

No-Fault and Beyond

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?

Three Types of Policy Questions

- Explicit (e.g., asking your thoughts on a proposed statutory scheme)
- Common law development
- Substantive tort law rules asks for court to make a policy determination

How to answer a policy question?

- Pay attention to the task specified in the question
- Know that doctrinal rules tell you what the law is, but your job is to argue for what the law should be
- Policy questions are thorny, difficult, wicked problems and should be treated as such
 - There are always tradeoffs, costs and benefits
 - Not all values can be maximized
 - Your job is to argue for the optimal balance, not to argue that all goals have been achieved
- Opportunity to bring in theory (corrective justice, law and econ, etc.), but good answers ground that theory in the particulars of the question.

| | 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"> - 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 is finished, not in anticipation of harm
- individualized approach to economic loss
- tort-like awards for noneconomic loss (later refined into formulas)
- low administrative costs

| - | Torts | Workers' Comp | No-Fault Funds | 9-11 Fund |
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| 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 | ??? |
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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

Some unsolicited advice...

Befriend anxiety

Care for each other

Kick some ass