

No-Fault and Beyond

Class tomorrow

Friday April 26th

10:00am to 11:15am in the Hall of the 70s.

Office hours immediately following the end of class.

Why are we studying this?

For alternatives to tort, what types of questions are fair game?

Insurance

For a given fact pattern:

- How does insurance affect (or not affect) the tort litigation?
- How does insurance change incentives of the parties?
- How does insurance change our assessment of the fairness and efficacy of a particular tort law rule?

Workers' Compensation

For a given fact pattern:

- Can the plaintiff pursue a tort claim or is workers' compensation the exclusive remedy?
- What can the plaintiff recover from workers' compensation compared to tort?
- With multiple defendants, what are the plaintiff's options for redress?

Policy Questions

For a given aspect of tort law:

- How does an alternative to tort fare at addressing a particular problem compared to tort law?
- Should tort law adopt this policy or rule from an alternative to tort?
- In crafting law that addresses personal injury and accidents, what should our values and goals be? What rules should we adopt?

The Bargain of Workers' Compensation

No fault

and

Exclusive remedy

Workers' Compensation Requirements

Only compensates for work-related injuries

Benefits include:

- Medical coverage
- Percent of lost wages
- Vocational rehabilitation
- Survivor benefits

Employers must buy workers' comp insurance

-	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	???	???	???

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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	???	???	???

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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	???	???	???

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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)

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Causal connection	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Factual cause - Proximate cause	- Injury must be “work-related”
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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"> - Fault - Dangerous activities - Products - Intentional harm 	<ul style="list-style-type: none"> - Workplace injuries 	<ul style="list-style-type: none"> - Specific injuries
Causal connection	<ul style="list-style-type: none"> - Factual cause - Proximate cause 	<ul style="list-style-type: none"> - Injury must be “work-related” 	<ul style="list-style-type: none"> - Limited proof required
Affirmative defenses	<ul style="list-style-type: none"> - Comparative fault - Assumption of risk 	<ul style="list-style-type: none"> - Employee was outside “scope of employment” 	<ul style="list-style-type: none"> - Few defenses available
Damages available	<ul style="list-style-type: none"> - Past and future damages (economic, noneconomic, punitive) (lump sum payment) 	<ul style="list-style-type: none"> - Unlimited medical compensation - Fraction of lost wages (with statutory cap) (paid in installments) 	<ul style="list-style-type: none"> - Unlimited medical compensation - Strict statutory formulas for other economic or noneconomic compensation, if available at all

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

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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

Doing Away with Tort Law

Stephen D. Sugarman

Proposal:

- No more tort law
- Compensation: Expanded safety net (public and private)
- Deterrence: Regulatory state

Muss Es Sein? Not Necessarily, Says Tort Law

Anita Bernstein

A defense of tort law as progressive. How so?

Compared to all other fields of law, tort law

- empowers the vulnerable to challenge the powerful
- gives plaintiffs space for creative pleading
- imposes individual accountability on the powerful

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?

Some unsolicited advice...

Befriend anxiety

Care for each other

Kick some ass