# ACCOMMODATING TORT LAW: ALTERNATIVE REMEDIES FOR WORKPLACE INJURIES

*Robert L. Rabin**

TABLE OF CONTENTS



## INTRODUCTION

Late in the summer of 1941, a waitress at Tiny's Waffle Shop, an inconspicuous locale in Merced, California, set the stage for a tort case that would become foundational to the development of products liability law in the twentieth century. As Gladys Escola restocked the refrigerator in the establishment, she was seriously injured by an exploding Coca-Cola bottle. The majority opinion of the California Supreme Court in *Escola v. Coca Cola Bottling Co. of Fresno*, which

* A. Calder Mackay Professor of Law, Stanford Law School. Thanks to Ken Abraham, Nora Engstrom, Ariel Porat, and Steve Sugarman for helpful comments on an earlier draft, and to Emily Rong Zhang for valuable research assistance.

affirmed recovery on a negligence theory of *res ipsa loquitur*,[1] ordinarily would have gone largely unnoticed. But Justice Roger Traynor, in a concurring opinion that would become a landmark of products liability law a generation later, demurred from the majority approach, instead proposing a theory of strict liability in tort for product injuries.[2]

What passed without comment, both by the majority and Justice Traynor's concurrence, was that Gladys Escola had already received injury benefits in the not-so-grand amount of $42.60 from a workers' compensation claim that she filed as a matter of course for her work-related injury.[3] Interestingly, Justice Traynor's concurrence relies heavily on the two-pronged ideology of workers' compensation: resting enterprise liability responsibility on risk-spreading and risk-reduction goals.[4] But the interplay between a workers' compensation system that precluded recovery in tort against the employer for workplace injuries, while also allowing for recovery in tort against a third-party manufacturer of the product causing the workplace injury, goes unmentioned.

Gladys Escola's case affords a prototypical instance of third-party tort claims forging an alternative pathway, complementing earlier recovery of workers' compensation benefits. Indeed, a generation after *Escola*, leading California cases that contributed to shaping the doctrinal framework of strict liability for defective products involved just such scenarios of tort liability complementing workers' compensation recovery. In *Cronin v. J.B.E. Olson Corp.*, a bakery truck driver suffered a serious back injury from a driving accident when an abrupt stop broke the safety hasp securing a shelf of trays.[5] The trays were propelled forward, striking the driver and pushing him through the windshield. The court granted relief against the truck manufacturer on a theory that the tray hasps were defectively designed,[6] despite the plaintiff already receiving workmen's compensation.[7] In *Barker v. Lull Engineering Co.*, where the operator of a high-lift loader was injured when the vehicle overturned on a slope, the court modified *Cronin* and adopted a two-pronged design defect theory that remains the foundation

1. 150 P.2d 436, 440 (Cal. 1944). For a detailed accounting of the case, exploring its factual background and significance, see Mark Geistfeld, Escola v. Coca Cola Bottling Co.: *Strict Products Liability Unbound*, *in* TORTS STORIES 229 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

2. *Escola*, 150 P.2d at 440 (Traynor, J., concurring).

3. Geistfeld, *supra* note 1, at 229.

4. *See Escola*, 150 P.2d at 440–41 (Traynor, J., concurring).

5. 501 P.2d 1153, 1155 (Cal. 1972).

6. *Id.* at 1162.

7. *Id.* at 1163 n.2.

of strict liability for defective products in California.[8] Again, plaintiff was an employee eligible for workers' compensation benefits.

These variegated claims need to be considered against the backdrop of the most prominent of all mass tort claims: the asbestos litigation—litigation that almost invariably traces its origins to workplace exposure.[9]

Whatever the source and scale of harm, the incentives to pursue a third-party suit are straightforward. Workers' compensation benefits feature stringent caps on economic loss beyond medical expenses and bar non-economic recovery altogether.[10] By contrast, tort provides the prospect of recovery for total wage loss as well as pain and suffering, which is considerably more remunerative than workers' compensation benefits—particularly in the case of more serious injuries or workplace-related fatalities.[11]

Putting asbestos aside, the prototypical third-party suit does not involve exposure to a toxic substance. Most such toxic exposures are internal to the job-site (e.g., exposure to a process-related chemical solvent) and frequently raise a contested causation issue but in the context of a stand-alone workers' compensation claim.[12] Rather, the recurrent third-party tort suit involves physical injury from supplier-manufactured machinery that is allegedly either defective in design (frequently, an easily removed safety guard) or inadequate in warning of physical risk.[13]

---

8. Barker v. Lull Eng'g Co., 573 P.2d 443, 446–47 (Cal. 1978).

9. *See* Lawrence G. Cetrulo, *Brief History of Asbestos Litigation*, *in* 3 TOXIC TORTS LITIGATION GUIDE § 33:4 (2016).

10. *See* 1-1 LARSON'S WORKERS' COMPENSATION LAW § 1.03 [4]–[5] (2016).

11. Not surprisingly, then, these claims are of significant magnitude in the products liability universe. *See* Paul C. Weiler, *Worker's Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L.J. 825, 827–28 (1989) (suggesting that forty percent of overall payments by product liability insurers are made to injured workers already covered by workers' compensation).

12. *See* W. Kip Viscusi, *Compensating Workplace Toxic Torts*, 37 PROC. ACAD. POL. SCI. 126, 131 (1988).

13. This category is by no means the exclusive scenario of third-party litigation. Consider, for example, a FedEx driver who is negligently run over by a third-party defendant-driver while delivering a package to a customer. A particularly interesting third-party category involves suits by a worker who is injured on the worksite after inspection by the employer's workers' compensation insurance carrier; the claim is against the carrier for negligent inspection preceding the injury. *See, e.g.*, Jansen v. Fid. & Cas. Co., 589 N.E.2d 379, 380 (N.Y. 1992); John Dwight Ingram, *Liability of Insurers for Negligence in Inspection of Insured Premises*, 50 DRAKE L. REV. 623, 624–25 (2002).

These cases, in turn, can raise a related question that again demonstrates the inextricable tie between workers' compensation and tort: whether the third-party product manufacturer, if responsible in tort, can recover a portion of the tort award through a contribution claim against the employer—despite the ban on a direct employee tort claim against the employer. Consider, in this regard, the *Barker* case facts, just above, where the employer insisted upon operation of the high-lift loader on terrain for which it was arguably ill-suited.[14] Or the scenario in which the employer is determined to increase productivity by forcefully removing a safety guard from production-line machinery.[15]

Correlatively, there is the prospect of the employer seeking to recapture workers' compensation benefits paid to the employee through a subrogation claim against the third-party tort defendant.[16]

These intersecting claims most frequently involve accidental harm in the workplace, rather than intentional misconduct or reckless disregard for the safety of workers. But in the latter cases of egregious employer misconduct, most states recognize an exception from the bar on tort recoveries.[17] As a consequence, these are situations where tort recovery may be a *substitute* for workers' compensation rather than standing side-by-side with tort, as in accidental harm cases.[18]

Similarly, Title VII claims for sexual harassment in the workplace stand as a distinct tort-type source of recovery entirely apart from the workers' compensation system.[19]

In the parts of this paper that follow, I will explore the often-contested territory that tort occupies, delineated briefly above, within the more expansive domain of workers' compensation. This exploration reveals that, far from being substitutes, tort and workers' compensation are, in fact, deeply and inextricably joined—a complementarity that underscores the trade-offs intrinsic to each system.

---

14. Barker v. Lull Eng'g Co., 573 P.2d 443, 447 (Cal. 1978).

15. *See infra* Part II.

16. *See infra* Section III.B.

17. *See infra* Section IV.A.

18. In some instances, these cases of intentional misconduct can be characterized as arising outside of the job-related-injury nexus. In this regard, a "dual-capacity" doctrine creates still another occasional avenue for tort recovery. DAN B. DOBBS ET AL., HORNBOOK ON TORTS at 921 (2d ed. 2016) (permitting tort suit against employer because the employer was "acting in some capacity other than an employer").

19. 42 U.S.C. § 2000e-2(a) (2012). The Act addresses racial as well as sexual harassment. *Id.* In addition, common law claims have been recognized for both sexual and racial harassment. *See, e.g.*, Turley v. ISG Lackawana, Inc., 774 F.3d 140, 161–62 (2d Cir. 2014) (recognizing a racial harassment claim); Kanzler v. Renner, 937 P.2d 1337, 1342–44 (Wyo. 1997) (recognizing a sexual harassment claim). Recourse to the common law can be of particular salience when the Title VII claim is not available.

## I. THE DEMISE AND RESURRECTION OF TORT: A BRIEF HISTORICAL ACCOUNT

Somewhat ironically, the initial recognition of tort as a unified field is frequently identified in historical accounts with the upsurge of workplace injuries that marked the dawn of the Industrial Revolution.[20] The irony is implicit in the corresponding recognition that, in fact, claims for industrial injuries ran the gauntlet of defenses to the emerging law of negligence available to workplace employers: contributory negligence, assumed risk, and the fellow-servant doctrine.[21] In essence, the nineteenth-century judiciary continued to recognize the hegemony of deeply engrained contract principles over the still-developing conception of an autonomous body of accident law grounded in the negligence principle.[22]

It took the advent of the Progressive Era and the adoption of workers' compensation legislation that then swept the states to break this bond.[23] The Grand Bargain relegated tort to the scrap-heap—abandoning the prospect of tort recovery—in return for a no-fault system that grounded eligibility for benefits in a showing that the injury arose out of the workplace without reference to unreasonable conduct on the part of the employer or employee.

This appeared to mark the demise of tort, at least in the field of workplace injuries. But behind the scenes, in the superficially unrelated area of product injuries to consumers, a landmark case was decided in 1916 that would forge a fresh bond between workers' injuries and the tort system: *MacPherson v. Buick Motor Co.*[24] Writing for the New York Court of Appeals, Judge Cardozo severed yet another constraint on the development of liability for negligence acts—the privity barrier to

20. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 350 (3d ed. 2005).

21. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 58 (1967).

22. *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 947 (1981).

23. For detailed analysis, see PRICE V. FISHBACK & SHAWN E. KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 88–119 (2000). The first state to adopt workers' compensation legislation was New York in 1910; within a decade, forty states had followed suit. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 127 (2004). On the theoretical underpinnings of the workers' compensation movement, see *id.* at 126–51.

24. 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.).

recovery by a product-related injury victim in a suit against the manufacturer of the product, despite the absence of any direct contractual relationship between the parties.[25]

The privity bar had constituted a zero-sum game for the purchaser of a defective product: unless the bar could be lifted by one of the narrowly defined exceptions, the injured consumer was simply left without recourse to compensation.[26] In contrast, by the time *MacPherson* was decided, the workers' compensation movement was in full swing. Within a few years, most states provided statutorily established benefits for the injured worker in place of tort.[27]

But the terms of the Grand Bargain nonetheless created strong incentives to claim in tort against *a third party*—that is, a party other than the employer—when a colorable case could be made out that the defendant's negligent conduct had contributed to the injury in the workplace.[28] The most salient consideration was the uniform rejection of recovery for pain and suffering (i.e., intangible loss) under workers' compensation schemes; of almost equivalent significance were the restrictive caps on out-of-pocket recovery for lost wages.[29] Somewhat paradoxically, then, tort law re-emerged virtually free of the crippling defenses that marked its demise in nineteenth-century injury claims against employers—albeit, conditional upon an identifiable third party whose conduct generated risks in the workplace.

The capacity to pursue these third-party suits is substantially enhanced by the plaintiffs having recovered baseline medical expenses and lost wages. While this recovery hardly levels the playing field against a large, corporate defendant, it does function somewhat along the lines of outside-litigation financing.[30] Nonetheless, as the following

---

25. *Id.* at 1054–55.

26. *See id.* A breach of warranty claim against the immediate supplier generally would offer bleak prospects of comprehensive damages recovery.

27. *See* FRIEDMAN, *supra* note 20, at 516.

28. *See* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 67 (2008).

29. *See id.* As Professor Abraham notes:

> Since workers' compensation does not pay damages for pain and suffering, in effect these employee tort suits against third-party defendants are a search for a substantial payment for the employee's pain and suffering. The result is that tort suits brought by employees injured on the job are often high-stakes affairs. Although only 10 percent of all tort suits arise out of workplace injuries, over 60 percent of all tort recoveries in excess of $100,000 involve these injuries.

*Id.*

30. Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise"*, 61 DEPAUL L. REV. 303, 346 (2012).

Part indicates, third-party tort actions generated their own set of limitations on recovery for workplace injuries.

## II. CLAIMS AGAINST THIRD PARTIES: THREE PERSPECTIVES

There is no single scenario encompassing the range of claims in tort against third parties.[31] But there is a setting that has highlighted the divergent perspectives on how to reconcile third-party responsibility with the intervening workplace relationship of employer and employee. In this setting, the third party is a product manufacturer of machinery that bears some intrinsic risks of bodily injury. To prevent the risks from coming to fruition, the product bears a detachable protective safety guard that can be removed by the employer to enhance productivity. Injury to the employee then follows.

The courts can be located on a continuum in delineating responsibility in these situations. At one end of the continuum—probably reflecting the majority view—some states rely on more general tort principles of foreseeability in assessing third-party liability for workplace removal of the safety guard.[32] In *Anderson v. Nissei ASB Machine Co.*, waste material from a machine for making plastic bottles had to be regularly removed by machine operators to prevent hardening. Removal was accomplished through a narrow space created by a safety guard; jarring the safety guard shut down the machine for unacceptable periods of time, encouraging removal of the guard; and injury followed when the guard was removed. The court held the guard was defective as manufactured because of the foreseeable prospect of removal.[33]

At the other end of the continuum is the Missouri approach, well-illustrated by *Jones v. Ryobi, Ltd.*, in which the plaintiff was seriously injured when her hand was caught in the moving parts of a printing

31. *See, e.g.*, Barker v. Lull Eng'g Co., 573 P.2d 443, 445–46, 458 (Cal. 1978) (reversing decision in favor of defendant-manufacturer where plaintiff was injured using defendant's high-lift loader); Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1155 (Cal. 1972) (affirming recovery against truck company where trays hit plaintiff in the head during truck's movement); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051, 1055 (N.Y. 1916) (affirming judgment against wheel manufacturer where car collapsed because of defective wheels, injuring plaintiff).

32. *See, e.g.*, Anderson v. Nissei ASB Mach. Co., 3 P.3d 1088, 1091, 1093–95 (Ariz. Ct. App. 1999).

33. *Id.* at 1090–95; *see also* DOBBS ET AL., *supra* note 18, at 806–07 ("Badly conceived products that carry needless danger are designed defectively.").

press.[34] The guard on the machine had been removed and an interlock switch disabled by the employer. By the court's own admission, its affirmance of a directed verdict for the defendant, appears particularly harsh: "[b]ecause this modification increased production by saving the few seconds required to stop and to restart the press when the operator adjusted the eject wheels, the modification was a common practice in the printing industry."[35] Nonetheless, the court affirmed judgment as a matter of law in favor of the defendant, adhering to the Missouri rule that if the modification occurs after the defendant's sale of the product, then that is the end of the matter, and plaintiff cannot recover damages.[36]

A middle-ground approach, with an interesting twist, has been carved out by the New York Court of Appeals. *Robinson v. Reed-Prentice Division of Package Machinery Co.* once again involved a production-line injury (plaintiff's hand was injured while he was operating a plastic molding machine).[37] Rather than relying on an absolute post-sale bar on recovery against a third party, the court held that manufacturers are not liable if there has been a "substantial modification" in the design by the employer that renders the product unsafe.[38] By reference to traditional common law doctrine, the court was, in essence, invoking a proximate cause defense in cases where the intervening party—the employer—engaged in conduct sufficiently egregious ("substantial modification") to insulate the third-party defendant from liability.[39]

The interesting twist occurs in a subsequent case decided by the New York Court of Appeals, *Liriano v. Hobart Corp.*[40] A young, recent immigrant to the country was employed in the meat department of a retail grocery store. The safety guard on the meat grinder had been removed, and the plaintiff lost his hand while operating it. There was

34. 37 F.3d 423, 424 (1994).

35. *Id.* at 425. The dissent pointed out that an alteration in the design that added external adjustment handles—arguably low-cost—would have addressed the disruption of stopping and restarting the press. *Id.* at 426 (Heaney, J., dissenting).

36. *Id.* at 425–26 (majority opinion). Interestingly, the Court of Appeals affirmed on different grounds than the district court holding. The lower court focused on the "open and obvious" nature of the risk to the employee. *Id.* at 425. The Court of Appeals shifted the focal point to the conduct of the employer in removing the guard. *Id.* at 425–26. By doing so, it avoided confronting the coercion of the employee (plaintiff had testified that she feared dismissal if she refused to operate the machine without the guard) that would have undermined the "open and obvious" defense. *Id.* at 425.

37. 403 N.E.2d 440, 441 (N.Y. 1980).

38. *Id.* at 443.

39. *See id.*

40. 700 N.E.2d 303 (N.Y. 1998).

no warning on the machine about using it without a guard; this turned out to be the critical consideration for the court. Rather than relying exclusively on a traditional design defect theory, which would have been contestable under the "substantial modification" doctrine, the plaintiff also alleged a failure-to-warn claim.[41]

The court was receptive to a less stringent standard of employer misconduct to establish third-party liability for defective warning than for design defect:

> Unlike design decisions that involve the consideration of many interdependent factors [(i.e., risk/utility analysis)], the inquiry in a duty to warn case is much more limited, focusing principally on the foreseeability of the risk and the adequacy and effectiveness of any warning. The burden of placing a warning on a product is less costly than designing a perfectly safe, tamper-resistant product.[42]

It may be useful, at this point, to revisit the workers' compensation complementarity theme for purposes of reconsidering how the two systems diverge. The contrasting views on employer blameworthiness as a defense put the two systems in sharp relief. The issues that generate doctrinal divergence in tort turn on whether foreseeability alone, or some variant, should be the touchstone to third-party responsibility (or whether, to the contrary, employer risk-enhancement should serve as an absolute defense to third-party liability). By contrast, from the perspective of entitlement to workers' compensation benefits, these competing approaches are of no consequence whatsoever. The premise (and promise) of workers' compensation recovery turns not on the conduct of the respective risk-creators but solely on the nexus of injury in the workplace.

This distinction is highlighted by shifting our focal point to the employee's behavior. In *Liriano*, just discussed, when the case was remanded to the district court for determination of the failure-to-warn issue, a one-third deduction for the plaintiff's comparative negligence was upheld on appeal.[43] No such reduction in benefits, of course, would

41. *Id.* at 305, 309.

42. *Id.* at 307.

43. Liriano v. Hobart Corp., 170 F.3d 264, 273 (2d Cir. 1999). By contrast, reconsider the court's reluctance to recognize an "open and obvious" defense. Jones v. Ryobi, Ltd., 37 F.3d 423, 425–26 (8th Cir. 1994). More generally, consider three potential scenarios: First,

have been forthcoming on the employee workers' compensation claim, where the reasonableness of the employee's conduct—apart from intentional self-injury or inebriation—was irrelevant.

## III. CLAIMS AGAINST THIRD PARTIES: COLLATERAL ISSUES

### *A. Contribution Claims: Complementarity of Tort and Workers' Compensation Reconsidered (I)*

Earlier in this Article, I have referred to *Barker v. Lull Engineering Co.* as illustrative of tort actions brought on the foundation of preceding benefits received in workers' compensation claims.[44] A closer look at the facts in *Barker* reveals a related issue. The plaintiff, as mentioned, was operating a high-lift loader on sloping ground when it capsized, allegedly indicating a design defect in the manufacture of the vehicle type. In presenting its defense, the manufacturer called as a witness the regular operator of the loader, who had called in sick that day. The witness proceeded to testify that he had called in sick when the employer indicated to him that the loader would be operated on a steep slope, which, in his mind created a serious risk of capsizing the vehicle. In fact, by way of protest, he told the supervisor that a crane was necessary to do the work on that slope. When his protest was ignored, he stayed home. This led to the plaintiff, an inexperienced operator, being assigned to the job—and suffering the consequences.[45]

These facts vividly indicate a more general scenario in the third-party cases—including a substantial number of the safeguard-removal cases discussed in the preceding Part.[46] Blameworthiness for the employee injury is frequently shared between a manufacturer's design

---

the protective safety guard is removed by the employer; the employee is not even aware that there was such a guard. Obviously, to invoke assumed risk here would be a return to the nineteenth century conception of workplace injuries. Second, and probably the most common set of circumstances, the protective guard is removed by the employer and the employee is aware of it. Given the coercive setting, one can argue that here too invoking assumed risk is reminiscent of nineteenth century thinking. Finally, the employee removes the guard at her own behest to get the job done more quickly and reap the correlative wage benefits. In this scenario, the *Liriano* remand approach—that is, taking cognizance of comparative fault and reducing recovery accordingly—could be regarded as the most equitable result. *See generally* 170 F.3d 264 (2d Cir. 1999).

44. Barker v. Lull Eng'g Co., 573 P.2d 443, 457–58 (Cal. 1978); *see also supra* note 8 and accompanying text.

45. *See Barker*, 573 P.2d at 448 & n.2. .

46. *See, e.g.*, Jones v. Ryobi, Ltd., 37 F.3d 423, 425 (8th Cir. 1994); Anderson v. Nissei ASB Mach. Co., 3 P.3d 1088, 1094–95 (Ariz. Ct. App. 1999); *Barker*, 573 P.2d at 445; Liriano v. Hobart, 700 N.E.2d 303, 307 (N.Y. 1998).

(or warning) that might have diminished the risk of harm and an employer's desire to cut costs through establishing a hazardous workplace setting.[47]

The following question naturally arises: Whether the defendant third-party manufacturer should be allowed to enter a contribution claim against the employer in the tort suit, or whether the employer should be allowed to rely on the bar on tort suits at the core of the Grand Bargain.[48] The majority of courts extend the bar on tort against employers to this third-party contribution claim. In other words, the third-party defendant has no recourse in recouping any part of its responsibility to the plaintiff for damages from the employer.[49]

Another approach is attractive from a fairness, as well as a deterrence, perspective. Obviously, it would be consistent with the movement away from traditional all-or-nothing tort responsibility—a tradition reflected in the contributory negligence and proximate cause doctrines—to an era of comparative fault/comparative contribution by allowing full proportionate recovery by the third-party defendant for the percentage of responsibility allocable to the employer's fault.[50] But it appears that no courts take this position.[51]

How the issue of complementarity plays out from a contribution perspective is, of course, premised on joint attributable blameworthiness. But an equally plausible scenario runs the complementarity question in the opposite direction: What of the

47. *See, e.g.*, *Liriano*, 700 N.E.2d at 307.

48. For discussion of this issue, see Weiler, *supra* note 11, at 830–38, 839–51.

49. DOBBS ET AL., *supra* note 18, at 919–20.

50. This assumes joint-and-several liability or some variation short of pure several liability assignable to the third-party defendant. In a several-only liability jurisdiction, there would be no grounds for contribution.

51. Presumably, this reflects a concern about back-door encroachment on the exclusivity of workers' compensation benefits as the ceiling on employer responsibility reflected in the Grand Bargain. According to Dobbs, a minority of courts allow third-party recovery against the employer up to a cap based on the amount of workers' compensation benefits paid by the employer. *See* DOBBS ET AL., *supra* note 18, at 919–20. This would appear to be tantamount to eliminating the workers' compensation employer's right to subrogation and, consequently, is a variant on the second approach. The authors point out that in a several liability, comparative fault jurisdiction, the employee's tort recovery against the tort defendant will be limited to the share of responsibility allocated to the third-party defendant, and if the workers' compensation benefits are less than the discounted tort award, the employee will end up with a shortfall below full compensation, even after recovery from both sources.

employer's claim for reimbursement against the third-party defendant for workers' compensation benefits paid? I turn next to this issue.

### *B. Subrogation Claims: Complementarity of Tort and Workers' Compensation Reconsidered (II)*

The critical issue raised by subrogation claims is whether the workers' compensation employer can recover some portion of its benefit payments from the third-party tortfeasor. Once again, the question is how tort and workers' compensation mesh. Here, the starting point for consideration of this issue is the collateral source rule, a longstanding principle of damages in American tort law, under which a plaintiff's benefits from a collateral source (e.g., medical insurance payments, reimbursed wage loss) are ignored in assessing tort damages (allowing what is often characterized as "double recovery").[52] Putting subrogation aside, an injured worker would, as a consequence of the collateral source rule, recover full tort damages without reference to having received workers' compensation benefits for the same injury.

It is a standard practice, however, when economic considerations favor it, for the workers' compensation employer to exercise a right of subrogation to recoup its outlay of employee benefits from the third-party defendant.[53] In the most straightforward version, the third-party defendant has no right of contribution against the employer (see discussion above), and the subrogee-employer's claim is unhindered by comparative fault considerations. In theory, the economic consequences that follow lead to an efficient outcome on all fronts: the workers' compensation employee receives full compensation (from the tort judgment) but no double recovery, since workers' compensation benefits paid are recouped by the employer. The workers' compensation employer, by virtue of recoupment, incurs no losses that are attributable to third-party misconduct. The third-party manufacturer bears full responsibility for the loss and, consequently, is the target of optimal safety incentives associated with its risk-related harm.

For present purposes, I will simply outline the qualifications introduced by real-world considerations of comparative fault, several-only liability, and a world of settlements.

---

52. It should be noted that in recent years, many states have modified the collateral source rule in a variety of ways. *See* DOBBS ET AL., *supra* note 18, at 860–61.

53. To simplify, the right is exercised either through a lien, post-judgment, or stand-alone (or participatory) claims in the third-party litigation itself.

1. Comparative Fault and Several Liability: Introducing Contemporary Tort Reform Considerations

Reconsider the earlier discussion of *Barker v. Lull Engineering Co.*, in which the greater degree of fault appeared to be associated with the employer's decision to dictate use of the high-lift loader on unsuitable terrain.[54] In most states, as I indicated, there would be no right of contribution recognized in favor of the third-party manufacturer against the employer.[55] But does it follow that the workers' compensation employer—in fact, the workers' compensation *insurer*—should be entitled to uncompromised subrogation recovery against the third-party manufacturer (assuming, for present purposes, no comparative fault assignable to the employee)?

As an initial proposition, allowing full subrogation rights is inconsistent with the now generally accepted tort principles of comparative fault—and correlatively, externalizes risk from the source of workplace safety, the employment setting, to the third-party product manufacturer. On the other hand, piercing the veil of the Grand Bargain by discounting the employer/insurer's subrogation right would reintroduce fault considerations into the allocation of responsibility in a primarily compensation-based system.

The issues are further complicated by the introduction of several liability, which, in a variety of forms, has now replaced joint-and-several liability in a majority of the states.[56] Whatever the model, assignment of percentages of fault to each party, including those not responsible in tort, is a predicate to apportioning tort damages. Thus, the employer who removes a safety guard from machinery, enhancing a risk of injury that comes to fruition, might be found seventy percent at fault, with a corresponding finding that the manufacturer's failure to append an adequate warning bore thirty percent responsibility. Supposing that damages in tort of $500,000 are assessed (including pain-and-suffering), and further supposing $200,000 in medical expenses and scheduled wage loss recovered in workers' compensation benefits, the injured employee would recover $150,000 from the tort defendant and $200,000 from the workers' compensation employer,

54. 573 P.2d 443, 458 (Cal. 1978); *see also supra* Section III.A.

55. *See* DOBBS ET AL., *supra* note 18, at 919–20.

56. For a listing of the principal approaches, see MARC FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 453 (10th ed. 2016).

strikingly below the total loss recognized in the tort award. Moreover, if the workers' compensation insurer is entitled to recoupment of benefits via subrogation, the employee's net benefits realized would be still further reduced.[57]

This, of course, is only a single subrogation scenario in an interplay between tort and workers' compensation. There are near-infinite variations.[58] I offer it only to illustrate the extraordinary complications in reconciling the competing economic and fairness considerations generated by the crossroads between the two systems.

2. A World of Settlements

Like product liability suits generally, most third-party defendant suits are settled rather than litigated to final judgment. Traditionally, this real-world consideration has led to reluctance on the part of first-party health insurers to pursue their subrogation rights. In addition, there is the problem of identifying medical expenditures on behalf of accident victims in a universe of medical expense reimbursements. Even if identification is feasible, participating in negotiations over the

57. *See* ABRAHAM, *supra* note 28, at 205. As Professor Abraham notes:

> One alternative [in settlement proceedings] is to deny reimbursement unless the sum of insurance benefits paid plus the tort settlement exceeds the victim's losses, and then to permit reimbursement only to the extent necessary to prevent overcompensation. This is known as the 'make-whole rule.' Another alternative is the 'pro-rata' rule: to permit the insurer a partial reimbursement when the victim has not been made whole, based on the proportion of the victim's total loss that the settlement represents.

*Id.*

58. For a more expansive survey and discussion of potential approaches than is addressed in this Article, see generally Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY J. EMP. & LAB. L. 65 (2005). Professor Klein builds on the foundation of American Law Institute's REPORTERS' STUDY, ENTERPRISE LIABILITY FOR PERSONAL INJURY, VOL II, at 183–98 (AM. LAW INST. 1991). But the ALI study was conducted before the implications of the replacement of joint-and-several liability by several-only liability in many states had taken place.

Taking account of this development, Professor Klein advocates elimination of the subrogation right, full recovery of workers' compensation benefits, and partial recovery in tort based on allocation of fault in the tort suit between employer and third-party defendant. In essence, workers' compensation benefits would be regarded as comparable to a tort settlement with one of two co-defendants, with recovery in tort against the remaining co-defendant reduced by the amount of the "settlement" (i.e., the workers' compensation benefits). *See id.* at 80–83. His analysis is far more detailed, because there are many variants beyond joint-and-several or several-only liability. But those details are beyond the scope of this Article.

proper allocation to medical expenditures of undifferentiated settlement awards has raised a red flag of runaway administrative costs.[59]

These considerations are less weighty in the workers' compensation context because of the greater ease in identifying injuries resulting in third-party litigation. Nonetheless, the prospect of hands-on negotiating of settlement allocations strongly pulls in the direction of limiting subrogation claims by workers' compensation insurers to high-benefit payment cases. One is left with the question of whether it would remain desirable to retain third-party suits in an ideal world of enhanced workers' compensation benefits with guaranteed disability award levels and rigorous OSHA supplementation of workplace safety standards.[60] But, of course, we are far removed from any political prospect of realizing these goals.

## IV. CLAIMS AGAINST THE EMPLOYER: LIMITS OF THE GRAND BARGAIN

By far, the continuing vitality of tort in cases of accident-related workplace injuries involves claims against third-parties, discussed in the preceding sections. This category of cases demonstrates the ingenuity of plaintiffs' attorneys in skirting the boundaries of tort established by the Grand Bargain. But, as it happens, the domain *inside* the Grand Bargain—tort claims against the employer—has not been entirely sealed off. Workers' compensation statutes carve out a thin wedge of territory in which tort remains viable; namely, claims of intentional harm against the employer.[61] In addition, federal statutory law provides another realm in which tort claims—apart from common law principles—remain a dynamic force; in particular, Title VII claims of racial and sexual harassment. I discuss each in turn.

---

59. *See* ABRAHAM, *supra* note 28, at 204–07.

60. A vigorous proponent of eliminating third-party tort suits was no-fault champion Jeffrey O'Connell. *See infra* note 77 and accompanying text.

61. Russell L. Wald, *Workers' Compensation—Employer's Intentional Misconduct*, 48 AM. JUR. PROOF FACTS 2d 1, 5 (2016). Wald finds:

> Many of the workers' compensation acts containing an exclusive remedy provision also provide as an exception that the right to bring a tort action against an employer for the recovery of damages compensable under the act in question shall not be abrogated with respect to an employee's injury or death resulting from the employer's 'willful,' 'deliberate,' or 'intentional' conduct, or from the employer's 'intention' or 'deliberate intention' to cause the injury or death.

*Id.*

### *A. Tort Claims Against the Employer: Intentional Harm*

Consider a straightforward factual setting: An enraged employer hits an employee and throws her down in a fit of pique over her job performance, causing serious injury. In a mid-1970s California case, *Magliulo v. Superior Court*,[62] the court had little difficulty finding that intentional misconduct of this kind lifted the workers' compensation bar on tort claims.[63]

Nonetheless, the courts have been wary of exceeding a narrow pathway into tort. Thus, a leading California Supreme Court case, decided a decade after *Magliulo*, *Cole v. Fair Oaks Fire Protection District*, involved a pattern of employer harassment for engagement in union activities that allegedly led to a totally disabling stroke.[64] The court rejected an intentional infliction of emotional distress claim as failing to satisfy the intent element on the grounds that recognition of such claims would open the door to wide recognition of employee tort suits for employer fractious, overbearing conduct in workplace relations.[65]

Not all courts have been quite so cautious. In fact, three views can be elicited from recent case law: Following the restrictive California approach, a Mississippi case, *Franklin Corp. v. Tedford*, in which an employer allegedly permitted employees to be exposed to excessive gas vapors,[66] dictated that "an actual intent to injure" was a requisite for

---

62. 121 Cal. Rptr. 621, 636 (Ct. App. 1975), *superseded by statute as stated in* Fermino v. Fedco, Inc., 872 P.2d 559 (Cal. 1994) (en banc).

63. *Magliulo*, 121 Cal. Rptr. at 779–80.

64. 729 P.2d 743, 746–48 (Cal. 1987) (en banc).

65. *Id.* at 748–51. The court also rejected the loss of consortium claim of the employee's wife on the grounds that it was derivative of the worker's failed intentional infliction of emotional distress claim. *Id.* at 751–52. Claims regarded as derivative have been more broadly excluded under the tort immunity—whether based on intentional or lesser misconduct. *See* Snyder v. Michael's Stores, Inc., 945 P.2d 781, 784 (Cal.1997) (noting the bar on claims by nondependent parents for wrongful death and for loss of services and citing *Cole* on the derivative character of consortium claims).

Interestingly, the *Snyder* court distinguished the plaintiff's claim for a fetal injury from exposure to a toxic substance in her mother's workplace—allowing recovery in tort on the grounds that the injury was "independent" rather than "derivative." *See generally id.* Similarly, while the courts have been sharply at odds on whether plaintiffs in "take-home asbestos cases" (generally, spouses contracting asbestos-related diseases from exposure to the clothing of asbestos workers) can prevail against employers and third-party defendants, there has not been reliance on workers' compensation exclusivity when ruling in favor of workplace defendants. *See* Meghan E. Flinn, Note, *A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposures*, 71 WASH. & LEE L. REV. 707, 711–19 (2014).

66. 18 So. 3d 215, 222–24 (Miss. 2009).

lifting the tort bar.[67] By contrast, a more charitable embrace of tort is found in *Hannifan v. American National Bank of Cheyenne*, a Wyoming case involving the collapse of a wall in a coal mine.[68] Here, the court required only that the employer's misconduct be "willful and wanton," not necessarily intentional.[69] And, in an intermediate zone, the Utah Supreme Court has held—again, in a toxic exposure setting—that the appropriate test is whether the employer misconduct makes it "virtually certain" that injury would occur.[70]

In an interesting variant on these intentional/near-intentional employee claims aimed at lifting the tort bar, an employee argues that the bar is not applicable in the first instance; that is, that the conduct in question simply did not arise in the course of employment. A representative illustration is *Mason v. Lake Dolores Group, LLC*, where a worker at a water amusement park suffered catastrophic injuries while sliding down his favorite ride before checking in for work—when the park was closed.[71] Adhering to the traditional workers' compensation nexus, the California Court of Appeals found no bar to a tort claim of negligent maintenance because the injury did not occur in the course of employment.[72]

### *B. Tort Claims Against the Employer: Racial and Sexual Harassment*

Beginning in the mid-1980s, the U.S. Supreme Court extended liability under Title VII of the Civil Rights Act of 1964 from so-called "quid pro quo" cases—those involving employment discrimination based on rebuffing of sexual advances—to cases involving tortious conduct claims based on findings of subjection to "an abusive working environment."[73] Note that these cases would frequently not lead to recourse under workers' compensation because of the noneconomic character of the harm. But statutory tort claims based on Title VII animated an entire field of workplace-based tort law. As such, a detailed treatment of these statutory claims is beyond the scope of this Article. Suffice to say that the Supreme Court has revisited this area in

67. *Id.* at 232.
68. 185 P.3d 679, 685–86 (Wyo. 2008).
69. *Id.* at 683.
70. Helf v. Chevron U.S.A., Inc., 203 P.3d 962, 974 (Utah 2009).
71. 11 Cal. Rptr. 3d 914, 918–19 (Cal. Ct. App. 2004).
72. *Id.* at 922.
73. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

a succession of leading cases: refining the standard of liability,[74] extending liability to same-sex harassment,[75] and articulating standards of vicarious liability.[76]

## V. CONCLUDING THOUGHTS: IS THERE A PLACE FOR TORT IN THE REALM OF WORKPLACE INJURIES?

Turning the clock back a century in time, it seems fair to say that the founders of the workers' compensation movement would be surprised—if not aghast—by the vitality that tort has demonstrated in carving out a complementary role for a subset of employees whose injuries can be identified with the workplace but whose claims have moved considerably beyond the boundaries of the Grand Bargain, as originally conceived. In the final analysis, the question is whether these developments—in particular, the third-party defendant claims—are to be praised or condemned.[77]

From a tort perspective, third-party liability can claim a respectable grounding in traditional common law principles. It comports with the "make whole" foundation of tort law (especially if there is joint-and-several liability), and it promotes optimal deterrence (particularly if there is contribution from blameworthy employers).[78]

On the other hand, from a social welfare perspective, it is more problematic. While workers' compensation is not a model of horizontal equity among similarly injured workers, it is strongly influenced by a social welfare ethic. Introducing tort law against third-party wrongdoers is inconsistent with that ethic: it is a carve-out. Only those

74. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co., 119 S.W. 576 (Mo. 1909).

75. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79, 82 (1998).

76. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998). For summary discussion (and references) to common law and statutory claims for workplace racial harassment, as well as sexual harassment, see FRANKLIN ET AL., *supra* note 56, at 929–31.

77. A strong proponent on the condemnation side was Jeffrey O'Connell, the leading advocate of no-fault replacement of tort more generally. With respect to scrapping third-party tort claims in the workers' compensation domain, see generally Jeffrey O'Connell, *Supplementing Workers' Compensation Benefits in Return for an Assignment of Third-Party Tort Claims—Without an Enabling Statute*, 56 TEX. L. REV. 537 (1978); Jeffrey O'Connell, *Transferring Injury Victims' Tort Rights to No-Fault Insurers: New "Sole Remedy" Approaches to Cure Liability Insurance Ills*, 1977 U. ILL. L.F. 749; Jeffrey O'Connell, *An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees, with an Employer's Remedy Against Third Parties*, 1976 INS. L.J. 683.

78. Several-only liability complicates the analysis since there is then presumably no contribution against the employer.

injured workers suffering injury from an outside source realize redress approaching make-whole recovery.

Is this an indictment of third-party tort claiming? Not necessarily. The question always is, "As compared to what?" Wholesale abolition of workers' compensation and resurrection of tort would negate all of the comparative advantages of no-fault compensation over tort. On the other hand, full-throttled scrapping of tort would deny all the virtues of full compensation and promotion of optimal incentives to safety. Pragmatically then, perhaps it is most sensible to live with this complementarity and concentrate on incremental adjustments that promote more satisfactory allocation of blameworthiness.[79]

79. These incremental adjustments might vary from state to state. For example, if creating more optimal incentives to safety is a goal, a state with joint-and-several liability might recognize a right of contribution in third-party defendants; by contrast, a state with several-only liability might decide to further this goal by limiting the right of subrogation.