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Chapter 1

Introduction

Tort law regulates involuntary interactions in private settings, when such interactions harm some, or all participants. As such it raises questions of both social policy and moral theory. William Prosser has observed that '[p]erhaps more than any other branch of the law, the law of torts is a battleground of social theory'.[1] In fact, tort law is a battleground of philosophical theory. The philosophical battleground precedes the social one in the sense that a major battle pertains to the legitimacy of the claim that tort law should be a battleground of social theory. Some dispute the public nature of tort law and ignore its broader social ramifications, both practically and symbolically. Tort law, however, is rife with value judgments concerning the kind of society one would like to live in. It strikes a balance between the values of opposing autonomy-based claims, and between the values of self-reliance and personal responsibility on the one hand and altruism and other-regarding on the other.

The potential reach of tort law is extensive due to the fact that it is based on involuntary interactions which are not mediated by a possible sense of shared community (as might arguably be the case in a contractual setting). These features make tort law an especially interesting philosophical and social battleground. This book endorses a view that is both sensitive to the political stakes of tort law and that is egalitarian; it is committed to advancing the status of disadvantaged members in society. This book tries to show why such a view is commendable and should be endorsed normatively, and how it can be relevant to tort law.

The battle over philosophical and social interpretations of tort law spills over into the question of the goals that tort law should promote. Numerous answers have been given to this question. Although tort scholarship includes some pluralist approaches, it is dominated by two monist approaches: an economic analysis of law, which aims to maximize societal wealth; and corrective justice, which limits itself to meting out justice on a retroactive basis to particular litigants.[2] This book offers another approach to tort law: one that is instrumentalist, pluralist, contextual and progressive.

Instrumentalist (or functionalist) legal approaches are forward-looking. They view law as an instrument which is used to achieve social and moral goals. Pluralist approaches to tort law maintain that tort law should (or does) promote more than one goal. The underlying theme in this study is that in addition to traditional goals, such as deterrence and compensation, tort law should be attentive to its distributive effects; tort law can and should promote equality and in particular the status, power and well-being of the disadvantaged. It will be shown how tort law can promote the status of the disadvantaged, given its structural limitations and its role in promoting other

1 William L. Prosser, *Handbook of the Law of Torts* (4th edn, St Paul, 1971), pp. 14–15, s. 3.
2 See Ch. 5.I below.

goals. As will become clear from the discussion in the following chapter, this study dwells on the intersection of doctrine (tort law), conceptual apparatus (distributive justice), and normative commitment (an egalitarian-progressive approach).

This study could be classified as belonging to two streams of scholarship. The first stream attempts to defend the relevance and legitimacy of using private law for (limited) redistributive purposes. The other line of scholarship related to this study is the one trying to employ tort law progressively, with an ambition to be sensitive to the demands of equality and the interests of disadvantaged groups in society.[3]

The book is divided into two parts, theoretical (Chapters 2–3) and practical (Chapters 4–8). Chapter 2 begins by introducing the theoretical framework – an exposition of distributive justice, concepts of equality and a functional approach to law and tort law. The latter will be examined in terms of its function, social impact, goals and normative commitment. It then comments on the relationship between egalitarian tort law and the welfare state, and introduces the limits of the argument advanced in this book. Chapter 3 is devoted to defending the normative claim that tort law can and should promote equality as one of its goals. The discussion attempts to provide answers to critiques from both corrective justice and efficiency-oriented scholars. It responds to the claims that the egalitarian agenda is illegitimate due to the fact that judges are not accountable (illegitimacy), that it is unjust to promote equality by private law since such redistribution is deemed to be partial (randomness), that such an attempt is undesirable since it interferes too much with the attainment of other goals of private law (excessive cost), and that it is likely to be ineffective due to institutional limitations of courts and private law (ineffectiveness). It finds all these charges ultimately unconvincing.

Chapter 4 lays the ground for the application of an egalitarian approach to tort theory. It exposes the inherent regressive bias of existing tort law, explores the ways in which an egalitarian commitment can reshape tort law, presents the difficulties involved in an attempt to assess a rule's equality effect, explains the two possible egalitarian recommendations, and sketches a framework for balancing the dictates of egalitarianism with other competing goals of tort law. Chapter 5 suggests how to formulate an egalitarian standard of care. It defends the adoption of such a standard, while reconciling egalitarianism with other major policy considerations of corrective justice, efficiency, loss spreading and fairness. Chapter 6 explains how a duty of care should take egalitarianism into account. It concentrates on the issue of maternal prenatal duty and concludes, somewhat surprisingly, that a feminist-egalitarian approach might support a duty that hinges upon the existence of insurance. Chapter 7 maintains that the tort of negligence could and should be used to complement legislation in order to combat discrimination. Chapter 8, after revealing some patterns and lessons emerging from the previous application chapters, concludes by suggesting the contours of a reform to damages law and by flagging a new frontier for egalitarian tort law (which awaits future research) – the fight against human trafficking.

3 Scholars associated with the first stream are Anthony Kronman, Hugh Collins (contract law), Hanoch Dagan (unjust enrichment law), Iain Ramsay, Alan Kruger, and Robert Lee (consumer law). See e.g., Anthony T. Kronman, 'Contract Law and Distributive Justice', 89 *Yale LJ* (1980) 472. Scholars associated with the second stream are Richard Abel, to whom this work owes a lot, Leslie Bender, Kate Sutherland, Elizabeth Handsley, Anita Bernstein, Martha Chamallas, Elizabeth Adjin-Tettey, Bruce Feldthusen, Mayo Moran, Ken Cooper-Stephenson, Ted Decoste, Thomas Koening & Michael Rusted, Chris Sanchiricho, and Duncan Kennedy. See e.g., Richard L. Abel, 'General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)', 55 *DePaul L Rev* (2006) 253, pp. 323–4; Leslie Bender, 'An Overview of Feminist Torts Scholarship', 78 *Cornell L Rev* (1993) 575

The discussion in the following chapters will revolve around four questions and one theme. An attempt to promote equality and distributive justice by tort law has to inquire what sort of entitlements are distributed by tort law, who is affected by such distribution, what is the price involved in promoting equality, (or engaging in redistribution), and how equality can be promoted effectively and fairly. These questions can be summarized as the 'what', 'to whom', 'at what cost' and 'how' questions. The theme underlying the analysis is the importance of context. Tortious interactions arise in different contexts, and sensitivity to the different variables controlling tortious interactions is warranted in order to develop a normatively attractive legal rule.

With respect to the 'what' question, the analysis calls to attention the fact that tort law distributes different entitlements, that at times a given rule affects positively the distribution of a given entitlement to a certain group, while at the same time affecting negatively the distribution of another entitlement to the same group, and that the analysis should distinguish between issues of redistribution and recognition.

With respect to the 'to whom' question, the analysis distinguishes between issues of inter-group justice and intra-group justice and calls to attention the fact that third parties – those not likely to be litigants – can be affected by the legal rule as well.

With respect to the 'at what cost' question, the analysis maintains that the relative weight that should be given to the goal of promoting equality changes with the context, as is the extent to which tension exists between the goal of promoting equality and other goals. For example, at times the more egalitarian rule is also the more efficient.

With respect to the 'how' question, the analysis suggests the following: (1) The overall distributive result of the rule in question should be examined (as opposed to a Rawlsean approach). (2) Egalitarian commitment may impose a duty on the actor to behave in a certain way; it may also impose a duty on the policymaker to consider adopting a certain rule given the rule's distributive effects. (3) Egalitarian considerations can work in the direction of curtailing liability of disadvantaged groups or enhancing liability toward them. (4) Curtailing liability can at times be based on a rationale of excuse and at others based on a rationale of justification. Given the expressive and symbolic aspects of the law, this distinction is important since egalitarian considerations change the social meaning of the defendant's behaviour. (5) Egalitarian considerations can work both directly and indirectly, by reformulating other policy considerations. (6) The analysis should distinguish between the ability of tort law to redistribute wealth and its ability to redistribute non-material entitlements. (7) In constructing egalitarian rules we can distinguish between rules aiming to help the disadvantaged ('pro-disadvantaged') and rules aiming to deprive the 'haves' of excessive riches (anti-'haves'). (8) In constructing egalitarian rules

we can distinguish between rules aiming to reverse inequalities created by the effect of the legal rule, and rules aiming to reverse inequality whose cause is external to the rule in question. (9) Inserting egalitarian sensitivity can be done at numerous levels; the most basic distinction, however, is between rules pertaining to the scope of liability and rules pertaining to the scope of compensation.

This book's ambition is to show that tort law can and should be used progressively, as one mechanism in the ongoing struggle to achieve a more just and egalitarian society. A contextual egalitarian approach to tort law can be squared with other goals that tort law should promote. This book is not a comprehensive descriptive account of existing tort law, but rather a pro-active search for new approaches and conceptual tools to meet the challenges faced by egalitarians. Hopefully, the understanding of tort law offered in this book will bring about better practical results in specific cases, will further the support to the progressive troops in the ongoing philosophical and social battles that take place in the field of tort law as well as elsewhere, and will add another voice – rich, nuanced and sensitive – to the chorus that is tort theory.

Chapter 2

Theoretical Framework

Introduction

This chapter introduces the three concepts which form the theoretical framework and explain the way they interrelate: distributive justice, egalitarian commitment and tort law. Distributive justice deals with distributing benefits and burdens in society in a fair manner according to several criteria. One possible criterion is equality – an attempt to decrease the gaps between the 'haves' and the disadvantaged. Tort law is one area where some kind of burden is distributed – the harm caused by involuntary interactions among individuals. Tort law should develop several criteria to answer the question how to distribute this burden and it has done so. The central claim of this study is that one of these criteria should be equality. After introducing the principles underlying distributive justice, egalitarianism and tort law, in Parts I, II and III respectively, Part IV pulls the threads together and sets the ground for the normative claim and the application of the argument.

I. Distributive Justice

Distributive justice, according to Aristotle's classic definition,[1] is a mechanism to distribute benefits and burdens among the members of a relevant group in proportion to some criterion for distribution, such as merit, needs, equality, status, and so on. Aristotle's formulation is based on a 'geometrical' proportion between two (or more) participants, regarding their possession of the criterion/criteria for distribution and their respective share in the thing distributed (the benefit/burden). For example, if the relevant criterion for distribution is merit, and one person is twice as meritorious as another, the former's share in the good distributed should be double the latter's. It is often noted[2] that Aristotle did not commit himself in his discussion of distributive justice to a particular criterion for distribution, but rather mentioned that such a selection is dependent upon one's political conception of the good. The basic structure of distributive justice, therefore, is comprised of: (1) the participants in the distribution; (2) the thing to be distributed; and (3) the criterion/criteria for distribution.

1 Aristotle, *Nicomachean Ethics* (trans. Martin Ostwald, Book Five, New York, 1962), pp. 117–20.

2 See e.g., Hanoch Dagan, *Unjust Enrichment* (Cambridge, 1997), p. 32.

A. The Participants

Issues of distributive justice are relevant to the distribution of entitlements (goods) between groups consisting of two participants or more. One distinction offered in the literature is between distributions among small groups, and in society at whole.[3] In this respect, the situation in the context of torts is something of a hybrid. From a corrective justice perspective – looking at the specific parties litigating over past interaction – it involves a small number of litigants, usually two. From an instrumentalist perspective – looking at the rule's effects on potential litigants – it includes all the potential litigants affected by the rule, and possibly third parties as well.

An important aspect of the approach presented here is that the examination of the distributive effects of tort rules should be attentive to the group identity of the individuals involved and affected by the distribution. An evaluation of the desirability of the distributive effects of tort rules should therefore be attentive to the ways in which these rules affect different identifiable groups in society. In particular, egalitarian approach requires that we give attention to the ways in which tort rules affect members of disadvantaged groups, such as women, minorities, and the poor.

B. The Thing Distributed

Distributive justice dispenses benefits and burdens among the participants in the distribution. For present purposes it is important to observe three interrelated points. First, the legal rule will also distribute intangible goods. Second, a given legal rule can affect the distribution of more than one good. Third, some goods distributed by the legal rule are derivative of other goods whose distribution by the rule is more evident. The legal rule controlling the distribution of goods (either in regard to persons or property) will distribute more than the rights to the tangible object or its economical value.[4] It also distributes goods such as liberty (both negative and positive), dignity and societal power and status, as well as control, individual security in one's wealth and social responsibility.[5]

C. Criteria for Distribution

Most of the debate in the distributive justice literature is dedicated to the question of which criterion or criteria should control the distribution. Monist approaches emphasize criteria such as entitlement, equality, needs or desert. According to Robert Nozick's libertarian-patterned entitlement theory, individuals are entitled to what they acquired in a procedurally fair manner. Entitlement can be obtained

3 See David Miller, 'Distributive Justice: What the People Think', 102 *Ethics* (1992) 555, pp. 556–8, 564; Phillip Brickman *et al.*, 'Microjustice and Macrojustice', in Melvin J. Lerner & Sally C. Lerner (eds), *The Justice Motive in Social Behavior* (New York, 1981), p. 173.

4 See Dagan, *supra* note 2, pp. 3, 23–31, 33; Jules Coleman & Arthur Ripstein, 'Mischief and Misfortune', 41 *McGill LJ* (1995) 91.

5 See Dagan, *supra* note 2, pp. 3, 23–31, 33.

either through a transfer from a rightful prior owner or by a first acquisition. The government has no justification in engaging in redistribution of what was acquired according to the procedural rules, regardless of the desirability of the end-result of the holdings.[6]

Egalitarian programmes all share the idea that the participants in the distribution should get the relevant good according to the concept of equality. What the demands of equality consist of is a hotly debated question briefly commented upon in the next part of this chapter. Nonetheless, egalitarian theories share some commitment to performing the distribution in a way that will diminish existing disparities in holdings among the participants in the relevant entitlement. For example, John Rawls' difference principle demands that, subject to the lexical priority of the equal right to the most liberty compatible with a similar liberty to all, social and economical inequalities should be arranged to the greatest benefit of the least advantaged.[7]

Needs-based programmes 'are premised on the moral priority of supplying individuals with certain basic needs – such as food, shelter and minimal self-respect – over and above the satisfaction of the preferences of any other individual in society, including, according to some theorists, those of the needy themselves.'[8] Needs as a prominent criterion for distribution is embedded in the Marxist (and French socialist) principle of 'to each according to his needs'.[9] The scope of needs-based claims, as well as their origin, is debated in the literature.[10]

Desert-based claims are premised on the idea of giving each person their due.[11] Adherents of desert disagree on the scope, origin and details of desert-based claims. For example, there are different approaches regarding the question whether the proper basis for desert should be effort, talent or outcome.[12] Many view desert as necessarily based on the subject's autonomous decisions.[13]

6 Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974), Ch. 7.

7 John Rawls, *A Theory of Justice* (rev. edn, Cambridge, 1999), p. 266. Compare with Kai Neilsen, 'Radical Egalitarian Justice: Justice as Equality', 5 *Soc Theory & Prac* (1979) 209, p. 211 (income and wealth are to be so divided that each person will have a right to an equal share).

8 See Dagan, *supra* note 2, p. 29. For some leading defences of need-based theories see David Braybrooke, *Meeting Needs* (Princeton, 1987); David Wiggins, 'Claims of Need', in Ted Honderich (ed.), *Morality and Objectivity: A Tribute to J.L. Mackie* (London, 1985), p. 149.

9 For a review of Marxist approaches to justice see Bernard Cullen, 'Philosophical Theories of Justice', in Klaus R. Scherer (ed.), *Justice: Interdisciplinary Perspectives* (Cambridge, 1992), p. 15, pp. 39–42.

10 See Dagan, *supra* note 2, p. 30 (distinguishing between a strong version of needs-based distribution premised on some kind of altruism, and a weak version which is premised on commitment to personal liberty).

11 Among the prominent adherents of desert are George Sher, *Desert* (Princeton, 1987) and Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Dordrecht, 1985).

12 See Miller, *supra* note 3, p. 563; Robert Young, 'Egalitarianism and Personal Desert', 102 *Ethics* (1992) 319, pp. 332–3.

13 See e.g., Sher, *supra* note 11.

This book endorses a pluralist and contextual approach to the question of determining the relevant criteria for distribution, according to which the selection of the criteria for distribution is contextual and contingent. Pluralist theories of distributive justice are supported by many thinkers including John Lucas, Charles Taylor and Michael Waltzer.[14] According to pluralist approaches there is no one criterion which is preferable to others under all circumstances. The appropriateness of the chosen criterion is at least partially dependent upon the nature of the goods that are to be distributed.[15] Moreover, a given distribution ought not necessarily to be controlled by a single given criterion, but might rather be made according to a synthesis of several criteria.[16]

Egalitarian commitment entails a conclusion that equality and needs are relevant criteria for distribution in the tort context. A pluralist approach entails a conclusion that these criteria should be balanced against other criteria for distribution, including desert, which in the context of tort law roughly parallels the notion of fault. Desert, as a criterion for distribution, can be understood to operate in a way which is sensitive to the demands of equality and needs.[17] An egalitarian reformulation of desert can either view the actions of the disadvantaged who harms others as more justified or excused, or view the actions which harm the disadvantaged or committed by the 'haves' as more culpable.

II. Egalitarianism

A. Concepts of Equality

The goal of this study – inserting an egalitarian sensitivity in tort law – raises four questions: (1) Why should we promote equality at all? (2) What concept of equality would we like to promote and why? (3) Why should tort law be used as a mechanism to enhance equality? (4) How can tort law combine an egalitarian commitment as one of its goals within a pluralist and contextual understanding of tort law? Of these four questions, this study tackles only the last two. The discussion assumes the desirability of equality as a value (and the ethos, albeit not the practice, of Western

14 John R. Lucas, *On Justice* (Oxford, 1980), pp. 163–70; Cullen, *supra* note 9, pp. 39–42 (reviewing Lucas, David Miller and David Raphael's pluralist approaches); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford, 1983); Charles Taylor, 'The Nature and Scope of Distributive Justice', in *Philosophy and the Human Sciences* (Cambridge, 1985) 289, pp. 289, 312; Paul Stern, 'Citizenship, Community and Pluralism: The Current Dispute on Distributive Justice', 11 *Praxis-Int'l* (1991) 261, p. 263.

15 See e.g., Lucas, Ibid., pp. 164–6; Walzer, Ibid., p. 21; Cf. Dagan, *supra* note 2, pp. 34–49.

16 See e.g., Norman E. Bowie, *Towards a New Theory of Distributive Justice* (Amherst, 1971), pp. 122–33; Lucas, *supra* note 14, p. 169.

17 Cf. Sadurski, *supra* note 11, p. 169 (meeting basic needs is a precondition for the operation of desert); Richard Delgado, '"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?', 3 *L & Ineq J* (1985) 9; See Ch. 5.II.B3 and Ch. 6.IV.D below.

societies endorses equality as a prime value). Of course, those disputing the need to promote equality altogether would oppose a call for a more egalitarian tort law. However, even those committed to the ideal of equality might think that doing so through tort law is unjust, undesirable or impractical. This book responds to those sceptics.

The main dispute regarding the value of equality is centred on the second question – what concept of equality we should adopt. In the discourse of political philosophy, competing political theories are supported by their proponents in the name of equality.[18] A basic distinction in the typology of different approaches to equality is between equality of opportunity and equality of result. The former is concerned with ensuring equality at the starting points of the participants; the latter with ensuring equal end-results. One concept of equality of opportunity is narrow and formal and is limited merely to removing formal barriers to competition between the participants in the distribution. This concept is supported by libertarians. The substantive version of equality of opportunity is concerned with ensuring a *fair* equality of opportunity. The substantive concept takes into account the different starting points of the participants, and focuses on the social construction of disadvantage and history of discrimination. This approach is committed to incorporating an understanding of prior disadvantage and to ensure that all participants have a fair chance in competing for the desired scarce good. Such a concept, however, is not necessarily committed to ensuring equal end-results, and it would usually allow for differences in end-results to be determined by merit.

Equality of result is committed to ensuring that a distributive scheme gives participants the same amount of the entitlement distributed as a final outcome. Different theories exist regarding the question of what is the thing to be distributed equally (the equalisandum). The main dichotomy is between equality of welfare (measured by happiness or preference-satisfaction) and equality of resources (and here, too, different approaches exist regarding the question of which set of resources should be equated).[19]

Another distinction in the equality literature is between formal and substantive concepts of equality.[20] Substantive notion is defined here as one showing sensitivity to the different starting points of the participants, and therefore as being committed to taking this difference into account to a certain extent while distributing the relevant entitlement.

18 For one typology see Ronald Dworkin, *Law's Empire* (Cambridge, 1986), pp. 297–301 (reviewing libertarian, welfare-based conceptions of equality, material equality, and resource equality). See also Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, 2000), Chs 1–2.

19 See Kyle Logue & Ronen Avraham, 'Redistributing Optimally: of Tax Rules, Legal Rules, and Insurance', 56 *Tax L Rev* (2003) 157, pp. 161–3.

20 Formal equality is traced back to Aristotle. See Aristotle, *Ethica Nicomachea* (trans. William D. Ross, Book V.3, Oxford, 1925), p. 1131a–b. For critique of formal equality see e.g., Martha A. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago, 1991), pp. 20–22. For one definition (out of many and at times incompatible) of substantive equality as equality not of treatment, but rather of conditions or result see Emily L. Sherwin, 'The Limits of Feminism', 9 *J Contemp Leg Issues* (1998) 249, p. 250.

Yet another distinction in the equality literature is the one between redistribution and recognition paradigms. The philosopher Nancy Fraser distinguishes between socio-economic injustice (that is, the unjust distribution of wealth in society) and cultural injustice, which concerns the recognition and status of members of disadvantaged groups in society. The 'socio-economic injustice' paradigm views the unequal distribution of wealth as the main basis of inequality in society; by progressively redistributing wealth the problem of inequality will be solved, so that the membership of individuals in historically disadvantaged groups would become irrelevant. According to such a view, the basic unit of inequality is the individual (despite the relevance of the issue of class), and the main problem (that is, the unequal distribution of wealth) results in a lack of adequate respect for the individual. In contrast, under the 'recognition' paradigm, the main problem is not economic but rather social and symbolic: the problem stems from social bias towards the values and preferences of dominant groups. The basic unit of inequality is the group rather than the individual, and the remedies should focus on legitimizing social divergence and enhancing the status of historically disadvantaged groups.[21]

Another claim made by Fraser is disputed. Fraser argues that the two paradigms are in constant tension with each other, since solving the problem of inequality of wealth distribution (which involves group membership) weakens the collective identity, and its goal is 'to put the group out of the business as a group',[22] while the remedies of the recognition paradigm are meant to affirm the value of group identity. In contrast, Iris Young argues that promoting equality necessarily combines recognition and distribution, and that there is no tension between the two goals.[23] In fact, this debate echoes the difference between symmetrical and asymmetrical approaches to equality and the politics of difference. Asymmetrical models of equality celebrate the differences between members of disadvantaged groups and members of the dominant group. They call for an acceptance of those differences and for their accommodation, rather than for an attempt to eliminate the differences and assimilate the disadvantaged within the archetypical 'have', his values, wishes and needs, which are the basis for comparison.[24] A politics of difference, or intersectionality, maintains that inequality is textured and often compounded by multiple disadvantages, and that (in)equality theories which universalize from the experience of only one disadvantaged group are flawed by their erasure of situated differences.[25]

21 Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (New York, 1997), pp. 13–15.

22 Ibid., p. 19.

23 See Iris M. Young, 'Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory', 222 *New Left Rev* (1997) 147, p. 159.

24 See Fraser, *supra* note 21, p. 11; Christine A. Littleton, 'Reconstructing Sexual Equality', 75 *Calif L Rev* (1987) 1279; Leon E. Trakman, 'Substantive Equality in Constitutional Jurisprudence: Meaning Within Meaning', 7 *Can JL & Jur* (1994) 27, p. 28.

25 Sheila McIntyre, 'Backlash Against Equality: The "Tyranny" of the "Politically Correct"', 38 *McGill LJ* (1993) 1, n. 3 n 4.

This study merely introduces, rather than fully defends the version of equality it supports. It should also be noted that the argument presented in this study could be supported by competing versions of egalitarian commitment.[26] This is so since tort law can be only one, partial element of a progressive agenda, and it neither can nor should play the main role in advancing the goals of egalitarianism. None of the competing substantive concepts of equality (for example, fair equality of opportunity versus end-result resource equality) can be accomplished by a progressive-minded tort law alone. However, a progressive-egalitarian agenda that is supported by either version of substantive equality could be advanced by tort law as one goal among others.

The essential elements of the approach to equality taken in this book – group-based understanding, and asymmetrical model of equality – have already been explained above. This approach combines a fair equality of opportunity, with a commitment to decreasing (but not necessarily eliminating) gaps in end-result resource allocation. The latter commitment encompasses both ensuring the provision of basic needs at the bottom of the spectrum, and taking some of the wealth accumulated by those in the upper part of the spectrum. Different end-results are allowed (as long as they are not too excessive) by accepting either notions of positive desert or instrumental considerations such as the need to create enough incentives to produce wealth. Matters of recognition and the distribution of non-material entitlements are also taken seriously into account.

While this approach diverges from some egalitarian approaches (most notably Rawls') by allowing desert to play a role, the difference is more apparent than real. First, it shares the view that a desert-based claim, even if not completely arbitrary from a moral perspective, cannot support the subject's demand to the full market value accruing to her due to her natural talents,[27] and therefore justifies redistribution. This approach is also based on the ideas of the diminishing marginal utility of money and the need to promote cohesiveness in society, possibly by encouraging and cultivating some degree of altruism among its members. Secondly, some egalitarian approaches, including Rawls', allow different end-results in practice due to the concept of legitimate expectations (which in turn are based on the need to ensure adequate incentives).[28] Finally, Rawls' theory accepts the relevance of negative desert, which is especially relevant in tort law.[29] This similarity should not obscure the basic disagreements between the concept of equality sketched above and the liberal-Rawlsian concept of equality, which is based on an individualistic (as opposed to group-based), abstract (as opposed to situated), 'neutral' (as opposed to perfectionist), assimilationist (as opposed to accommodating) and decontextual approach.

26 Cf. Logue & Avraham, *supra* note 19, pp. 162–3.

27 Cf. Edwin C. Hettinger, 'Justifying Intellectual Property', 18 *Phil & Pub Aff* (1989) 31, pp. 38–9.

28 Rawls, *supra* note 7, p. 274.

29 Ibid., pp. 276–7.

B. 'Progressive', 'Disadvantage' and 'Equality Effect' Defined

This book advocates the adoption of a progressive approach to tort law that is egalitarian and that takes into account a rule's distributive effect on the disadvantaged. Progressivism, is a political and moral commitment to social change that will empower members of disadvantaged groups in society. Accordingly, the terms 'progressive', and 'egalitarian' (which are used interchangeably), connote a solution or a rule which redistributes benefits from the more to the less advantaged, or burdens from the less to the more advantaged. One can distinguish between strong and weak versions of such a commitment. Proponents of the strong version would insist on using private law rules to narrow gaps in society, while proponents of the weak version would be content with not permitting such gaps to widen as a result of the rule's effect. As for the terms 'disadvantage' and 'the disadvantaged', they should be understood contextually; these terms are related to asymmetrical models of equality and the politics of difference, and are relational and relative.[30] A member of a given group might be disadvantaged when compared to one individual but not when compared to another. Moreover, sometimes we deal with multiple disadvantages. For example, black women in the United States are burdened both on the account of their race and their gender.

An important aspect of the disadvantage is that it is attached to immutable characteristics. These include both traits that are completely immutable such as race, authenticity, sexual orientation and sex (sex operations notwithstanding), and traits that can be changed, if at all, only with much difficulty, such as class. The immutability calls into attention both the strong important group membership aspect of the disadvantage and the injustice ingrained in attaching burdens based on such characteristics.

Viewing the problem of disadvantage through the prism of acceptance models of difference and intersectionality alerts us to the fact that: (1) disadvantage is essentially group-based rather than individual-based, and is systematic; (2) disadvantage almost always has an historical dimension as well, as members of disadvantaged groups do not only face obstacles to their full participation in society in the present, but were discriminated against historically to an ever greater extent than they are today; and (3) the preferred solution might need to be based not on assimilation, but rather on accommodation. Disadvantage is also a relational and relative term.

Equality effect is the rule's overall distributive effect in terms of promoting equality. A rule's equality effect can be either regressive, progressive, neutral or unknown, according to whether it increases, decreases, or leaves unchanged the gap between the 'haves' and the disadvantaged.

C. The Level at which Egalitarian Considerations Work

The distributive effects of a given rule can be measured at four levels. (1) A rule or a doctrine can benefit plaintiffs as a group at the expense of defendants as a group or the other way around. (2) Often, potential plaintiffs and defendants can be identified according to their functional capacities – their role in the interaction regulated by the

30 Cf. Trakman, *supra* note 24, p. 28 (substantive equality as a relational term).

rule. The scope of liability will have distributive consequences for these groups.[31] (3) At times, there will be a correlation between the functional capacity of potential litigants and their immutable characteristics. When such correlation exists, the rule's equality effect can be assessed. If it works (on balance) to the benefit of the disadvantaged it is progressive; if it works to their detriment it is regressive. (4) Finally, the rule always has an equality effect with respect to the particular litigants. To illustrate, requiring plaintiffs to establish defendants' duty of care in negligence suits works to the benefit of defendants as a group, since duty serves as liability-curtailing mechanism; a shift from a fault to a no-fault system for road accidents benefits pedestrians at the expense of drivers; if physicians and the average patient are stronger than patients with respect to whom the duty to obtain informed consent has been breached, expanding the scope of liability for such a breach has a progressive equality effect; such an expansive rule can have a regressive effect if in the particular case the patient is a powerful CEO and the physician is young and a member of an ethnic minority group.

One has to decide at which level the rule's equality effect should be assessed, that of the typical or that of the particular litigants?[32] A commitment to instrumentalism suggests that the formulation of rules needs to be strongly influenced by a forward-looking approach. Given an instrumentalist commitment, ignoring the consequences of rules, including their distributive consequences, is nonsensical. In deciding the appropriate level for egalitarian inquiry, and for purposes of resolving the tension between forward- and backward-looking approaches to law, one has to distinguish between two phenomena. First, some of those burdened by the rule will change their behaviour in a way that might thwart the intended distributive consequence. The extent to which an egalitarian rule will produce such a backlash changes with the context, and when backlash is insignificant more weight should be given to the rules *ex post* effects (on both potential and particular litigants). Second, regardless of the problem of backlash, and given issues of over- and under-inclusiveness, a gap might exist between a rule's overall equality effect and its effect in the particular litigation at hand. Any egalitarian-oriented rule that is not *ad hoc* ('decide in favour of the weaker party in the particular litigation') might bring about a regressive result in particular cases, despite the fact that its overall effect is progressive.[33]

Important values, notably predictability and equality before the law, support the evaluation of a rule's equality effect based on the identity of the typical litigants rather than on an *ad hoc* basis. However, we should not exaggerate the risks stemming from an approach which takes the parties' status into account when determining the scope of the mutual obligations of particular parties. More generally, an instrumentalist commitment should not eclipse the importance of an intrinsic perspective and of the need to fairly resolve the dispute with respect to the litigants at hand.

31 Rules' distributive effects affect third parties – those not likely to be potential litigants – as well. See Ch. 4.III.B2 below.

32 Where the identity of the litigants according to their functional capacity cannot be established or where there is no correlation between functional capacity and group membership according to immutable characteristics, the rule's overall equality effect cannot be assessed.

33 For the problem and ways to deal with it see Ch. 5.IV.B2(d) below.

III. Tort Law

A. Instrumentalism, Pluralism, Contextualism

The goals of tort law should be understood against the background of a general approach to law which is instrumentalist, pluralist, contextual and progressive. An instrumentalist (or functional) approach to law views law as a vehicle for attaining social goals.[34] According to an instrumental approach, law should be understood as 'a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other'.[35] Accordingly, the normative evaluation of a given legal rule should be made according to the effects it brings about. By contrast, an opposite approach, allied chiefly with formalism or conceptualism, analyses law according to its concepts rather than its function.[36] Instrumentalists can and do differ on the question of what goal (or goals) the law in general, or a specific legal rule in particular, should promote. The instrumentalist understanding of law, including private law, presents the initial foundation of the argument for promoting egalitarian goals and alleviating distributive concerns through tort law.

An instrumentalist approach can be either monist or pluralist. An instrumentalist-monist approach strives to achieve a single goal. Even if such an approach concedes the legitimacy of other goals, it will nonetheless prioritize the goal it endorses when this goal is at variance with others. Monists may want to promote the same goal across different, and even all, branches of law – the law and economics school is the most notable comprehensive instrumentalist monist theory – or promote different (single) goals by different particular legal rules. By contrast, an instrumentalist-pluralist theory recognizes more than one goal that should be promoted, either by law in general or specific legal rules and branches of law.

Pluralists can and do differ regarding the question of which mix of goals should be promoted by the law.[37] Pluralists can differ regarding the legitimate goals that tort law should promote, as well as the weight that should be accorded to each legitimate goal (either generally or in particular circumstances). Naturally, so long as the goals are not essentially identical, a pluralist cannot usually achieve in full any single goal included in the mix of goals she supports. This is a price one has to pay in order

34 Instrumentalism was espoused and influenced by sociological jurisprudence (e.g., Rosco Pound), philosophical pragmatism (e.g., John Dewey) and legal realism (e.g., Karl Llewellyn), and continues to guide diverse approaches to law such as law and economics, law and society and critical legal studies. See Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca, 1982), pp. 19, 22–3; Richard Posner, *Overcoming Law* (Cambridge, 1995), p. 403; Roberto M. Unger, *The Critical Legal Studies Movement* (Cambridge, 1986), pp. 2–4.

35 Karl Llewellyn, 'Some Realism About Realism: Responding to Dean Pound', 44 *Harv L Rev* (1931) 1222, pp. 1233–4.

36 See Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, 1995), pp. 5–6, 19, 21.

37 See e.g., Gary T. Schwartz, 'Mixed Theories of Tort Law: Affirming Both Deterrence And Corrective Justice', 75 *Tex L Rev* (1997) 1801, p. 1819 n.132 (noting the differences between his and Izhak Englard's pluralist theories of tort law).

to try and promote more than one goal.[38] Rather, the pluralist's overall objective is to suggest rules that best promote the mix of goals to be advanced. Therefore, the concept of a trade-off is indispensable to the pluralist. Alternative legal rules would promote different goals to a different degree. However, (presumptively) there would be one suggested rule, which on the whole will best promote the entire mix of goals. The main goal in this study, which is informed by a pluralist approach, is to defend the inclusion of an egalitarian commitment as one of the goals of tort law, and to examine its relations with other goals that tort law should promote.

A pluralist theory may strive to advance either a constant mix of goals under all circumstances or a shifting mix across different contexts. The latter contextual approach disavows any *a priori* mix of goals, and insists instead on a contextual examination, according to which the promotion of certain goals might be undesirable in certain circumstances but imperative in others. More importantly, two or more situations that call for the promotion of the exact same goals may differ with regard to the relative weight that should be given to the relevant goals in balancing them against each other. For example, in certain situations – such as when the potential defendant's negligent activity might risk herself or her family members – less weight should be given to tort law's deterrent role, since the actor already has other strong incentives to be cautious. In a similar vein, a contextual approach accords varying weight to the goal of promoting an egalitarian agenda through tort law. The particular type of tort involved, the identity of the typical litigants, the social background in each culture and the legal background rules within each jurisdiction – all these are relevant for an analysis of the desirable tort rule. Generally, one of tort law's goals should be the promotion of an egalitarian agenda. The exact weight that should be given to distributive concerns should be left to a contextual examination of the circumstances of each relevant case.

A pluralist-contextual approach is susceptible to two kinds of critique. The first touches upon the relative lack of ambition of such an approach. By refusing to provide a grand theory (and by doubting the general validity of grand and abstract theories), it renounces the automatic applicability of the analysis of any specific case study to other doctrinal dilemmas. While this may generally be true, it is not a convincing critique *per se*. As much as the limited availability of a grand theory is disappointing, a good theory with limited applicability is better than a bad theory with ubiquitous applicability. While chemistry is less glamorous than alchemy, experience has shown the former to be a more productive academic pursuit.

The second charge against a pluralist-contextual approach is more cogent. Since a pluralist-contextual approach involves discretionary judgments about values (which goals to promote in any given case and what weight to give to each of the goals chosen), it raises the question of whose discretionary judgment should apply. A pluralist-contextual approach can be accused of being whimsical, unprincipled, unpredictable, subjective and disingenuous. If this critique accuses the supporters of a contextual approach in believing that law is politics to a certain degree,[39] and

38 See Patrick S. Atiyah, *Vicarious Liability in the Law of Torts* (London, 1967), p. 15.

39 For such claims see e.g., Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, 1997); Allan C. Hutchinson, *It's All in the Game: A Nonfoundationalist Account*

that judges can, do and should engage in questions of values and morality,[40] I plead guilty to these charges. It is doubted however whether an embrace of a contextual approach is more difficult to justify than an embrace of any other value-committed theory of adjudication. While a contextual approach does seem to be more susceptible to claims of judges' personal biases due to the lack of an 'objective' mechanism to select and prioritize goals, the practical advantage of a contextual approach – reaching more just results – seem to outweigh its problems in terms of procedure and perception of justice. In fact, similar charges to those raised against a contextual approach are equally relevant when raised against equity, as equity is essentially about changing general rules that result in unjust results in particular cases or categories of cases.

Finally, the appropriateness and reasonableness of the choice and weight of the relevant goals can be scrutinized, as are other normative decisions made by judges. The discretion of judges within a contextual-pluralistic framework – their choice of a particular combination of goals to be applied in any given context – is susceptible to scrutiny to the same degree as any other decision judges make. This fact should serve as a safeguard against the apprehension of improper use of judicial discretion.

B. A Sketch of Tort Law and its Goals

Tort law regulates involuntary interactions in private settings, when such interactions harm some, or all participants. It has to balance the interest in freedom of action of potential tortfeasors and the interest in security of potential victims. An important distinction should be drawn between harm caused by conduct deemed undesirable from a social perspective and harm caused by the fact that two activities which are both desirable are incompatible with each other. In both cases society has to determine by means of tort law how to allocate the losses caused by the interaction. With respect to the former category, the criterion of fault suggests itself as a candidate for allocating the loss to the person who caused harm to herself or to others based on either notions of negative desert or on notions of deterrence. However, even in this category, and *a fortiori* when the loss was not caused by anyone's fault, there are other relevant considerations.

Generally, the following considerations should be deemed relevant in allocating the loss: (1) How socially valuable is the defendant's activity that risks and harms others? What was the purpose of the activity, and who stood to benefit from it? (2) How big was the risk imposed, and to what extent it was necessary? (3) How big is the disutility caused to the party who has to bear the loss from the activity? (4) How strong are the relevant parties? The egalitarian consideration, clearly manifested in the fourth question, indirectly affects the answers that should be given to the other questions as well. The social value of the party's activity is determined also by the range of alternatives open to her, and these in turn partially hinge on her social,

of Law and Adjudication (Durham, 2000).

40 The last tenet is accepted also by liberal theoreticians. See e.g., Ronald Dworkin, 'Darwin's New Bulldog', 111 *Harv L Rev* (1998) 1718.

cultural and economic status. The question whether the imposition of the risk is necessary, which relates to the costs of precaution, should be determined as well with respect to the range of available options, and of course the disutility of bearing the loss *ex post* (or of having one's autonomy curtailed *ex ante*) is closely affected by one's status, societal power and wealth. Normative considerations reflecting ideas of corrective justice, deterrence, loss spreading and fairness all have their place in tort law. Alongside them there is a place for an egalitarian commitment, and such a commitment should also reformulate the way we understand other considerations.

As one can easily see, these considerations can be translated into criteria for distribution. According to such an approach, tort law is the locus for distributing burdens (and benefits) caused in the process of involuntary interaction in a private setting, and considerations of desert (both positive and negative), merit,[41] needs[42] and equality all serve to help decide how the loss should be allocated, and to whom.

This understanding of tort law ascribes importance to the normativity of law, and the analysis will draw on the expressive aspects of the law. Accordingly, at times one of the goals of tort liability is to convey a moral judgment of the inappropriateness of the defendant's (or the plaintiff's) behaviour. That tort law distributes also non-material goods and has symbolic effects is central to the analysis offered in this study. This symbolic message is important not only within an instrumentalist framework; it also has intrinsic importance.

IV. Pulling the Threads Together

A. Egalitarian Tort Law in the Context of the Declining Welfare State

The idea of using tort law in order to reduce inequality in society can be evaluated against the backdrop of the welfare state – both the ideal and the reality. Much progressive thought in the 1960s and 1970s called for the replacement of tort law with more comprehensive compensation schemes. These schemes would serve the ideal of the welfare state in ensuring security against any debilitating circumstances befalling members of society, regardless of the impossibility of finding another's fault or even human causal responsibility. Such a critique of tort law, based on the haphazard nature of liability and compensation, was offered by Terence Ison and echoed (with some variations) by many other scholars, such as Richard Abel and Allan Hutchinson.[43] (It

41 Examples of considerations of merit in the tort context are, for instance, the inquiry into the social value of the defendant's activity and the purpose of imposing the risk. The idea of fairness, that one should bear the costs of any activity that one stands to benefit from, calls attention to the different moral evaluation of self-serving as opposed to altruistic behaviour.

42 One manifestation of need is the idea of loss spreading. Since losses cause disutility, spreading the loss will preserve one's basic needs and prevent a significant loss of utility.

43 Terence G. Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation* (London, 1967); Richard L. Abel, 'A Critique of Torts', 37 *UCLA L Rev* (1990) 785; Allan C. Hutchinson, 'Beyond Non-Fault', 73 *Cal L Rev* (1985) 755.

was also offered by many others, not all of whom are committed to the ideal of the welfare state.[44])

Such criticism seemingly casts doubt on the significance and desirability of inserting egalitarian commitment to tort law in two ways. First, if indeed tort law ought to be dispensed with for progressive reasons, and all the more so if it is already fading away, there is no apparent use in trying to insert progressive notions into it. Secondly, striving to achieve progressive results by tort law might not only be less than ideal, due to the limited reach of the solution, but also unwarranted, since the appearance of the progressive (but partial) solution would take the pressure away from achieving a more comprehensive and radical solution. Stephen Sugarman has dubbed this problem as the good being the enemy of the best.[45]

This criticism is unconvincing on both levels, and for several reasons. To begin with, as was noted by Iain Ramsay, '[T]he argument made in the 1960s that much of private law, such as tort law, would fade away in the administrative state seems currently to have been hopelessly utopian.'[46] Tort law has been remarkably resilient and does not appear to be fading away; rather it is the welfare state which is under siege. In this state of affairs, it does not seem that an attempt to use tort law in a progressive way is a cause for the decline of the welfare state; instead, it might be its effect.

Moreover, the relationship between tort law and the ideal of the welfare state is more complex than might be thought on first reflection. While a true commitment to a comprehensive welfare structure seems to obviate the need for tort law (or the bulk of it anyway), the Scandinavian experience shows the opposite. During the 1970s and 1980s Finland moved toward a welfare state model. During these same decades, there was a tendency to move towards need-orientation in the Finnish law of obligations, including tort law.[47] We see therefore that in Finland there was a positive correlation between a use of tort in order to achieve progressive results and an increase in state welfarism. 'The need-oriented elements are elements of the law in a welfare state',[48] or at least they *can* be, as the Finnish experience teaches us, rather than a progressive-agenda for tort being a (poor) substitute for the state's dissociation from the ideal of a welfare state.

Nonetheless, it seems that inserting egalitarian sensitivity into tort law might be even more crucial and laudable in a political climate hostile to the ideal of the welfare state, although of course the judiciary might be less likely to insert progressive-attentiveness into tort law in such a political climate. The lesson we should learn from the Finnish experience is that, contrary to claims of some critics

44 See e.g., Stephen D. Sugarman, 'Doing Away with Tort Law', 73 *Cal L Rev* (1985) 555, pp. 592–6; Patrick S. Atiyah, *The Damages Lottery* (Oxford, 1997); Jeffrey O'Connell, *The Lawsuit Lottery: Only the Lawyers Win* (New York, 1979).

45 Sugarman, Ibid., p. 592.

46 Iain Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State', 15 *Oxford JL Stud* (1995) 177, p. 196.

47 See Thomas Wilhelmsson, *Critical Studies in Private Law* (Dordrecht, 1992), pp. 111–25, 147.

48 Ibid., p. 147.

on the left, the agenda promoted here will not necessarily hinder the struggle for a more comprehensive shift toward the welfare state ideal.[49]

As for Sugarman's argument that the good is the enemy of the best, there are two points to be made. First, the phenomena of the general resilience of tort law and the retrenchment of the welfare state seem to be rooted in sociological, political and cultural currents which run much deeper than any general progressive shift that tort law may be assumed to be undergoing. Secondly, to the extent that the critique is more narrow, and holds only that a specific progressive tort law rule will prevent a more comprehensive (but localized) response by the state to the problem regulated by the rule, it must be recognized that this is a contingent and empirical claim. Chapter 3 below raises some doubts about its cogency, based on institutional considerations and public choice insights.

A major theme underlying this study is animosity to the status quo, and the belief that it harms much more than protects the interests of the disadvantaged. To those who share this animosity, a policy of abstaining from a small change in the positive direction in order not to jeopardize the chances for a major change in the positive direction seems a non-starter. In short, the approach taken here is informed by pragmatism preferring evolution to an anticipated (but doubtful) revolution. Accordingly, the current study could be viewed as part of a trend of progressive-minded scholars, who believe in the ability of private law to bring about limited progressive change. However, it should not be understood as a defence of the tort system as we currently know it, either generally or for its potentially useful role in promoting a progressive agenda. Rather, it should be understood as the claim that, given the institution of tort law and its resilience, we should and can try to use it progressively.

B. The Limits of the Argument

This study is concerned with the area in which distributive justice, egalitarianism and tort law overlap, namely understanding tort law as one tool for promoting equality, while understanding that in doing so tort law serves as one tool for promoting distributive justice – the just distribution of losses caused by incompatible involuntary human interactions in private settings. The limits of the inquiry and scope of argument should be clear: first, an egalitarian agenda can and should be promoted by means other than tort law. Tort law does not have a conclusive or even major role in the promotion of equality. Similarly, tort law is only one (and in some respects a limited) instrument for the promotion of distributive justice. Second, we should not exaggerate tort law's capacity to promote equality. However, it has a role which is far from trivial. Third, distributive justice in general, and the distribution of burdens with which tort law deals in particular, should use several criteria, and not merely a commitment to equality. Indeed, tort law should promote goals other than the empowerment of the disadvantaged in society and the latter goal should

49 For a view of tort law as protecting the disadvantaged (mainly unorganized consumers) against the 'haves' (mainly corporate greed) see Thomas H. Koening & Michael L. Rusted, *In Defense of Tort Law* (New York, 2001).

not take precedence over other goals. This study neither defends the claim that tort law should promote other distributive goals (such as loss spreading or fairness) nor examines in detail the way in which it can do so. Fourth, some of the arguments mounted against an attempt to promote equality by tort law can similarly be raised against attempts to achieve other distributive goals.[50] While it might well be the case that the responses offered in the next chapter in the context of promoting equality are applicable in other distributive contexts as well, such a general claim is not made. However, the discussion in the next chapter can serve as a useful framework and starting point in analysing tort law's legitimacy and effectiveness in promoting other distributive goals.

Fifth, while the application part of this book concentrates on tort law (mainly, in fact, on the tort of negligence), the normative argument advanced in the next chapter basically applies to the promotion of equality in private law. While some important distinctions exist between different branches of the law of obligations – mainly between contract law's obligations, which are consensual, and tort law's obligations, which are not – these distinctions should not always change the analysis, and when they do change it this fact will be noted. Accordingly, the argument put forward in Chapter 3 could be understood as a general claim that equality should be promoted by private law rules.

Sixth, this book does not delve into the contentious and elusive, but not unuseful dichotomy between public and private. This should be understood neither as a call for the abolition of this dichotomy, nor as a support for the view that one's duty to treat another equally is the same in private and public settings. In fact, the scope of the duty to promote equality changes even within different contexts in private and public law. With the exception of the discussion in Chapter 7, which deals with the duty not to discriminate, the rest of the applicatory part of this book deals with the duty of rule-makers to design tort rules with an egalitarian sensitivity in mind. Nor is much space devoted to the interesting issue of the public authority's tort liability. A useful starting point would be that the weight of egalitarian considerations in this context should be more significant, but this application requires more detailed and refined analysis. While there are obvious differences between the meaning of the requirement for equality in public law and the meaning of egalitarian commitment as defended in this book, nevertheless, public authorities should take into account the egalitarian concern to a greater extent, given the role of the government according to (non-libertarian) common and diverse political theories.

Seventh, no claim is made to having exhausted the discussion of the role of egalitarian sensitivity in tort law. The project is still in its infancy. Finally, the argument made in this book is normative, not descriptive. The study does not try to establish (or refute) the claim that egalitarian sensitivity is currently understood by the courts to be one of tort law's goals (although this may be true to some extent) and if so, how significant that commitment is. Descriptive claims merit suspicion for two reasons. One reason is that reality is so rich and complex that bodies of law can hardly be expected to be reduced to one explanatory principle. In other words,

50 See e.g., Richard A. Epstein, 'The Social Consequences of Common Law Rules', 95 *Harv L Rev* (1982) 1717.

law makers (or at least most of them) are pluralist and contextual. The other reason for being suspicious of descriptive claims is that they seem to reflect a researcher's bias. There is a frequent positive correlation between the researcher's normative commitment and his descriptive account of the law – Posner and Weinrib's conflicting descriptions of tort law as reflecting, respectively, efficiency and corrective justice is a good example of this phenomenon. Descriptive theorists, it seems, are searching for the lost doctrinal coin under their own theory's streetlight.