

Persistence of Tort & the Less Grand Bargain

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Do we blow it up?

- . . . Or is it already blowing up?
- What we might do will be different depending on whether we are
 - Transitioning
 - Rebuilding after collapse

If Transitioning (and we have time)

- Professor Scales ideas are interesting
 - Sliding pieces around
 - New insurance structures for partial/temporary benefits
 - Transparent cost shifts to the federal government for permanent total
 - Expansion of ACA for certain employers
 - Limited tort-like remedies

Do I think that can happen?

- Hard to imagine in this climate
- Complicated federal/state divisions of responsibility
- If we could do this why wouldn't we first try major fixes to wc?
- What will bring the current winning parties to the table?
What is the trigger?

Collapse Scenario

- This is where and why tort remains relevant
- Like a koan: imagine an oncoming collapse and . . . Nothing
- As Prof. Rabin reminds us – tort has remained in the background – the interstices
- What will judges do – what is the plan, exactly, in Florida?
 - *Padgett*: back to the threat of tort
- *Status quo ante*: that is what happens in labor law when changes are made unilaterally, eschewing good faith bargaining

Didn't Roscoe Pound warn us?

- Champion of the common law
- Grudging acceptance of the administrative state *unless* judicial review afforded

A non-collapse scenario

- Legal limits and real judicial review
- **Worker input** – unions or other structures
- An actual bargain

Scope of the Bargain

- More delicate than often understood
- Ongoing subtle interplay between tort and workers' compensation
- What does it even mean to “undo” the Grand Bargain?

Persistence of Tort

- Unless injury can be said to be *purely accidental* there will be a residual frame of “wrongfulness”
- Concepts of foreseeability and causation are in tension
- But as Prof. Scales says – fault tends to be insisted upon when causation questions are close
- I don’t see this as a new reality – the tension is resolved differently depending on who holds the reins of power
- Bargaining occurs around these poles—if you don’t have the power to bargain you will “lose” in the negotiation

WC Emerging at the Wrong Time?

- 1911 snapshot
- Frozen in place Company Town
- But consider an agency from the “right time” – the NLRB and the unraveled labor law
- Long time targets are easier to hit – so who knows what a workers’ compensation agency would have looked like by now?
- Is there ever a right time?