A Tribute to Wil Smith, Maine Law Class of 2006

Jennifer Wriggins

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Wilton Smith was a kind, brave, wise and generally amazing person. He was a quiet and effective world-changer. “All feel the poorer that he has gone from us,” as Winston Churchill said in his eulogy of T.E. Lawrence. He was many things to many people – coach, leader, parent, advisor, guide, friend, fiancé; I knew him as a student in my first-year torts class in the fall of 2003.

Few people know that Wil actually changed the field of torts, that foundational course about personal injuries and other civil wrongs, required for all U.S. law students in their first year. He did this by asking a single question that no one else had asked, and opened up an entire field of knowledge.

It was about a month into the semester and we were discussing the civil law of self-defense. The assigned case1 involved a shooting in which a parking lot owner shot a man in the foot. When the injured man sued the parking lot owner seeking compensation for his injuries, the judge said the parking lot owner’s fear was reasonable and that the shooting was justified under the circumstances. The justifying circumstances were that the plaintiff was drunk, had grabbed the defendant, had been asked to leave, and was tall and strong while the defendant was short and weak.

Wil knew, although I did not, that the plaintiff, Paul Silas, a professional basketball player, was African-American. Near the end of the class, Wil raised his hand, mentioned that the plaintiff was African-American, and gently suggested that perhaps the plaintiff’s race had something to do with the fear felt by the parking lot owner (who was probably white), and with the conclusion that the fear was reasonable (and the shooting therefore ‘justified’). This comment was instructive and sadly, still all too relevant.

Wil also asked how the torts system had dealt with claims brought by and against African-Americans. For me at that moment, time stood still. I knew virtually nothing about the answer to Wil’s broader question. It was instantly clear what an important question this was -- torts is part of the legal system; and the legal system, through the fourteenth amendment of the Constitution, promises everyone equal protection of the laws. I told the class and Wil that I did not know but would find out.

I went back to my office and immediately did some online research, thinking I would find a few great articles, go back to the next class, and explain the general contours of the way the torts system had dealt with claims by African-Americans specifically and race generally. However, I was not able to report back because almost nothing had been published about race and torts in the legal literature! Reams had been written about how the criminal justice system treated African-

American defendants, and cases on the topic were discussed in Constitutional Law courses and Criminal Law courses. But the dozens of legal scholars who wrote articles in the field of torts simply had not turned their attention to race and the torts system. No court decisions involving race and torts were discussed in the legal literature.

In the next few years, my research and writing focused on trying to answer Wil’s question. The result was a series of articles and a book, *The Measure of Injury: Race, Gender and Tort Law* (N.Y.U. Press 2010, co-authored with Martha Chamallas). This work could not have been done without my many fabulous research assistants (Marya Baron, Zach Brandmeir, Dennis Carillo, David Goldman, Erin Krause, Katharine Rand, Josh Scott, and Rebekah Smith) and the librarians and staff of Maine Law.

We found a wealth of material, including in published legal opinions, hiding in plain sight, that had been overlooked or ignored. We first found that many torts claims, starting at the end of slavery and continuing until the 1960s, were brought by African-American plaintiffs and that judges writing decisions in these cases generally identified the plaintiff’s race in the decision. Where a plaintiff was white, judges would not mention this fact. This showed that African-American plaintiffs had access to legal remedies in torts, and also that whiteness of plaintiffs was the unstated default in the torts system. Second, we dug deeper, and read hundreds of cases from across the U.S. We found that a race-based discount was applied in many torts decisions, so that claims by African-Americans were valued for lower dollar amounts than similar claims by whites. While many find this unsurprising, this had never before been written about. Third, we uncovered some early twentieth century cases in which the race bias of the judges was blatantly on display, explicitly devaluing injuries to black plaintiffs. Fourth, we found unheralded cases that were civil rights cases in the form of torts cases. The best example is *Bullock v. Tamiami Trails Tours,* in which a bus company had to pay damages to a Jamaican couple for injuries they suffered when a white passenger attacked them as they sat in the front of an interstate bus a few months after buses were desegregated.

Besides shining light on these issues through publishing about them, I’ve spoken to torts classes and legal conferences all across the country about them. The book and articles are used in many torts classes. No one can say or credibly assume that race and racism are separate from and irrelevant to the field of torts. And the research continues, as scholars across the country research further about the question Wil raised.

After Wil graduated, I stayed in touch with him. I sent him a copy of my book and articles that his question inspired. When I told him of the impact he had, he smiled his warm smile, with a twinkle in his eye, and gently nodded. Wil, thank you. I miss you, and will always be grateful for your presence at University of Maine School of Law, and in my life.

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2 266 F.2d 326 (5th Cir. 1959).