

# No-Fault and Beyond

# Ideology

# Does Tort Law Have an Ideology?

# Big Picture: Workers' Comp vs. Tort Law

Deterrence

Compensation

Administrative Cost

Equity

-	Negligence	Strict Liability	Intentional Torts
Type of Conduct	???	???	???
Causal Connection	???	???	???
Affirmative Defenses	???	???	???
Damages Available	???	???	???

-	Negligence	Strict Liability	Intentional Torts
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm
Causal Connection	???	???	???
Affirmative Defenses	???	???	???
Damages Available	???	???	???

-	Negligence	Strict Liability	Intentional Torts
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm
Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause
Affirmative Defenses	???	???	???
	???	???	???
Damages Available	???	???	???

-	Negligence	Strict Liability	Intentional Torts
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm
Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause
Affirmative defenses	- Comparative fault - Assumption of risk	- Comparative fault - Assumption of risk	- Consent - Self defense - Necessity
Damages Available	???	???	???



-	Negligence	Strict Liability	Intentional Torts
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm
Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause
Affirmative defenses	- Comparative fault - Assumption of risk	- Comparative fault - Assumption of risk	- Consent - Self defense - Necessity
Damages available	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)

-	Negligence	Strict Liability	Intentional Torts	Workers' Comp
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm	???
Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause	???
Affirmative defenses	- Comparative fault - Assumption of risk	- Comparative fault - Assumption of risk	- Consent - Self defense - Necessity	???
Damages available	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	???

-	Negligence	Strict Liability	Intentional Torts	Workers' Comp
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm	- Workplace injuries
Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause	???
Affirmative defenses	- Comparative fault - Assumption of risk	- Comparative fault - Assumption of risk	- Consent - Self defense - Necessity	???
Damages available	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	???

-	Negligence	Strict Liability	Intentional Torts	Workers' Comp
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm	- Workplace injuries
Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Injury must be “work-related”
Affirmative defenses	- Comparative fault - Assumption of risk	- Comparative fault - Assumption of risk	- Consent - Self defense - Necessity	???
Damages available	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	???

-	Negligence	Strict Liability	Intentional Torts	Workers' Comp
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm	- Workplace injuries
Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Injury must be "work-related"
Affirmative defenses	- Comparative fault - Assumption of risk	- Comparative fault - Assumption of risk	- Consent - Self defense - Necessity	- Employee was outside "scope of employment"
Damages available	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	???

-	Negligence	Strict Liability	Intentional Torts	Workers' Comp
Type of conduct	- Fault	- Dangerous activities - Products	- Intentional harm	- Workplace injuries
Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Injury must be "work-related"
Affirmative defenses	- Comparative fault - Assumption of risk	- Comparative fault - Assumption of risk	- Consent - Self defense - Necessity	- Employee was outside "scope of employment"
Damages available	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Past and future damages (economic, noneconomic, punitive) (lump sum payment)	- Unlimited medical compensation - Fraction of lost wages (with statutory cap) (paid in installments)

# No-Fault Systems / Compensation Funds

Common features:

- Narrow category of injury
- Reduced fact-finding and proof requirements
- Fixed recovery amounts
- Insurance-like funding rather than individual defendant-to-plaintiff payouts

-	Torts	Workers' Comp	No-Fault Funds
Type of conduct	<ul style="list-style-type: none"> <li>- Fault</li> <li>- Dangerous activities</li> <li>- Products</li> <li>- Intentional harm</li> </ul>	<ul style="list-style-type: none"> <li>- Workplace injuries</li> </ul>	<ul style="list-style-type: none"> <li>- Specific injuries</li> </ul>
Causal connection	<ul style="list-style-type: none"> <li>- Factual cause</li> <li>- Proximate cause</li> </ul>	<ul style="list-style-type: none"> <li>- Injury must be “work-related”</li> </ul>	<ul style="list-style-type: none"> <li>- Limited proof required</li> </ul>
Affirmative defenses	<ul style="list-style-type: none"> <li>- Comparative fault</li> <li>- Assumption of risk</li> </ul>	<ul style="list-style-type: none"> <li>- Employee was outside “scope of employment”</li> </ul>	<ul style="list-style-type: none"> <li>- Few defenses available</li> </ul>
Damages available	<ul style="list-style-type: none"> <li>- Past and future damages (economic, noneconomic, punitive) (lump sum payment)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Fraction of lost wages (with statutory cap) (paid in installments)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Strict statutory formulas for other economic or noneconomic compensation, if available</li> </ul>



# 9-11 Fund

Unique characteristics:

- created after the harm, not in anticipation of harm
- individualized approach to economic loss
- tort-like awards for noneconomic loss
- low administrative costs

-	Torts	Workers' Comp	No-Fault Funds	9-11 Fund
Type of conduct	<ul style="list-style-type: none"> <li>- Fault</li> <li>- Dangerous activities</li> <li>- Products</li> <li>- Intentional harm</li> </ul>	<ul style="list-style-type: none"> <li>- Workplace injuries</li> </ul>	<ul style="list-style-type: none"> <li>- Specific injuries</li> </ul>	???
Causal connection	<ul style="list-style-type: none"> <li>- Factual cause</li> <li>- Proximate cause</li> </ul>	<ul style="list-style-type: none"> <li>- Injury must be “work-related”</li> </ul>	<ul style="list-style-type: none"> <li>- Limited proof required</li> </ul>	???
Affirmative defenses	<ul style="list-style-type: none"> <li>- Comparative fault</li> <li>- Assumption of risk</li> </ul>	<ul style="list-style-type: none"> <li>- Employee was outside “scope of employment”</li> </ul>	<ul style="list-style-type: none"> <li>- Few defenses available</li> </ul>	???
Damages available	<ul style="list-style-type: none"> <li>- Past and future damages (economic, noneconomic, punitive) (lump sum payment)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Fraction of lost wages (with statutory cap) (paid in installments)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Strict statutory formulas for other economic or noneconomic compensation, if available</li> </ul>	???

-	Torts	Workers' Comp	No-Fault Funds	9-11 Fund
Type of conduct	<ul style="list-style-type: none"> <li>- Fault</li> <li>- Dangerous activities</li> <li>- Products</li> <li>- Intentional harm</li> </ul>	<ul style="list-style-type: none"> <li>- Workplace injuries</li> </ul>	<ul style="list-style-type: none"> <li>- Specific injuries</li> </ul>	<ul style="list-style-type: none"> <li>- 9-11 terrorist attacks</li> </ul>
Causal connection	<ul style="list-style-type: none"> <li>- Factual cause</li> <li>- Proximate cause</li> </ul>	<ul style="list-style-type: none"> <li>- Injury must be “work-related”</li> </ul>	<ul style="list-style-type: none"> <li>- Limited proof required</li> </ul>	<ul style="list-style-type: none"> <li>???</li> </ul>
Affirmative defenses	<ul style="list-style-type: none"> <li>- Comparative fault</li> <li>- Assumption of risk</li> </ul>	<ul style="list-style-type: none"> <li>- Employee was outside “scope of employment”</li> </ul>	<ul style="list-style-type: none"> <li>- Few defenses available</li> </ul>	<ul style="list-style-type: none"> <li>???</li> </ul>
Damages available	<ul style="list-style-type: none"> <li>- Past and future damages (economic, noneconomic, punitive) (lump sum payment)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Fraction of lost wages (with statutory cap) (paid in installments)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Strict statutory formulas for other economic or noneconomic compensation, if available</li> </ul>	<ul style="list-style-type: none"> <li>-???</li> </ul>

-	Torts	Workers' Comp	No-Fault Funds	9-11 Fund
Type of conduct	<ul style="list-style-type: none"> <li>- Fault</li> <li>- Dangerous activities</li> <li>- Products</li> <li>- Intentional harm</li> </ul>	<ul style="list-style-type: none"> <li>- Workplace injuries</li> </ul>	<ul style="list-style-type: none"> <li>- Specific injuries</li> </ul>	<ul style="list-style-type: none"> <li>- 9-11 terrorist attacks</li> </ul>
Causal connection	<ul style="list-style-type: none"> <li>- Factual cause</li> <li>- Proximate cause</li> </ul>	<ul style="list-style-type: none"> <li>- Injury must be “work-related”</li> </ul>	<ul style="list-style-type: none"> <li>- Limited proof required</li> </ul>	<ul style="list-style-type: none"> <li>- Injury happened in “zone of danger” of the terrorist attacks</li> </ul>
Affirmative defenses	<ul style="list-style-type: none"> <li>- Comparative fault</li> <li>- Assumption of risk</li> </ul>	<ul style="list-style-type: none"> <li>- Employee was outside “scope of employment”</li> </ul>	<ul style="list-style-type: none"> <li>- Few defenses available</li> </ul>	<ul style="list-style-type: none"> <li>???</li> </ul>
Damages available	<ul style="list-style-type: none"> <li>- Past and future damages (economic, noneconomic, punitive) (lump sum payment)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Fraction of lost wages (with statutory cap) (paid in installments)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Strict statutory formulas for other economic or noneconomic compensation, if available</li> </ul>	<ul style="list-style-type: none"> <li>???</li> </ul>

-	Torts	Workers' Comp	No-Fault Funds	9-11 Fund
Type of conduct	<ul style="list-style-type: none"> <li>- Fault</li> <li>- Dangerous activities</li> <li>- Products</li> <li>- Intentional harm</li> </ul>	<ul style="list-style-type: none"> <li>- Workplace injuries</li> </ul>	<ul style="list-style-type: none"> <li>- Specific injuries</li> </ul>	<ul style="list-style-type: none"> <li>- 9-11 terrorist attacks</li> </ul>
Causal connection	<ul style="list-style-type: none"> <li>- Factual cause</li> <li>- Proximate cause</li> </ul>	<ul style="list-style-type: none"> <li>- Injury must be “work-related”</li> </ul>	<ul style="list-style-type: none"> <li>- Limited proof required</li> </ul>	<ul style="list-style-type: none"> <li>- Injury happened in “zone of danger” of the terrorist attacks</li> </ul>
Affirmative defenses	<ul style="list-style-type: none"> <li>- Comparative fault</li> <li>- Assumption of risk</li> </ul>	<ul style="list-style-type: none"> <li>- Employee was outside “scope of employment”</li> </ul>	<ul style="list-style-type: none"> <li>- Few defenses available</li> </ul>	<ul style="list-style-type: none"> <li>- Terrorism</li> </ul>
Damages available	<ul style="list-style-type: none"> <li>- Past and future damages (economic, noneconomic, punitive) (lump sum payment)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Fraction of lost wages (with statutory cap) (paid in installments)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Strict statutory formulas for other economic or noneconomic compensation, if available</li> </ul>	<ul style="list-style-type: none"> <li>???</li> </ul>

-	Torts	Workers' Comp	No-Fault Funds	9-11 Fund
Type of conduct	<ul style="list-style-type: none"> <li>- Fault</li> <li>- Dangerous activities</li> <li>- Products</li> <li>- Intentional harm</li> </ul>	<ul style="list-style-type: none"> <li>- Workplace injuries</li> </ul>	<ul style="list-style-type: none"> <li>- Specific injuries</li> </ul>	<ul style="list-style-type: none"> <li>- 9-11 terrorist attacks</li> </ul>
Causal connection	<ul style="list-style-type: none"> <li>- Factual cause</li> <li>- Proximate cause</li> </ul>	<ul style="list-style-type: none"> <li>- Injury must be “work-related”</li> </ul>	<ul style="list-style-type: none"> <li>- Limited proof required</li> </ul>	<ul style="list-style-type: none"> <li>- Injury happened in “zone of danger” of the terrorist attacks</li> </ul>
Affirmative defenses	<ul style="list-style-type: none"> <li>- Comparative fault</li> <li>- Assumption of risk</li> </ul>	<ul style="list-style-type: none"> <li>- Employee was outside “scope of employment”</li> </ul>	<ul style="list-style-type: none"> <li>- Few defenses available</li> </ul>	<ul style="list-style-type: none"> <li>- Terrorism</li> </ul>
Damages available	<ul style="list-style-type: none"> <li>- Past and future damages (economic, noneconomic, punitive) (lump sum payment)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Fraction of lost wages (with statutory cap) (paid in installments)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Strict statutory formulas for other economic or noneconomic compensation, if available</li> </ul>	<ul style="list-style-type: none"> <li>- Full economic damages up to 98% of wage earners</li> <li>- Noneconomic losses compensated in full</li> </ul>

# New Zealand

## Total tort reform

Common law torts for accidental injury are abolished

All accidental injuries now covered under a no-fault scheme:

- unlimited medical expenses
- fixed compensation for lost earnings
- lump sums for lost body parts and pain and suffering

# In-Class Exercise

You are a wise federal trial judge with experience managing multidistrict litigation for toxic harms. Policymakers are considering establishing a compensation fund for victims of toxic harms. You have been asked to advise the group that is drafting the proposal.

Here are some features of the current plan. To receive compensation, the plaintiff must prove that she was sufficiently exposed to a toxic substance such that the toxic substance could have caused her injury. If there are multiple possible defendants, the plaintiff is not required to prove which defendants are responsible for her injuries. The plaintiff is not required to prove that the defendant was at fault. The plaintiff can receive unlimited compensation for medical expenses (including medical monitoring) in installments over time, but the plaintiff cannot be compensated for other losses. If the plaintiff receives compensation from this fund, the plaintiff is barred from pursuing any common law tort action related to the injury.

What are the strengths and weaknesses of this plan? What are your suggestions for revision?