

Is a no fault regime
better than a
negligence rule as a
way of compensating
the v...

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Introduction This paper seeks to resolve whether no fault regime is better than negligence rule as a way of compensating the victims of medical negligence. We will resolve the issue by identifying and discussing the advantages of over the other in relation to the desired objectives of the tort law, which serves as the bases of the two rules

Brief Background Fenn, P. et al (2004) talked of dissatisfaction expressed in many quarters about the performance of the current system compensating the medical victims of medical negligence in England by which patients are compensated for injuries related to their medical care. They noted that the system is said to be costly and time-consuming because of the need to prove fault, with the consequence that too few patients obtain compensation for their losses and that in spite of this barrier to claiming, clinicians are accused of taking excessive care ('defensive medicine') and being unwilling to report mistakes for fear of being sued. The authors then noted that consequently, the Department of Health has proposed reforms that diminish (without removing) fault as the basis for compensation, and allow access to 'fast-track', low cost determination of eligibility and benefits for claims of relatively low value (DoH, 2003) (Fenn, P.

et al, 2004) (Paraphrasing made). Presumed less advantages of negligence rule

The essay question in the title of this paper assumes a proposition that the negligence rule is less advantageous as compared to a no fault regime. Hence we are led to find what appears to be the advantage of no fault regime or the so called strict liability. But in determining whether one is better over the other, there must be a basis of comparison. The two are actually rules under the tort law, hence, there is need to relate with the

purpose of the tort law? What then is tort law and what is the purpose of the tort law? Tort law applies where one person (the injurer) causes harm to another person.

To understand the nature and purpose of the tort law, Schaefer and Schonemberger (1999) referred to the negligence rules and strict liability rules as the major rules of liability used in tort law to deal with situations where one person (the injurer) causes harm to another person (the victim). They explained that in England, France and Germany, for instance, the usual forms of liability are the comparative negligence rule and strict liability with the defense of relative negligence, and in the US it is the comparative negligence rule, the negligence rule with the defense of contributory negligence, and strict liability with the same defense (Paraphrasing made). In discussing the details of above the rules Schaefer and Schonemberger (1999) cited Zweigert and Kötz (1996, secs.

40-43) who provided a rigorous description of tort law in England, France and Germany and Keeton, Dobbs, et al. (1984, chs 5, 11, 13) in the case of the US. They explained that historically, it is interesting to observe the changes in the relative importance of different liability rules and that before the nineteenth century, for instance, strict liability was predominant in most common law jurisdictions but in the early and mid-nineteenth century, this changed with negligence and fault becoming the prevailing standard of tort liability. They also found that since the twentieth century, rules of strict liability have enjoyed a renaissance and have been applied more and more to determine who should bear the costs of an accident and to what extent,

citing a good example of this phenomenon is the shift back to strict liability in products liability cases (Paraphrasing made). We could thus find above seeming advantage of no fault rule or strict liability over the negligence rule with the former's renaissance. In choosing one over the other what could be the real political and economic reasons? What are negligence rule and its characteristics? Knowing what is negligence rule and its characteristics would perhaps start the find.

Schaefer and Schonenberger (1999) said, " Under the negligence rule, the injurer will be held liable only if she exercised precaution below a level usually determined by the law and/or by the court. This level is called reasonable care or due care. Posner (1972) proposed an economic efficiency criterion which could be used to identify the efficient precaution level to establish it as the legal standard. It should be borne in mind that one of the most important objectives of tort law is to give the injurer an incentive to apply the efficient level of care fulfilling the optimality condition (2). Interestingly enough, the first person to describe this legal standard of care was not an economist, but a judge. Learned Hand (1947) suggested that an injurer is liable if her burden B of adequate precautions is less than the probability P that the accident occurs, multiplied by the size L of the injury. Note that Judge Hand's statement of the rule is unclear as to whether it refers to total or marginal levels of benefits and costs of caretaking, but we assume that he had marginal values in mind. Stated in algebraic terms, an injurer is negligent if the condition $B > PL$ (3) holds; and equality denotes optimality.

If the injurer exercised due care she will not be held liable for the costs of the accident.” Schaefer and Schonenberger (1999) then would like now to suppose that the court or the law would set the level of due care equal to the socially optimal level of care. In asking whether the negligence rule result in the socially optimal level of care being taken, their answer is yes, by arguing that a self-interested person will choose her level of precaution to minimize her private costs. In asking further whether the would-be injurer want to choose a precaution level above the level of due care, the authors answer is no, because any care taken in excess of the standard set by the court would be more costly without reducing the costs of compensation since due care is enough to be non-labile. By futher asking whether the same would be injurer, on the other hand, want to choose a precaution level below due care, their answer was also a big no, because now she (the would-be injurer) is running the risk of bearing the total amount of the expected damages (Paraphrasing made). What may then advantages of negligence rule? It could be stated that negligence rule can guarantee that an activity is socially useful because as analyzed above it can create incentives to exercise an optimal level of precaution on the part of the would-be injurer, but it is not able to make sure that the social utility of an activity is positive. Schaefer and Schonenberger (1999) further explained the effects of negligence rule by rrelaxing assumptions behind the rule. They thus said, “ Note that in the previous section we made a few simplifying assumptions.

First, we assumed that the court would set the level of due care equal to the socially optimal level. Second, it was assumed that the legal sanction imposed equals the harm actually caused and, third, the level of activity was supposed to be constant. We will now examine how the results change if we relax these assumptions one by one, that is, we will discuss the effects of relaxing only one assumption at a time. Some of these issues are clearly presented by Cooter and Ulen (1997, chs 8 and 9).

” They continued by proposing to first examine the question of how the results of the previous section change when the court sets a level of due care that is not equal to the socially optimal level. They would like to suppose, for instance, that the court does not require any precaution at all and that under these circumstances, it is obviously cheapest for the injurer not to exercise any care, because she will escape liability even without taking any care at all. They posited that taking greater care would have no advantage, but would involve additional costs, so that that if they put more generally, the potential injurer will satisfy the legal standard even if it is pegged below the socially efficient level. They also argued that the same applies to a legal standard above the socially efficient level, with one important exception, though. They inferred that if the amount of precaution costs at the legal standard exceeds the total amount of precaution and expected damage costs at the socially optimal care level, then the potential injurer will ignore the legal standard and set her caretaking level at the lower socially optimal care level. Thus they found that this result changes if the injurer is not held liable for the entire accident losses, but only for the

amount of damage in addition to the damage that would have been caused if the injurer had exercised the level of care set by the courts (partial liability) (Paraphrasing made); Schaefer and Schonenberger (1999) proceeded to note the difficulty for courts, legislatures and authorities to identify the efficient level of care in order to establish it as the legal standard. They argued that due or reasonable care is usually identified by comparing what a reasonable person would have done under the circumstances with the actual precautionary activity of the injurer. They cited an illustration of the reasonable person standard as provided by Posner (1992, p.

167), but, this standard according to the authors is very vague and 'flexible'. Still in explaining negligence rule, Schaefer and Schonenberger (1999) said, "Another assumption we made in the previous section is that the legal sanction imposed equals the harm actually caused. What will happen if we relax this assumption?" They thus said that from a rather intuitive and less formal perspective we can say that, under the negligence rule, equality between harm and sanction is not essential as long as the sanction is sufficiently large so that the private costs of the injurer are minimized by conforming to the legal standard. But they contented that once the legal sanction falls below a certain level, the injurer will minimize her costs by taking less precaution than the legal standard (Paraphrasing made). They finally want to relax the assumption of a constant level of activity to study the effects of an increase in the injurer's level of activity that will result in a proportional increase in the total amount of expected accident damages, given a specific level of care. They pointed the

importance of this when it comes to assessing the social utility of an activity. They cited the work of Finsinger and Pauly (1990) pointing out that the total net utility of a risky activity ought to be positive. They explained that the first aspect can be dealt with quite easily by slightly modifying the optimization problem as represented in their equation (1).

They did discuss the details, saying, " The social objective function now has to take into account that various levels of activity influence the utility u of the actor that is the injurer. It is plausible to assume that utility is an increasing function of activity. Those who are familiar with optimization problems should also note that for a unique solution to exist it is necessary to assume further that the utility function is well-behaved. From the total amount of utility we need, of course, to subtract the total costs of care which are assumed to be equal to the level of activity multiplied by the level of care, x . eventually, we need to subtract the total amount of expected damages d . Thus we obtain as the social objective function $\max u(a) - ax - ad(x)$ (4) To solve this maximization problem we first have to determine the optimal level of care x^* by minimizing the total costs of taking care represented by the second and third terms in equation (4).

Substituting into (4) and differentiating with respect to the level of activity we obtain $u'(a) = x^* + d(x^*)$ (5) which is the equivalent of equation (2) in the case of a constant level of activity. The interpretation is straightforward. The injurer should raise her activity as long as the marginal increase in utility she derives from raising activity exceeds the increment to total costs caused by doing so." In illustrating that the negligence rule that is not able to

make sure that the social utility of an activity is positive, Schäfer and Schönenberger (1999) said, " A simple example might illustrate this point. Assume that the utility of an activity is 100. The costs of the optimal level of precaution are 80, and the amount of total damages is 30. Since the victim has to bear the costs of the accident when the injurer exercises due care and, therefore, is not liable, the injurer has a benefit of 20 by engaging in her activity.

However, the net utility of the activity is clearly negative meaning that the injurer should not engage in the activity in the first place. Since injurers will escape liability by taking due care they have no reason to consider the effect that their activities have on accident damages. As a result, the rule of negligence can create incentives to exercise an optimal level of precaution, but it is not able to make sure that the social utility of an activity is positive."

What are the characteristics to ' no fault' liability and what maybe its advantages? Having known the characteristics of negligence rule, it now appears challenging to see whether strict liability or no fault regime could surpass the perceived advantage of the negligence rule as analyzed and overcome the perceived limitation. First, there a need to know the is strict liability. It simply means that as long as there is damage, there must be liability whether there is negligence or not. In discussing the alternative to the rule of negligence: the rule of strict liability, Schäfer and Schönenberger (1999) said, " Again, we start off by assuming that the legal sanction equals the actual damage and that the activity level is constant.

Under strict liability, the courts do not have to set any level of due care because the injurer has to bear the costs of the accident regardless of the extent of her precaution. In this case, the expected amount of costs to the injurer of taking care x is $c(x) + d(x)$ (6) that is, the injurer faces the total amount of costs caused by the accident. Since it is the self-interested injurer's objective to minimize her private costs and since, under strict liability, the total social costs just equal her private costs, the injurer will have an interest to minimize total accident costs. In other words, the social objective function (1) and the private objective function resulting from minimizing equation (6) are obviously identical. Therefore, under the rule of strict liability in the case of unilateral accidents, the injurer will choose the socially optimal level of care." As could now be found and which the authors confirmed that as a result, both the rules of strict liability and the rule of negligence achieve the socially optimal level of care and but that there are also quite a few differences. The authors took notice of the fact division of costs under each rule is different. Difference between negligence rule and no fault rule.

Schäfer and Schönenberger (1999) noted that under strict liability, the injurer has to bear the total amount of expected damages, whereas under the negligence rule, the victim has to bear the accident costs if the injurer exercised due care. Further differences appear when relaxing the assumptions we made (Paraphrasing made). Conclusion There is thus a trade off of advantages and limitations of adopting a negligence rule and no fault or strict liability rule. There is thus basis to agree with Schäfer and

Schönenberger (1999) that in attaining optimality condition of the trade off, they concluded that as a result, the potential injurer does not exercise the socially optimal level of care when damages are not perfectly compensatory. On other hand, adopting purely negligence rule with may deprive some victims to have their claims compensated by their failure to prove negligence of the injurer. Despite the advantages serve by no fault regime, it could not be adopted altogether because of the higher cost that would be incurred because damages would just need to be proved although there could have been negligence. There is also good reason to agree with Fenn, P. et al (2004), putting a balance between no fault and negligence rule, when they concluded, that a high cost of adopting the no fault regime therefore discourages its full adoption.

As what Fenn, P. et al (2004) recommend, they limited adoption of no-fault compensation for birth-related injuries, in addition to the retention of fault within some streamlined administrative scheme for low value cases with a view to increasing access and improving administrative efficiency simultaneously. They believed that balance strategy will promote social efficiency. It is also worth noting to agree that the social efficiency of these proposed reforms will of course depend on how they are implemented.

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