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Review of the doctoral dissertation of Natali Levin, MA, entitled *Philosophical and Legal Approach to the Tort of Negligence in the Israeli Law. Medical malpractice and non-fault insurance system*

Thesis supervisor: Dr. Hab. Karolina M. Cern, Prof. UAM
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The dissertation presented by Natali Levin, MA, is devoted to the issue of the tort of negligence in the context of medical malpractice, particularly the judicial and medical practice in Israel. The Author's aim is strictly practical. This is because she is committed to finding the optimal way to improve Israel's existing tort law system. Thus, in terms of subject matter and methodology, this work is situated at the interface of ethics, social philosophy, political philosophy, philosophy of law and philosophy of medicine. It addresses such vital issues as the questions of professional and personal responsibility, distributive justice, corrective justice and social justice, questions of compassion, solidarity, sense of harm, social inequality and many other issues. A comprehensive analysis of the issue addressed by the title would require the Author of the dissertation to have an enormous knowledge of not only law but, above all, philosophy. She would have to possess knowledge significantly beyond what one might reasonably expect from a doctoral school graduate.

Tort itself is undoubtedly very timely and widely debated in many countries. It is also the object of passionate political disputes. This is particularly the case in the United States, where the topic is directly linked to the issue of the liability of corporations for harm caused to citizens. This applies primarily to pharmaceutical companies (including those responsible for the opioid crisis) but also to all companies harming the environment and producing harm to the health of consumers. This is why any proposal for tort law reform is immediately the subject of intense disputes and is considered one of the more contentious points of public debate.

Undoubtedly, in the era of human-induced climate change, the issue of the responsibility of greenhouse gas emitters towards not only present but also future generations will be one of the most important political topics of the coming decades.

It is hard to resist the impression that philosophical reflection has not kept pace with political practice and has little to say on this particular issue. Of course, the subject matter is a focus of philosophical reflection. Although we find the issue already in Aristotle's *Nicomachean Ethics*, the origins of the philosophy of tort law *sensu proprio* are only located in the 20th century, in the commentaries on the publications of Oliver Wendell Holmes Jr. Nowadays, the tone of the debates concerning this topic is imposed by publications by J. Coleman, R. Posner, A. Ripstein, E. Weinrib or B. Zipursky. Despite the efforts of these authors, however, there is still a vast field for philosophical research in this area. Therefore, any new proposal to philosophically conceptualise this area of research is of great importance.

For the above reasons, Ms. Levin's choice of dissertation topic is both ambitious and academically significant. Rather than choosing one of the many available, already well-developed topics in the philosophical literature with rich secondary literature, the Author set out to analyse a relatively under-recognised and labour-intensive issue. Any such attempt deserves recognition. Having read the dissertation's title and the introduction, I was prepared for an original work with potentially very valuable conclusions for social and political philosophy.

The Author has organised her dissertation into four sections of varying length (ranging from 30 to over 60 pages). They are preceded by an introduction and crowned by a brief conclusion, which is only half a page.

In the Introduction, the Author announces the content of the relevant chapters and justifies the choice of the topic she has undertaken. She precisely indicates the thesis of the entire dissertation, according to which "Any harm caused as a result of medical negligence must prompt an appropriate response" (p. 7), and specifies the most critical research questions: "What is the role of the state and society when harm is inflicted, and liability cannot be proven? What is the justification for implementing the no-fault system in Israeli law? How can the legal system radically change the relationship between the basic concepts in tort law: the injured and injured parties, harm and fault (legal responsibility/liability)?".

The Author convincingly justifies the choice of her research subject by the momentousness of the task of reconciling the concern for citizens' health with the optimisation of the costs allocated for this purpose. Negligent medical treatment is associated with an

increasing financial burden of lawsuits and compensation costs. There is a growing awareness among citizens of their rights and, consequently, an increasing number of lawsuits for damages.

The Author also intends to address some more specific issues in her dissertation: "the concepts of pain and suffering" and "the legal standards for evaluating nonpecuniary harm" (p. 10). She intends to link the issue of the tort of negligence with legal theory and philosophy, especially in the context of its philosophical justification. She intends to consider the issue of the role of judges in malpractice trials and the problem of medical malpractice itself. Finally, she also intends to argue in favour of the adoption of 'a no-fault compensation system for medical injury compensation and insurance model' in Israel. This is a system in which compensation is paid to malpractice victims even before the performing doctors' direct liability has been established. According to the Author, such a system will eliminate the main disadvantages of the alternative solutions. It will make it sufficient for compensation to be received by demonstrating a causal link between the medical procedure and the deterioration of the claimant's condition (pp. 10-11) without the problematic and lengthy proof of the fault and responsibility of the specific person carrying out the procedure.

In the first chapter, the Author presents the general characteristics of the Israeli legal system. The history of the legal solutions applicable in the territory of the present-day State of Israel, even before its establishment, is described at great length. The Author begins her narrative with the period of the Ottoman Empire, then describes British Mandate law in the territories and the initial stages of forming the legal system of the State of Israel. The Author places particular emphasis on the antinomies inherent in Israel as a state and its legal system, especially those between a democratic rule of law and a Jewish state drawn from the tradition of the Holy Scriptures, and the antinomy between the legislative and executive powers on the one hand and the judiciary on the other. The Author describes, inter alia, the process by which English law was first introduced into the territories of present-day Israel, replacing Ottoman law. The Author devotes a great deal of space to the debates about Israel's constitution, the rationale for writing it, and its present format in the form of the 13 Basic Laws.

Chapter two is devoted to the issue of tort. Its origins in common law are described. The Civil Wrongs Ordinance (CWO) (especially its Part C) is discussed, and the differences and similarities of Israeli solutions with British tort law are explained. The practicalities of applying this law are approached: the role of judges, the rational practitioner test, and philosophical approaches relating to corrective justice. The Author refers, rather briefly, in this context to the thought of, among others, Aristotle, Richard Epstein and Ernst Weinrib (on pp. 65-66).

A substantial part of chapter two is devoted to the problem of lawmaking by judges and the question of judicial precedent. The duty of care and breach of the duty of care are also described, as well as the problem of the definition of a physician's reasonableness, which is determined by the criterion of the ability to foresee the course of events (p. 82).

The third chapter describes the health system in Israel from its establishment through the adopting of the compulsory insurance system under the 'National Health Insurance Law (1995). It addresses the issues of malpractice and medical negligence models in Israel. The chapter is divided into three parts. The first describes the reality of the current insurance system in Israel, which aims "to restore the situation to its previous state" (*restitutio in integrum*) (p. 13) through lawsuits. The Author describes the problems that the choice of such a role for the system raises, especially in situations where the injured persons are suffering psychologically or mentally and, therefore, where it is not possible to determine the extent of the suffering inflicted on them intersubjectively, nor to assess the amount of material compensation. The Author uses both Aristotelian teleology and the utilitarian hedonic calculus as potential sources of justification for tort law in the case of non-pecuniary harm (pp. 103-104). She also describes the approaches to the problem of intentional and unintentional harm present in Jewish Law. In the second part of the third chapter, the Author analyses the philosophical 'foundations of justice' based on references to the Old Testament, the thought of Maimonides, Aristotle, Gustav Radbruch, and finally Rawls and the libertarians, with Nozick in the lead.

In the last part of chapter three, the Author analyses two theoretical approaches to tort law: the one focused on justice and redress of wrongs (justice-based) and the one oriented towards realising overall economic welfare (deterrence-based). The former approach emphasises significantly the relationship between victim and wrongdoer, while the latter focuses on the broader social consequences of particular malpractices. The main risks associated with applying tort law are also identified, including the problem of defensive medicine.

The final chapter is devoted to the 'no-fault compensatory system'. The Author begins it by defining the category of comparative law and then makes a comparative analysis of no-fault systems existing in other countries: New Zealand, Sweden and the USA. Finally, the Author presents the arguments for introducing a no-fault compensatory system in Israel. She emphasises the simplicity of this system, its cost-effectiveness, the elimination of the problem of defensive medicine, and its potential to heal the relationship between patients and physicians. To use the Author's own words, "My suggested approach to compensation would be a simpler, faster, cheaper, and more efficient system. Liability for medical injuries under the proposed

system would, in most cases, be almost automatic" (p. 202). The Author outlines the general principles of a no-fault system that could apply in Israel.

Ms. Levin's work undoubtedly deserves recognition in many respects. As I stressed earlier, it explores an issue scarcely recognised and conceptualised on philosophical grounds. On the positive side, therefore, is the originality of the topic of the work. Undoubtedly, the Author also approached the discussed issue in a many-sided manner. She deals with the issue of tort law both historically, by analysing the development of the Israeli legal system, and, above all, practically - by quoting dozens of court rulings falling within her area of interest. The dissertation demonstrates the Author's vast competence, primarily in law and the history of the Israeli legal system. The Author also repeatedly refers to various philosophical conceptions (from the areas of ethics, social and political philosophy and philosophy of law) in her analyses of tort law. She cites, among others, the theories by Rawls, Nozick, Dworkin, Aristotle, Kant, Bentham, J.S. Mill and Peter Singer.

Despite these many positives of the work, several shortcomings can also be identified. First and foremost, one could expect much better clarification of the rationale behind the choice of structure of the work. Serious doubts arise already with a study of the first chapter, devoted, let us recall, to a discussion of more than a hundred years of the development of legislation in the lands now belonging to Israel. I have doubts whether this history adds anything to the main subject of the dissertation. Is it essential for a discussion of the issue of tort law reform in Israel to describe the history of the otherwise exciting debates on Israel's unwritten constitution? Is it necessary to bring up this history and devote an entire chapter to it to understand that judicial precedent plays an essential role in the Israeli legal system (and this seems to be the most important conclusion of Chapter One)? I sincerely doubt it. Chapter One would have been much better served if it had been devoted directly to the role of tort law in philosophy in light of the existing literature. This worry is even more legitimate if one considers that final arguments put forward by Ms. Levin in favour of the no-fault system do not differ at all from those invoked, for example, by American proponents of this system. From this perspective, it seems questionable whether learning about the peculiarities of the Israeli system is essential for the argument of the final chapter.

Similar doubts are raised by the extensive (as many as 11 pages) definitions of comparative law in chapter four. If the Author aims to compare tort law solutions in several countries, it is unnecessary to define comparative law so extensively for this purpose. Just as there is no need to define philosophy, political philosophy or ethics in order to explore the

philosophical and political implications of the subject matter discussed in the dissertation. This part of the dissertation could have been managed much better.

The second noticeable shortcoming of the work is the somewhat surprisingly episodic role played by philosophy as such. Most of the work describes historical, historico-legal and strictly legal issues. The work is full of interesting case studies of judicial decisions, which, however, need more analysis based on any philosophical framework. In general, the philosophical positions invoked by the Author contribute little to her narrative, and the conclusions on the superiority of the no-fault system over alternative systems do not seem to depend at all on the philosophical concepts used in the work.

This is surprising, as, in many places, the work begs for an analysis of judicial and legal terminology from the perspective of philosophical disputes. For example, analyses of the categories of 'reasonable person' and 'reasonable physician' from the perspective of contemporary debates concerning the categories of 'reasonableness' and 'rationality' could be of great interest. They are, after all, the subject of a well-known philosophical and political dispute between universalist liberals (e.g. Rawls in his *Theory of Justice*) and communitarian liberals.

Similarly, when analysing Israel's tort law system, the Author writes that "a combination of justice, fairness and reasonableness are included in the definition of 'duty of care'" (s. 67). It is a great pity that the Author does not analyse the relationship between these, strictly philosophical categories, from the perspective of today's debates on reasonableness, rationality, and justice as fairness.

The nature of the sources referred to in the dissertation is also questionable at times. For example, although Will Kymlicka's book, initially published in 1990, is still an excellent compendium of contemporary political philosophy, it should not be the sole basis for describing libertarian critiques of John Rawls's philosophy (pp. 121-122). It would seem that the libertarian narrative on the role of central government in regulating the insurance market is so important that it deserves at least a reference to the source texts, such as Nozick's *Anarchy, State, and Utopia*. The reference in the doctoral dissertation to overview literature, in this case of an almost textbook character, may suggest that the Author of the dissertation has a rather rudimentary knowledge of contemporary theories of social justice. Following Kymlicka, the Author also reconstructs utilitarian philosophy and its critiques (pp. 124-125).

Finally, an objection can also be made (which is quite popular in this kind of reviews, although often misused) concerning the selection of secondary literature used. It is unclear why the Author does not draw on some of the recent literature on the subject she is analysing, e.g. the articles by A. Ripstein, "The Philosophy of Tort Law", or the article by the same author in

the *Stanford Encyclopedia of Philosophy*, to the book edited by Gerald J. Postema, entitled *Philosophy and the Law of Torts* (Cambridge, 2009), or the book edited by John Oberdiek entitled *Philosophical Foundations of the Law of Torts* (OUP, 2014). Nor does the Author use several articles whose authors interpret tort law from the perspective of the particular philosophical concepts she addresses, e.g. the philosophy of J. Rawls (works by L Martins-Zanitelli, A. Ripstein, S. Freeman, among others).

Some minor issues can also be raised. For example, is it not too controversial to attempt to justify tort law through Hedonic Calculus (p. 104)? What about the classic argument from proponents of deontological approaches that utilitarianism conflicts with the idea of universal human rights? In the perspective of act utilitarianism, the suffering of a few need not be compensated if it leads to an increase in the happiness of a greater number of people. Would not the thought of Aristotle or the deontology of Kant be a much better justification for tort law in this context?

Finally, the Author argues very strongly in favour of the no-fault system, presenting a number of arguments in its favour. One gets the impression, however, that she rarely gives the floor to the critics of this system to consider their arguments fairly.

On the formal side, the thesis is written correctly, although a typo in the title ('*non*-fault system') is somewhat glaring, and the thesis uses inconsistent line spacing. The Introduction and Chapter 3 are written using 1.5 line spacing, and Chapters 1, 2 and 4 use single spacing. The work also uses different footnote styles (e.g. footnotes 52 and 55).

On pages 75-76, the Author describes Contractual Liability twice and omits completely the previously announced description of wrongful act.

Despite the above doubts, I believe that both the choice of a very ambitious topic for the dissertation, the effort put into trying to situate it in the context of the legal system of Israel, and the ambition to present one's position on the issue described justify admitting it to the further stages of the doctoral procedure. I believe the thesis fulfils all the conditions set for doctoral dissertations.

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