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

This doctoral thesis explores the topic of tort law in the field of medical negligence in the State of Israel. The research relates to some of the central problems of modern society, such as an individual's fundamental right to autonomy over their body, as well as his or her health and self-dignity. The most difficult question concern the philosophical context of these issues, particularly, what is the proper institutional response to the harm caused by medical negligence and how it should be dealt with.

The goal of tort law, in the context of medical malpractice lawsuits, is to restore an injured party to his or her previous state, following a case of medical negligence and return him or her to the situation which existed prior to the harm caused, or as close as possible to this state. However, it is very difficult to measure the mental damage or suffering experienced by the victim and to quantify it as financial payment.

The legal aspect of the problem is mainly focused on the Israeli legal system. In chapter four the research is extended to other selected non-fault systems in comparison to the tort law system in Israel. This will serve to introduce prescriptive proposals to the tort law system and will contribute to the debate on the dominant philosophical approaches to tort law. The Israeli tort law does not provide an adequate solution to calculate the amount of damage caused or a formula that defines the commensurate compensation.

First, there is a lack of clarity as to how compensation can be determined in a consistent manner, as well as a lack of consensus regarding the basis of compensation rulings when the damage is not property. Second, there is difficulty in the quantification of the damage and the determination of the compensation. How are pain and suffering evaluated? How is the loss of the pleasures of life estimated? Is there a market price for the pleasures of life?

There is a conventional saying that no money in the world can compensate for the pains of the body and mind, for the reduction of the chances of establishing a family, or for the loss of pleasures of normal life, and that it is therefore not possible to compensate a person financially who has lost a limb or who remains with a defect for the rest of their life. Even if we fill the damaged party's home with silver and gold, we cannot correct the damage caused. How is it possible to precisely, or even approximately, estimate a monetary value to the pain and suffering or the sorrow and shame of a person whose hand or leg has been amputated or of a person who walks on his legs but worries in their heart that their days are numbered?

One of the arguments that is made against the extension of compensation to non-material damage is that this damage is largely subjective. This claim has led to the view that

determining such damage would be subject to the discretion of the court and is very much a case of guesswork. Among the rules for evaluating damages associated with pain and suffering, the courts have therefore determined a principle stipulating that it is essential to grant to the harmed party appropriate compensation following specific consideration of every case. In other words, the current guidance dictates that it is unfitting and ineffective to use a fixed measure for compensation and that it is preferable to evaluate the appropriate compensation for every case, according to its circumstances, while also relying on previous rulings and attempts to ensure consistency in order to mitigate this cognitive and legal gap.

The situation of every harmed individual is specific, and the extent of harm is highly contextual. According to the economic approach to law, prevalent in many countries (including Israel), the guiding principle in tort law is justice should remedy the harm equally. The thesis argues that the dominant philosophy of tort law is based on uncertain premises, especially considering conflicted presupposed concepts justice. Furthermore, there is a lack of well-defined legal standards regarding the assessment of non-pecuniary damages. This results in considerable discrepancies in case-law and lack of consistency in justifying judgments in tort liability in the Israel.

The courts that implement rulings pertaining to medical malpractice are constantly striving to strike a compromise between two conflicting interests. On the one hand, a claimant's demands to be protected against damages, and on the other, a defendant's interest in not being restrained; the proper administration of the law includes weighing the conflicting interests in the balance sheets of social value, in a manner that will reduce the collision between individuals, and increase the public good.

A no-fault compensation system for medical injury compensation and insurance model may be the answer to the malpractice crisis everywhere in the world today. Allowing doctors to continue after an error occurs, and for them to remain connected with the patient and the hospital system can improve the entire health network.

A no-fault system is a legal approach that has been adopted in several countries in order to regulate compensation for patients due to injuries inflicted in the course of medical treatment. However, there are often substantial differences between the mechanisms implemented in each country that has adopted the system. While common law legal systems apply the tort law approach, whereby compensation is granted to the patient that has proven that the medical provider bears responsibility for the harm caused to them, the no-fault system is different.

The common denominator and shared principle of all no-fault systems that distinguishes them from common law tort methods is that the provision of compensation is contingent not on proving the responsibility or negligence of the medical provider, but rather on showing a causal connection between the treatment received and the injury. The driving principle behind the no-

fault system is the removal of the requirement of liability. The simplification of the legal procedure reinforces the sense of distributive justice and fairness vis-à-vis the patients for whom the outcome of the medical treatment was not what had been expected.

#### **Main arguments of the thesis:**

1. Any harm caused as a result of medical negligence must prompt a due response.
2. The state and society have certain responsibilities in case damage is caused and if no one can be held guilty.
3. The implementation of a "no-fault" system in Israeli law will be justified from the practical and ethical points of view.
4. The way the legal system is conceptualized affects the fundamental relationships between legal concepts, including tort law, the injured party and the tortfeasor, damage, and guilt. Consequently, adopting a certain philosophy of tort law also means the interpretation of the relations between these concepts in the judicial context.
5. The State of Israel is a highly varied society, in terms of culture, ethnicity, religion, and language, and the legal system plays a significant role in determining the identities of its citizens. The "no-fault" system is from the normative standpoint a preferable and best-justified solution to the dilemma of tort liabilities.

#### **Structure**

This doctoral dissertation is based on philosophical approaches to medical negligence in Israel, with particular consideration given to torts of medical negligence and compensation for pain and suffering.

The thesis is divided into four chapters:

1. **An Overview of the Israeli Legal System:** the legislative process in Israel; the court system; the judge's perspective; the Israeli constitution (or lack of), and the conflict between religion and state. This chapter provides the historical context in order to answer the research question.
2. **Tort Law:** analysis of tort law ordinance and its foundation in the common law; evaluation of the condition for liability of negligence, including violation of the duty of care; negligence and malpractice, with reference to the concept of the reasonable person test and the reasonable physician; as well as philosophical approaches relating to corrective justice. This chapter provides the constitutional framework for exploring the need to change the relationship between the parties and the many challenges in the existing legal system.
3. **Medical Negligence in Israel:** medical malpractice; nonpecuniary harm and intangible harm; the patient-physician relation in tort law and philosophical approaches to

negligence, such as economic approaches and theories of corrective justice; as well as an analysis of the conflict between morality and law. This chapter establishes the philosophical foundations for an in-depth analysis of the approaches and values in society and existing policies. This facilitates the discussion in the final chapter on the solution, the adoption of the no-fault legal system in Israel.

4. **No-fault Solution:** This chapter presents a comparative legal study of various countries with a no-fault compensatory system. The aim is to demonstrate the workings of legal institutions in other countries and to identify similarities and differences in comparison to the Israeli legal system. This is done with consideration of the various social, political, economic and religious factors that guide the implementation of such systems, particularly, the influence of religious values on decision-makers. In addition, the no-fault solution with respect to financial compensation is outlined, including the proposal of a no-liability option for insurance compensation for injured parties in cases of medical negligence and non-pecuniary damage. Through this comparative examination of approaches throughout the world, the philosophy of justice is examined in relation to the non-fault mechanism, seeking to provide a solution to the problems discussed in the preceding chapters and to elucidate the research questions..