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**The Action Was Outside the Courts: Consumer Injuries and the  
Uses of Contract in the United States, 1875–1945.**

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The legal history of personal injury claims in late nineteenth- and early twentieth-century America lies not only in the law of torts but equally, if not more importantly, in the law of contracts. The bulk of that history, moreover, lies not in formal judgments of courts but in private decisions of injury victims to waive, settle, or abandon their claims without judicial resolution. A major part of that out-of-court process, in turn, consisted not of freely bargained agreements that occurred randomly but rather of pressured settlements that were harvested systematically. To a large and insufficiently unexplored extent, the legal history of personal injury claims lies in the organized release-seeking practices of thousands upon thousands of corporate lawyers, doctors, and claim agents who secured quick and low-cost settlements in countless numbers of homes, streets, offices, roadways, factories, vehicles, and hospitals where injury victims and their families were found.

The years from the 1870s to the 1940s constituted a distinct period in the development of corporate settlement practices. During the last quarter of the nineteenth century, a rapid increase in commercially related accidents and the emergence of a plaintiffs' personal injury bar coincided with the nationalization of the economy and the rationalization of corporate management techniques to spur a systematic use of releases to pre-empt potential tort claims. By the end of the century the methodical and aggressive new practices were in widespread use. Then, in the early years of the twentieth century, continued expansion of the plaintiffs' personal injury bar and the growth of labour unions and consumer groups increased the de facto access of tort victims to

counsel, while popular attitudes increasingly supported the idea that injured persons should be more fully compensated. Both courts and legislatures moved to strengthen the legal position of those who sought to sue corporate defendants. Beginning in the 1920s, the numbers of commercially related accidents declined, and insurance coverage expanded rapidly, spreading costs, bringing financial predictability, and decreasing the pressure on corporations to terminate adverse tort claims for the barest possible amounts. By the mid-twentieth century, corporate settlement practices—especially those of large insurance companies and their well-protected clients—had become increasingly bureaucratized and routinized. The result was to moderate some of the companies' most objectionable practices, raise the general level of compensation paid, and increase somewhat the regularity with which the de facto tort compensation system operated.

A consideration of corporate release-seeking practices highlights a major gap that has marked the history of personal injury litigation. From the turn of the century corporate spokespersons decried the work of 'ambulance chasers' and complained about a purported flood of frivolous and fraudulent claims.<sup>1</sup> Many lawyers and bar associations joined the attack, denouncing the 'abuses' fostered by contingent fee agreements and the ethical failures of personal injury attorneys. Similarly, much contemporary law and economics literature follows the same track, focusing on frivolous 'strike' and 'nuisance' suits.<sup>2</sup> While such commentary has raised important issues, it has also largely ignored significant elements of the de facto litigation and settlement process. One, for example, is the abusive tactics that corporations utilized. '[W]hen we are for the defendant', explained one corporate lawyer, 'nothing can start us.'<sup>3</sup> They delayed cases, raised frivolous defences, filed excessive motions and appeals, and tried numerous other similar tactics to compound plaintiffs' burdens and raise their costs. Another element often ignored is the fraudulent and unethical

<sup>1</sup> Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (New York, 1992), 150-4 and sources cited therein.

<sup>2</sup> See, e.g., Lucien Arye Bebbchuk, 'Suing Solely to Extract a Settlement Offer', *Journal of Legal Studies*, 17 (1988), 437-50.

<sup>3</sup> Quoted in Sol M. Linowitz, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (New York, 1992), 25. On the importance of building a litigation 'reputation', see, e.g., Samuel R. Gross and Kent D. Syverud, 'Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial', *Michigan Law Review*, 90 (1991), 319-93.

behaviour of defendants. From 1889 to 1902, for example, the Metropolitan Street Railway Company of New York paid thousands of dollars in bribes to doctors, witnesses, court personnel, and police officers in order to defeat countless numbers of claimants. Eventually, after its practices were exposed, the company admitted that its legal department had been 'a perjury mill'.<sup>4</sup> A third such element, which this essay explores, is the methodical solicitation of inequitable out-of-court settlements. Indeed, corporate release-seeking practices helped stimulate—even necessitated—'ambulance chasing'. If plaintiffs' lawyers did not reach injury victims quickly, corporate agents would have their signatures on releases. No adequate understanding of the litigation and settlement process is possible without a consideration of such social factors.

### *Consumers and claiming*

In the decades around the turn of the century industrial accidents caused approximately 35,000 deaths and almost 2 million injuries per year.<sup>5</sup> For 'consumers' as a growing and identifiable social group, injuries resulted from contacts with a nearly infinite variety of objects, products, vehicles, activities, and facilities. For half a century the railroads injured 5,000–10,000 passengers every year and annually caused the death of several hundred more.<sup>6</sup> In the decade from 1887 to 1896 streetcars in New York City averaged some 140 accidents per year, while in Boston trolley accidents rose from just over 200 in 1887 to more than 1,700 in 1900.<sup>7</sup> Other new urban services similarly caused untold numbers of accidents. Gas and electricity accounted for twenty-eight deaths in Boston in 1900, and gas alone caused 142 deaths in New York City ten years later.<sup>8</sup>

<sup>4</sup> *In re Robinson*, 136 NYS 548 (App. Div. 1st NY 1912), *affirmed* 103 NE 160 (Ct. App. NY 1913); New York State Bar Association, 'Report of Committee on Contingent Fees', *Proceedings of the Thirty-First Annual Meeting* (1908), 121.

<sup>5</sup> Lawrence M. Friedman, *A History of American Law* (2nd edn., New York, 1985), 482.

<sup>6</sup> United States Department of Commerce, Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970* (Washington, 1975), pt. 2, 740.

<sup>7</sup> W. J. Clark, 'A Chapter of Accidents', *Street Railway Journal*, 13 (Oct. 1897), 667–70, 669; Robert A. Silverman, *Law and Urban Growth: Civil Litigation in the Boston Trial Courts, 1880–1900* (Princeton, 1981), 101.

<sup>8</sup> Silverman, *Law and Urban Growth*, 108; Randolph E. Bergstrom, *Courting Danger: Injury and Law in New York City, 1870–1910* (Ithaca, NY, 1992), 51.

Although the conditions of late nineteenth- and early twentieth-century life created literally millions of potential tort claims, the courts disposed of relatively few of them. Most never became lawsuits, and a majority of those that did were settled without final legal judgment. In one way or another, out-of-court resolutions accounted for more than 90 per cent of all potential tort claims and well over half of those that were filed in court.<sup>9</sup>

There are few reliable statistics, but it seems likely that, compared to injured workers, at least, consumers as a group converted a somewhat higher—though still relatively small—percentage of their potential claims into lawsuits and may have prosecuted a slightly higher percentage of those suits to judgment.<sup>10</sup> Consumers were generally free from the kinds of social and economic pressures that corporate employers used so effectively to discourage suits by their own employees,<sup>11</sup> and they often had little to lose and much to gain, especially if their injuries were serious and contingent fee arrangements allowed them counsel. Further, again as compared to injured workers, consumers occupied a more favoured legal position. They did not have to confront the daunting fellow-servant defence, and they could often avoid difficult evidentiary problems by invoking the doctrine of *res ipsa loquitur*. Finally, some consumers—principally passengers on elevators and escalators, amusement park rides, taxicabs, railroads, streetcars, and buses—enjoyed an especially favoured position. Common carriers owed them not merely the standard duty of ‘reasonable care’ but rather a much more rigorous duty of ‘the highest care’. That higher standard meant that injured passengers could more commonly and economically prove the carriers’ liability. Moreover, in the frequent cases that involved collisions, derailments, explosions, and other mechanical failures, carriers were deprived of two of their most powerful defences, contributory negligence and assumption of risk.

<sup>9</sup> Frank M. Munger, Jr., ‘Miners and Lawyers: Law Practice and Class Conflict in Appalachia, 1872–1920’, in Maureen Cain and Christine B. Harrington (eds.), *Lawyers in a Postmodern World: Translation and Transgression* (New York, 1994), 185–228, 210, 228 n. 42; Purcell, *Litigation and Inequality*, 32–3, 259–60.

<sup>10</sup> Lawrence M. Friedman, ‘Civil Wrongs: Personal Injury Law in the Late 19th Century’, *American Bar Foundation Research Journal* (1987), 351–77, 367.

<sup>11</sup> Social and economic vulnerability and the fear of employer retaliation made workers extremely reluctant to sue their employers for tort compensation. Munger, ‘Miners and Lawyers’, 209–11, 227 n. 40, 228 n. 43; Purcell, *Litigation and Inequality*, 37–42.

*Corporate defendants: incentives and leverage*

Whatever the exact percentage who brought suit, corporate defendants worked painstakingly to keep as many tort victims as possible out of court. A handbook for railroad accountants emphasized the importance of settling claims without judicial involvement. While a corporate legal staff handled a variety of problems, it explained, a 'very large part of its duty is to effect settlement of disputes outside of court,' especially in 'personal injury' cases.<sup>12</sup> A streetcar company announced bluntly that its policy was 'to settle all accident cases promptly, and never allow them to reach the courts if we can possibly prevent it'.<sup>13</sup>

Powerful economic incentives spurred corporate efforts to settle out of court. Potential tort claims threatened regular and substantial economic exposure.<sup>14</sup> Transportation companies, in particular, had compelling economic incentives to settle adverse claims. They tended to be involved in large numbers of personal injuries, and often their fault was clear and no legal defence available. In such cases out-of-court settlements constituted the best—and perhaps only—opportunity to resolve claims for relatively minimal amounts.<sup>15</sup> Further, railroad and streetcar companies were often under acute financial pressure, and they sought avidly to trim their variable costs wherever possible.

An additional economic incentive may also have inspired corporate settlement efforts. Some scholars have maintained that common law judges sought economically 'efficient' results. They maintain, that is, that the courts tended to hold defendants liable for negligence only when the 'costs' of preventing an injury were less than the 'costs' of the injury itself discounted by its likelihood of occurrence. If they are right, that common law dynamic created a compelling economic incentive for corporate defendants to press for minimal settlements. For, by holding down settlement amounts generally, they could help create and maintain a widespread perception that the 'costs' of injuries—a subjective, socially generated criterion—were and should be quite low. By

<sup>12</sup> J. Shirley Eaton, *Handbook of Railroad Expenses* (New York, 1913), 197-8.

<sup>13</sup> Quoted in Friedman, 'Civil Wrongs', at 371.

<sup>14</sup> See, e.g., M. L. Byers, *Economics of Railway Operation* (New York, 1908), 566-9; Eaton, *Handbook*, 81-83, 115-17, 187-91, 197-8.

<sup>15</sup> Friedman, 'Civil Wrongs', at 375; Bergstrom, *Courting Danger*, at 158-60.

minimizing the generally perceived 'costs' of injuries they could ensure that the applicable negligence formula would shrink the scope of their potential liability and thereby reduce the overall number of cases where the law would require them to pay damages.<sup>16</sup>

Driven to minimize the cost of claims, corporate defendants came quickly to recognize the advantages of out-of-court settlements. Most fundamental, they learned that such settlements could often be arranged easily and cheaply if accomplished immediately after an accident. Victims were frequently in no condition to negotiate knowingly or effectively. Often they were alone, in shock or pain, disoriented and frightened, and ignorant of both their legal options and the extent of their injuries. Above all, their immediate and overwhelming concern was to obtain proper medical treatment. The victim of a Santa Fe Railway collision, for example, who had received cuts, bruises, a broken leg, and a fractured skull, signed a release in the railroad's hospital four days after the accident. The victim 'did not seem to care' about 'the matter of dollars and cents', the agent who secured the agreement testified. 'All he wanted was to have proper care.'<sup>17</sup> Sometimes, injury victims were preoccupied with the condition of another member of their family who had also been injured. Sometimes, they were emotionally shaken but deeply relieved—and therefore pliable—because they had apparently not been injured more seriously. 'I was glad to save my life,' explained one injured worker who signed a release shortly after his injury.<sup>18</sup> An insurance company official acknowledged the obvious. 'In settling claims considerable money can be saved if done in the early stages before the case falls into the hands of an attorney.'<sup>19</sup>

While corporations held overwhelming advantages in dealing with accident victims immediately after their injury, they also had other advantages they could use against those who resisted settlement. First, corporations learned that most injury victims were unable to bear the burdens of litigation. If companies insisted on

<sup>16</sup> See, e.g., Richard A. Posner, 'A Theory of Negligence', *Journal of Legal Studies*, 1 (1972), 29. Cf. Bergstrom, *Courting Danger*, 167-96.

<sup>17</sup> *Atchison, Topeka & Santa Fe Railway Co. v. Cunningham*, 54 P. 1055, 1057 (Sup. Ct. Kan. 1898).

<sup>18</sup> United States House of Representatives, *Hearings before Subcommittee No. 4 of the Committee on the Judiciary of the House of Representatives*, 80 Cong., 1 sess. (1947), 72.

<sup>19</sup> Quoted in Roy Lubove, 'Workmen's Compensation and the Prerogatives of Voluntarism', *Labor History*, 8 (1967), 254, 260 n. 15.

their non-liability while making low settlement offers, they could compel injured individuals to choose between a quick, easy, and cost-free resolution and a risky, expensive, and protracted litigation. They knew that potential plaintiffs were balked by any number of practical obstacles: psychological inability to face confrontation, ignorance of the judicial system, fear of the company or its representatives, unfamiliarity with—or deep distrust of—lawyers, a desperate need for money to pay medical expenses and provide for their families, knowledge that attorneys' fees would consume much of any award they might win, the costs of retaining expert witnesses and locating and assuring the timely appearance of fact witnesses, the innumerable risks and uncertainties involved in litigation and trial, the costs and delays of the nearly inevitable appeal that would follow any plaintiff's victory, and, finally, the cumulating personal and family pressures that years of waiting for a final legal judgment could generate.<sup>20</sup> By the late nineteenth century corporate defendants had learned that those pressures would combine relentlessly to make most claimants falter and eventually succumb to discounted settlement offers. They understood, in short, the uses and forms of strategic cost imposition.<sup>21</sup>

Second, corporations also learned to use their economic leverage. They had relatively fixed legal costs and handled large numbers of cases and, consequently, were able to spread the higher costs of the relatively few cases they chose to litigate over the much larger number they settled. In contrast, individual claimants bore the entire cost of their litigations and had to pay for them out of whatever proceeds resulted from their single suit. Moreover, because corporate defendants had legal costs that were budgeted, relatively fixed, and spread over a large base, they were not subject to significant economic pressure by any action that an adversary might take in filing, litigating, trying, or appealing a

<sup>20</sup> See, e.g., Austin Sarat, 'Studying American Legal Culture: An Assessment of Survey Evidence', *Law and Society Review*, 11 (1977), 427-88, 436, 448-52, 464-5, 466-72; David M. Engel, 'Cases, Conflict, and Accommodation: Patterns of Legal Interaction in an American Community', *American Bar Foundation Research Journal* (1983), 803-74, 816-22, 851; Purcell, *Litigation and Inequality*, chs. 2 and 3.

<sup>21</sup> Kathleen Engelmann and Bradford Cornell, 'Measuring the Cost of Corporate Litigation: Five Case Studies', *Journal of Legal Studies*, 17 (1988), 377-99; Keith N. Hylton, 'Litigation Costs and the Economic Theory of Tort Law', *University of Miami Law Review*, 46 (1991), 111-48.



claim. Further, knowing that most claims would ultimately settle, they could generally be indifferent to the fate of any individual case,<sup>22</sup> a position that strengthened their resolve to stand firm on low settlement offers. Finally, their permanent legal staffs and substantially lowered per-case costs meant that corporate defendants could, when necessary, allocate extensive resources to litigate specific and troublesome disputes. That capability, in turn, enabled them to drive up the costs of those claimants who chose to litigate seriously—thereby devaluing their claims—and to increase their own chances of winning in court.<sup>23</sup> Corporations utilized, in short, the strategic advantages they held as the least costly litigators.

To obtain quick releases, corporate defendants organized special claims departments and retained networks of agents across the country. 'These cases constitute so regular and large a group, and are so nearly similar', explained a railroad accounting handbook, 'that they result in specialization with regular staffs to handle them.'<sup>24</sup> One of the first responsibilities of a corporate legal staff, announced a study of railroad economics, was '[t]he settling of claims for personal injury'.<sup>25</sup> A streetcar company explained that it instructed its agents to 'hunt up' injury victims, get in their 'good graces', and 'insist on paying [them] something' to get their signatures on releases.<sup>26</sup>

Those regular staffs and individual agents enjoyed wide discretion in conducting their operations. They had one clear goal—to obtain quick and inexpensive settlements—and one clear test of success—whether or not they got the desired releases. They could choose their tactics, adapt their approach to any situation, and

<sup>22</sup> Corporate attorneys would ensure the settlement—generously, if necessary—of suits that were legally or prudentially indefensible or that threatened to alter the law in an unfavourable direction. See, e.g., Wayne V. McIntosh, *The Appeal of Civil Law: A Political-Economic Analysis of Litigation* (Urbana, Ill. 1990), 146.

<sup>23</sup> See Stanton Wheeler, Bliss Cartwright, Robert A. Kagan, and Lawrence M. Friedman, 'Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970', *Law and Society Review*, 21 (1987), 403–45, 439–40; McIntosh, *Appeal of Civil Law*, 146, 150–1. For defendants' legal/economic advantages, see Robert D. Cooter and Daniel L. Rubinfeld, 'Economic Analysis of Legal Disputes and their Resolution', *Journal of Economic Literature*, 27 (1989), 1067, 1073–4; Martin J. Bailey and Paul H. Rubin, 'A Positive Theory of Legal Change', *International Review of Law and Economics*, 14 (1994) 467–77.

<sup>24</sup> Eaton, *Handbook*, 197–8. Compare R. W. Kostal, *Law and English Railway Capitalism, 1825–1875* (Oxford, 1994), app., 373–88.

<sup>25</sup> Byers, *Economics of Railway Operation*, 566.

<sup>26</sup> Quoted in Friedman, 'Civil Wrongs', at 371.

rely on the fact that their statements would go unrecorded. Their positions gave them both the opportunity and incentive to pressure claimants immediately, vigorously, and tenaciously. Their employers profited from their successes and had little or no economic incentive to supervise them closely or to restrain their tactics. Individual tort claimants held no significance as regular customers or suppliers, and they seldom possessed any social or economic leverage against their corporate adversaries. Neither the companies nor their agents had any noticeable incentive to cultivate their goodwill. The companies devoted few resources to constrain their agents, and the agents quickly learned the most efficient methods available to bring in the largest number of settlements at the lowest possible cost.<sup>27</sup>

### *Practice*

Reported release cases do not merely state the law. They also record something quite different: the operation of an alternative corporate legal process—massive, organized, profitable, and largely invisible to the public.<sup>28</sup> They reveal the companies' standard tactics, their frequent successes, and the substantial savings they reaped. They suggest, further, both the relative unimportance of substantive legal norms and the decisive importance of the

<sup>27</sup> Economic and rational choice theories support this conclusion. See, e.g., Cooter and Rubinfeld, 'Economic Analysis of Legal Disputes', 1078-86. See Carl Gersuny, *Work Hazards and Industrial Conflict* (Hanover, NH, 1981).

<sup>28</sup> There was an interesting split in the period's legal literature. Judges and practitioners frequently referred to organized and aggressive agent tactics, but the university law reviews were largely silent on the subject. Revealingly, when the law reviews discussed releases, they did so with an almost exclusive focus on matters of doctrine and 'logic'. Indeed, they directed most of their efforts to a critique of a single topic, the 'joint tortfeasors rule'. Obviously dysfunctional and unfair, the rule lent itself readily to a sharp doctrinal critique; e.g., note, *Harvard Law Review*, 28 (1915), 802-4; note, *Yale Law Journal*, 28 (1918), 90-1; *Michigan Law Review*, 18 (1920), 680-4. Only rarely, and well after the turn of the century, did the law reviews discuss the significance of organized corporate release practices: e.g., note, *University of Chicago Law Review*, 5 (1938), 455-63. This difference between the courts and the law reviews suggests, again, that legal 'formalism' was a relatively limited phenomenon, that the bench was generally sensitive to the law's social context, and that there was much less congruence than often assumed between the 'mentalities' of some 'high formalists' on the one hand (e.g. the discussion of releases in Samuel Williston, *The Law of Contracts*, vol. iii (New York, 1929), 3138-208) and large numbers of judges and practitioners on the other. See Edward A. Purcell, Jr., review of G. Edward White, *Justice Oliver Wendell Holmes*, *Journal of Southern History*, 61 (1995), 620, 622.

social characteristics of the parties in determining who received compensation and how much they received.

The single most obvious and important characteristic of corporate practices was the sheer speed with which claim agents acted. Repeatedly, the courts criticized their 'unseemly haste'.<sup>29</sup> Claim agents, declared a lawyers' magazine in 1905, 'fly with the wings of an eagle to the scene of the accident'.<sup>30</sup> The Vice-President of the American Electric Railway Association acknowledged that corporations sought 'the immediate settlement of accidents and damages'. Indeed, companies should provide their claims agents with a ready cash 'Working Fund', he advised, so that their agents could settle cases without having to 'wait until the regular check and voucher can be received'.<sup>31</sup> The railroads sometimes held trains in place until their claims agents arrived and secured the desired releases. One court, for example, criticized a railroad for

[h]olding the train, sending for a law agent to make a settlement before any medical or other attention was given [the injured person], and when she was suffering from [a concussion of the brain and spine], and, if conscious, giving her attention to her little, bleeding grandson.<sup>32</sup>

The railroads took injured passengers to company hospitals where their claim agents had ready access to them; they placed agents on board their trains to secure releases from them while they travelled; and they stationed agents in waiting at passengers' down-line transfer or destination points. Railroad, streetcar, taxicab, and bus companies took injured passengers to depots or company offices or tracked them to nearby hospitals or doctors' offices. Within days of accidents—sometimes hours—agents arrived at the doors of injured persons' homes or resting places seeking their signatures on releases. Immediate contact with injured persons and control of the post-injury situation was designed to exploit the uncertainty, confusion, and anguish that followed in the immediate wake of personal injuries. In 1908 the New York State Bar Association castigated

<sup>29</sup> c.g. *Chicago, Rock Island and Pacific Railway Co. v. Lewis*, 109 Ill. 120, 134 (1884).

<sup>30</sup> Editorial note, *Virginia Law Register*, 11 (1905), 843.

<sup>31</sup> Irville Augustus May, *Street Railway Accounting: A Manual of Operating Practice for Electric Railways* (New York, 1917), 253.

<sup>32</sup> *Southern Railway Co. in Kentucky v. Brewer*, 105 SW 160, 163 (Ct. App. Ky. 1907).

the practice, now become notorious, of unscrupulous agents of railroad corporations seeking out injured persons, and, through chicanery and fraud, obtaining from them, in the moment of their pain and suffering, releases on insufficient consideration.<sup>33</sup>

The releases that such victims signed were almost invariably for steeply discounted amounts, often for small or wholly token payments.

Incessant pressure was the second major characteristic of corporate settlement practices. Agents hounded potential claimants to sign releases. They pressured them with repeated visits to their hospitals and homes; they told them that they had to leave town and that there could be no settlement if the victims waited; and they persistently pressed them to sign releases regardless of their feelings, prior refusals, and uncertain medical conditions. 'The agent of the company who approached [an injured passenger] was notified by her nurses and attendants that she was not in a mental and physical condition to attend to any business', the Supreme Court of Georgia explained in one case, 'but he insisted on an interview or settlement.'<sup>34</sup> The Eighth Circuit described the case of an injured man in the hospital under the influence of narcotics:

Three or four days after the accident, while this [narcotics] treatment was going on, and while his arms were suspended over a rope stretched across his bed in order to relieve the pressure upon his injured spine, and when he was tortured and racked with physical pain (when not under the influence of opiates), the defendant's agents found their way into his sickroom, from which his friends and all others, save his nurses, had been excluded, by order of his physician.<sup>35</sup>

The Wisconsin Supreme Court described the actions of an agent who secured a release from a 66-year-old woman by making a number of false representations:

He succeeded in getting her to sign by high-pressure methods during a siege at her bedside in the hospital, from 7:30 to 9:30 p.m., within seventy-five hours after she had been injured. She was badly shocked,

<sup>33</sup> New York State Bar Association, 'Report of Committee on Contingent Fees', *Proceedings of the Thirty-First Annual Meeting* (1908), 103.

<sup>34</sup> *Smith v. Georgia Railroad & Banking Co.*, 62 SE 673, 674 (Sup. Ct. Ga. 1908).

<sup>35</sup> *Union Pacific Railway Co. v. Harris*, 63 F. 800, 803 (CCA 8th 1894), *affirmed* 158 US 326 (1895).

and grievously hurt, her hip was fractured, the pain was excruciating, she was dazed, confused, mortified, and embarrassed . . . While she was in an exhausted and distressed condition, packed in sand bags to keep her hip immobile, and racked with pain and under the influences of sedatives and hypnotics, the adjuster, whom she had never known, entered her room without her permission.<sup>36</sup>

Agents of one railroad secured a release by making the injured person's mark and having him touch the pen while he 'was lying in his bed, the morning after his foot had been amputated, under the influence of opiates'.<sup>37</sup> Another agent persuaded a doctor to suspend his examination and treatment of an injured passenger—who 'was suffering severe pain'—while he secured his signature on a release.<sup>38</sup> The Supreme Court of Pennsylvania found that another claimant 'was in the hospital, suffering from his injuries, and was unconscious, at the time it is alleged the release was signed by him'.<sup>39</sup>

The third major characteristic of corporate settlement practices was their methodical and often ruthless opportunism. Agents reached agreements not only with persons suffering great physical and emotional distress, but also with those who were elderly, illiterate, unable to speak or understand the English language, and under the influence of some type of drug or alcohol given as a painkiller. They attempted to deal with injured persons while they were alone, often trying to keep others out of the room while they obtained their signatures. Some succeeded in getting releases from parties with attorneys by dealing with them alone and without their attorneys' knowledge. One railroad treated a female passenger, gave her narcotics, and placed her on a train in a locked car with several of its agents.<sup>40</sup>

Claim agents used a variety of dubious techniques. They offered jobs with the company and promised to 'take care of' victims if their injuries proved more serious than they appeared. They tried to divide potential claimants and use them against one another. They apparently switched or misrepresented documents or altered

<sup>36</sup> *Allison v. Wm. Doeflinger Co.*, 242 NW 558, 561 (Sup. Ct. Wisc. 1932).

<sup>37</sup> *Jones v. Alabama & Vicksburg Railway Co.*, 16 So. 379, 380 (Sup. Ct. Miss. 1894).

<sup>38</sup> *Springfield Consolidated Railway Co. v. Pickett*, 125 Ill. App. 519 (Ct. App. 3d Ill. 1906).

<sup>39</sup> *McCaw v. Union Traction Co.*, 54 A. 893, 895 (Sup. Ct. Pa. 1903).

<sup>40</sup> *St. Louis, Iron Mountain and Southern Railway Co. v. Phillips*, 66 F. 35, 37-8 (CCA 8th 1895).

the terms of the agreements they had negotiated when they presented written releases for signature. A street railway employee told an injured woman that 'she would be kicked off the car' unless she signed a release,<sup>41</sup> while a claim agent bought a victim six drinks in a bar before obtaining his signature.<sup>42</sup> Another agent used the captivating lure of, literally, a pile of money. He 'came to the meeting with a general release all prepared, except filling blanks, and with 100 \$5 bills, which at some time during the negotiation were laid in a pile on the table before the [injured person]'.<sup>43</sup>

Again, claim agents quickly gathered and then used whatever relevant information they could discover. They interviewed doctors who had treated injured persons, apparently violating the patients' rights to confidentiality, and obtained valuable medical information that could help the company in future lawsuits. More immediately, they used such medical information directly, telling injured persons about their conversations and claiming that the victims' own doctors regarded their injuries as minor or temporary. Similarly, agents interviewed both victims and potential witnesses, obtaining additional information both to pressure claimants for settlements and to prepare for litigation. Together with regular company employees, they asked passengers to sign reports about the nature and cause of their injuries, securing potentially powerful admissions to undercut subsequent claims.

Their efforts, too, were comprehensive. They insisted on getting releases even from those who believed they had not been injured or who disclaimed any desire for compensation. The agents pressed them to accept token payments in order to cover possible injury to their clothing, parcels, or baggage; they insisted that they take small amounts of money to compensate for whatever 'expenses' or 'inconveniences' they might have suffered. Sometimes, the agents offered the money as a purported 'gift' or 'donation'. The signed agreements that they obtained in return proved invariably to be complete releases for claims of all varieties, including personal injuries. Frequently, such releases precluded subsequent suits by those who later realized or learned that they had, in fact, suffered significant injuries.

<sup>41</sup> *Dalmage v. Crow*, 49 NYS 1004 (City Ct. NY 1898).

<sup>42</sup> *Logue v. Philadelphia Rapid Transit Co.*, 78 Pa. Sup. Ct. 239 (Sup. Ct. Pa. 1922).

<sup>43</sup> *Barrett v. Lewiston, Brunswick & Bath Street Railway Co.*, 85 A. 306, 308 (Sup. Jud. Ct. Me. 1912).

A 1929 Texas case was both typical and revealing. In *Bankers' Health & Accident Co. of America v. Shadden*,<sup>44</sup> the court found that an agent's own testimony 'conclusively demonstrated' his fraudulent behaviour. He had preyed

upon a widow of limited education without training in matters of business, wholly unacquainted with the exclusions, inclusions, and highly technical phrases of an accident insurance policy, with practically no understanding or comprehension of the facts involved, or her legal rights thereunder, and over whom the clouds of bereavement, by reason of her husband's recent death, were still hovering.

Among other statements, the agent admitted telling the woman that he had studied the policy and that it simply did not cover her husband. He threatened that 'if you don't make a settlement with me, you are going to have to fight with my company and they are not going to pay you a dime'. He insisted further that 'if you go to an attorney with this, your attorney won't get enough of it to pay their [*sic*] fee'. Finally, as his emotional *coup de grâce*, he informed the grieving widow that 'where there is any doubt about an accident they remove the body from the grave and have it examined'.<sup>45</sup> Two aspects of the case are particularly significant. First, the agent testified freely about his tactics, evidencing his belief that they were wholly ordinary and legitimate. Second, he also testified that he had been a claim agent for twenty-six years.<sup>46</sup> Together, those two facts suggest that manipulative and unscrupulous practices were in common use and that they affected thousands upon thousands of victims whose claims never reached the courts.

Innumerable cases support those conclusions. It was a railroad's division superintendent, for example, who secured a release within eighteen hours of an accident by twice meeting with a woman who had a fractured shoulder blade and was in a state of shock.<sup>47</sup> An agent with fifteen years' experience secured the release of a woman's claims by bringing her husband's supervisor to the meeting where he negotiated the settlement. The supervisor, who 'had authority to retain or discharge' the husband, told the wife

<sup>44</sup> *Bankers' Health & Accident Co. of America v. Shadden*, 15 SW 2d 704 (Ct. Civ. App. Texas 1929).

<sup>45</sup> *Ibid.* at 706.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Chicago, Rock Island and Pacific Railway Co. v. Lewis*, 109 Ill. 120 (Sup. Ct. Ill. 1884).

that 'it would be better for them to sign the release'.<sup>48</sup> Again, it was the 'chief special claim agent' of an insurance company who felt free to adopt an even more dramatic tactic. Trying to settle a \$2,500 life insurance policy for \$500, the agent left the attorney of the widow-beneficiary and, contrary to his promise, went directly to the woman's home. Alone with her, he used a series of false statements and threats to coerce a release.<sup>49</sup>

The fourth major characteristic of corporate settlement practices—especially of railroad and streetcar companies—was the maintenance of company hospitals and doctors. Claim agents sent or accompanied injured persons to company physicians and facilities, and in countless other cases company doctors turned up at the accident scene or, shortly thereafter, visited victims at their homes or hospitals. In some cases, even though injured persons had already received emergency medical care or were under treatment by their own physicians, the company doctors came to examine and treat them anyway.

The ready availability of medical care minimized victims' suffering and often prevented more serious injuries, but the benevolence was grounded in well-understood corporate interests. 'Medical and hospital service', a railroad accounting handbook explained, 'is of the nature of preventive measures to avoid when possible more serious injuries or fatalities with the consequent heavier damages.'<sup>50</sup> Company doctors were also superb discovery instruments. By conducting their own examination of victims, they prepared themselves to testify on the basis of first-hand knowledge and gained critical information that would otherwise have been unavailable to their companies prior to trial. Finally, and probably most important, by becoming the victims' physicians and tending their injuries, company doctors earned both their gratitude and their confidence. When they advised patients that their injuries were minor or temporary, they eased their worries and raised their hopes. When they supported, directly or indirectly, the constant importuning of the ever-present claim agents, they helped induce their patients to settle on the agents' terms.

The cases suggest that injured persons were often susceptible to

<sup>48</sup> *Peterson v. A. Guthrie & Co.*, 3 F. Supp. 136, 137 (DCWD Wash. 1933).

<sup>49</sup> *Harms v. Fidelity & Casualty Co. of New York*, 157 SW 1046, 1048, 1049 (Ct. App. Mo. 1913).

<sup>50</sup> Eaton, *Handbook*, 190.



the doctors' lead. Hurting, shocked, and distressed, they desperately wanted to believe that they would recover fully and that they would shortly be back about their lives as if nothing had happened. When company agents and doctors told them that their injuries were 'minor' and 'temporary', injury victims seized hungrily on such welcome news. Pressed to make decisions quickly, they often opted to accept the happy future that was promised, or at least dangled as a likelihood, and to go ahead and take the settlement offered.

In many cases company doctors participated in the effort to obtain releases from their patients. Sometimes they initiated negotiations themselves, informing patients that they were not seriously injured and urging them to settle quickly. Sometimes they introduced their patients to claim agents, and sometimes they merely advised them to go and see the agents. Sometimes, apparently when they were not formally company 'employees', they joined with claim agents to seek quick releases so that the company would pay for their services immediately. Such efforts nudged injury victims towards settlement and, in many cases, gave them the impression that accepting the agents' offer was the best—or only—option available.

While company doctors did not always encourage settlement, they were apparently expected never to discourage it. The Supreme Court of Kansas focused on some critical testimony. Several witnesses testified that the company doctor had told them that his patient had come 'within a hair's breadth of breaking his neck' and that he had 'intended to warn him against signing a release of the railroad company'. He had not done so, however, the doctor explained, because 'the claim agent was so near at hand that he had no chance'.<sup>51</sup>

The intrinsic conflict of interest that plagued company doctors repeatedly created situations that were at best ambiguous. Company doctors made mistaken diagnoses and rendered opinions that proved to be overly optimistic, and they apparently failed frequently to warn their patients about the dangers of future complications and disabilities. Even assuming their most scrupulous good faith, they regularly and directly advanced their companies' interests by the frequent support they gave for immediate settle-

<sup>51</sup> *Missouri Pacific Railway Co. v. Goodholm*, 60 P. 1066, 1068 (Sup. Ct. Kan. 1900).

ments. With surprising frequency, the courts found that company doctors had engaged in fraudulent behaviour and that they had purposely or recklessly misled their patients in order to obtain releases.

*Social variations: gender and race in the  
informal legal process*

While company agents used a variety of tactics against injury victims, it seems likely that they were particularly effective in securing releases from women and especially from blacks.<sup>52</sup> The cases show that women were often subjected to some of the agents' most intrusive and manipulative tactics. In a collision that occurred around one or two in the morning, for example, agents of one railroad pressured an injured woman all night long while she 'was laboring under great nervous strain'. In addition to her own injuries, 'she was greatly distressed and excited' because '[h]er infant was injured about the head'. After hours of effort, the agents finally secured her signature on a release 'about day-break'.<sup>53</sup> The Supreme Court of Illinois described another female passenger who

was in her private room at the hotel, suffering at the time the most intense pain, was partly disrobed, and was being attended by a lady,—a casual acquaintance,—who had been applying liniment to her person, and was then combing her hair, when two strange men entered the room to secure her signature to the paper.<sup>54</sup>

Another railroad agent arrived at a widow's home less than two hours after she had viewed her husband's 'mutilated remains' which had been found 'scattered along the track, the hands at one place, the head at another, and the liver at another'. When she confessed to the agent that her 'one thought' was to have her husband's remains buried at his old home in another county, the agent immediately seized the opportunity. He told her that

<sup>52</sup> Cf. Ian Ayres and Peter Siegelman, 'Race and Gender Discrimination in Bargaining for a New Car', *American Economic Review*, 85/3 (1995), 304–21.

<sup>53</sup> *St. Louis, Iron Mountain & Southern Railway Co. v. Reilly*, 161 SW 1052, 1053 (Sup. Ct. Ark. 1913).

<sup>54</sup> *Chicago, Rock Island and Pacific Railway Co. v. Lewis*, 109 Ill. 120, 132 (Sup. Ct. Ill. 1884).

if she did not sign a release to the railroad company, she would have to bury her husband at her own expense; that he was in a hurry to get back and notify the undertaker; that it was too great expense to bury her husband at his old home; that the railroad company would do nothing towards burying her husband but would 'hands off' unless she would sign a release. He also stated that the railroad company was not liable to her.

All of the agent's statements, the Supreme Court of Georgia subsequently found, were false.<sup>55</sup>

If agents tried more often to bully and intimidate women, female claimants who subsequently took their claims to court sometimes received a particularly sympathetic hearing. The courts often showed solicitude for widows, and they appeared willing to give relatively heavy weight to the argument that women were not responsible for signing releases because they possessed little or no business experience. A Kentucky court affirmed a verdict for a female plaintiff on the ground, *inter alia*, that she 'had no male friend present to advise her' when she signed a release,<sup>56</sup> and the Supreme Court of North Dakota did the same for a woman who 'was away from her husband and without legal advice'.<sup>57</sup>

While gender sometimes won judicial sympathy for female plaintiffs, it often made no difference. Many women claimants received not a whit of special consideration. The courts often upheld the releases they contested, even when the circumstances were dubious. Although the nature of the evidence makes any conclusions tentative, it seems likely that claim agents frequently exploited the special vulnerabilities of female injury victims and that the courts remedied their abuses only erratically.

If women were relatively vulnerable to agent tactics, blacks suffered even more, especially in the South. First, as a practical matter, the opportunity for blacks to pursue tort claims was problematic and even dangerous. Repression, intimidation, and violence were integral parts of southern race relations; and blacks knew all too well the risk of offending whites for 'not knowing

<sup>55</sup> *Hixon v. Georgia Southern & Florida Railway Co.*, 137 SE 260, 261 (Sup. Ct. Ga. 1927).

<sup>56</sup> *Southern Railway Co. in Kentucky v. Brewer*, 108 SW 936, 937 (Ct. App. Ky. 1908).

<sup>57</sup> *Clark v. Northern Pacific Railway Co.*, 162 NW 406, 409 (Sup. Ct. ND 1917). See Barbara Y. Welke, 'Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920', *Law and Social Inquiry*, 19 (1994), 369-403.

their place'.<sup>58</sup> Filing an action that reflected badly on a local white—a small businessman, a corporate employee involved in the injury, or a claim agent responsible for settling the matter—could provoke social abuse, economic retaliation, or physical violence. Second, most blacks were relatively poor and uneducated, and they suffered as a group from high illiteracy rates. The inability of large numbers to read and write increased their vulnerability to white dishonesty. A black sharecropper who signed a highly disadvantageous contract remembered the lesson. '[I]f you didn't understand it', he explained, 'they just took advantage of your ignorance.'<sup>59</sup> Finally, most blacks looked on what they called 'the white folks' courthouse' with deep scepticism, if not outright hostility.<sup>60</sup> In many southern and border states blacks could not serve on juries, while black witnesses subjected themselves to unknown extra-legal dangers and, in any event, risked the cold disbelief of white juries.<sup>61</sup> There was also reason to believe that white juries would not award large judgments to black plaintiffs.<sup>62</sup> Further, in order to dare a court case blacks had little choice but to retain white attorneys. As one white southern attorney remarked: 'Negro lawyers do not get "good breaks" before white juries.'<sup>63</sup> Thus, hazarding a lawsuit would most likely require a black to trust a white attorney, as well as a white judge and white jury. Small wonder that in his classic study, *An American Dilemma*, Gunnar Myrdal concluded that as a practical matter most southern blacks were 'restricted to trying to settle things outside of court'.<sup>64</sup>

<sup>58</sup> 'To lodge a complaint against a white person was also to invite harassment and sometimes violence.' Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* (New York, 1980), 285.

<sup>59</sup> Theodore Rosengarten, *All God's Dangers: The Life of Nate Shaw* (New York, 1975), 151. See David M. Katzman and William M. Tuttle, Jr. (eds.), *Plain Folk: The Life Stories of Undistinguished Americans* (Chicago, 1982), 157.

<sup>60</sup> Quoted in Gunnar Myrdal with the assistance of Richard Sterner and Arnold Rose, *An American Dilemma: The Negro Problem in Modern Democracy* (New York, 1944), at 537.

<sup>61</sup> Gilbert Thomas Stephenson, *Race Distinctions in American Law* (New York, 1910), 253-77; Myrdal, *American Dilemma*, 549-50; Litwack, *Been in the Storm So Long*, 287; Katzman and Tuttle, *Plain Folk*, 181.

<sup>62</sup> Maxwell Bloomfield, 'From Deference to Confrontation: The Early Black Lawyers of Galveston, Texas, 1895-1920', in Gerard W. Gawalt (ed.), *The New High Priests: Lawyers in Post-Civil War America* (Westport, Conn., 1984), 159.

<sup>63</sup> Quoted in John Dollard, *Caste and Class in a Southern Town* (1st pub. 1937; 3rd edn., Garden City, NY 1957), 262.

<sup>64</sup> Myrdal, *American Dilemma*, 528. Accord W. J. Cash, *The Mind of the South* (1st pub. 1941; New York, 1991), 120, 414.

Given those conditions, it seems almost certain that corporate claim agents, who lived on their ability to secure cut-rate releases, leaned frequently and heavily on the lever of race. 'Any white man can strike or beat a Negro, steal or destroy his property, cheat him in a transaction and even take his life, without much fear of legal reprisal,' Myrdal summarized. 'The minor forms of violence—cheating and striking—are a matter of everyday occurrence.'<sup>65</sup> Race relations, especially in the South, created an ideal context in which claim agents could ratchet up the social pressures they applied and secure drastically discounted settlements. When cornered by a white man and asked to sign an employment agreement, a southern black reported, '[w]e would have signed anything, just to get away'.<sup>66</sup>

Especially striking was the aftermath of a Seaboard Air Lines wreck in North Carolina in 1911. A special excursion train, scheduled for the annual outing of the St Joseph's African Methodist Episcopal Sunday School, carried 912 blacks packed into seven wooden coaches that had been designed to hold fifty people each. When the special crashed into a slow-moving freight, ten blacks were killed and another eighty-six injured, fifty-eight seriously. The Seaboard was clearly responsible for the wreck and had no legal defence to its passengers' claims. Immediately, the railroad dispatched agents to the scene, and a local paper reported that the resulting settlements ranged from \$1 to \$1,000.<sup>67</sup> Contemporaneously, a congressional study found that tort judgments for injured railroad workers averaged more than \$900 in cases involving temporary injuries, \$2,500 in death cases, and from \$4,000 to \$11,000 in permanent disability cases.<sup>68</sup> Apparently, therefore, the Seaboard's agents secured discounts of 80 to 90 per cent of the judgment value of the claims.

More revealing is the fact that the Seaboard's payments were low even compared to other out-of-court settlements. Such settlements, of course, were almost invariably lower than judgments, and the same congressional study found that they averaged approximately \$70 for temporary injuries, \$1,200 for both per-

<sup>65</sup> Myrdal, *American Dilemma*, 559.

<sup>66</sup> Hamilton Holt (ed.), *Life Stories of Undistinguished Americans as Told by Themselves* (New York, 1906), 191.

<sup>67</sup> Katie Letcher Lyle, *Scalded to Death by the Steam: Authentic Stories of Railroad Disasters and the Ballads that were Written about Them* (Chapel Hill, NC, 1991), 79–80.

<sup>68</sup> Sen. Doc. 338, 62 Cong., 2 sess. (1912), i. 131, 135, 139, 143.

manent partial disability and death claims, and just under \$4,000 for claims of permanent total disability.<sup>69</sup> Two powerful forces, of course, helped keep those worker settlements relatively low: first, employers often threatened their employees with sanctions, including the loss of jobs, if they did not settle their claims readily; and, second, employers had a battery of special legal defences that made employee claims particularly unpromising.<sup>70</sup> The blacks injured and killed in the Seaboard wreck, in contrast, confronted neither of those compelling pressures and, indeed, occupied a commanding legal position because the railroad seemed clearly at fault. Regardless of those facts, however, the black passengers apparently settled for amounts significantly lower than those that the railroad workers obtained in their out-of-court agreements. Indeed, the blacks in the Seaboard wreck obtained much less than another group of passengers had received more than thirty years earlier. In 1880 the West Jersey Railroad settled forty claims on behalf of eighteen dead and twenty-two injured passengers for an average of \$1,270 per claim, probably at least double or triple the average amount the blacks received.<sup>71</sup>

While the calculus of race placed black tort victims at a steep disadvantage, it did not invariably deny them justice. Conditions varied widely across the nation and even in the South, and the legal options available to blacks may have improved somewhat after the 1920s. Further, those known to be 'good blacks' and those who had white 'sponsors' were sometimes treated with benevolence. Those fortunate enough to obtain able white counsel and get into court—at least on claims with no 'racial' overtone—could sometimes succeed in winning relief. Indeed, black passengers injured on trains owned by foreign corporations probably had a relatively decent chance of prevailing. Reported release cases involving blacks—few in number—suggest that southern and border state courts would on occasion find in favour of blacks who seemed truly deserving, especially if they were old, severely injured, obviously overreached, and—perhaps—female.

The relatively small number of release cases involving blacks, however, together with the evidence of general racial repression

<sup>69</sup> Ibid. 131, 135, 139, 143.

<sup>70</sup> Purcell, *Litigation and Inequality*, 38–41, 72–82; Bergstrom, *Courting Danger*, 158–60.

<sup>71</sup> Robert B. Shaw, *A History of Railroad Accidents, Safety Precautions and Operating Practices* (2nd edn., [n. p.], Vail-Ballou Press, Inc., 1978), 422–3.

and discrimination, supports a simple conclusion. The overwhelming number of blacks settled their claims out of court, received relatively low amounts of compensation, and dared challenge releases only rarely and only under unusually favourable social circumstances. '[N]o one of us', recalled one southern black, 'would have dared to dispute a white man's word.'<sup>72</sup>

*Using legal rules: policing and counter-crafting behaviour*

The pressure tactics of company agents and the minimal amounts paid in settlements combined to make many judges deeply sceptical of releases signed shortly after accidents or in hurried circumstances. Frequently, they voided such agreements for fraud, protecting claimants against many of the agents' most overt and deceitful tactics. Given the need to prove 'intentional' misrepresentation and to meet a higher 'clear and convincing' standard of proof, however, fraud was difficult to establish. Suspicious courts, therefore, often turned to other theories to void dubious releases.

Increasingly, they used the doctrines of 'mistake' and 'mental incompetence'. Both filled the middle ground where serious doubts existed about an agent's actions but intentional misrepresentation had not clearly been shown. If misleading statements had not been made intentionally, then they had necessarily been made on the basis of an erroneous assumption of fact. In such event, both parties were mistaken, and the intended agreement had not been consummated. Similarly, if injured persons were not able to act 'rationally', they lacked the mental competence to enter into binding agreements. In either case, their contracts could be set aside.

The irony, of course, was obvious. Corporate agents persistently sought out injury victims as soon as possible after accidents and pressed them to sign releases immediately, regardless of their physical and mental state and regardless of their ignorance about their medical condition. The agents' goal was precisely to deal with potential claimants while they were acutely vulnerable and to pre-empt suits before they could become aware of the nature of their injuries and obtain informed legal advice. Ignoring the

<sup>72</sup> Holt, *Life Stories of Undistinguished Americans*, 191.

essence of the social practice of corporate release-seeking, courts used fictitious concepts of 'mistake' and 'competence'—sporadically and erratically—to try to limit its overall operation. They drew essentially arbitrary lines to police the worst excesses of a social practice that flooded broadly beyond their control.

While the law provided some escape hatches for those who signed releases, it also provided corporate attorneys with powerful tools to defend many of their agents' most aggressive tactics. The 'mere concealment' rule, for example, was often useful. Since parties had a duty to read whatever agreements they signed, written releases were not voidable for fraud if agents 'merely' concealed the contents as opposed to fraudulently misrepresenting them. '[I]f by negligence and indifference to his own interests one permits himself to be overreached', explained one court, 'the law affords him no redress because his own conduct is blameworthy.'<sup>73</sup> Agents might succeed in securing legally binding agreements, in other words, even though the written document they presented contained terms that were different from those they had orally discussed or promised. If the injured person had an opportunity to read the agreement, the 'mere concealment' rule could salvage a release from a claim of fraud.

The 'statement of law' rule was equally serviceable. 'The law is presumed to be equally within the knowledge of all parties,' declared an Ohio court, upholding a contested release. 'The agent's opinion as to [the claimant's] legal rights, however strongly stated, was not a misrepresentation of a fact for the consideration of the jury.'<sup>74</sup> Thus, if agents couched their comments and exhortations in legal terms—the victim's 'fault', the company's non-liability, the legal significance of the alleged facts, or the elements that a claimant would have to prove if she went to court—they could stay within the law and probably ensure the validity of the releases they obtained.

There was an even more comprehensive rule—the 'opinion' rule—that was, understandably, of even greater utility. 'The true rule is that the mistake must relate to either a present or past fact or facts that are material to the contract of settlement', declared the Supreme Court of Nebraska, 'and not to an opinion as to

<sup>73</sup> *Carroll v. United Railways Co. of St. Louis*, 137 SW 303, 309 (Ct. App. Mo. 1911).

<sup>74</sup> *The Aetna Insurance Co. v. Reed*, 33 Ohio NS (DeWitt) 283, 294, 293 (Sup. Ct. Comm. Oh. 1877).



future conditions as the result of present known facts.<sup>75</sup> Artfully phrased, or at least testified to, statements about a victim's prognosis, the efficacy of the company's safety precautions, the weight due to the victim's testimony, the soundness of a doctor's evaluation, and other similar topics could be considered mere 'opinions' and, hence, insufficient to sustain a claim of fraud. The rule was especially serviceable in defending the optimistic prognoses of company doctors and the glowing assurances of their claim agents. 'A physician's diagnosis is necessarily a matter of opinion', wrote one court, 'except in cases where the ailment is external and visible.'<sup>76</sup> Though sensible in some contexts, the 'opinion' rule encouraged ambiguities to thrive where conflicts of interest inhered. The rule conferred a sweeping leeway on those whose statements served two masters, and it imposed heavy burdens on anyone who tried to challenge their craft. As long as agents cast their statements as opinions, they could hover in the grey, and their companies' attorneys could readily defend their actions.

Although courts often invoked the 'opinion' rule, they came increasingly to limit it after the turn of the century.<sup>77</sup> They seemed to grow more sensitive to the wiles of agents and the vulnerabilities of victims. 'The rule that a forecast of what will happen in the future is merely promissory, and not a statement of existing fact', explained the Supreme Court of Missouri in 1927, 'does not apply, where the matter involved is peculiarly within the speaker's knowledge.' The court upheld a ruling voiding a release because the 'agent was in better position to know the facts about [plaintiff's medical condition] than the plaintiff'.<sup>78</sup> Similarly, the courts seemed to become more willing to scrutinize records and find that statements of opinion actually contained misrepresented or concealed 'present facts' that company doctors knew or should have known. Such an interpretation allowed them to avoid the 'opinion' rule altogether. 'The gist of fraudulent misrepresentation is the producing of a false impression upon the mind of the other party', explained the Supreme Court of Oklahoma in 1913, 'and if this

<sup>75</sup> *Simpson v. Omaha & Council Bluffs Street Railway Co.*, 186 NW 1001, 1003 (Sup. Ct. Neb. 1922).

<sup>76</sup> *Denver and Rio Grande Railroad v. Ptolemy*, 169 P. 541, 542 (Sup. Ct. Colo. 1918).

<sup>77</sup> Compare, e.g., *Chicago and Northwestern Railway Co. v. Wilcox*, 116 F. 913, 919 (CCA 8th 1902) with *Great Northern Railway Co. v. Fowler*, 136 F. 118 (CCA 8th 1905).

<sup>78</sup> *State ex rel. St. Louis & San Francisco Railway Co. v. Daves*, 290 SW 425 (Sup. Ct. Mo. 1927).

result is actually accomplished the means of accomplishing it are immaterial.' Affirming a judgment for plaintiff, the court noted simply that the plaintiff was 'ignorant' and that 'the [company] physician had superior knowledge'.<sup>79</sup>

The courts increasingly recognized that experience, knowledge, and craft allowed agents to posture their behaviour and frame their statements in order to pressure victims to settle while at the same time avoiding any obvious, or at least provable, overreaching.<sup>80</sup> They knew, too, that such artfully ambiguous behaviour enabled company attorneys to characterize agents' actions in legally defensible ways and thereby to maintain the validity of the releases they secured. In the early twentieth century, by restricting such doctrines as the 'mere concealment' and 'opinion' rules, many judges began trying to limit the ability of agents to accomplish by art what the law condemned in principle.

*The utility of releases and the scope of the  
informal legal process*

As often as the courts voided releases, their decisions reached only a small percentage of the agreements that companies secured. The major social significance of corporate release practices did not occur in the frequent cases where courts voided agreements. Rather, their principal impact occurred in three other classes of cases where the releases prevailed.

The first was the large class of cases in which the courts did not void releases even though the record suggested pressured circumstances, agent overreaching, or a victim who had little or no understanding of his legal rights, medical condition, or the document presented. A New York appellate court refused to void a release signed the day after a streetcar accident by an 80-year-old man who had suffered a dislocated shoulder,<sup>81</sup> and the Supreme Court of New Jersey upheld a release for \$100 signed by a passenger who had lost his arm while riding on a streetcar.<sup>82</sup>

<sup>79</sup> *St. Louis & San Francisco Railroad Co. v. Reed*, 132 P. 355, 357 (Sup. Ct. Okla. 1913).

<sup>80</sup> See, e.g., *Scheer v. Rockne Motors Corporation*, 68 F. 2d 942, 945 (CCA 2d 1934) (Hand, J.).

<sup>81</sup> *McLoughlin v. Syracuse Rapid Transit Railway Co.*, 101 NYS 196 (App. Div. 4th Dept. NY 1906).

<sup>82</sup> *Zdancewicz v. Burlington County Traction Co.*, 71 A. 123 (Sup. Ct. NJ 1908).

The law of releases, in other words, did not grind exceedingly small. '[C]ourts have shown a special disposition to sustain compromises of disputed claims', the New Hampshire Supreme Court declared in 1915, 'often without much regard to the injustice resulting.'<sup>83</sup> In *Spritzer v. Pennsylvania Railroad Co.*, for example, it was uncontested that plaintiff had been injured in a train wreck, thrown some 10 or 15 feet from the train, carried unconscious to a hospital, and placed on the floor on a stretcher in the company of approximately 100 other victims of the same wreck. The plaintiff testified that he awoke a couple of hours later 'in a kind of stupor', that he was 'cold because I was naked', and that he had 'a very terrible pain in my shoulder'. Finally, it was also uncontested that an agent approached the plaintiff while he was lying on the floor and, approximately three hours after the wreck, obtained a release. The Supreme Court of Pennsylvania upheld the agreement on the ground that the plaintiff had not set forth sufficient facts to show that he had been 'incompetent' when he signed it.<sup>84</sup>

The second class of cases where corporate release practices had their major social impact included those where the courts refused to void releases because the facts showed little or no evidence of culpable overreaching. Those cases revealed, instead, simply that the victims had acted most unwisely and—for whatever reason—had settled for inadequate compensation. In these cases it made no difference to the courts that the releases were signed within days or weeks of injury, that the victims were without knowledgeable advisers, that they might have been influenced by mistaken diagnoses of company doctors, that they were injured more severely than they had thought, or that they had probably had little or no real understanding of the documents they signed. The law protected releases that were free from certain identifiable—and properly proven—types of overreaching, regardless of the substantive unfairness of their terms or the gross inequality between the parties. In 1914, for example, the Supreme Court of Arkansas upheld a \$10 release, signed two days after a train collision, and overturned a \$2,500 jury verdict for a woman who had received permanent internal injuries. 'The settlement was an improvident one', the court acknowledged, 'but the plaintiff

<sup>83</sup> *McIsaac v. McMurray*, 93 A. 115, 118 (Sup. Ct. NH 1915).

<sup>84</sup> *Spritzer v. Pennsylvania Railroad Co.*, 75 A. 256, 257 (Sup. Ct. Pa. 1910).

entered into it in full possession of her senses and without the perpetration of any trick or fraud.<sup>85</sup>

The third class of cases where corporate release practices had their major impact was the least visible but by far the largest and most important. It was the class where the practice of organized release seeking bore its true and most abundant harvest. It consisted of the vast and untold numbers of releases that were never challenged in court and, hence, that never surfaced in the reported 'cases' or left traces in the judicial records. This third class was founded on the beliefs of millions of tort victims that the releases they signed had terminated any chance of legal recovery. The major social impact of corporate settlement practices, in other words, occurred outside the courts in a legal process that was quick, effective, largely invisible, extremely profitable for the companies, and in every practical sense final and irremediable.

Exact measurement is impossible, but three basic facts suggest the huge size of this third class. Millions of potential tort claims arose every year; only a tiny percentage of them were resolved judicially; and corporations maintained specialized departments devoted to the goal of keeping adverse claims out of court. The staggering disparity that existed between the number of potential claims and the number of actual lawsuits establishes that the number of out-of-court dispositions was huge, and the extensive and methodical nature of corporate practices suggests that their claims departments must have been highly successful in settling out of court the overwhelming number of claims against them. Those claimants who did challenge releases in court, therefore, almost certainly constituted but a minute fraction of the total number of tort victims who signed corporate settlement agreements.

Those who signed releases were, of course, severely disadvantaged in any subsequent attempt to assert their original claim. Before they could even attempt to present their case on the merits they would have to convince a court to void the release. That required them to establish fraud, mental incompetence, or mutual mistake—all of which required a substantial legal and practical effort. Equally important, they faced a series of procedural obstacles designed to protect the integrity of releases. Many

<sup>85</sup> *Kansas City Southern Railway Co. v. Armstrong*, 171 SW 123, 125 (Sup. Ct. Ark. 1914).

jurisdictions required them to attack releases only in a separate suit in equity. That requirement imposed on them the burden of prosecuting two suits instead of one, a burden that increased their costs, delayed their action on the merits, and often deprived them of a jury on the critical questions at issue. Similarly, most courts held claimants to a particularly high standard of proof. The need to prevail by 'clear and convincing' evidence compounded claimants' problems of proof, warning them of the need to locate more and better witnesses and increasing their overall risk of ultimate failure. Finally, many courts required claimants to tender back to defendants the money paid pursuant to the releases. Though a seemingly minor procedural matter, the tender requirement could impose significant hardships on poorer claimants, create a technical defence that could complicate or even bar their action, and, in some cases at least, prevent those who lacked funds from even getting into court.

That combination of legal and practical burdens undoubtedly discouraged large numbers of injured persons who came to regret their original settlements and belatedly considered the possibility of taking legal action. The major de facto function of releases, then, was not to block claims in court, but to dissuade claimants from ever attempting to seek relief in any court.

*Conclusion: peering outside the courts*

An examination of corporate settlement practices during the period from 1875 to 1945 suggests a number of conclusions. First, the release cases support the proposition that tort victims as a group received drastically discounted compensation for their injuries, that corporations extracted substantial benefits from the overall de facto process of claims disposition, and that the law allowed—and in some ways encouraged—those results. It would be impossible to quantify in any precise way the overall economic impact of this claims disposition process, and any complete accounting would have to include a range of discounting factors and a variety of other costs, including those unfairly or improperly imposed on corporate defendants. Still, the organization, numerical scope, and frequent ruthlessness of corporate settlement efforts suggest both that the methodical practice of release

seeking constituted a highly effective way of minimizing overall corporate costs and, further, that in its direct economic impact on ordinary Americans the practice far overshadowed the importance of formal legal processes. The de facto system of corporate release seeking harmed tort victims seriously and benefited corporations substantially, and it rendered the common law tort system of the period highly inefficient.<sup>86</sup>

Second, the study of corporate settlement practices highlights the paradoxical and ambiguous nature of freedom of contract. A wondrous instrument of liberty, creativity, and material progress, contract was also a duplicitous and ruthless tool of coercion, oppression, and exploitation. Too often its proponents—like its detractors—saw only one side of its power. In the period from 1875 to 1945, largely congruent with the so-called ‘Lochner era’, courts and commentators praised contract fervently, but they also began to recognize its oppressive uses and tried increasingly to limit them.

Third, the study also suggests more broadly that ‘costs’ are not only unavoidable burdens that occur in all human endeavours but also tools that are sought out, created, magnified, and—above all—used. ‘Litigation’ is neither an abstract nor wholly rule-bound process. Rather, it comprises an infinite variety of actions—legal and extra-legal as well—that clients and their attorneys take in order to pressure their adversaries to discount or abandon their claims. Corporate claim departments used the feared costs of litigation as a threat to persuade injured persons to discount or forsake their claims. They used the burdens of actual litigation to drive up the costs of pursuing those claims in order to serve the same purpose. They used releases to add new obstacles—economic and social—to the paths of tort victims who might subsequently be tempted to revive their claims. The study of litigation costs requires not only the study of generalized and economically inevitable ‘transaction costs’ but, more importantly, an examination of ‘strategic and tactical costs’—the costs that lawyers discover, create, magnify, manipulate, and exploit.

Fourth, examination of corporate settlement practices shows

<sup>86</sup> See I. P. L. Png, ‘Litigation, Liability, and Incentives for Care’, *Journal of Public Economics*, 34 (1987), 61–85; A. Mitchell Polinsky, ‘The Deterrent Effects of Settlements and Trials’, *International Review of Law and Economics*, 8 (1988), 109; Hylton, ‘Litigation Costs and the Economic Theory of Tort Law’.

that both empirical studies of judicial caseloads and analytic theories about the 'selection' of cases for litigation, settlement, and trial need to be deepened and contextualized. This study shows that the interests and practices of institutions and groups helped shape the contours of the out-of-court settlement process. Settlements did not occur randomly or accidentally. Rather, they had distinct patterns depending on the nature of the parties and the types of claims involved, and changing social factors were critical in shaping those patterns and determining their practical results.<sup>87</sup> Understanding the nature and distribution of judicial caseloads and the process by which cases were 'selected' for litigation or settlement requires an understanding of the social interests and institutions at work in any given historical period, not merely a logical analysis of timeless probabilities about the litigation options of abstracted 'plaintiffs' and 'defendants'.<sup>88</sup>

Fifth, the study of corporate settlement practices also shows that in some socio-legal contexts the ostensibly applicable substantive law may have little or no effect on the content of private agreements. In spite of the law's varied impact in other contexts, it had only an oblique and contingent relationship to the settlement agreements that corporate agents secured. Any study of the social or economic impact of legal rules, in other words, must examine both the extent to which various specific types of actors were able to avoid those rules as well as the extent to which they were able to use them in ways that went beyond their formal purposes. Legal rules were not self-executing, and in the great majority of disputes they were never judicially applied. Consequently, there is no a priori reason to assume that they determined, shaped, or even affected the out-of-court settlement of any individual case or any particular class of cases.<sup>89</sup>

Sixth, this study also highlights the fact that 'difficult' cases, 'ambiguous' situations, and 'disputed' facts do not always just

<sup>87</sup> See, e.g., the discussion of 'social litigation systems' in Purcell, *Litigation and Inequality*, 248-50.

<sup>88</sup> Barry Nalcbuff, 'Credible Pretrial Negotiation', *Rand Journal of Economics*, 18 (1987), 197-210; Marc Galanter and Mia Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements', *Stanford Law Review*, 46 (1994), 1339; John C. Harsanyi, 'Games with Incomplete Information', *American Economic Review*, 85 (1995), 291.

<sup>89</sup> e.g. Samuel R. Gross, 'The American Advantage: The Value of Inefficient Litigation', *Michigan Law Review*, 85 (1987), 734-57. Cf. Austin Sarat and Thomas R. Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life', in A. Sarat and T. R. Kearns (eds.), *Law in Everyday Life* (Ann Arbor, 1993), 21-61.

happen. Rather, they are often created and sometimes systematically cultivated. By seeking quick releases—by dealing with injured persons when they were alone, in pain, without counsel, under medication, and ignorant of the true extent of their injuries—corporate agents chose to operate in a grey area where ambiguities not only would abound by nature but could also thrive by design. By artfully crafting their behaviour and statements to remain arguably within the limits of certain legal rules—the ‘opinion’ rule or the ‘mere concealment’ rule, for example—they could ensure that their actions would be legally defensible, regardless of the calculated de facto pressures or misconceptions they generated. As organized and experienced parties, in other words, corporate agents learned to play in the grey, and their companies profited from the results.<sup>90</sup>

Finally, though this study only glances at the formal law, it suggests the amazing constitutive power of legal language and doctrine. The law of releases helped define and animate the ideology of the ‘free’ and ‘rational’ economic individual. In a context where organization, sophistication, and calculation confronted ignorance, confusion, desperation, and pain, the law presumed fairness, knowledge, capacity, and mutuality. Establishing those ideal qualities as ‘normal’, it required parties who would attack releases to prove by ‘clear and convincing evidence’ that their situations were aberrational. Absent such proof of fraud, the law forced them to speak of ‘incompetence’ and ‘mistake’ in situations where neither of those concepts fairly or realistically captured what had in truth occurred. Therein lay a powerful act of creation.

<sup>90</sup> Some statutes tried to restrict the use of releases. See, e.g., *Thorne v. Columbia Cab Co.*, 3 NYS 537 (City Ct. NY 1938).