Lodz, 4th of December 2023

widti: 5. 12. 2023 r.

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Review of PhD dissertation

by Natali Levin

„*Philosophical and Legal Approach to the Tort of Negligence in the Israeli Law. Medical malpractice and non-fault insurance system*"

1. The thesis of Natali Levin is an interdisciplinary work that encompasses considerations from the fields of civil law (broadly understood), constitutional law, and philosophy of law. The choice of the doctoral thesis topic should be regarded as appropriate. The need for a civil-legal, comparative, and philosophical analysis of the phenomenon is derived directly from the requirements of theory and practice.

The author's multi-layered considerations on the issue of tort liability for negligence or medical errors are undoubtedly worthy of serious attention. The subject matter addressed in the reviewed doctoral dissertation is associated with serious social, legal, and ethical problems. A particularly controversial issue from a social perspective that of the extent of liability for medical negligence/errors, and the nature of this liability – especially the question of whether it is a liability based on fault or risk, or whether it is associated with qualified due diligence on the part of the medical service. All of these issues are very sensitive and of great importance. All of these issues are very sensitive and of great importance. Hence, the research significance of the reviewed dissertation should be unequivocally acknowledged as positive.

The doctoral candidate primarily presented classical philosophical concepts concerning justice and law (retributive, distributive, procedural, or social justice, libertarianism, utilitarianism), and juxtaposed them with issues of tort liability in the context of national and international law. Furthermore, she grounded them in the experience of judicial practice. Additionally, these concepts were further grounded in the experiences of judicial practice. The findings have broad potential for practical application, although there are points of contention in several areas. In formulating assessments, and presenting and arguing her own standpoint in

this regard, the doctoral candidate demonstrated a high level ability for scholarly synthesis as well as the capability to articulate thoughts logically and persuasively.

2. The title of the thesis has been formulated correctly. The first part introduces the subject of the thesis, while the second signals the research perspective.

The structure of the work is intriguing, and, at the same time, well-thought-out, consistent, and clear. Achieving all of this was by no easy, considering the substantial number of detailed issues that are addressed in the work.

The thesis consists of three distinct sections: preparatory (Chapter I), dogmatic (Chapter II), and critical-analytical (Chapters III-IV). In the first part, the author presents the specific features of the Israeli legal system. This chapter also addresses methodological issues, such as the ongoing controversy over the relationship between law and morality, and in Israel between law and religion. The second part includes an analysis of tort liability in Israeli law. Its scope encompasses comparative considerations (referring to Anglo-Saxon systems where appropriate) and the key concepts of a reasonable person and a reasonable doctor. The third part discusses selected types of medical negligence in Israel from a legal perspective, addressing fundamental legal institutions such as medical malpractice, non-pecuniary damage, and the patient-doctor relationship in tort law. In the subsequent sections, the author addresses a number of significant issues in the light of the dissertation's theme, such as economic approaches and theories of restorative justice, and the relationship between law and morality. The last part considers the "non-fault" system as a solution to the dissertation's key problem, along with a proposal (de lege ferenda). The doctoral candidate compares various healthcare systems that have implemented the "non-fault" system (e.g., New Zealand, the USA, and Sweden), highlighting diverse arguments of a social, political, economic, and religious nature that may have influenced the adopted institutions and the way they operate.

The aim of the dissertation is to systematically discuss the normative approach to tort liability for medical errors or negligence, taking into account a broad ethical, legal, and philosophical context. In pursuit of the stated objective, the doctoral candidate employs systematic, legal-theoretical and comparative analysis, as well as the analysis of documents and other source materials.

The dissertation concludes with Chapter IV, in which the author provides a concise description of the theoretical framework she has constructed and briefly comments on the implications arising from it. The conclusions drawn, besides their theoretical value, have significant practical importance, especially concerning the adoption of the "non-fault" system in Israel. In summary, the author astutely observes that the legal regulations defining tort

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liability in Israel do not establish conditions for the comprehensive and effective protection of patients, which, however, would be served by adopting the "non-fault" system. It is suggested that the introduction of such a system would lead to ensuring both the public interest and the interest of the patient (injured parties).

The formal aspect of the doctoral dissertation merits a very positive assessment. Despite its interdisciplinary nature, multifaceted content, and extensive research scope, the work has been well-constructed, in a clear manner.

One could have reservations about whether it was necessary to devote so much space to the discussion of the Israeli legal system, but undoubtedly, this was beneficial in terms of organization and enabled the reader to efficiently identify the research problems posed.

In terms of the substantive evaluation, it has to be acknowledged that the dissertation submitted for review is an ambitious accomplishment characterized by high intellectual maturity and an interdisciplinary approach. As already mentioned, the doctoral candidate's reflections are situated at the intersection, on one hand, of dogmatics and the theory of civil law and philosophy of law, thereby encompassing an extensive study; and on the other hand, constitutional law theory and legal comparative studies.

It is worth emphasizing that the doctoral candidate reflects equally on the titular issue across all the mentioned dimensions. This approach necessitated demonstrating extensive knowledge and scientific analytical skills across various social disciplines. I would like to emphasize that this required the adept application of research methods characteristic of each discipline and the evaluation of the collected materials. The doctoral candidate has successfully achieved this. It is worth noting that while discussing areas beyond civil law, the doctoral candidate has taken care to maintain reasonable proportions and appropriately subordinate these discussions to the central themes of the work. It is beyond doubt that in formulating assessments, presenting her own standpoint, and supporting her arguments, the doctoral candidate has displayed significant skills and the ability to articulate her thoughts logically, systematically, and persuasively.

3. The author draws from an extensive bibliography which encompasses sources from civil law, legal philosophy, Israeli law, and constitutional law. A significant portion of these sources consists of foreign publications, primarily of Anglophone origin. Additionally, the doctoral candidate extensively cites source material, particularly the case law. All of this attests to the remarkable research diligence of the doctoral candidate, as well as the thoroughness of the conducted research and the tremendous effort invested in preparing the reviewed dissertation.

4. The main thesis of the work is clear, stated in the introduction, and further elaborated on in various chapters, particularly the final one and the conclusion. The aim of the work has been clearly articulated, and the conclusions are precisely defined and well-supported. The significance of the work's objective does not require extensive commentary. The subject matter is not only extensive, demanding deep reflection and knowledge, but it also represents a topic that is widely discussed in the scholarly literature, jurisprudence, and public discourse.

5. My detailed comments are typically linked to highlighting areas for discussion, as is common in reviews. I would like to draw attention to issues that particularly interested me and to which, in my opinion, the author did not devote sufficient attention.

Optimizing the regime of compensation liability, particularly tort liability, has long been a popular subject of research in the economic analysis of law. This is due to the fact that issues related to the compensation liability regime are subject typical for microeconomic analysis. In the classic work dedicated to the economic analysis of tort liability, W. Landes and R. Posner assumed that regulations defining the conditions and principles of compensation liability can be examined using economic analysis because they shape the motivations influencing the behavior of both the injurer and injured parties (W. M. Landes, R. Posner, *The Economic Structure of Tort Law*, Cambridge MA. 1987, p. 6). Therefore, tort liability regulations can be evaluated from an economic standpoint, focusing on efficiency and social welfare. According to a fundamental premise in the economic analysis of law, the purpose of regulations forming the basis of compensation liability is to minimize the social costs associated with harmful events (G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven 1970, pp. 313-315). Social costs include the total costs related to the occurrence of harm – administrative costs, insurance costs, preventive costs incurred to reduce the frequency of harmful events – which are borne by both potential wrongdoers and victims. I am interested in how the doctoral candidate would assess the liability regime concerning so-called preventive claims, which aim to "avert imminent danger" through necessary measures. This may involve active measures, but also passive measures, especially the cessation of activities causing harm.

The author has set herself an extremely significant but very challenging task of constructing a specific theory of legal research. In this context, I would like to note that, at the level of jurisprudence where a theory of law should be formulated, it is necessary to address the question of what kind of doctrinal concept is at stake here. At this level, as indicated by

Dworkin, morality plays a significant role, as reflection on the doctrinal and aspirational dimensions converge. The aspirational concept of law is that to which the law aspires, and therefore it is an idealized concept. Thus, in the author's view, is Dworkin's position (according to him: adequate) valid, according to which the consideration of such an aspirational ideal of law must take into account the ideal of political integrity, i.e., a "coherent set of political principles" bringing "benefits to all citizens"?

I would like to reiterate that, according to Richard A. Posner, within Dworkin's framework judges should "apply moral philosophy"; meanwhile, Habermas repeatedly asserts that "legal autonomy does not coincide with freedom in the moral sense", and that the basis in the search for the source of law should be the category of autonomy, abstractly conceived to be capable of generating both the principle of morality and the principle of democracy simultaneously. However, in Posner's view, this position stems from Habermas's desire to reject any philosophical-theoretical proposals that might imply a totalitarian vision of society in favor of "securing the conditions of rational exploration" of mutual cooperative consent, which is always temporary and which sooner or later requires revision because, as humans, we are limited by the passage of time when we make even important decisions. However, Dworkin's ultimate concern is not so much in the pursuit of rational consent and the procedures securing it (e.g., regarding fundamental rights), rather his research focuses on constructing a procedure that results in *One Right Answer*; thus in constructing a procedure that will achieve the specific goal of his philosophical-theoretical inquiries, based on the principle of political integrity, which anticipates the possibility of providing one correct answer for hard cases. I must admit that I sense this thread is lacking from the dissertation because, in my opinion, it belongs to the most crucial aspects of contemporary jurisprudence. Of course, I am aware that, given the broadly formulated topic, the author had to omit certain issues, and I do not find fault with her for this reason. However, I am curious about her opinion on this matter.

The author addresses the issue of distributive justice. It might be worthwhile to consider the concept of redistribution in the context in question. From the perspective of the distribution of goods, it is characteristic that in a civil society, each individual's own interest can only be enforced through the interests of others. It should be emphasized that the term "just" does not necessarily mean ethical or moral; it pertains to what a given society considers appropriate, taking into account the needs, status, and contributions of various members of society. In the broadest sense, distributive justice regulates the division of goods and burdens among members of a community or group. In public law, relationships between individuals are mediated by the object and criterion of distribution. Both the object and criterion of distribution are determined

by its purpose, which is external to the law. In the case of public law, the connection with politics is inevitable, although it has its internal normative structure in the form of the idea of distributive justice. Distributions of rights and duties, which fall within the domain of public law, thus have two dimensions: political, referring to the external purpose of distribution, and legal, related to the internal structure of distributive justice. Weinrib captures the latter as follows: "Distributive justice, as the integration of persons and things in accordance with a criterion, incorporates two related presuppositions. First, distributive justice postulates a distinction between things and persons. (...) Second, distributive justice presupposes that the criterion of distribution applies equally to all who fall under its justificatory force, without underinclusion or overinclusion". Therefore, in the context of the reviewed dissertation, the question arises as to how the "non-fault" system will effectively meet the requirements of redistribution. Will the departure from the principle of fault in the examination of tort liability result in increased burdens on the entire society (e.g., through an increase in insurance premiums)? Or will it lead to a situation where, due to the risk associated with certain medical procedures, insurance companies may be reluctant to insure them, or the premiums will be extremely high?

6. In concluding the review, it is important to emphasize once again the significance of the research idea and the consistency in its execution, the thoroughness of the bibliographic material that was examined, and the practical importance of the insights derived from the conducted analyses. All the shortcomings and points of contention mentioned above do not diminish the value of the reviewed dissertation. They simply underscore its scholarly worth and the research maturity of the author. The importance of the thesis lies primarily in its cataloging of the issues related to the supervision of economic activities in a relatively holistic manner, and discussing them from legal, theoretical, economic, and axiological perspectives. This endeavor presented a challenging task and required immense effort, and the author of the reviewed work undoubtedly succeeded.

7. The above remarks, in my opinion, provide clear grounds to conclude that Natali Levin's doctoral dissertation meets the requirements set for doctoral works. As such, it deserves to be accepted, and the author should be allowed to proceed with the public defense.

Dawid Wojciechowski