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TAL MAZAR

TORT LIABILITY OF REGULATORY AUTHORITIES IN ISRAEL

The tort liability of regulatory authorities in Israel is a topical and important issue that has been researched in the academic literature only in specific contexts. However, this literature has not focused on the level of liability of regulatory authorities, and the impact of the changes that characterize the Regulatory State on this issue. This article seeks to examine this issue for the first time from two perspectives. *First*, a descriptive point of view focused on the way in which Israeli case law has developed when dealing with "regulatory negligence" cases. For this purpose, an empirical study was conducted, examining the level of responsibility of regulatory authorities from 2000 to 2020. The paper then discusses the question whether this level is desirable in light of the changes that have taken place in regulatory policy in Israel. The study also examines how Israeli case law relates to changes in Israeli regulatory policy, and whether this is consistent with the desired level of liability. *Second*, a prospective point of view examines the ways in which this case law could develop in order to provide a proper response to the changes that characterize the Regulatory State.

The main finding of the study is that the level of tort liability in regulatory negligence cases, which are cases that reflect an expansion of liability, is not high. On the contrary, the liability of regulatory authorities was found to be limited, especially in the last decade. Thus, the study presents a different picture from that portrayed in the literature and in case law dealing with tort claims against public authorities more generally. The arguments for a high level of liability border on the absurd, and do not seem to be relevant to the specific type of regulatory negligence. Similarly, it appears that such a limited level of liability is desirable, since the changes that characterize the regulatory reform have bolstered considerations for limiting the liability of regulatory authorities. At the same time, in addition to maintaining "restrained" judicial review, it is

suggested that courts should further "incentivize" the regulatory authority to act in accordance with the characteristics of modern regulatory methods recently adopted in the Regulation Principles Law (2021). A review of existing Israeli case law revealed that it does rely on these modern regulatory methods, in conformity with the desirable level of liability. Finally, the article proposes two ways in which the case law might be improved. One possible way is to focus on "procedural reasonableness" and examine the regulatory procedure (as opposed to the content of the regulation). Another way is to improve judicial review by emphasizing the different stages of the "regulation" and distinguishing between different types and numbers of both regulators and regulatees in different sectors.

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YUVAL PROCACCIA

REMEDIES AND INCENTIVES IN EMPLOYMENT LAW: CONTRIBUTORY FAULT, CAUSATION, AND PUNITIVE DAMAGES

One of the most challenging tasks facing employment law regulation is how to incentivize compliance. Violations of the law often occur through "employment misclassifications", where employers and employees wrongly present their relationship as one of principal and contractor. Such misclassifications may hurt employees by denying them their legal rights. But they may also benefit employees, by allowing higher wages or greater workplace flexibility.

This paper discusses three distinct questions raised by the phenomenon of employment misclassification. The first pertains to cases in which the employee initiates the misclassification to receive its associated benefits, but then proceeds to sue the employer, alleging violation of her rights. Should an employer be granted a defense of "contributory fault" in such cases? If so, how should the presence of contributory fault impact the legal protections afforded by employment law regulation? A second question is how to define the harm caused by misclassification. Should an employer's liability be reduced by the value of the benefits the misclassification conferred on the employee? In that case, how should such "offsets" be regulated? A third question is what principles ought to guide the determination of punitive damages. Should damages be based solely only on the employee's individual grievance, or should they also reflect possible externalities affecting other employees? A related question is whether punitive damages ought to be granted when an individual plaintiff sustained no harm at all, and even when the misclassification afforded her a net gain.

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CHAGAI SCHLESINGER

THE CONSTITUTIONAL REASONING OF THE KVANTINSKY CASE: CONSERVATISM IN ACTION

In the Kvantinsky case, the Israeli Supreme Court struck down legislation, for the first time, due to flaws in the legislative process. The authority to do so is not mentioned in basic laws, and the court rarely discusses its own authority (except for relying on precedents). This is especially interesting given the fact that the decision was written by Justice Noam Sohlberg, who identifies himself as a 'conservative' judge, who tends to respect majority decisions.

This article traces the conservative roots of the Kvantinsky ruling by examining how the court anchored its authority in the Foundations of Law Act, 1980, and then in Halakhic sources. The article argues that this reference to Jewish law is not merely a rhetorical ornament, but rather indicates the perception of institutional constitutional law as a realm in which there is a 'lacuna' in the constitution, which urgently requires filling. This perception stems from a conservative position that views the role of the judiciary as that of overseeing the procedure, and less the content, of governmental decisions. According to this worldview, existing Israeli constitution law, which stresses the protection of human rights rather than that of institutional norms, is a distortion. This distortion permitted Justice Solberg to view the situation before him as a lacuna; and in order to complete it, he turned to Halakhic sources – which in itself reflects adherence to 'conservative values'. The result was severe judicial review with no formal basis. This phenomenon creates an interesting conservative paradox, and the article discusses its origins, its difficulties, and the potential it creates for the development of Israeli constitutional law.

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SHANI SCHNITZER

BEN-GURION, THE HIGH COURT OF JUSTICE AND THE ISRAELI CONSTITUTION THAT NEVER WAS

In 1950, it was decided that a formal Constitution would not be enacted in Israel. This decision, commonly referred to as 'The Harari Resolution', was to a great extent the result of David Ben-Gurion's adamant opposition to the adoption of a constitution. However, upon establishment of the State of Israel in May 1948 and during the ensuing months, Ben-Gurion showed no signs of such opposition. On the contrary, he regarded adoption of a constitution as an integral part of establishment of the State. This article reveals an overlap between the shift in Ben-Gurion's approach to the process of constitution-making and the Israeli High Court of Justice's activity in its first few months. Never discussed before, this fundamental fact reveals a connection between the HCJ's function and the shift in Ben-Gurion's position. To this end, the article juxtaposes petitions filed in the HCJ during the second half of 1948 (first with the Tel Aviv District Court and later with the Supreme Court of Israel) and a draft constitution that the Constitution Committee of the Provisional State Council was considering at the time. This juxtaposition serves to show that seemingly theoretical concerns that Ben-Gurion had regarding the adoption of a constitution were in fact the result of the HCJ's activity, and more specifically, its foreseeable exercise of the power of constitutional review. Framing the opposition to a constitution as anti-judicial backlash, meant to curtail the judiciary's power in its endeavors to protect rights, has implications for our understanding of the processes that shaped Israeli public law during the formative years of Statehood. It further raises questions as to the first Prime Minister's commitment to democracy and to the rule of law, which are also discussed in the article.

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OREN GAZAL AYAL & SHIRA GUR-ARIEH (EPHRON)

WHEN RELEASE PREVENTS DANGER: RETHINKING PREVENTIVE DETENTION

In Israel, almost all decisions to remand defendants in custody until the end of judicial proceedings are based on the need to prevent defendants from endangering others. When considering whether supervised release can substitute the remand order, courts balance the fundamental rights of defendants against the interest in reducing this risk. The underlying premise behind this balance is that remand is the most effective tool for reducing the danger posed by a defendant. We seek to challenge this perception and argue instead that, often, supervised release can be more effective than remand in reducing the risk posed by defendants for several reasons that courts do not currently consider.

First, defendants on supervised release remain under supervision for much longer than remanded defendants. Second, supervised release increases the likelihood that defendants will participate in effective rehabilitation programs – both during the criminal process and after sentencing. Third, remanded defendants are more likely to be sentenced to a short prison term, which has a criminogenic effect.

Currently, remand is perceived as the best way to reduce the danger posed by defendants, and conditional release is only offered to mitigate the infringement of defendants' rights. We suggest that courts should also consider the advantages of conditional release as a way to reduce the danger posed by release of defendants and hence reduce the use of remand.

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TZUR GROSSMAN

MISTAKEN PARTY'S NEGLIGENCE: FAULT, JUSTICE AND GOOD FAITH

Israel's Contracts (General Part) Law does not stipulate anything with respect to a mistaken party's negligence, and the consequences of this negligence on the nature and scope of the remedies to which such parties will be entitled. On several occasions, Israeli case law has dealt with cases where the mistaken party was negligent. In these cases, the central tendency of case law has been opposition to the denial of contract voidability, except in very specific contexts. This article discusses and criticizes existing case law, mainly arguing that it leads to binary results and is therefore unjust in the usually complex situations where the mistaken party was negligent. The article discusses various considerations with respect to the fundamental issue and suggests that the mistaken party's negligence should be taken into account. This suggestion leads to the argument that the appropriate remedy for dealing with situations where the mistaken party was negligent is a flexible one. Case law has proposed some remedies of this sort, but the main disadvantage of these remedies is that they are suitable only for certain factual and legal circumstances. Therefore, this article develops a mechanism of conditional voidability of a contract, through which more flexible and justifiable results can be achieved in situations where the mistaken party was negligent.

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URI Y. HACOHEN

PROTECTING FAIR PHARMACEUTICAL COMPETITION WITH THE LAW OF UNJUST ENRICHMENT

Pharmaceutical evergreening – attempts by brand-name manufacturers to leverage patent rights in order to artificially extend legal protection for drugs – is among our time's most pressing and unresolved public policy challenges. On July 14, 2021, in Sanofi et al. vs. Unipharm Ltd., the Israeli Supreme Court adopted a novel and internationally unprecedented legal policy to combat the evergreening pandemic. By using its equitable powers, the Israeli court empowered a generic manufacturer, Unipharm, to claim on behalf of the public interest the wrongly obtained monopoly profits that a brand-name manufacturer, Sanofi, obtained by improperly leveraging its improvement patent to impair generic market entry. This article introduces and critically evaluates the provocative Israeli decision. It begins by exploring the evergreening phenomenon along with its grim economic and social implications. It then exposes the inadequacy of the existing remedial mechanisms, and suggests that courts utilize the law of unjust enrichment in order to mitigate the harms of evergreening. Lastly, this article offers a detailed doctrinal analysis for a carefully crafted unjust enrichment remedy. Such a remedy could deter brand-name manufacturers' overreach without stifling pharmaceutical ingenuity