

Torts, Egalitarianism and Distributive Justice

Tsachi Keren-Paz

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Redistributive taxation can be- and often is used by progressive governments to promote equality. But in Torts, Egalitarianism and Distributive Justice Tsachi Keren-Paz argues that *tort law* should also be used to promote equality.¹

Admittedly, typically tort law is not egalitarian — here are two of the many examples that Keren-Paz offers. For instance, by returning people to their earlier situation, the *restitutio ad integrum* principle in effect protects inequalitarian patterns of distribution since the wealthy are returned to their prior well-off position, while the poor are only returned to their prior badly-off position.² What makes matters even worse is that since tort law works in tandem with liability insurance, wealthy people's superior level of protection is subsidized by the poor who pay similar liability insurance premiums to the wealthy³ but yet they benefit from them less.⁴ Secondly, tort law's use of an *objective* standard of care in the moral assessment of people's actions (whether they were negligent or not) also unfairly disadvantages the poor because to avoid being found negligent people must take sufficient care, however since taking care may come at a cost and the poor have fewer resources than wealthy people do, it is therefore relatively harder (in *real* rather than numerical/monetary terms) for them to take the same precautions, but yet tort law's objective standard expects both to take the same level of precautions.⁵

Nevertheless, Keren-Paz argues that there is no principled reason why tort law could not be reformed so as to take egalitarian considerations into account. For instance, when calculating damages for lost income, rather than trying to estimate how much income a particular plaintiff would have

¹ Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate, 2007) 1.

² *Ibid* 67-9.

³ Liability insurance covers your victims rather than you, but since insurers don't know whether your victims will be wealthy (and stand to lose a lot) or poor (and stand to lose comparatively little), they therefore charge everyone the same insurance premiums.

⁴ *Ibid* 69.

⁵ *Ibid* 69-70.

earned in the future if the tort had not occurred and then awarding that amount of damages to them, which replicates socio-economic and gender-based inequalities in levels of pay that still exist today,⁶ Keren-Paz instead suggests that everyone – irrespective of age, gender or prior socio-economic situation – should only be entitled to the same *standardized* income replacement set at the level of an average income.⁷ Secondly, he also argues that there is no principled reason why a *subjective* standard of care could not be used in the context of the negligence inquiry, which on the Learned Hand formulation gets us to compare the value of the potential victims' security interests to the value of their injurer's liberty interests; this would be done by comparing the *real value* or impact (rather than the numerical/monetary values) of the respective parties' interests to one another, to take into account the fact that it is more burdensome for the poor to take the same level of precautions as the wealthy take.⁸

Keren-Paz also cites precedents to show that this way of thinking is not alien to tort law.⁹ For instance, in *Paris v Stepney Borough Council* [1951]¹⁰ the special vulnerability of an employee who only had one good eye was taken as a reason to hold their employer negligent for failing to provide them with protective eye goggles, even though their failure to provide goggles to employees with two good eyes was not deemed negligent — this suggests that the *plaintiff's* situation does affect our judgment of what standard of care is owed to them. Secondly, the fact that courts are more likely to award damages when defendants have deep rather than shallow pockets suggests that *defendants'* situation affects our judgment of what standard of care they owe to others. The point of citing these precedents is to show that since tort law is already prepared to take into account the level of resources available to litigants when determining who owed whom what duty of care, the suggested changes (in this case a

⁶ ... as well as being questionable because of the inherent guess-work that this involves ...

⁷ Keren-Paz, above n 1, 182.

⁸ Ibid 103-13. The reasoning here goes like this: whether an injurer's action was negligent or not depends on whether it was reasonable to expect them to have taken further precautions; but, if we think that taking those precautions would have burdened them too much, or that the real (as opposed to monetary) value of their victim's security interest was actually lower than the real value of their own security interests, then we will not think it reasonable to expect the injurer to have taken those precautions, and thus we ought not judge their actions as unreasonable or as negligent.

⁹ Ibid 125-31

¹⁰ *Paris v Stepney Borough Council* [1951] 1 A 11 ER 32 (HL) 127.

shift from an objective to a subjective standard of care) would not require a *revolution* but only *evolution* or incremental tort law reform.¹¹

Keren-Paz holds that we should in general promote egalitarian aims¹², and since on his account tort law can promote these aims (see Chapter 3), he therefore argues that in addition to whatever else we do (e.g. funding social welfare systems) we should also promote equality *through tort law* (i.e. tort law should supplement these other efforts). Consequently, a sizeable portion of this book is devoted to working out the many fine details of precisely what might be involved in taking adequate account of egalitarian considerations within tort law.

On Keren-Paz's account, ensuring that tort law takes adequate account of egalitarian considerations is no simple task since lots of things may impact on whether a given tort rule or judgment will have an egalitarian effect or not. Some of the things which complicate matters here include: (i) the bilateral nature of the tort remedy — the fact that the fates of plaintiffs and defendants are tied together, so that compensating one party leaves someone else worse off; (ii) the many different interests over which tort law adjudicates, each of which may be differently affected by a given tort rule — e.g. tangible goods, liberty, dignity, power, status, control, security and social responsibility — and each of which may impact differently on people's wellbeing; (iii) the many different parties which tort rules affect — for instance, in addition to the litigants, third parties may also be affected by the symbolic effects of a given judgment;¹³ (iv) the subtle complexities and interrelations between different litigants — e.g. dependencies between mother and child,¹⁴ subtle interactions between a live-in landlord and their tenant, or the loss-spreading which goes on when an insurer passes on their greater costs to the insured by raising premiums thus drawing us away from the desired distribution of resources; (v) the fact that we may wish to pursue- and thus that we may need to reconcile the pursuit of plural aims (not just egalitarian ones) each of which pulls in a different direction; and (vi) a host of other contextual issues that will change from case to case.

¹¹ For example Ibid 19.

¹² Ibid 8.

¹³ Consider, for instance, the symbolic impact of a court's recognition of the claim that one can be slandered by an accusation of being homosexual, on those who actually are gay (75).

¹⁴ See discussion of maternal prenatal duties in Chapter 6.

Keren-Paz's clear, careful and intricate analysis suggests that if sufficient attention is paid to these many details, then tort law will be able to promote egalitarian aims. But, even if he is right that with sufficient attention paid to these details tort law could promote egalitarian aims, two questions still beckon: (1) whether it is practical to expect courts to routinely take so many considerations into account in adjudicating every case, and (2) whether tort law is really the best tool for the given job of promoting equality? I will now say a little more about each of these worries.

As I mention above, a sizeable portion of this book's analysis is devoted to discussing the many intricate details which must be taken into account if tort law is to promote equality. However, although the implementation of some of Keren-Paz's recommendations would arguably only involve a small amount of extra work,¹⁵ taking account of some of the other things which he mentions would come at a considerable administrative cost. For instance, it is not always clear *what other interests* will be affected by a given ruling; or *who else* will be affected by that ruling and how they might respond (which may upset the distributive outcome that we were trying to bring about by the tort ruling); or even what kinds of subtle *interrelations* might obtain between different (groups of) the affected parties. Each of these things may ultimately affect whether a given ruling would have an overall egalitarian or an opposite effect, and so each of them should be given their due consideration, but if courts have to pay attention to all of these details then this will impose a considerable additional administrative burden onto them and this might make the reformed-tort-law solution less efficient than alternative solutions (see below for comments on efficiency). Some of this worry could dissipate if Keren-Paz's recommendations were targeted solely at reformers, since this would entail only a one-time administrative cost to be borne by them (plus some extra time for the courts to get acquainted with the modified system). However, his recommendations are targeted just as much at judges as they are at reformers,¹⁶ and so this worry can not be put aside this easily.

As regards the second worry – i.e. whether tort law is really the best tool for the job of promoting equality – Keren-Paz interprets it in three

¹⁵ For instance, it is probably not much more time-consuming to take into account the real- rather than the monetary value in the context of the negligence inquiry, when we compare the value of the respective parties' interests to one another.

¹⁶ This is particularly clear in his rebuttal of the "illegitimacy" objection in Chapter 3, especially when he mentions the "superiority of the judiciary" who it is suggested are often better able to bring about more substantively just outcomes (opposed to the more procedurally just outcomes generated by government legislation) (24-33).

ways,¹⁷ and he offers three replies. First, he claims that '[t]ort law has been remarkably resilient and does not appear to be fading away; rather it is the welfare state which is under siege'.¹⁸ Second, and in response to an interpretation of this worry which he calls 'the good being the enemy of the best' and which he attributes to Stephen Sugarman, he states that 'the Scandinavian experience shows ... that inserting egalitarian sensitivity into tort law might' lead to 'an increase in state welfarism'.¹⁹ And third, he claims that it is only if we are 'committed to a monistic approach',²⁰ about value that we will see the need to sacrifice some egalitarian goals for the sake of the other more traditional goals which tort law has been thought to pursue as something to regret.

However I do not think that any of these responses meets my worry, and I will briefly explain in reverse order. As regards his third point, there is nothing objectionably value-monistic about recognising that tort law is inefficient and that we can get better value for money from another setup; after all, we can strive to pursue plural aims at the lowest possible price without thereby having to sacrifice the pursuit of any of those aims for the sake of even greater efficiency. As regards his second point, apart from doubts about whether the move towards increased state welfarism in Finland was indeed *caused* by inserting egalitarian sensitivity into tort law, we can still surely ask whether the same result (increased state welfarism) couldn't be achieved in a cheaper way (e.g. perhaps through advertising campaigns) than at the hefty price tag of the tort law system. And finally, as regards his first point, suppose for instance that tort law were abolished completely and that people were only allowed to claim no-fault benefits from the social welfare system; if this setup did a better job of promoting the aims which we wanted to promote than the reformed-tort-law based setup and it did this at a lower administrative cost too, then shouldn't we choose this other system rather than the reformed tort law alternative? Thus, if my first worry about the complexity of Keren-Paz's solution is justified, then that solution may indeed turn out to be very expensive, and that in turn might give us reason to search for another tool – e.g. social welfare or no-fault systems – which is better suited for the job of promoting the aims that we wish to promote.

¹⁷ Please see the relevant sections of Keren-Paz's book for how these are meant to be interpretations of this worry.

¹⁸ Keren-Paz, above n 1, 18

¹⁹ Ibid 18.

²⁰ Ibid 41.

So in summary, this book presents impressingly detailed analysis that bolsters the case in favour of incremental tort law reform. However, although its greatest strength is the depth of analysis offered, at the same time supporters of radical law reform proposals may interpret the complexity of the solution that is offered (and its respective cost) as conclusive proof that tort law can only take adequate account of egalitarian aims at an unacceptably high cost.

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