*, BORDO, *supra* note 6, at 38–42, 283–85, 291–94. On the necessity of adopting the phenomenological approach to the body, *see* Helen Marshall, *Our Bodies, Ourselves: Why We Should Add Old Fashioned Empirical Phenomenology to the New Theories of the Body*, *in* FEMINIST THEORY AND THE BODY: A READER 64, 64–65 (Janet Price & Margrit Shildrick eds., 1999).

[135] In the context of Disabilities Studies, Myriam Winance showed how technological developments construct the disabled body and affect its designation. *See generally* Myriam Winance, *Trying Out the Wheelchair: The Mutual Shaping of People and Devices Through Adjustment*, 31 SCI. TECH. & HUM. VALUES 52 (2006).

[136] Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENV. U.L. REV. 1, 34–35 (2009).

[137] There are numerous additional examples concerning the complex relationship between the body and its environment and their merging with each other. Inter alia, these examples include techno-medical instruments, upon which we are dependent, planted in our bodies (e.g., pacemakers, prosthetic arms or legs) or externally attached (e.g., wheelchairs, glasses, contact lenses, hearing aids, canes, or COVID-19 masks), and common cultural practices soldered into the body (e.g., hair dye, tattoos, or piercings). For more examples of the merging of the body with the environment, *see Id.* at 34. Ramachandran examines

Due to the undermining of the borders between the body and the environment, and their following unification, Ramachandran argues that the only bodies we know anything important about are the social bodies. These are the bodies that exist in a complex framework of medical standards, cultural practices, technological arrangements, and legal norms.[138] Therefore, Ramachandran argues that the only bodies that deserve legal protection are the social bodies. In her words,

> [I]f there is a "body" that . . . law ought to be protecting, it is not the "human body," as defined to mean an organic, physically continuous being distinct and isolated from the surrounding world, but rather the "post[modern] body," defined as constructed by and situated within a social and technological context. Protecting this "post[modern] body" can't be done by carving it off for special legal status because it can't be carved off at all.[139]

Agreeing with the notion that the only bodies that deserve legal protection are "postmodern bodies" (as distinct from the "human bodies") does not mean that filing tortious lawsuits following personal injuries should be impossible. Rather, we should say that there is no full correspondence between the physical borders of the body and the limit for claiming personal damage. Instead of presuming that there is only one universally and uniformly given body from which any deviation comprises bodily damage, we should acknowledge a pluralism of configurations of bodily existence.[140]

This proposal replaces the negative approach toward bodily damages with a positive approach. In this context, the meaning of "negative or positive" is "profusion or lack" and not "good or bad." Instead of an approach that estimates how much the damaged body is lacking, which is based on the presumption that all bodies are uniform, I suggest adopting an approach that encourages profusion and diversity of configurations of bodily existence for the basis of personal injury claims.

However, how can we know which bodily configurations can serve as the basis for a personal injury claim if the physical boundaries of the body are deconstructed and a social understanding of the body is adopted? I propose adopting a phenomenological approach and defining personal injury as a severe, bad influence on one's lived experience.[141] Using the idiom "one's lived experience" is meant to enable flexibility and acknowledgment of the pluralism of configurations of bodily existence.[142] This suggestion

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to what extent we can extend the body's borders. She provocatively asks whether we can consider cars or smartphones (which are already nicknamed our legs or exo-brains, retrospectively) as part of our body. *See* Gowri Ramachandran, *Assault and Battery on Property*, 44 LOY. L.A. L. REV. 253, 262 (2010).

[138] Ramachandran, *supra* note 137, at 261.

[139] Ramachandran, *supra* note 136, at 38–39.

[140] Anne Bloom supports this proposal by stating that, "cultural developments will push tort law in the direction of what might be characterized as 'anti-foundationalism,' or less reliance on categorical assumptions in legal analysis." *See* Bloom, *supra* note 5.

[141] Of course, not every terrible influence on one's lived experience should justify the recognition of personal injury. Public policy reasons may deprive one of having his/her personal injury recognized.

[142] Phenomenology explores how personal experience affects the ways the phenomenon is perceived in consciousness. The French philosopher, Maurice Merleau-Ponty, emphasized the centrality and significance of the body in our personal experiences and noted that our thinking is mediated through our body. In his words, "Insofar as, when I reflect on the essence of subjectivity, I find it bound up with that of the body and that of the world, this is because my existence as subjectivity [consciousness] is merely

supports the latest initiatives of scholars in different areas of the law to acknowledge the profusion and diversity of bodily configurations, and it aspires to implement these initiatives in one more area of law: tort law.[143]

Basing conceptualization and praxis on a phenomenological definition of personal injuries, while adopting a social understanding of the body, acknowledges the existence of personal injuries called into question above. A remarkable example is lack of success in achieving the desired body (as distinct from worsening an existent body). In the abovementioned case of *R.G.*, the plaintiff's lived experience severely worsened during the years she lived with one enlarged breast and one natural-sized breast due to failed breast surgery. According to the proposed paradigm, which gives serious weight to one's lived experience and adopts a social understanding of the body, the plastic body with silicone breasts should be referred as the baseline for the evaluation of the plaintiff's damages. Therefore, the lack of one enlarged breast should grant bodily disability and appropriate compensation.[144]

It is only a positive approach toward personal injury, which encourages pluralism of bodily configurations (including plastic bodies—the hybrid between the natural and artificial material), that could be a basis for disability due to the failure to attain an enlarged breast. A negative approach to personal injuries, which presumes that the body is universally and uniformly given to us and which evaluates how much the damaged body is lacking, will not grant disability for preservation of the body (breast) in its natural state.

An additional example of damage that a negative approach toward personal damages did not acknowledge is foreskin left on a newborn's penis due to a botched circumcision. Disability and compensation, however, would have been granted, according to the positive approach. According to the negative approach, an uncircumcised body cannot be found "lacking." However, a positive approach toward personal injuries, which acknowledges a profusion of configurations of bodily existence, could be the basis for

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one with my existence as a body and with the existence of the world, and because the subject that I am, when taken concretely, is inseparable from this body and this world." *See* MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 475 (2002).

[143] Supporting pluralism in bodily configurations, some legal scholars undermine the physical borders of the body. In the context of constitutional law, for instance, Ramachandran argued that the right to bodily integrity is not subject to the body's physical borders, and that there should not necessarily be compatibility between the organic borders of the body and the legal rights derived from them. *See generally* Ramachandran, *supra* note 136. Similar arguments were heard also in the context of property law. Regarding this area of law, Ramachandran undermined the distinction between human organs and other objects. She suggested considering damage to the medical instrument upon which one is dependent (e.g., a prosthetic leg) as bodily damage. *See* Ramachandran, *supra* note 137, at 253.

[144] Common law unexpectedly and astonishingly adopts a similar approach and expands the physical borders of the body. It perceives damage to an object close to the body (e.g., glasses on the nose, prosthetic teeth, or hearing aids) as damage to the body itself. The Israeli Road Accident Victims Compensation Law has adopted this idea and includes in the definition of "bodily damage" also "a device required for the operation of one of the body parts, which was attached to the injured person['s] body at the time of the road accident." *See* Road Accident Victims Compensation Law, (1975) § 1 (Isr.). Though the law refers to devices attached to the body, the requirement for attachment has been liberally interpreted in the Israeli legal literature. *See* ITZHAK ENGLARD, COMPENSATION FOR ROAD ACCIDENT VICTIMS 177 (2005). Additional amazing examples of Israeli law that abandon the physical borders of the body and use the artificial body as the baseline for disability rulings are found in § 10(g) Disabled Persons Regulations (Tests to Determine Disability Level) (1969). According to this regulation, if either an organic or artificial organ was transplanted into one's body, the disability level is determined, based on the functionality of the transplanted organ and not based on the lack of the organ.

disability if the circumcision left extra foreskin on a male body and if the quality of the individual's lived experience severely worsened as a result. A third example of the potential contribution of the proposed paradigms is damages that could result from failed sterilization procedures. The fertile body may be found "lacking" only if the positive approach to personal injuries is accepted. This perspective deconstructs bodily boundaries and positions the infertile body as a baseline for evaluation of the plaintiffs' damages.[145]

The suggested paradigm has obvious effects on not only the understanding of personal injuries but also on the conceptualization of identities defined by bodily attributes. Deconstructing the body morphology forces us to abandon the presumption that certain identities (e.g., disabled or gendered identities) are embedded in the body.[146] If we adopt a social understanding of the body, which supposes that the body and environment bleed into each other and that various configurations of bodily existence are enabled, it also means that identities, allegedly embedded in our body, are a construction of social perceptions and cultural practices. Therefore, failure to adopt a certain body or identity (e.g., a sterilized body which prevents a woman from becoming a mother) should be recognized and compensated for, according to the proposed paradigm.

The proposed paradigm for defining personal injury claims has individual and political significance. The individual significance of the paradigm stems from the weight it gives to the phenomenological experience of the plaintiffs and the ways in which they experience their bodies in order to estimate their damages. Furthermore, deconstructing the physical boundaries of the body and adopting a social understanding of the body affect the way the plaintiffs perceive and experience the world. Our perceptions and experiences of the world are enabled through our bodies and, therefore, adopting a new definition of the body could change our perceptions and experiences.[147] The political significance of the proposed paradigm is evident in its recognition of pluralism of bodily configurations.[148]

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[145] Anne Bloom and Marc Galanter argue that, "whether injuries are viewed as harmful or enhancing is influenced by fashion or religious obligation." The key point, in their opinion, is that the construction of a particular event as "injury" is an interpretive event. *See* Anne Bloom & Marc Galanter, *Good Injuries*, *in* INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 185 (Anne Bloom, David Engel & Michael McCann eds., 2018).

[146] Many scholarly works in the area of jurisprudence of identities aspire to disconnect the allegedly unavoidable ties between the body and identities and subvert the essential understanding of the body. *See, e.g.*, Ramachandran, *supra* note 136, at 35. In the context of gender studies, Judith Butler argued that the gendered body is performative. *See* JUDITH BUTLER, GENDER TROUBLE 173 (Linda J. Nicholson, ed., Routledge 2d ed. 1999). Furthermore, in the context of disabilities studies, a performative understanding of the disabled body was adopted. *See, e.g.*, LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM & OTHER DIFFICULT POSITIONS (2003); Areheart, *supra* note 124. In the context of race or age, it was suggested to abandon the essential understanding of the body. *See* POWELL, *supra* note 75; RACE AND RACISM IN THEORY AND PRACTICE (Berel Lang ed., 2000).

[147] In order to illustrate how our perceptions and experiences are enabled through our bodies, Gowri Ramachandran offers us the following example. Imagine that artificial eyes for improving vision contain a filter, "blocking [us] from seeing images that [are] deemed to undermine the interests of the company that sold [us] the eyes . . . ." We can easily see how "this physical change would alter . . . [our] perception and experience of the world." *See* Ramachandran, *supra* note 136, at 36–37.

[148] *See id.*, at 20–24. Furthermore, scholars in disabilities studies have expressed similar worry and claimed that aspiring to correct every single bodily impairment would ruin the cultural richness of society. A significant example in this context is the ways sign language culturally enriches society. *See* John Swain & Sally French, *Towards an Affirmation Model of Disability*, 15 DISABILITY & SOC'Y 569 (2000).

An important question is to what extent the proposed paradigm celebrates a festival of bodily configurations. After all, the plaintiffs' phenomenological experiences—the ones that should be the basis for personal injury claims—are conceptualized and experienced through social norms that presume a given bodily existence and that support an essentialist perception of bodily identities.[149] Indeed, we can presume that most plaintiffs will refuse to deconstruct the morphology of the body. Nevertheless, replacing the paradigm creates a new legal horizon and stops the automatic channeling of personal injury claims to dictated-in-advance structures of *body*. It enables alternative possibilities of existence and a new position of knowledge, which could create a social change (even if only in rare cases).[150]

It is also worthwhile mentioning that examining the proposed paradigm in light of political arrangements shows that it is neither right-wing nor left-wing. Deconstructing the familiar morphology of the body contradicts the conservative right-wing viewpoint, which refuses to undermine world orders, acts against the law of nature, and challenges the laws of creation. Insistence on preserving the well-known boundaries of the body is also shared by humanistic left-wing individuals, who refuse to blur the distinction between the human and the inhuman, due to their devotion to human dignity, bodily integrity, and sanctity of life.

Since the new paradigm encourages the deconstruction of essentialist understanding of the body without ignoring the ways plaintiffs conceptualize and experience their damages, it deals with the structural and ethical problems described above. Together with the analysis of the conceptualization of the body, it offers a new theoretical framework for studying tort law. While focusing on the tortious damage (rather than liability) question, it explores the construction and deconstruction of the body (rather than the rights given to its owner),[151] gives significance to the human phenomenological experience,[152] and imports post-structural theories

[149] The belief that a social matter should be perceived and understood as essential has been termed "strategic essentialism" by Michael Herzfeld. Herzfeld explained the ways the normalcy discourse works. *See* MICHAEL HERZFELD, CULTURAL INTIMACY: SOCIAL POETICS IN THE NATION-STATE 32–33 (Routledge 2d ed. 2005).

[150] My political-analytical move ends with an invitation to acknowledge alternative possibilities of existence, based on the understanding of the performative nature of the body and bodily identities. However, I do not discuss the question of when and under what circumstances the plaintiffs will demand acknowledgment of alternative possibilities of existence, though a full political theory should clarify the process which grants the plaintiffs agency to oppose social norms, derived from their aspiration for a better life. For a critical discussion of Butlerian theory for not giving an account of one's agency to oppose social norms, s*ee* Seyla Benhabib, *Feminism and Postmodernism: An Uneasy Alliance*, *in* FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE 17 (Seyla Benhabib, Judith Butler, Drucilla Cornell & Nancy Fraser eds., 1995). For a possible solution to dealing with this difficulty *see* Miri Rozmarin, *Individuality and Political Existence*, 8.1 RESLING 25 (2001).

[151] Most of the legal literature concerning the human body relates to the rights of its owners. *See, e.g.*, ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW (1988); LAW AND BODY POLITICS: REGULATING THE FEMALE BODY (Jo Bridgeman & Susan Millns eds., 1995); Yofi Tirosh, *The Right to Be Fat*, 12 YALE. J. HEALTH POL'Y L. & ETHICS 264 (2012). However, there are few studies that relate to the construction of the body in law. A significant example of such a work is Alan Hyde's groundbreaking book. In the introduction to his book, Hyde describes the absence of literature on the legal construction of the body: "The problem, rather, on which I discovered no legal literature of interest, is describing just which bodies law currently constructs and when and how it comes to construct different bodies for different purposes." *See* ALAN HYDE, BODIES OF LAW 5–6 (1997).

[152] Scant literature gives significance to human phenomenology. For criticism of the textualization of the body, *see* BORDO, *supra* note 6; Marshall, *supra* note 134. Elizabeth Grosz argues that while bodily representations are extensively analyzed, the body's materiality has not yet been seriously taken into

and cultural approaches into tort law. Due to the fact that very few studies have challenged the presumption of the existence of pre-discursive body in torts[153] and that the development of a cultural approach to torts is still in its very beginning, my analysis and proposed paradigm have the potential to significantly contribute to the study of the torts area of law.

VII. CONCLUSION

It is hard to believe that, to date, there have been no serious attempts to examine how the body is conceptualized in torts. This article studied how the body is conceptualized in a concrete Israeli field of personal injury claims. It demonstrated that the body's perception in the research field is not uniform, coherent, or universal and that it includes multitudinous contradictory bodily regimes. The article points out competing bodily perceptions and exposes various possibilities of signifying the body. Inter alia, these possibilities include signifying the body as natural or artificial, normal or perverted, proper or improper, whole or lacking, scientific or cultural, disabled or reparable, etc. I have argued that all these possibilities for conceptualizing the body are assembled into two possibilities, which are constantly in tension with one another. The tension is between the legal presumption of a universally and uniformly given body and the paradoxical and undermining existence of countless artificial bodily regimes. While the law presumes that the body is a universally and uniformly given category in order to estimate bodily damage and grant compensation, this category is constantly changing and infinitely reconstructed. Additionally, I explored the influences of this paradox on the construction of disability and gender. Relying on cultural approaches to torts, and adopting a sociological perspective to bioethics, the proposed analysis demonstrates sensitivity to the Israeli context, both doctrinally and culturally. From a doctrinal perspective, it critically examines the Israelis' exceptional use of a disabilities book. As to cultural aspects, it gives an account of the Israeli norms of aesthetics, Israeli motherhood idealization and family values, Jewish religious traditions, etc.[154]

Understanding the category of body as infinitely changing and being reconstructed has also been supported by far-reaching developments in disability and gender studies. Post-structural approaches in disability and gender studies undermine the naturalness, stability, and uniformity of the proper body, and question the necessity of repairing the body that is conceived as damaged.[155] Furthermore, the spirit of our time and its

account. ELIZABETH GROSZ, SPACE, TIME, AND PERVERSION: ESSAYS ON THE POLITICS OF BODIES 31 (1995).

[153] For an exceptional article that examines the construction of the (gendered) body in torts by post-structural theories, *see* Bloom, *supra note* 13.

[154] On the implementation of Israeli social and cultural paradigms through the body, *see* MEIRA WEISS, THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY (2002).

[155] *See*, *e.g*, Bordo, *supra* note 6; JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX (1993); BUTLER, *supra* note 146; JUDITH BUTLER, UNDOING GENDER (2004); DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY (Marian Corker & Tom Shakespeare eds., 2006); FOUCAULT AND THE GOVERNMENT OF DISABILITY 108 (Shelley Tremain ed., 2005); Donna J. Haraway, *A Cyborg Manifesto: Science, Technology and Socialist-Feminism in the Late Twentieth Century*, *in* SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 149 (Routledge 1991); ROBERT MCRUER, CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY (2006); Areheart, *supra* note 124.

technological developments support this understanding of the body. The countless possibilities of bodily reparation, which are encouraged by technology, undermine the definition of the proper body and destabilize the limits between the proper and the improper body.

Conceptualizing the body as socially constructed is neither sensational news nor a surprising discovery. If we were asked, from the beginning, whether the body is deconstructed and socially constructed, we would probably immediately answer yes, it is. If this is the case, then why should we invest time and efforts conducting empirical analysis? What is the value of such empirical work if the argument stemming from it is, to a large extent, predicted in advance? There are three main answers to this question.

First, it is important to distinguish between amorphously knowing that the body is deconstructed in law and acknowledging the ways in which this deconstruction takes form. The empirical analysis exposes the diverse ways in which the body is deconstructed and does not reduce them to one meta-narrative. Second, my empirical study focused on an Israeli research field, which uses a disabilities book for determining personal injuries. Critically exploring the conceptualization of personal injuries within the Disabilities Book, and reevaluating the use of a disability percentages method, may benefit other legal contexts that rely on disabilities books or a disability percentages method, such as welfare law. Third, there is significant importance to exposing the diverse ways in which the body is deconstructed in law. In the absence of an empirical analysis, we could have mistakenly thought that the social construction of the body is uniform or stable. Only empirical analysis of the kind that was presented here could expose the existence of multitudinous changing bodily regimes and consequently lead to replacing the assumption of a universally given body with a new paradigm that requires cognitive flexibility and sensitivity to the individual.

This article exposed the deconstruction of the body in law, undermined the conceptual justification and practical feasibility of personal injury claims, and pointed out the plaintiffs' difficulty in being identified with the deconstruction of the body in law. In other words, this article presented a puzzle more than providing answers. It wonders how the tortious area of personal injury claims can continue operating in light of the ideas presented here. What is the value of such a project, which is more disturbed by the puzzles than supplying answers? I would like to suggest three answers to this query.

The first is that this endeavor has *intellectual value*. It offers a subversive reading of legal texts that exposes how these texts create and confirm the category of body as a given. It sheds lights on the possibility of thinking about the body as socially constructed—a possibility that is pushed aside in these texts. It is an attempt to attribute opposite meaning to the accepted reading of legal texts, which supports the naturalization of the body and its perception as a given. The critical reading encourages us to think of the issue of damage in personal injury claims in a productive manner: While the plaintiff's body is damaged, the critical function is invited, and the acknowledgment of multitude bodily configurations is enabled. This leads directly to the second value of my work.

This work also has *psychological value*. Deconstructing the presumption of a given body is liberating, to a large extent. Acknowledging countless socially constructed and constantly changing bodily regimes could neutralize the feeling that we have not yet improved our bodies to the optimal state. The constant movement toward self-improvement, and the unlimited readiness to be corrected, up until the time of death may be stopped by internalizing the theoretical insight that the body is neither universally nor uniformly given to us, and that it is infinitely and constantly constructed by the society. There is no one ultimate configuration of bodily existence.

The third and last value of this work is a *normative* one. Though most of this article raises a puzzle, it also offers a paradigm for defining personal injuries. This paradigm can be seen as offering a new legal horizon, rather than a prescriptive program, since entitling certain damages as reimbursable and others as non-reimbursable only represent specific configurations of existence. I do not finalize the list of acknowledged configurations of bodily existence, since the idea is to define personal injuries based on the plaintiffs' phenomenological experience.