

# # Schedule this week

## Wednesday

Class - 8:00am - 9:40am - No Fault and Beyond

Office Hours - 12:00pm - 1:00pm

## Thursday

You can use your laptops in class on Thursday

Class - 10:10am - 11:50am - No Fault and Beyond / Review

Office Hours - 12:00pm - ???

**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.

# Workers' Compensation



# 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

# 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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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	???	???	???

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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	- 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)

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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	???
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-	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	???
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)	???

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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	???
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)	???

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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)



# 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)</li> <li>(lump sum payment)</li> </ul>	<ul style="list-style-type: none"> <li>- Unlimited medical compensation</li> <li>- Fraction of lost wages (with statutory cap)</li> <li>(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>	- Workplace injuries	- Specific injuries	???
Causal connection	<ul style="list-style-type: none"> <li>- Factual cause</li> <li>- Proximate cause</li> </ul>	- Injury must be “work-related”	- Limited proof required	???
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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>	???
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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**