2007

# Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007

Jennifer Wriggins
*University of Maine School of Law*, wriggins@maine.edu

# Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007

Jennifer B. Wriggins*



## I. INTRODUCTION

This essay addresses a void in torts scholarship and pedagogy—the relationship between remedies and race in U.S. tort law. In virtually all torts scholarship and teaching, the unspoken assumptions are that race and racism are extrinsic to the torts system and that all parties are white unless otherwise specified. Torts scholars and casebooks discuss important cases from the early part of the twentieth century, and invariably mention the historical context of technology and industrialization. Yet, historical and contemporary context about torts and race generally is absent in scholarship and teaching.

This essay, part of a larger effort to explore issues of race and gender in torts, proceeds in two parts.[1] First, I challenge the

* Sumner T. Bernstein Professor of Law, University of Maine School of Law.

1. Martha Chamallas and I are writing a book on this subject. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND THE LAW OF TORTS (forthcoming 2008). Other already published and forthcoming works that discuss some of these issues are Martha Chamallas, *The*

boundary between rights and remedies by highlighting a stunning but previously overlooked 1959 instance of an individual tort remedy serving as a significant civil rights remedy in the integration of public transportation throughout the South.[2] Second, I outline the whiteness of the civil justice system and focus on neglected material concerning the relationship between race and damages from 1865 to the present.[3] The torts system provided access to indigent plaintiffs, black and white, during periods when poor people were otherwise denied legal representation in every other context. Yet, the system worked by means that resulted in the classic torts remedy, money, being less readily dispensed to black plaintiffs than to other tort plaintiffs. Recent evidence suggests that tort remedies are still affected by race in ways that merit more exploration.

The methodological barriers to making definitive statements about the torts system are familiar and significant. Tort litigation involves individualized adjudication of liability and damages. Comparing liability decisions and damage awards in different

---

*Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Martha Chamallas, *Civil Rights in Ordinary Torts Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005) [hereinafter Chamallas, *Civil Rights*]; Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99 (2005) [hereinafter Wriggins, *Torts*]; Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 13 (2005) [hereinafter Wriggins, *Feminist Revision*]; and Jennifer B. Wriggins, *Whiteness, Equal Treatment, and the Valuation of Injury, 1900–1949*, *in* FAULT LINES: TORT LAW AND CULTURAL PRACTICE (David Engel & Michael McCann, eds., forthcoming 2008). Thanks to Martha Chamallas and Deborah Tuerkheimer for reading drafts of this essay, to my research assistant Erin Krause, to the librarians of the Garbrecht Law Library at the University of Maine School of Law, and to Douglas Laycock for his work on this symposium.

2. Bullock v. Tamiami Trails Tours, Inc., 266 F.2d 326 (5th Cir. 1959).

3. This essay focuses on cases involving those perceived to be African-American and Caucasian. Cases involving those perceived to be of other races have not been researched for this essay, although that is an important area for future study. "African-American" and "black" are used interchangeably. This essay does not take a position on whether race is something biologically "real" or not. In these cases, litigants are not explicitly challenging the racial designation applied to them. For further discussion, see the excellent book IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) and Wriggins, *Torts*, *supra* note 1, at 100 (discussing the incompleteness of conventional understandings of the tort system because of erroneous assumptions regarding the extent and effect of race in the system).

decisions to see if injuries are treated consistently is rarely done. Enforcement is decentralized and occurs almost exclusively through private attorneys. Settlements and verdicts are often unreported. There is no comprehensive databank, and in the late nineteenth century and the first half of the twentieth century there was even less information available than there is now. Moreover, comprehensive information about the incidence of injury, as well as wage data, is not readily available for the late nineteenth century and the first half of the twentieth century. In addition, determining the race of tort litigants is not necessarily easy. Although appellate judges in torts cases during the late nineteenth and early twentieth centuries routinely referred to the race of plaintiffs and witnesses when other than white, they did this less frequently after 1950.[4] Bearing in mind that comprehensive conclusions would be premature, tort law and race are intertwined in crucial ways. Tort law played an unheralded but significant role in desegregating interstate public transportation, as described in Part II. Further, race and racism have affected the calculation of damages, largely to the detriment of African-American claimants, as shown in Parts III and IV.[5] The essay concludes with reflections on the implications of the racial history of tort damages for contemporary efforts to make tort remedies more consistent.

## II. RACE, REMEDIES, AND RECOGNITION

The recognition of an individual, private wrong can be a broad remedy in itself with significant ramifications for racial

4. BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920 (2001) (discussing hundreds of cases from the early twentieth century identifying the race of black plaintiffs); Wriggins, *Torts*, *supra* note 1, at 105 (discussing appellate courts' practice of referring to African-American plaintiffs as "colored" or "negro" in the first half of the twentieth century).

5. One common question is whether judges applied race-based torts principles and standards of liability. My preliminary answer is generally in the negative. *See* Wriggins, *Torts*, *supra* note 1, at 105 n.26 (discussing cases in which a race-based liability rule was claimed by the plaintiffs, yet not adopted by the courts); *id.* at 113 n.53 (noting that more stringent standards of liability or specific doctrinal rules were not applied to black plaintiffs, with the possible exception of self-defense).

equality. The Fifth Circuit decision in *Bullock v. Tamiami Trail Tours, Inc.* reflects this.[6] This case deserves to be widely taught and included in citations to duties of common carriers. It is a tort remedy for an individual case, but its wide implications demonstrate its importance as a civil rights remedy.

The events at issue in the case took place on an interstate bus in Florida at the same time that the Montgomery bus boycott was taking place.[7] A married couple from Jamaica came to Florida as tourists in late summer 1956, intending to travel by bus to New York in order to "see more of the country-side."[8] They arrived just seven months after the Interstate Commerce Commission (ICC) had ordered integration of interstate public transportation, including the very bus on which they were going to take their sightseeing trip.[9] They boarded a bus in Miami, and sat together in the front.[10] The husband, Reverend Bullock, "was dark or black," while the wife "though a Negress, appeared" to be white.[11] Not far from Miami, a white passenger complained to the driver about where Reverend Bullock was sitting, and the driver asked him to move to the back of the bus.[12] He refused to move back.[13] When the bus stopped in the middle of the night at a northern Florida restaurant that was used as a bus stop after midnight, the bus driver told some people in the restaurant about the Bullocks' presence in the front of the bus and

---

6. 266 F.2d 326 (5th Cir. 1959), *rev'g* 162 F. Supp. 203 (N.D. Fla. 1958). This case is discussed further in Wriggins, *Feminist Revision*, *supra* note 1, at 148–152. The Fifth Circuit's decision contains much fascinating detail that space limitations make it impossible to discuss fully here.

7. CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 108–24 (1983). The Montgomery Bus Boycott, an important early victory in the struggle for racial equality in the twentieth century, began after Rosa Parks, on December 1, 1955, refused to move to the back of the bus. African-American residents of Montgomery, Alabama organized a boycott of the city's segregated buses which lasted over a year and eventually resulted in a United States Supreme Court decision affirming a Fifth Circuit decision holding that segregation in public transportation was illegal and in successful integration of the buses. Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956); BARNES, *supra*, at 108–127.

8. *Bullock*, 162 F. Supp. at 204.

9. BARNES, *supra* note 7, at 98.

10. *Bullock*, 162 F. Supp. at 204.

11. *Bullock*, 266 F.2d at 328.

12. *Bullock*, 162 F. Supp. at 204.

13. *Id.*

about how they had refused to move to the rear.[14] Milton Poppell, a white farmer who lived nearby, overheard the conversation, bought a ticket, boarded the bus, told the Bullocks to move to the rear, and when they declined, he slapped Mrs. Bullock and beat Rev. Bullock, injuring his face and body.[15] Mr. Poppell later testified that he was particularly incensed, not only that a black man would ever sit in the front of a bus, but also that a black man was married to and sitting with a white woman in the front of the bus.[16] When the Bullocks sued the bus company for their injuries, Federal District Judge DeVane ruled against them, holding that the attack was unforeseeable and the bus company could not be held responsible.[17] Calling segregation in public transportation a voluntary preference of the black population, the judge termed this the only instance of unprovoked assault in the four-year history of desegregating public transit in Florida and the South.[18]

The Fifth Circuit reversed and actually found the bus company liable, remanding only for a determination of damages.[19] The court was called upon to apply Florida law to the case, and found the attack foreseeable, largely because of the social conditions of the day.[20] Judge Rives wrote that "the folkways prevalent in Taylor County, Florida . . . would cause a reasonable man, familiar with local customs, to anticipate that violence might result if a Negro man and a seemingly white woman should ride into the county seated together toward the front of an interurban bus."[21] Context was everything; "mischief was hovering about,"[22] and the bus company did not do enough to prevent the attack.

---

14. *Id.* There was a factual dispute about whether the people the driver told included a police officer or not. *Id.*

15. *Id.* at 205.

16. *Bullock*, 266 F.2d at 338 n.1.

17. *Bullock*, 162 F. Supp. at 205.

18. *Id.*

19. *Bullock*, 266 F.2d at 332.

20. *Id.*

21. *Id.*

22. *Id.* at 331. The damages remedy would not have been available for a truly random attack. To begin to convey a sense of the taboo attached to interracial couples, at the time of the attack, Florida had a statute forbidding racially mixed heterosexual couples from habitually occupying the same room "in the nighttime" which was in effect until struck down by the Supreme Court in 1964 in *McLaughlin v. Florida*, 379 U.S. 184 (1964). Extensive violence that

The damages remedy for the Bullocks was an individual, retrospective remedy and hopefully provided some compensation for their physical and psychological injuries. But the Fifth Circuit's liability determination against the bus company was, in effect, a broad remedial order. The order finding liability for the individual bus company could be reworded to state as follows: "We remind all interstate bus companies that they have to allow black people, interracial couples, and couples who appear to be interracial to sit in the front of buses as the ICC has previously ordered. Second, all interstate bus companies are hereby ordered to protect such passengers from attacks by other people including other passengers, and if they fail to do so they will be liable for damages to the injured passengers." The court order was a broad affirmative injunction as well as a doctrinal recognition that this particular bus company was liable for these particular past injuries. If future bus companies violated this de facto injunction, the remedy would be compensatory damages. Coming from the Fifth Circuit at this time, when it was comprised of not only Florida, but also Alabama, Mississippi, Georgia, Louisiana, and Texas, this decision was a significant part of the court's work in dismantling legal segregation in the South.[23]

While the issue of whether and to what extent tort liability actually deters behavior is perpetually debated, it seems unassailable that this particular remedy was the kind of tort remedy most likely to act as a deterrent.[24] This is because it was a clear public statement, by a court that covered a broad geographic area, against the precise type of defendant—an interstate bus carrier—that the judges most likely wanted to affect.[25]

---

accompanied desegregation of public transportation has been well documented. *See, e.g.*, BARNES, *supra* note 7, at 38–40, 62 (citing incidents of violence between people of different races on public transportation).

23. *See, e.g.*, Charles Clark, *Forward: The Role of the United States Court of Appeals for the Fifth Circuit in the Civil Rights Movement*, 16 MISS. C. L. REV. 271 (1996) (describing the role of the Fifth Circuit as a forerunner in starting a new era of race relations, particularly in regard to employment and education).

24. *See, e.g.*, Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does the Tort System Actually Deter?*, 42 UCLA L. REV. 377, 416–19 (1994) (citing several examples of commercial landowners instituting protective measures in response to the liability threat).

25. The Fifth Circuit's opinion contains some rather equivocal language about preventive measures that the bus company could have taken to prevent the harm; for example, that the driver could have told the Bullocks why he wanted them to move. *Bullock*, 266 F.2d at 332. However, given that the judges found

Significantly, three years before the *Bullock* opinion was written (and two months before the Bullocks were attacked), Judge Rives, who wrote the Fifth Circuit's opinion in *Bullock*, had written the initial decision in the Montgomery bus boycott case. The opinion, holding that the laws and ordinances requiring segregation on Montgomery's buses were unconstitutional, was later upheld by the U.S. Supreme Court.[26] In *Bullock*, by ruling that the bus company breached its duty by failing to protect the couple and warn them of possible violence, the court in effect "sided" with persons who were defying the segregation customs of the day. It signaled that the court would be willing to do so on other occasions and foreshadowed the struggle over integration of public facilities. By reshaping the duty to protect, the court afforded a broad prospective civil rights remedy in tort for private racial violence.

## III. 1865–1950, DAMAGE REMEDIES: A PRELIMINARY PICTURE

### *A. The Whiteness of the Civil Justice System*

One of the obvious ways in which whiteness was the norm in tort remedies is that, until the first half of the twentieth century, the decisionmakers in civil cases—jurors, lawyers, and judges—were almost exclusively white and male.[27] Particularly following the beginning of the twentieth century, the wider culture was divided by discriminatory laws, policies, and customs, and by a race-based caste system that placed African-Americans below whites, allowed

---

that the Bullocks should have been protected from attack in the actual circumstances of the case, when Mr. Bullock had been asked to move and had declined, it seems unlikely that they would have been barred from recovery if the driver had told them the reason for moving and they had still refused to move.

26. Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956).

27. *See, e.g.*, Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 75–93 (1990) (describing how Southern states created laws aimed at precluding African-Americans from serving as jurors); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844–1944, app. 2, tbl. 13 (1993) (showing that the number of black lawyers in the United States in 1940 was less than one percent of the number of white lawyers).

pervasive violence by whites against them, and denied them political power.[28]

Another way in which whiteness was the norm is that the race of litigants and witnesses was not mentioned in appellate tort opinions unless it was other than white. "Colored" man or woman, "Negro" man or woman, and occasionally "Negress," were terms used to describe litigants and witnesses who were not white.[29] Contemporary readers sometimes can infer that a litigant was white from the location of the tort or the descriptive language. For example, in one wrongful death case the decedent was struck by a flying timber while "in the waiting room for white passengers."[30] In another opinion, a wife who was sitting in the "ladies' waiting room" of a railroad station and who was insulted by a "negro woman" attendant necessarily was white.[31] Railroads in the early twentieth century often had a specific waiting room for white women, customarily known as "the ladies' waiting room."[32] The plaintiff's location in that waiting room while being attended by an African-American employee of the railroad established her as white. Appellate judges did not articulate these inferences. The norm to appellate judges was that people were white, and only departures from that norm needed identification.

### *B. Access to Tort Remedies—Legal Representation*

Beginning in at least the late nineteenth century, African-Americans won tort cases before juries and appellate courts in every region. Part of this success must be due to one of the enforcement

---

28. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 114–22, 280–348 (2002) (pointing to widespread laws hostile to African-Americans effectively barring them from participation in civil, political, and social life); WELKE, *supra* note 4, at 365 (describing justifications for segregation laws including the allegation that race-mixing would lead to violence and social disruption); C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 98 (1974) (discussing discrimination and segregation laws).

29. *See* Wriggins, *Torts*, *supra* note 1, at 111 n.48 (describing references to litigants' race and terms used to describe African-Americans).

30. Taylor v. Vicksburg, Shreveport & Pac. Ry. Co., 91 So. 732, 732 (La. 1922).

31. Gulf, C. & S.F. Ry. Co. v. Luther, 40 Tex. Civ. App. 517, 519, 90 S.W. 44, 45 (Tex. Civ. App. 1905).

32. WELKE, *supra* note 4, at 276–277. White women's children and husbands were also permitted in the waiting room. *Id.*

mechanisms of torts—contingency fee agreements. Contingency fee agreements have been widely used in tort litigation since at least the middle of the nineteenth century.[33] Since lawyers were almost universally white, it was white lawyers who represented black plaintiffs in tort cases soon after slavery ended. While long criticized as fomenting litigation,[34] contingency fee agreements were and are an egalitarian feature of the legal system. Contingency fee agreements, because they aligned, to some degree, the financial incentives of plaintiffs' tort lawyers with those of their clients, allowed poor clients who could not pay a lawyer's fees to have some access to the tort system. The United States African-American population has always been disproportionately poor.[35] The contingency fee system provided access to tort remedies for African-Americans at a time when no other part of the legal system supplied lawyers for them.

These early tort cases were brought and won during periods when poor litigants, of whatever race, lacked attorneys. They were brought long before *Gideon v. Wainwright* mandated lawyers for indigent criminal defendants charged with serious crimes,[36] before states began supplying lawyers to indigent parents in child protective cases,[37] and before the Legal Services Corporation provided some

---

33. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 231 (1998).

34. Herman Melville in his 1846 book, *Typee*, includes tort lawyers in a list of the maddening and unfortunate aspects of 'civilization,' in contrast to the idyllic life on the Marquesa Islands which the book chronicled: "There were none of those thousand sources of irritation that the ingenuity of civilized man has created to mar his own felicity . . . no assault and battery attorneys, to foment discord, backing their clients up to a quarrel, and then knocking their heads together." HERMAN MELVILLE, TYPEE 242 (1846), *reprinted in* HERMAN MELVILLE, TYPEE: A PEEP AT POLYNESIAN LIFE; OMOO: A NARRATIVE OF ADVENTURES IN THE SOUTH SEAS; MARDI: AND A VOYAGE THITHER (G. Thomas Tonselle ed., Viking Press 1982). While Melville did not explicitly mention contingency fee agreements, his implication is that the attorneys had a financial incentive to create tort suits, which is a perennial criticism of contingency fee attorneys.

35. *See, e.g.*, ARNOLD ROSE, THE NEGRO IN AMERICA 68–73 (1948) (describing geographic and employment factors as well as traditional exploitation of blacks by whites as creating a dire economic situation for blacks).

36. 372 U.S. 335, 348 (1963).

37. *See, e.g.*, Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 34 (1981) (citing sources from the 1960s and 1970s recommending such appointments and noting

representation in civil cases for clients who lacked resources to hire attorneys.[38] In terms of poor people's access to legal representation, the contrast between the torts system and the rest of the legal system could hardly be more extreme.

This is not to say that the contingent fee system was perfectly egalitarian. Its financial incentives meant that cases with lower financial values attached to them would have been less attractive for lawyers to bring. To the extent that claims of black men and women were valued less by the tort system than the claims of white men and women, the blacks' claims would have been correlatively less attractive for contingent fee lawyers to pursue. Preliminary information suggests that black plaintiffs were underrepresented as plaintiffs relative to their proportion in the population, although more information is necessary to draw firm conclusions as to the reasons for this.[39] Moreover, much conduct that was tortious as well as criminal could not be pursued through the torts system because of political and other barriers.[40]

---

that as of 1981, 17 states did not require appointment of counsel for termination of parental rights cases).

38. The federal Legal Services Corporation was founded in 1974. 42 U.S.C. § 2996 *et seq*. (1974).

39. For example, Louisiana's black population ranged from 47.1% in 1900 to 32% in 1950. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1790 to 1990, For the United States, Regions, Divisions, and States* (Working Paper No. 56, tbl. 33 (2002)), *available at* http://www.census.gov/population/www/documentation/twps0056.html (last visited Mar. 5, 2008). By contrast, in appellate wrongful death cases that featured published opinions regarding the measure of damages, black claimants comprised only 17.1% of the total claimants. *Id.* It is also very difficult to estimate accident rates in the nineteenth and early twentieth century. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 25, 59 (2003) (citing family employer self-reporting and the boom of personal injury cases at the turn of the century as complicating estimations of the actual accident rates).

40. One of the few civil cases involving damages from a lynching involved the lynching of a white man. Williams v. Great S. Lumber, 277 U.S. 19 (1928); *see also* Wriggins, *Torts*, *supra* note 1, at 106 n.28 (noting the conspicuous absence of any reported cases in which black plaintiffs sought compensation for lynchings).

### *C. Access to Tort Remedies—Money Damages*

The classic tort remedy, of course, is money to compensate for an injury. The traditional dichotomy is between economic damages and noneconomic damages. Both noneconomic and economic damages have a long history as remedies.[41] Broadly speaking, economic damages generally have included lost wages, lost future earnings, pecuniary loss, medical expenses, and the like. Noneconomic damages have included pain and suffering, mental anguish, loss of consortium, and in some states and contexts, grief. Instructions given to jurors as to the measure of damages have long been vague.[42] Jurors have been told to make an individualistic determination of the damages remedy, particular to the plaintiff, and not based on group-based schedules of projected compensation. However, when it is difficult to make an individual projection of what a person would have earned in the absence of injury, such as when a person has no track record of earnings or dies or becomes disabled at a young age, courts and juries often resort to group-based data, such as earnings tables or mortality tables. Group-based data such as mortality tables have been used to inform damage determinations in cases of death and permanent disability for more than one hundred years.[43] Values determined by jurors who actually decide cases have long been influential in determining settlement values.

Focusing solely on economic damages, one would expect African-Americans' tort claims to be valued less than whites' tort claims because of the lower earnings of African-Americans.[44]

---

41. *See* Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 362–67 (2006) (comparing historical examples of torts that award economic damages with torts that award noneconomic, "intangible" damages).

42. *See id.* at 374 ("In the realm of accident law, model jury instructions on compensatory damages offer no clue as to a methodology for calculating pain and suffering awards.").

43. *See, e.g.*, Central Law Journal et al. eds., *Admissibility of Life or Mortality Tables in Evidence in Cases of Death or Permanent Injury, for the Purpose of Estimating the Amount of Damages*, 55 CENT. L. J. 101, Col. 2 (Aug. 8, 1902) (noting that the general rule is to admit mortality tables in all cases of personal injury).

44. *See* ROSE, *supra* note 35, at 68–73 (discussing the historic reasons behind African-American poverty).

However, class and economic inequality do not tell the whole story. Noneconomic damages were available for many torts, and these damages allowed consideration of factors other than earnings. But the award of this type of damages was affected by a myriad of psychological and cultural mechanisms that devalued the losses suffered by black plaintiffs and seemed, from whites' perspectives, to call for a lesser remedy.

### 1. Pre-Trial Settlement

Published information about race and settlement during this period is scarce but provocative. For example, according to a 1905 article in the Street Railway Journal, 4.7% of the cases settled by the Philadelphia Rapid Transit Company in 1904 involved black claimants, but only 2.3% of the damages paid actually went to these claimants.[45] This is a significant disparity, but it could stem from differences in pre-accident earnings, seriousness of injury, or many other factors. More study of this would be useful, particularly as it involves other large defendants like railroads, in view of those defendants' importance as actors in the torts system.

Since most tort cases for decades have been resolved through pretrial settlements, the behavior and attitudes of people employed to settle cases against powerful defendants like railroads were significant. Perhaps such railway claims agents, now called claims adjusters, made race matter to the disadvantage of blacks even if blacks' earnings were the same as whites. 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.*"[46] This language identifies the injured white brakeman's

45. *Claim and Other Departments*, 26 STREET RY. J. 526, 533 (1905).

46. SMITH R. BRITTINGHAM, THE CLAIMS AGENT AND HIS WORK 271 (1927). It is not clear why workers' compensation is not referenced here, since almost all states had workers' compensation programs by 1921. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 80, at 573 (5th ed. 1984) (discussing movement for the passage of workers' compensation legislation).

occupation ("brakeman") as the dominant factor.[47] But for the injured African-American brakeman, it singles out his race ("only a negro") as the dominant factor.[48] This seems to suggest that claims agents should focus on an African-American plaintiff's race rather than his occupation in settling an African-American's injury claims.[49] This in turn implies that even when an injured white person and a similarly injured black person had the same job with the same salary, their claims might be treated differently by settlement agents. This differential focus would have pointed in the direction of lower compensation for African-American claimants.

While the race-based discount in individual cases was not necessarily always large, its cumulative effect may have been. If an injured white brakeman and an injured black brakeman were paid less for the same injury, that kind of difference could have ripple effects over many years. Hypothetically, one injured person might lose his house for lack of funds, while the more generously compensated person might be able to retain his house. This in turn could provide potential wealth for the person's children, and in turn, grandchildren, equity for future education loans, tax benefits, and psychological benefits that would be lacking for the person who lost his house. If one then thinks about the thousands of railway and streetcar injuries that occurred in the first half of the twentieth century, the magnitude of the harm caused by disparate recovery becomes more visible. This is not to say that the recovery provided to the injured white brakeman was adequate or generous. It was the opposite.[50] However, to get less than the pittance provided the injured white brakeman is to get little indeed.

### 2. Victories at Trial, and Race-Based Remittitur

Black plaintiffs won in front of juries for various types of tort claims in all regions, and appellate courts often affirmed those verdicts.[51] Many involved claims against large defendants such as

47. BRITTINGHAM, *supra* note 46, at 271.

48. *Id.*

49. *Id.*

50. *See* WITT, *supra* note 39, at 64 ("The rise of faultless injuries [in work-accident cases] precipitated a compensation crisis.").

51. Wriggins, *Torts*, *supra* note 1, at 100 n.7.

railroads for severe physical injuries.[52] Some recovered for injuries that did not involve actual physical harm or contact.[53] These types of tort claims involved psychological and dignitary injuries, and resulted in recovery of mental distress damages.[54] Not all claims were against large defendants. In one Louisiana case, for example, parents of a nine-year-old "colored boy" fatally shot by a fourteen-year-old child of a neighbor playing with a gun recovered $5,000 from the parents of the neighbor.[55] It is currently impossible to calculate figures like relative success rates at trial, reversal rates on appeal, and the like, because of the methodological issues mentioned earlier.

Given the racial caste system, it would not be surprising if many white actors in the torts system were more reluctant to recognize and compensate injuries to the psyches and dignity of African-Americans than to recognize and compensate their physical injuries. One example suggesting this possibility was a 1909 case seeking compensation for false imprisonment brought by a black Pullman porter falsely accused of stealing tickets and money.[56] A rich white financier, James Brady, made the false accusation, which resulted in porter Frank Griffin being briefly imprisoned before he was freed.[57] Since Griffin had neither suffered physical injury nor lost his job, the damages were essentially either mental distress damages, punitive damages, or both. The jury recognized Griffin's injury and awarded him $2,500.[58] The trial judge, former

52. Public recognition of these successes was important to some African-Americans, as the NAACP reported on some of them in *The Crisis* magazine. *Id.* at 107 n.33.

53. *See, e.g.*, Wilson v. Singer Sewing Mach. Co., 113 S.E. 508 (N.C. 1922) (upholding a black woman's battery verdict against Singer Sewing Machine for actions of rental agent in trying to repossess sewing machine by grabbing machine from plaintiff's hands while in her own home); Brown v. Crawford, 177 S.W.2d 1 (Ky. Ct. App. 1943) (affirming successful assault case of black former employee of distillery for manager charging after him and shooting at him, although manager missed).

54. Prosser and Keeton wrote about the tort of assault that "the plaintiff is protected against a purely mental disturbance . . . ." KEETON ET AL., *supra* note 46, § 10, at 43 (5th ed. 1984).

55. Sutton v. Champagne, 75 So. 209, 210–11 (La. 1917).

56. *Negro Not Equal to White: Suffers Less Humiliation in False Arrest, Court Holds*, N.Y. TIMES, May 22, 1909, at 16, col. 2.

57. *Id.*

58. *Id.*

Congressman Dugro, reduced the verdict 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."[59] Because blacks in the first place have a lower status, he asserted, the damage caused by being falsely imprisoned was necessarily less.[60]

The judge imposed a race-based standard to measure the damages remedy and reduce compensation to the black plaintiff.[61] Tellingly, his remittitur was affirmed in three appellate opinions, none of which discussed the substance of his action.[62] The trial court and appellate decisions received considerable critical attention in newspaper editorials across the United States, but minimal attention in contemporaneous legal scholarship.[63] The fact that the judge's explicitly racist reduction was affirmed by appellate courts, but criticized by the press, sent the following two-part message to judges deciding cases after *Griffin v. Brady*: first, if you think damage verdicts for black plaintiffs excessive because you think black plaintiffs deserve less than white plaintiffs, go ahead and reduce the verdicts pursuant to your discretion; second, do not be overt about your reasons for reducing the verdicts, or you may be loudly criticized in the press. It is almost impossible to know how frequently this kind of reduction happened in the wake of *Griffin*, but the common law system worked by just this kind of mechanism, where appellate decisions both resolved past cases and gave forward-looking messages to judges about what would be acceptable and what would be beyond the pale. It is plausible to assume that the message sent by *Griffin* was received and acted on by some jurists.

---

59. *Id.*

60. *Id.*

61. *Id.*

62. Griffin v. Brady, 117 N.Y.S. 1136 (App. Div. 1909) (mem.), *aff'd per curiam*, 118 N.Y.S. 240 (App. Div. 1909) (denying motion for reargument), *aff'd*, 126 N.Y.S. 1139 (App. Div. 1910) (mem.).

63. *E.g.*, *Discrimination on a Wrong Basis*, N.Y. TIMES, May 24, 1909, at 6 (evaluating Justice Dugro's analysis); Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 43 AMER. L. REV. 869, 905 (1909). This case is discussed further in Wriggins, *Torts*, *supra* note 1, at 130–35.

### 3. Use of Segregated Precedents

By and large, the tort remedies for African-American plaintiffs were determined by the usual tort approach of individualized, case-by-case settlement or trial. As in other tort contexts, the notion of rigorously comparing case outcomes to determine whether like cases were being treated alike was alien. Notwithstanding this general practice, some judges at times have attempted to make decisions on damages through comparing damage amounts awarded in similar cases.[64]

A comparative approach to remedy makes the choice of a comparison framework central to the analysis. Demonstrating this importance, some Louisiana courts in the 1930s, in determining damage amounts in wrongful death cases for black decedents, chose as their comparisons only cases involving prior deaths of black people. For example, the Louisiana First Circuit Court of Appeals overturned a defense verdict and awarded money to the parents of a black twenty-nine year old killed by a night watchman, stating in part,

> [I]n the . . . case of *Shamburg v. Thompson, Trustee*, we affirmed an award of $3200 to the mother of a twenty two year old colored boy who was injured by the train at nine o'clock in the morning and died in the afternoon of the same day. The parents of a twenty-nine year old colored boy were allowed $6,000 for loss of love and affection, support etc., and for the pain and suffering of the deceased in the case of *Rousseau v. Texas & Pac. R. Co., et al.* We have

64. *See, e.g.*, Jutzi-Johnson v. U.S., 263 F.3d 753, 759 (7th Cir. 2001) ("To minimize the arbitrary variance in awards bound to result from [the typical] throw-up-the-hands approach, the trier of fact should . . . be informed of the amounts of pain and suffering damages awarded in similar cases. And when the trier of fact is a judge, he should be required . . . to set forth in his opinion the damages awards that he considered comparable. We make such comparisons routinely."); Seffert v. L.A. Transit Auth., 364 P.2d 337, 346–47 (Cal. 1961) (Traynor, J., dissenting) ("Although excessive damages is an issue which is primarily factual and is not therefore a matter which can be decided upon the basis of the awards made in other cases, awards for similar injuries may be considered as one factor to be weighed in determining whether the damages awarded are excessive.") (internal quotations omitted).

> decided to fix the award in this case at $3500, which amount we believe to be proper under the facts and circumstance of the case."[65]

Prior damage awards for deaths of white people decided by the same court were treated as not relevant to determining the appropriate remedial amount for deaths of black people.[66]

It is easy to see now how problematic and objectionable this is. The deaths of black people were placed in a different category from deaths of white people. Moreover, using "black-only" precedent to determine damages, going back in time to earlier periods not long past slavery where education and wage disparities may have been even more pronounced, and applying those decisions to more recent torts, clearly reinscribes past discrimination on more recent cases. This use of precedent to determine damage amounts should give us pause because of the choice of framework and because it imposes past values on recent harm.

### 4. Mortality Tables, Race, and Pecuniary Loss

A New York admiralty case about a boat crash on a foggy night in the early twentieth century contains an extraordinary discussion about mortality tables that shows how racially influenced judgments about the value of a person's life have affected courts' views of the proper methodology to use in valuing such lives. The case, *The Saginaw and the Hamilton*, resulting from a collision between two boats in fog caused by the fault of both pilots, included discussion of the wrongful death cases of the eight people who drowned.[67] Six of the eight were "colored" and two of the eight were "white." Although the case eventually reached the United States Supreme Court and resulted in an affirmance by Justice Holmes, the trial judge's analysis of race and mortality tables was not mentioned in the appellate opinions.

---

65. Young v. Broussard, 189 So. 477, 481 (La. Ct. App. 1939) (internal citations omitted).

66. Wriggins, *Torts*, *supra* note 1, at 125.

67. 139 F. 906 (S.D.N.Y. 1905). The liability portion of the analysis is contained in *In re Clyde S.S. Co.*, 134 F. 95 (S.D.N.Y. 1904).

The damage law that applied to this collision was that of Delaware, which allowed only pecuniary loss damages to the surviving family members in wrongful death actions.[68] An admiralty commissioner made a preliminary decision on damage amounts, using standard mortality tables to estimate the life expectancies of the drowning victims, and in turn to gauge the pecuniary loss of the surviving family members.[69] Federal District Judge Adams, handling an appeal by the ship companies from the commissioner's decision, substantially reduced the damages for the surviving family members of both the black and the white decedents.[70] Judge Adams flatly rejected the use of mortality tables, although they were already commonly used in litigation for just this purpose.[71] Adams wrote that mortality tables "are very useful in insurance matters, but seem to afford little real aid in determining the duration of life in such cases as are now presented . . . . I have no confidence in, and less respect for, these tables made up by insurance agents, in which, of course, large allowance must be made for heavy commission, expenses, and profit. *And this is especially true where colored persons are concerned*."[72] He then quoted and included in his published opinion racially specific life expectancy tables based on census data from the 1896 book by Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro*.[73] These showed shorter life expectancies for "colored" people and purportedly showed "the difference in the vitality of the two races."[74] Frederick Hoffman is remembered for having claimed that the black population would eventually die out altogether because of its race-based "immorality," based on statistical analysis of comparative mortality and other figures,[75] and for being a prominent proponent of what

68. *The Saginaw*, 139 F. at 906 ("The measure of damages is such a sum as the deceased would probably have earned in his business during life, and would have gone to his next of kin, taking into consideration the age of the deceased, his ability, disposition to labor, habits of living and expenditure.").

69. *Id.* at 914–15.

70. *Id.*

71. *Id.*

72. *Id.* at 913–14 (emphasis added) (internal quotations omitted).

73. *Id.* at 914.

74. *Id.*

75. Brian Glenn, *The Shifting Rhetoric of Insurance Denial*, 34 LAW & SOC'Y REV. 779, 790–91 (2000). Glenn quotes the following passage from the Hoffman book on which Adams relied:

now is often termed "scientific racism."[76] Judge Adams thought that using "blended," race-neutral mortality tables, which presumably combined mortality data on whites and blacks, to estimate blacks' life expectancies, would overestimate blacks' life expectances.[77] To then base pecuniary loss estimates on those tables would be too generous to the surviving family members of black decedents, because of the shorter life expectancies of blacks.[78]

Judge Adams, significantly, did not substitute race-specific mortality tables from the census data.[79] Those race-specific mortality tables would have made the lost wage calculations lower, and hence the pecuniary loss calculations lower, than would using the mortality tables the commissioner applied.[80] Adams' assumption seems to have been that even using race-specific mortality tables based on past census data would overestimate black life expectancies

---

> For the root of the evil lies in the fact of an immense amount of immorality, which is a race trait, and of which scrofula, syphilis, and even consumption are the inevitable consequences. So long as more than one-fourth (26.5 per cent. in 1894) of the births for the colored population of Washington are illegitimate,—a city in which we should expect to meet with the least amount of immorality and vice, in which at the same time only 2.6 per cent. of the births among the whites are illegitimate,—it is plain why we should meet with a mortality from scrofula and syphilis so largely in excess of that of the whites. And it is also plain now, that we have reached the underlying causes of the excessive mortality from consumption and the enormous waste of child life. It is not in the conditions of life, but in the race traits and tendencies that we find the causes of the excessive mortality. So long as these tendencies are persisted in, so long as immorality and vice are a habit of life of the vast majority of the colored population, the effect will be to increase the mortality by hereditary transmission of weak constitutions, and to lower still further the rate of natural increase, until the births fall below the deaths, and gradual extinction results.

*Id.*

76. Beatrix Hoffman, *Scientific Racism, Insurance, and Opposition to the Welfare State: Frederick L. Hoffman's Transatlantic Journey*, 2 J. GILDED AGE & PROGRESSIVE ERA 2 (2003), *available at* http://www.historycooperative.org/cgi-bin/justtop.cgi?act=justtop&url=http://www.historycooperative.org/journals/jga/2.2/hoffman.html (last visited Oct. 7, 2007).

77. *The Saginaw*, 139 F. at 914.

78. *Id.* at 914–16.

79. *Id.*

80. *Id.*

because, according to Hoffman, blacks' lifespans were further decreasing due to the "difference in vitality"[81] of the two races.

Ironically, instead of using "better" race-specific mortality tables from the census to calculate the pecuniary loss remedy, he used an intuitive method, judging for himself how long he thought the decedents would have lived if they had not drowned, and meting out what he thought the surviving family members of each decedent would have received from the decedent.[82] He rejected the use of tables altogether to arrive at a sum that seemed fitting.[83] Although he lowered all the awards, on average he lowered the awards for the deaths of blacks ten percent more than the awards for the deaths of whites and he slashed three of the awards for blacks by forty percent or more.[84]

From today's perspective, Judge Adams and Frederick Hoffman were clearly wrong in their projections into the future. Judge Adams' approach, particularly given his seeming agreement with Frederick Hoffman's analysis, is also problematic because its individualized, intuitive method of determining remedies allows race and racism to have tremendous influence in ways that are nearly impossible to prove. While the idea of using group-based tables or generalizations to make decisions about damage remedy amounts is appealing in order to escape from the subjectivity of the intuitive method, any decision to use a group-based projection into the future as the basis for a damage remedy also involves normative judgments about the relevant frame of reference and the rate of future change.[85]

---

81. *Id.* at 914.

82. For example, regarding one victim, Sarah Elam, he wrote:

> The deceased was a colored stewardess on the Saginaw. She was 53 years of age and earned $10 per month with board. The latter was worth to her about $17 per month. She left three children who were more or less dependent upon her for support. The claimant was allowed $2,500. In view of the age of the deceased and her small earning capacity, I think the award was excessive and should be reduced to $1,500.

*Id.* at 915.

83. *Id.*

84. *Id.* at 914–916.

85. Chamallas, *Civil Rights*, *supra* note 1, at 1446.

### 5. Wrongful Death and Survival Damages in Louisiana

In order to examine how damages remedies may have been affected by race and racism, I read all the Louisiana appellate wrongful death and survival cases published between 1900 and 1950 dealing with the amounts of damages, of which there were 152. Twenty-six were brought by families identified as "Negro" or "colored," while the remaining 126 were brought by whites.[86] Louisiana's pertinent code provision allowed surviving family members in a wrongful death case to recover not only for pecuniary loss, grief, and loss of consortium, but also allowed the decedent's pain and suffering and lost wages to be recovered.[87] Louisiana cases were particularly rich with detail because, since Louisiana is a civil code state rather than a common law state, appellate review allowed judges to closely review facts, make their own factual determinations, and decide damage amounts.[88] Damage amounts awarded to surviving black family members overall were less than half amounts awarded to surviving white family members. The median award for black family members per case was $3,200, while the median award for white family members per case was $7,021. The average award for black family members per case was $3,559, while the average award for white family members per case was $8,245. The highest awards for both blacks and whites were for the deaths of husband-breadwinners, who had been supporting a wife and children, and the highest white award was more than double the highest black award. No clear pattern emerged as to appellate courts reversing jury verdicts for blacks or whites. Indeed, on occasion appellate courts reversed defense verdicts against black plaintiffs and ordered judgments in favor of black plaintiffs. Comparison of some contemporaneous cases from the same courts suggests "racially selective empathy,"[89] in which judges seem to value pain and

86. The Louisiana materials are discussed in more detail in Wriggins, *Torts*, *supra* note 1, at 110–29. I also reviewed cases from 1865–1900 dealing with amounts of damages, of which there were less than five. This research is also part of a larger project on wrongful death cases generally.

87. LA. CIV. CODE ANN., art. 2315 (2005).

88. *See* Wriggins, *Torts*, *supra* note 1, at 110–30 (discussing appellate review of Louisiana wrongful death cases from 1940–1949).

89. Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment,*

suffering and even lost wages of white decedents more highly than that of black decedents.

## IV. 1950S–NOW

Methodological problems mentioned earlier continue to make definitive conclusions elusive. The race of litigants is mentioned in appellate tort opinions less and less frequently from 1950 on. No longer is the civil justice system 'white' in exactly the way it was earlier. African-Americans can be jurors, and there are some African-American lawyers and judges. Anecdotal information, however, suggests devaluation patterns endure.[90] Race-specific worklife expectancy tables are used in cases where plaintiffs have no established work history, and these clearly disadvantage minority plaintiffs since they project lower earnings for racial minorities.[91] Empirical studies on the effect of race on damage outcomes point in contrasting directions.

One of the few studies with data on race and tort remedies is the well-known "Cook County Study."[92] The Cook County study was an analysis of over 9,000 civil jury trials in Cook County, Illinois that took place between 1959 and 1979.[93] Focusing only on race in terms of black and white, the authors found that "race seemed to have a pervasive influence on the outcomes of civil jury trials," that black plaintiffs lost more often than white plaintiffs in similar cases, and that the disadvantage for black plaintiffs was not less near the end of the study period.[94] This study noted that successful black plaintiffs received awards only 74% as large as white plaintiffs'

---

*and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988); *see* Wriggins, *Torts*, *supra* note 1, at 122–24 (discussing case comparisons).

90. Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 780 (1996).

91. Chamallas, *Civil Rights*, *supra* note 1, at 1438–39. Canadian jurisprudence has much more directly explored the ramifications of using race- and gender-specific worklife expectancy tables, as discussed in Chamallas, *Civil Rights*, *supra* note 1.

92. AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (1985).

93 *Id.* at v.

94. *Id.* at viii.

awards in comparable cases.[95] The authors also found that black plaintiffs were underrepresented relative to their proportion in the population, suggesting contingent fee lawyers may have been less willing to take their cases.[96] If so, perhaps this was because damages like lost wages were low, the authors suggested.[97] Neil Vidmar has criticized the supposition that juries discriminate against black plaintiffs, and suggested other possible explanations. He posits that perhaps less competent lawyers represented blacks, perhaps black clients could not afford economic or other experts to demonstrate the cost of their injuries, or perhaps black litigants had lower economic losses.[98]

A fascinating, more recent study concluded, based on an impressive array of data, that average jury verdicts significantly increased as black county poverty rates increased.[99] It also found that jury verdicts increased as Hispanic county poverty rates increased, although the authors were less sure of that conclusion because of definitional issues.[100] Noting the paucity of research on race and the civil justice system in contrast to the better-studied relationship between race and the criminal justice system, the authors' general hypothesis is that jury population affects tort awards.[101] The study did not include actual jury composition but inferred higher black jury populations from higher black and Hispanic populations in certain counties.[102] It also did not have data on the race of plaintiffs or defendants. The study also noted that increases in the white poverty rate actually led to decreases in verdict

---

95. *Id.*

96. Neil Vidmar, *Making Inferences About Jury Behavior from Jury Verdict Statistics*, 18 LAW & HUM. BEHAV. 599, 606 (1994).

97. CHIN & PETERSON, *supra* note 92, at ix.

98. Vidmar, *supra* note 96, at 606.

99. Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 26, 51–52 (2003). One large state court dataset dealt with trials from 1997–1998, a smaller federal court dataset dealt with trials from 1988–1997, and an additional state court dataset covered trials from 1991–1992. *Id.* at 29–32. The study also found that increases in the black poverty rates increased settlement amounts in those counties. *Id.* at 50. What the authors mean by "black poverty rate" is the "number of in-poverty blacks as a percentage of the county population." *Id.* at 38.

100. *Id.* at 47.

101. *Id.* at 38.

102. *Id.* at 52.

size.[103] The authors did not draw conclusions about causation, but they did control for many variables that might have influenced the result.[104] The authors note that "[o]ne hypothesis that could explain our results is that poor black and Hispanic jurors decide cases differently from white jurors of all poverty levels. Given the different life experiences of poor black and Hispanic jury members relative to whites of all poverty levels, it appears plausible that the decisions of such jurors about justice and due compensation could differ significantly from those of other jurors."[105] One revealing observation is that while some may argue that these data show that verdicts are 'too high' in poverty-stricken areas with predominately black and Hispanic populations, this 'too high' conclusion is only sound if you take the proper norm as being the norm in other areas. If you take the verdicts from black and poor, and Hispanic and poor areas reported in the study as the norm, verdicts elsewhere are 'too low.' Particularly given the seemingly disparate conclusions of the various studies, more research into contemporary dynamics of race and civil justice remedies is necessary.

## V. CONCLUSION

The most common tort remedy is money damages for individuals. When black plaintiffs brought damages cases, tort remedies for individuals could, and did, have broad implications for persons other than the plaintiffs. An outstanding example of this is the important Fifth Circuit case of *Bullock v. Tamiami Trails Tours*, where the Fifth Circuit in 1959 held that a bus company was liable for injuries that a black married couple seated in the front of a bus suffered when a white passenger assaulted and battered them.[106] Tort law in this case served as a civil rights remedy, putting other interstate bus companies on notice that their obligations included protecting black passengers sitting in the front of buses.

Given the importance of race and racism in our nation's legal history, it would be astonishing if race and racism played no role in the assessment of damages. New attention to race and damages,

103. *Id.* at 43.
104. *Id.* at 41–49.
105. *Id.* at 52.
106. 266 F.2d at 332.

particularly from Emancipation to 1950, paints a complex picture showing that race and racism are not extrinsic to torts but are as surely a part of it as is industrial development. Torts used an individualized market mechanism, the contingency fee agreement, which broadened access to remedies beyond what it would have been in the absence of that mechanism. Yet that same commitment to individualized remedial measures allowed great subjectivity, variation, and bias in settlements, trials, and appeals. In other words, the system allowed great latitude for like cases to be treated differently. Indeed, claims brought by African-American plaintiffs often seem to have been valued for less than comparable claims brought by whites. Moreover, the cumulative effect of even small differences in damage remedies may be great over time. The individualized enforcement mechanism and corresponding room for subjectivity, variation, and bias remain past 1950. More recent evidence is somewhat contradictory but does confirm the conclusion that race is significant in tort remedies.

The contemporary quest for ways to make damage remedies more consistent should be informed by examples from the racial history of tort law. The decision to use a particular framework of comparison is key, as we see in the "black-only" precedents chosen by some Louisiana courts in the 1930s to value (and devalue) the loss of black lives. Moreover, our search for neutral and consistent group-based predictions to estimate life expectancy and lost earnings is bound to be hounded by normative judgments. Federal Judge Adams' decision in early twentieth century New York, refusing to apply race-neutral mortality tables to pecuniary loss calculations for deaths of black people because he thought the black race would die out, is emblematic of the challenging nature of this search. If decisionmakers are attuned to the assumptions animating the choices of frameworks, tort remedies may hold promise for greater equity in the future.