

# The Time that Remains

**Wednesday, November 19 (Normal Class Time & Location) -  
Alternatives to Tort & Review**

**Wednesday, November 19 - 12pm Office Hours**

**Friday, December 5 - (1:30pm Merrifield Hall) Optional Review  
Session & Office Hours**

# Workers' Compensation

# Lamson v. American Axe & Tool Co.

“The Axe that Fell on the Employee”

# The “Unholy Trinity” of Common Law Defenses

1. Fellow servant rule
2. Contributory negligence
3. Assumption of risk

# 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

# When would an employee not file a workers' comp claim?

Injury wasn't work-related

Injury resulted from employer's intentional tort

Employee does not count as an employee

# Revisiting Lamson v. American Axe

What does the plaintiff recover?

Tort Law

Workers Comp

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Facts of actual case:

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Without assumption  
of risk defense:

# Revisiting Lamson v. American Axe

What does the plaintiff recover?

Tort Law

Workers Comp

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Facts of actual case: Nothing

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Without assumption Full recovery  
of risk defense:

# Revisiting Lamson v. American Axe

What does the plaintiff recover?

Tort Law

Workers Comp

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Facts of actual case:      Nothing

Partial recovery

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Without assumption      Full recovery  
of risk defense:

Partial recovery

# Third-party claims

Rule: Employee can file a workers' compensation claim against their employer but workers compensation' does not cover third parties.

**Hypothetical:** Gladys Escola is a waitress. While serving a Coca-Cola beverage at work, the bottle explodes in her hand, injuring her hand. She needs surgery and will be unable to work for months.

What's your legal advice for her?

# Big Picture: Workers' Comp vs. Tort Law

Deterrence

Compensation

Administrative Cost

Equity

# Ideology

# Does tort law have an ideology?

-	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	???	???	???

	Negligence	Strict Liability	Intentional Torts
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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## Negligence

## Strict Liability

## Intentional Torts

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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

- Comparative fault  
- Assumption of risk

- Comparative fault  
- Assumption of risk

- Consent  
- Self defense  
- Necessity

Damages

???

???

???

Available

	Negligence	Strict Liability	Intentional Torts
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	- Comparative fault - Assumption of risk	- Comparative fault - Assumption of risk	- Consent - Self defense - Necessity
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)

	Negligence	Strict Liability	Intentional Torts	Workers' Comp
Type of conduct	- Fault  - Products	- Dangerous activities	- Intentional harm	???
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	- Past and future damages (economic, noneconomic, punitive)  (lump sum payment)	- Past and future damages (economic, noneconomic, punitive)	- Past and future damages (economic, noneconomic, punitive)	???

	Negligence	Strict Liability	Intentional Torts	Workers' Comp
Type of conduct	- Fault  - Products	- Dangerous activities	- Intentional harm	- Workplace injuries
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	- Past and future damages (economic, noneconomic, punitive)  (lump sum payment)	- Past and future damages (economic, noneconomic, punitive)	- Past and future damages (economic, noneconomic, punitive)	???

	Negligence	Strict Liability	Intentional Torts	Workers' Comp
Type of conduct	- Fault  - Products	- 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	???
Damages available	- Past and future damages (economic, noneconomic, punitive)  (lump sum payment)	- Past and future damages (economic, noneconomic, punitive)	- Past and future damages (economic, noneconomic, punitive)	???

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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”
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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)	- Unlimited medical compensation  - Fraction of lost wages (with statutory cap)  (paid in installments)

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.

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

# 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

	Torts	Workers' Comp	No-Fault Funds	9-11 Fund
Type of conduct	<ul style="list-style-type: none"> <li>- Fault</li> <li>- Dangerous activities</li> <li>- Products</li> <li>- Intentional harm</li> </ul>	<ul style="list-style-type: none"> <li>- Workplace injuries</li> </ul>	<ul style="list-style-type: none"> <li>- Specific injuries</li> </ul>	???
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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