

AALS Workshop on Remedies
Wednesday, January 3, 2007
Social Inequality and Monetary Relief
Outline: Race and Remedies: Damages in Tort Litigation (revised 12/22/06)

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A. Methodological Challenges

1. Individualized (case-by-case) adjudication of liability and damages
2. Enforcement decentralized and via private attorneys
3. Settlements and verdicts unreported; limited data available
4. Limited data about injuries, particularly in first half of twentieth century
5. Racial identification of litigants and witnesses in reported opinions; whiteness as default, litigants and witnesses commonly referred to as “colored” or “Negro” from 1900-1950, seemingly declining thereafter. Few references to other races.

B. 1865-1950: A Preliminary Picture

1. General Observations

- a. “whiteness” of the civil justice system; exclusion of others from decisionmaking roles (jurors, lawyers and judges all white and male)
- b. tort doctrine generally not race-specific
- c. theoretical commitment to equality of treatment (including damages) persisted even during particularly racist periods.
- d. enforcement through contingent fee agreements, widespread since mid-nineteenth century, leading to some access by African-American tort plaintiffs to tort system since at least the late nineteenth century.
- e. African-Americans won tort cases before juries and appellate courts in every region, beginning in the late nineteenth century.
- f. African-Americans’ tort claims were valued for less than similar claims for whites at every stage of litigation—settlement, trial, and appeal--and this is not entirely explicable by African-Americans’ lower wages.
- g. A variety of explicit justifications were given by decisionmakers for lower values: lower status meant lesser injury, stereotypes (“improvident”), assumption that other decisionmakers assigned lower values, lower life expectancies, decisions to use segregated (black-only) frameworks for damage determinations.

2. Race & Damages in Stages of Tort Litigation

a. PreTrial Settlement

i. Lower compensation per claimant; 1905 Article in the Street Railway Journal stated that in 1904, 4.7% of the cases settled by the Philadelphia Rapid Transit Company involved black claimants, but only 2.3% of the damages paid went to these claimants.

ii. For whites, occupation was the dominant factor; for blacks, race was the dominant factor. For example, according to an influential 1927 manual for Railway Claims agents: “The Constitution of the United States guarantees its citizens the equal protection of the law and provides that legally no difference shall be made between citizens on account of a difference in race or color. But some of these guarantees have come to be greatly modified in the actual life of the nation....A brakeman is not always a brakeman. A white brakeman is a brakeman; but a negro brakeman is most likely only a negro.” The manual also claimed that juries awarded less for deaths of blacks, implying that therefore settlement values for injuries to blacks were less.

iii. Even if it was not actually true that juries awarded less for deaths of blacks, the perception that they did would depress settlement values. This would also discourage some lawyers from pursuing cases for black tort victims.

b. Damages at Trial: Victory Foiled by Race-Based Remittitur

i. The Victory: A \$2500 damage verdict in New York in 1909 for false imprisonment of a black Pullman porter against a rich white financier for falsely accusing the porter of stealing. No lost wages, essentially punitive damages for a dignitary injury.

ii. The trial judge slashed the award to \$300, stating, “[I]n one sense, a colored man is just as good as a white man, for the law says he is, but he has not the same amount of injury under all circumstances that a white man would have.” (New York Times, *Negro Not Equal to White: Suffers Less Humiliation in False Arrest*, May 22, 1909). New York appellate courts affirmed the reduction

iii. The affirmance of the trial judge’s race-based damage reduction combined with newspaper criticism of the decision, may have encouraged later trial judges to reduce damage awards to African-Americans on similar grounds, but to not state their reasons openly.

c. Death and Damages on Appeal I: Life Expectancy Tables and Wrongful Death Damages

i. Actuarial tables of life expectancy (non-race-based) widely used by insurance companies and in wrongful death litigation brought on behalf of blacks and whites for over a century, including to estimate lost wages.

ii. Rejection of their use: U.S. District Judge Adams’ opinion reviewing a referee’s decision in *The Saginaw and the Hamilton*, 139 F. 906 (S.D.N.Y. 1905), *aff’d* 146 F. 724 (2d Cir. 1906), *aff’d sub nom Old Dominion S.S. v. Gilmore*, 207 U.S. 398 (1907).

iii. Two justifications in Adams’ opinion for their rejection: First, mortality tables were developed by insurance companies and thus included insurance commissions and profits. Second, they were particularly inaccurate as to African-Americans because of their shorter life expectancies (explicitly relying on Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro*, and a proponent of the argument that blacks

would eventually die out because of the ‘feebleness’ of the race). Methodology used instead: the decisionmaker’s intuition.

d. Death and Damages on Appeal II: Louisiana, Valuation and Devaluation

- i. Why Louisiana? (more detail in Wriggins, 49 Howard L. J. 99 (2005))
 - A. Elements of damages under wrongful death code provision:
 - pecuniary loss suffered by survivor
 - survivor’s grief
 - loss of consortium of survivor
 - B. Elements of damages under survival code provision: decedent’s pain and suffering, decedent’s lost wages.
 - C. Scope of appellate review under Louisiana law: appellate judges can make decisions that conflict with factual questions decided by juries, can closely review facts and can decide on damage amounts.
 - ii. My database: All reported appellate decisions (from 1900-1950) dealing with amounts of damages, of which there were 152. 26 were brought by families identified as “Negro” or “colored,” the remaining 126 were brought by whites. [there were less than five cases dealing with amounts of damage from 1865-1899 and including those cases would not change the totals much].
 - iii. Median award for black family members per case, \$3,559; median award for white family members per case, \$7,021. Average award to black family members per case \$3,559; average award to white family members per case, \$8,245.
 - iv. Highest awards in both racial categories were for deaths of husband-breadwinners who had been supporting a wife and children, but the highest white award was more than double the highest black award.
 - v. Use of segregated Frameworks: *Young v. Broussard*, 189 So. 477 (La. Ct. App. 1939).
 - vi. Case comparisons suggest “racially selective empathy” (Kennedy):

Example:

Pierre v. Powell Box Co., 77 So. 943 (La. 1918) and *Vincent v. Morgan’s Louisiana & T.R. & SS. Co.*, 74 So. 541 (La. 1917). (other examples in Howard article)

| | Pierre | Vincent |
|----------------------|-----------------------------|---------------------------|
| Age of decedent | 16 | 16 |
| Race of decedent | black | white |
| plaintiffs | parents | parents |
| Pecuniary loss | Yes | No |
| P & S | excruciating | None |
| Activity when killed | Working (pre-Workers’ comp) | Throwing rocks at a train |

| | | |
|-------------------|---------|----------|
| Trial Award | \$2,500 | \$10,000 |
| Damages on Appeal | \$7,500 | \$10,000 |

vii. Stereotypes influencing damages: “Considering the well-known improvidence of the colored race, and the irregular life these colored brakemen lead, we think that upon this evidence a regular allowance of \$15 per month would lean more to the side of liberality to the plaintiff than otherwise (reducing a verdict from \$6,250 to \$1,985 to the mother of a 31 year old brakeman) *Blackburn v. Louisiana Ry. & Navig. Co.*, 54 So. 865 (La. 1910)

viii. Underrepresentation of black claimants

Louisiana’s black population ranged from 47.1% in 1900 to 32% in 1950. By contrast, in appellate decisions on magnitude of damages, only 17.1% of the total claimants were black. Black claimants underrepresented for potentially myriad reasons including lower values being assigned to their claims.

ix. Is Louisiana typical?

-yes and no.

Yes: exclusion of African-American from decision-making roles in legal system widespread, contingent fee agreements widespread, whiteness was the apparent default everywhere, African-Americans won cases everywhere, underrepresentation relative to population widespread.

No: LA scope of appellate review of damages broader than in common law states, LA code provision allowed more expansive damages broader than many other states (grief of survivors explicitly allowed), more appellate wrongful death cases in LA than many other states.

Tremendous regional variation: Example, some AL cases used precedents from slavery like a case involving liability for use of a spring gun, without comment, but no MS or KY cases that I found did that.

C. 1950-now

1. General Observations

- a. Race of litigants mentioned less and less frequently from 1950 on.
- b. Anecdotal information suggests continuation of devaluation patterns (McClellan).
- c. Data about the tort system and damages are increasingly available especially in past several decades, but information about race and damages are not more readily available.
- d. Existing data seem to confirm the continuation of preexisting patterns but more research needs to be done.

2. Cook County Study, Evidence from 1959-1979 (Chin & Peterson).

- a. Analysis of 9,000 civil jury trials in Cook County, Illinois found that “race seemed to have a pervasive influence on the outcomes of civil jury trials” and that the disadvantage for black plaintiffs was not less near the end of the study period.
- b. Successful black plaintiffs received awards only 74% as large as white plaintiffs’ awards in comparable cases.

c. Black plaintiffs were underrepresented relative to their proportion in the population, suggesting contingent fee lawyers may have been less willing to take their cases.

d. Vidmar, other possible explanations besides racial discrimination by juries: less competent lawyers represented blacks, black clients could not afford economic or other experts to demonstrate the cost of their injuries, black litigants have lower economic losses.

3. Race-Specific Earnings Tables

a. Race- and gender-specific earnings tables are often used to estimate lost future wages when tort victim lacks an earning history.

b. Implications

c. Questioning the Frameworks; September 11 Fund, Canadian perspective, US courts' perspective.

Kenneth R. Feinberg, Esq., Final Report of the Special Master for the September 11 Victims Compensation Fund of 2001, vol. 1, p. 31.

U.S. v. Bedonie, 317 F. Supp. 2d 1285 (D. Utah 2004). *Rev'd on other grounds sub nom*

U.S. v. Serawop, 410 F.3d 656 (10th Cir. 2005)

Wheeler Tarpeh-Doe v. U.S., 771 F. Supp. 427 (D.D.C. 1991), *Rev'd on other grounds* 28 F.3d 120 (D.C. Cir. 1994)

Walker v. Ritchie [2003] O.J. No. 18 (Ont. Sup. Ct. J.)(QL), 2003 CarswellOnt 10 (Can.)

d. Insights and questions from antidiscrimination law, insurance law and cognitive psychology

D. Conclusion

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Audrey Chin & Mark A. Peterson, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* viii (1985)

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