

## WEEK 2

### Corrective Justice

- Does it right the wrongs between the parties?
- About writing the wrong. Focus only to a parties in the dispute; what one party has morally wronged another, and how the compensation should flow!
- Wrong – personal injury, economic loss
- No room for any broader policy goals; it's not about the society.

### Distributive justice

- Broad society level (distributed in a just way).
- Is the system operating justly?
- Ideas are typically linked to insurance.
- No fault schemes (it doesn't matter if you are injured by your own fault or someone else's).

### Economic theory

- Efficient outcomes.
- Not really interested if there was a moral wrong, but if it will be economically efficient.
- Not that much about moral rights.
- Who should bear the loss? - Who would be the most efficient loss bearer?
- Problems: it rests on the idea if you put responsibility on the party that would deter across society. – Idea: it sends market signals that would prevent the accidents, but it is not really convincing.

### Feminist Theory

- Protecting the vulnerable.
- Nature of female injuries.
- Does gender matter? Is gender relevant?
- Injuries that happen at home, psychiatric injuries - at work.
- Not just about are you female, but does the gender matter on the other hand.

### Tort Law as Regulation

- Tort law should serve as an instrument of regulation when government regulation has failed.
- It is not just about the parties, but it is about using the law tool for broader social concerns.

You can't satisfy all of the theories at once.

## Introduction to Disability Jurisprudence (Kanter, Bloom and Miller) - 18 -

- Emerging field –understanding of the place of disability in society and disability in law. Surprisingly little consideration and application to tort law, given concerns personal injuries.
- How is the concept of disability constructed in society and in law?
- How well does this reflect the lived experiences of people with a disability?
- Disability not as ‘abnormal’ but as part of the ‘normal’ human experience and the normal human condition. (‘Disability is “Us”’).
- Rejects the view that disability is ‘solely a medical problem or a personal tragedy’.
- Critiques models of disability that locate the ‘problem within the individual rather than in society’ such that the individual must change rather than society.

We see disability as abnormal when in fact it is completely normal. We tend to see it only as a medical problem.

Part of the normal human condition is that you may have disability.

- Views a person with disability ‘not as victim of pathology’ but as limited by social attitudes and environmental barriers.

How can this help us think about/critique the law of negligence and the tort system?

If you are born with a disability there is no compensation for you, but if a car hits you and you’re disabled, you can get compensation. - Why do we treat two people with the same disability different?

Pregnant women - diagnosed that child will be disabled!

## WEEK 3

### Critiquing the Tort System

- Small number of disabled benefit.
- Different disabilities treated different ways.
- Most accidents not blameworthy - accidents happen. People unintentionally injure others and themselves.
- Cost and inefficiency, adversarial and court based (it can be very time consuming)
- Other costs (eg legal costs)
- Delays/Economic hardship (it doesn't give you part pays - you get everything at once).
- How will we know for sure what the damaged person will need in future?
- Discounts on settlement.
- No sharing of valuable information - settlements are typically confidential.
- Blame mentality, litigation neurosis, discourages rehabilitation - it is very stressful to litigate.
- Going for compensation may lead to worse health outcome.
- Reiterates social inequality - you are better off a hit a homeless person than to hit someone rich (they have to put you back to the situation/condition that you were in before; the system reinforces the social inequality the way that it works).

### No Fault Schemes

- The idea is that you'll get a quick compensation and quick access to rehab.
- *Rational design* - the schemes are the product of legislation, which is reviewed, and (usually) administered by an agency, which reports to Parliament through the responsible Minister.
- *Administrative efficiency* - saving of time and costs wasted on legal battles. Claims typically resolved administratively, through a claims process that is more informal than court action.
- *Compulsory insurance and insurance principles*: the schemes seek to balance interests (e.g. between insurance costs imposed on those who control/engage in activity, and compensation for those injured in the activity).
- *No-fault liability*: claimants need *only prove a causal link* with the insured activity (subject to exclusions for fraud or self-inflicted injuries). Fault is not the issue, usually is to show that the injury arose in some sort of activity.
- *Limitations or caps on damages* - statutory schemes usually limit recovery to defined benefits.
- In return to everybody getting something, everybody gets less.

### Summary of differences between no-fault systems and tort

- There is no requirement to prove fault
- Contributory negligence on the part of the P is (generally) irrelevant
- Payment is generally made periodically, as opposed to the lump sum payment made by the courts (although some schemes do pay lump sums for serious injuries) - every week or every month for minimal injuries - to recover and then to return to your normal activities.
- Compo paid is also generally much less than that available through a successful negligence action.
- May be focussed on particular activities
- NF may be more “data” rich - how many accidents are happening; great information about what’s happened across the system; how are the accidents happening, how can they be prevented.
  
- **Compensation:** more people receive benefits but the amounts are limited (if you win in tort you’ll get more, but in NF more people get something).
- **Deterrence:** not really achieved. Does Tort do any better?
- **Corrective Justice:** Not at all but the idea of no fault compensation does embody a principle of social justice and community responsibility (no element to hold someone responsible for doing something wrong).

### The current state of accident compensation in Australia

- Some coverage is compulsory (workers compensation, CTP/motor accidents)
- Some is “pseudo” compulsory (public liability, med mal)
- Some coverage is no-fault, some is fault-based
- Varying access to common law
- Some is underwritten in the private sector, some in the public sector
- Many injuries not compensable.

### New Zealand

- You do not sue for injuries.
- They’ve got ACC, which covers all the accidents.

### NDIS & NIIS -28-

- The ideas to have the lifetime care and support for disabled and injured.