Did the West Virginia Supreme Court Subsidize the Railroad Industry?

by

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RESEARCH PAPER 9609

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May, 1996

ABSTRACT: The debate over the legal system subsidizing industry has been waged for the past thirty years. This paper takes a look at two perspectives of this debate by comparing Morton Horwitz's thesis that industry was subsidized by the legal system and Gary Schwartz's thesis that it was not. To determine which thesis is most applicable to West Virginia, State Supreme Court of Appeals' rulings from 1870-1920 were examined in the areas of personal injury, fire, and injury to animals. In each of these cases, railroad companies (the dominant industry in West Virginia during this era) were the defendants. The findings support Horwitz's thesis by showing that the West Virginia legal system subsidized industry by favoring the defendant railroad companies in the Supreme Court's decisions.
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I. Introduction

Throughout its history, the United States has relied on the legal system as an unbiased arbiter of justice. In recent history, however, scholars have debated the premise that the system is unbiased in its deliberations. Morton Horwitz, for example, contends that the courts have fallen under the spell of the industrialization movement in America, and therefore have favored industry rather than rely on precedent and the merit of individual cases.

Gary Schwartz refutes Horwitz's thesis on the grounds that his evidence is weak, lacks credibility due to the vagueness of its analysis, and his reliance on a poor sample. Schwartz's own study of New Hampshire (a state at the forefront of nineteenth century industrialization) and California (a state that has been influential in the formation of twentieth century tort doctrine) reveals a contrary thesis that industry was not subsidized by the legal system. Instead, the legal system acted in an evenhanded manner by following precedent and deciding each case on its own merits.

Horwitz's and Schwartz's debate is still evolving, and before a national consensus can be realized the court system in the states must be studied. This requires longitudinal studies.
of tort cases in state courts to observe whose thesis is most applicable.

With this purpose in mind, I have studied selected West Virginia State Supreme Court decisions from 1870-1920. To find a clear sample, I observed cases only where railroad companies were involved as defendants. Railroad companies were representative of industrialization as Schwartz demonstrates for California. When they were defendants both theses were put to the test because the plaintiffs in those cases were citizens who had been injured either personally or in property. Such plaintiffs are representative of those who were favored by the courts in pre-industrial America (precedent).

The cases were categorized into three fields: personal injury, fire, and injury to animals. The circuit court decisions were cataloged by case along with whether the Supreme Court affirmed or reversed the circuit decisions. This categorization revealed whether the circuit courts (which are closer to the public) ruled in favor of the plaintiffs (typically farmers and other laymen), or the defendant railroad companies.

The reasoning behind observing circuit decisions is that they involved juries who, I hypothesize, pay more attention to the merits of the case than the Supreme Court. The high court's decisions involved justices who were elected on a statewide level. In order to be elected these justices needed money with which to campaign. Much of this money came from
industry, particularly the railroads during this era. As a group the wealthiest attorneys were railroad attorneys. An example of this is shown by Justice Henry Brannon, who was president of the Weston and Westfork Railroad Company before taking office (Reid, p.140). I hypothesize that such an experience undoubtedly influenced Supreme Court justices such as Brannon. In sum, my research will show how the West Virginia Supreme Court was inclined to subsidize railroads with favorable decisions.

II. The Debate

Schwartz debates Horwitz's thesis on many points. I will focus on why both scholars take the position they do on the issue of subsidization, and why Schwartz regards Horwitz's evidence as inadequate.

Morton Horwitz argues the courts ruled in favor of industry to promote economic growth as an overriding public good. In other words, industry was subsidized by the legal system rather than the tax system (Horwitz, p.100). He explains how state budgets in places like Massachusetts

'where between 1795 and 1820 the budget remained constant at roughly $133,000, the Hindlers have identified a clear pattern of state use of legal instruments such as monopolies and franchises as an alternative to cash outlays. In short, every bit financial encouragement of enterprise were the enormous, but hidden, legal subsidies and resulting redistribution of wealth brought about through
changes in common law doctrines' (Horwitz, p.100).

According to Horwitz, taxation was either too controversial or politically contentious because it would put a disproportionate burden on the wealthiest and most powerful individuals, namely industrialists. Most taxes during this era were in the form of property taxes and industrialists were the largest property owners. However, resort to common law enabled industry to raise to bolster profit margins and reduced their exposure to economic risk by placing the burden of economic development on "the weakest and least active elements in the population" (Horwitz, p.101).

Schwartz counters Horwitz's claim with a moral objection.

'Even if a subsidy of enterprise makes economic sense, it seems simply unconscionable to exact that subsidy from the individual victims of serious accidents by depriving them of their right to compensation from the enterprises responsible for their injuries' (Schwartz, p.1718).

It is unrealistic to believe, Schwartz contends, that the legal system would be so inhumane as to make the average citizen pay for industrialization.

The next consideration is the strength of the facts which support Horwitz's thesis. Horwitz's most inclusive argument contends that decisions in common law cases were governed by a "firm rule of strict liability, a rule the courts later overthrew in favor of a negligence standard" (Schwartz, p.1727). Horwitz then cites three opinions from New York, Massachusetts, and Pennsylvania he considers precedent setting.
He argues that these cases show how the courts from 1780-1850 abandoned a standard of strict liability (where the defendant could be held liable for damages even while exercising a reasonable degree of care under the circumstances) in cases involving negligence (where the defendants only had to prove they exercised a reasonable degree of care in order not to be held liable). A negligence standard would be more favorable to industry because it is harder to prove strict liability in such cases.

Schwartz counters by stating that the facts of Horwitz's cases and terminology for injury are unclear. The precedent setting New York case showed strict liability was not the presumed standard at the onset by all the parties involved. In this case the plaintiff agreed before trial that negligence was the key stating the defendant acted "at his peril" when navigating a ship in a night so dark. Here, the court did the opposite of Horwitz's claim that negligence was used as a general standard (against the protest of the plaintiff) to subsidize industry. Instead, Schwartz argues, the court used negligence because it was most applicable for this case (Schwartz, pp.1728-29).

According to Schwartz, the terminology used by Horwitz is vague. Horwitz states for example, that injuries conceived of as nuisances were a strict liability tort, but if "injury" means personal injury he cites no cases to prove the point.
This ambiguity serves to point out, Schwartz claims, that Horwitz's evidence is weak because strict liability terms in these cases are not clearly defined. Therefore, in Schwartz's opinion, it is impossible to state if any of the courts were working by a general strict liability rule (Schwartz, p.1729).

Schwartz further counters Horwitz's thesis by conducting a study of his own. His study of New Hampshire and California cases proves his thesis that injury cases were decided on an individual basis. For example in New Hampshire the only tort cases prior to the 1820's concerned the liability of sheriffs. Here, strict liability was supported by the court contrary to Horwitz who believed the court supported negligence. After this time period, two fire opinions were written in negligence with negligence carrying only the meaning of "lack of care or skill." Then, in an 1827 cattle trespassing case the court stated rules so complex it could not be classified along the negligence strict liability axis. Therefore, the New Hampshire cases cited by Schwartz show that there was no effort by the courts to overthrow the rule of strict liability on a general basis.

Schwartz's study also examines California cases in the latter half of the nineteenth century. Here too, negligence is the standard, but there is still no discussion in the courts of industry or economic policy. To support this claim he cites two blasting cases as examples of negligence liability. Schwartz
also tells how strict liability was affected as a precedent only in cases with respect to custody of animals (Schwartz, pp.1729-32). In sum, the California cases reveal no shift from a strict liability standard in terms of precedent while the New Hampshire cases demonstrate this point as well as the fact that cases were decided individually. These state case studies refute the claims of Horwitz that strict liability was the standard and that the courts deviated from it radically on a general basis.

In conclusion, both Schwartz's and Horwitz's theses are valid if one relies upon the evidence provided by each scholar. Therefore, we might conclude that this debate is a matter of perspective. The only way to determine which thesis is most applicable to a particular state is to conduct a longitudinal study of the state's court cases and come to an independant conclusion.

III. West Virginia Case Study

To this end, I have conducted a longitudinal study of West Virginia's Supreme Court of Appeals' decisions involving railroad injury suits in three categories: fire, injury to animals, and personal injury. In all three, it was shown to varying degrees that a negligence standard was adopted and industry was thereby subsidized.
A. Fire

In the ten fire cases which came before the West Virginia Supreme Court between 1870 and 1920 a trend emerges which supports Morton Horwitz's thesis. The high court is shown to have subsidized the railroad industry by deviating from the historical, pre-industrial standard of strict liability to one of negligence, thereby making it more difficult for the plaintiff to obtain compensation. Whereas formerly the plaintiff was required to prove that the injury resulted from the defendant's actions, the West Virginia plaintiff now had to prove that the defendant did something wrong, negligence.

The decision making trend is as follows: in nine cases observed (one of the original ten was not applicable due to a mixed Supreme Court ruling) the circuit court sided with the plaintiff 78% of the time while the Supreme Court sided with the plaintiffs only 56% of the time. This shows the high court to have sided with the defendant more often than the circuit court as also evidenced by its deviation from circuit rulings 44% of the time. I hypothesize that the circuit rulings were in favor of the plaintiffs since most circuit decisions involved juries. These juries were composed of citizens whose lives were comparable to that of the plaintiff thereby causing them to sympathize and rule against the defendant. The opposite position was taken by the Supreme Court since its justices were largely
industrialists who therefore favored industry.

My hypothesis is illustrated by several significant cases and their Supreme Court rulings.

In *Wilson v. Bush*, the circuit court ruled in favor of the plaintiff. A jury awarded him $935.00 for damages incurred when a train passing by emitted sparks that set fire to his lumber. The defendant appealed the case to the Supreme Court.

In its opinion, the Supreme Court overturned this decision and restated the position that railroads had to take ordinary care by declaring (as paraphrased from the opinion): proof of communication of the fire from an engine of the company raises a presumption of negligence, which the defendant must repel by showing proper construction, equipment, and operation of the engine in order to escape liability. Nevertheless the high court forced the plaintiff to prove why he deserved compensation by stating: assuming evidence of negligence on the part of the defendant, the plaintiff's right to recover, in such a state of the evidence of contributory negligence, is tested by the inquiry whether he exercised such care and caution as a reasonably prudent and careful man would have exercised under like circumstances in placing his lumber upon the premises without providing for its care by some person. The court also stated that plaintiffs must prove negligence in respect to its (the railroad's) engines as a requisite to liability, and that plaintiffs assumed all risk of loss if the defendant operated
its engines in a lawful manner and with reasonable care and skill, was erroneous in omitting the element of duty of the railroad company as to care of its track and right of way. The W.V. Supreme Court declared that a plaintiff must prove the railroad was negligent and that the plaintiff should have known better than to place his lumber in a hazardous area. This opinion clearly shows a bias for the major industries over the minor ones.

The Wilson case is further supported by the Jacobs case. In Jacobs v. Baltimore and Ohio Railroad Company, Mary Jacobs' house, which was near the B and O tracks at Duffield Station, was destroyed by fire. She claimed the fire was caused by sparks emitted by a B and O locomotive. When the circuit court ruled in favor of the defendant, Jacobs appealed.

The Supreme Court here again displayed a pro-industry attitude in its opinion. The court restated the premise that the burden is on the plaintiff to prove that the fire started from a spark. That being proven, however, a presumption arises that the company was negligent which presumption the company must repel by disproving negligence. The court further held that evidence demonstrating that the defendant had used the approved appliances to prevent the escape of fire, exercised reasonable diligence to obtain and use them, kept them in good repair, and that the engines were skillfully operated, overcomes the presumption of negligence from the setting of a fire. This
opinion shows a pro-industry sentiment since not only is the burden on the plaintiff to prove the injury occurred by the defendant, but also the defendant is excused if he did what he could to prevent the injury.

In conclusion, the West Virginia Supreme Court subsidized the railroad industry in fire cases through its opinions. Even though it ruled against the railroads in a few cases based on the particular uniqueness of the case, the important point is that the court placed the burden of proof squarely upon the plaintiff and allowed the defendant railroad companies to be excused if they had acted in a specific manner. Such opinions are the very definition of negligence, and thus support Horwitz's thesis. The railroad industry was subsidized in West Virginia, therefore, when the strict liability standard was replaced with a negligence standard as shown in the preceding fire cases.

B. Injury to Animals

In the thirty-four cases where animals were injured by the trains of defendant railroad companies, industry was once again subsidized and deviated from lower court doctrine. The justice of peace, the lowest court of origin at the time, ruled in favor of the plaintiff 100% of the time in the five cases originating at that level. This illustrates my hypothesis that courts closer to the people were more plaintiff oriented. All
of these cases and another twenty-nine were ruled upon at the circuit court level. Here, the plaintiffs won 79% of the time, but when all of these cases were appealed to the Supreme Court that number declined to 38% with the Supreme Court overturning cases 66% of the time. In other words, the Supreme Court was defendant or industry centered. An example can be shown in the rulings of two cases in which the lower courts found for the plaintiffs, but the high court subsequently overturned these decisions.

In Hawker v. Baltimore and Ohio Railroad Company, three cattle were killed and several others were injured when struck by a train. The plaintiff claimed it was not his fault the cattle were killed since no effort was made by the engineer to prevent the incident. The engineer made no attempt at slowing the train or to even blow its whistle as a warning. The plaintiff sued for $475.00 in damages and was awarded $275.00 by the second circuit jury, after the first jury failed to agree and was discharged. The defendant appealed the case to the Supreme Court.

In its opinion, the Supreme Court favored industry by claiming a railroad company is not responsible for an inevitable accident resulting in the killing of cattle even though the engineer failed to exercise any precaution whatsoever. This opinion allowed the railroad companies to kill livestock under the defense that such an incident would be inevitable and,
therefore, they could not be held liable.

In *Lovejoy v. Chesapeake and Ohio Railroad Company*, mules in a field came upon an embankment in front of a twenty-six car freight train. The engineer sounded the stock alarm, applied the air brake, and tried to reverse the engine, all to no avail. One mule crossed over the tracks and another was killed while making an attempt. The train could not have been stopped in time. Nevertheless, the circuit court found in favor of the plaintiff causing the railroad to appeal.

In its opinion, the West Virginia Supreme Court evolved the Hawker decision to a fairer, but still pro-industry, opinion. It declared that the engineer and fireman kept a proper lookout along the track in front of the train. Upon seeing a mule on the track two hundred through three hundred feet ahead, they sounded the stock alarms, put on the air brakes, shut off steam, and did all that could be reasonably expected in order to prevent a collision, but the train could not be stopped in time. Therefore, the company was not liable for the killing of the animal. This decision is an improvement over the Hawker decision from a plaintiff's perspective, nevertheless, it still favored industry by an outright abolition of the strict liability standard in favor of negligence.

The injury to animals cases show a clear bias on behalf of the Supreme Court in favor of the railroads because the standard of strict liability was dropped in favor of negligence,
and again in line with Horwitz's thesis.

C. Personal Injury

In thirty-one personal injury cases observed, a pro-industry attitude by the Supreme Court once again was shown. Plaintiffs won 65% of the time at the circuit level as compared to 45% at the Supreme Court. Although this difference is not as severe as that in injury to animals cases, it still shows an industrialist sentiment by the high court, a high court that was defendant oriented. However, simple enumeration does not show the cases involving injured children where the high court ruled in favor of plaintiffs. The Supreme Court ruled in favor of children in cases involving railroads, I hypothesize, because the court was composed of elected officials. The officials would have a hard time justifying to the electorate why they ruled against a grieving family who had just lost a child. Moreover small children are not largely responsible for their actions and this placed a greater burden on the defendant. The following case examples illustrate my point.

In Raines v. Chesapeake and Ohio Railroad Company, seven witnesses testified at the circuit level that Raines was killed while walking on the railroad tracks and the engineer blew the train whistle as a warning when it was only twenty to thirty feet away from the victim. The engineer did not make any attempt
to slow the train down. The jury was instructed by the judge (who apparently had industrialist sentiments) to discard all of the plaintiffs evidence and find for the defendant. The case was appealed by the plaintiff to the Supreme Court.

In its opinion for the defendant, the Supreme Court (to paraphrase its opinion) held that if those running a railroad train discover a trespasser in imminent danger on the track they must use all reasonable care to avoid inflicting injury, otherwise the company will be responsible; but if they omit no duty after becoming aware of his danger, the railroad company will not be responsible for such injury. The court went on to say if any apparently capable person, and one apparently in the possession of his faculties, is seen walking on a railroad track, the servants of the company running the train, having given such signals as are required, have a right to act on the presumption that such person will step aside in time to remove himself from the danger. This opinion clearly adheres to a negligence standard that favors the defendant. It assumes a responsibility and consciousness in adults that is not found in children whereas in cases where the plaintiff and defendant are of equal consciousness then presume in favor of the industrial defendant. The plaintiff in this case is supposed to step aside just because it can be proven that the railroad company made an effort to warn him, however meaningless that effort might have been.
The Supreme Court took a different stance in cases involving children. Here, it often ruled in favor of the plaintiff as illustrated in *Dempsey v. Norfolk & W. Ry. Co.* In this incident a sixteen month old child was killed when struck by a train as evidenced by where the body was found, the time the child was out of the mother's sight, and the footprints that lead to the track. The child, it was presumed, had wandered off to join other children playing nearby. The engineer should have seen the child since the horizon was unobstructed for 1,400 feet. He claimed he did not, but the facts contradicted his testimony. So, the jury awarded the grieving family $1,500.00. The defendant then appealed to the Supreme Court.

The Supreme Court rendered a verdict affirming the circuit decision, declaring that it is the duty of a locomotive engineer to look out for helpless trespassers on the track, so far as may be consistent with other duties of his position, and when he observes a child of irresponsible age on the track to take reasonable precaution for its safety. The court issued a stinging indictment against railroad companies when it further stated it is negligence for a locomotive engineer, when his other duties do not demand attention and the situation permits a view, to fail to observe a child of irresponsible age walking by the side of a track. Also when a child is in dangerous proximity thereto, or, when he does observe it and has distance in which to stop, to undertake to run a rapidly moving train
by the child in that position. These statements by the court reveal a sympathy to plaintiffs when they are injured children as compared to the rigidity shown towards adult plaintiffs. As a matter of fact, it appears that the legal doctrine used in cases involving injured children is similar to that of strict liability.

There may have been an exception to the Supreme Court's acts of mercy towards children. This is when the child is killed in a mining town. Here, the high court has shown itself to rule in favor of the defendant railroad companies. An example of this is shown in the Dickinson case.

In Dickinson v. New River & Pocahontas Consolidated Coal Co., the circuit decision was in favor of the defendant since, as I hypothesize, it was a mining town with a jury most likely composed of the mine's employees. In this case the plaintiff's eight month old child was killed by a train leading from the mouth of the mine to the coal yard. Many employees testified that this railway lay between the mining houses and the town. The plaintiff appealed to the Supreme Court.

The West Virginia Supreme Court also ruled that the mining company which owned the railway was not liable, affirming the circuit court's opinion. In its opinion, the court stated that a coal mining corporation need not ordinarily keep a look out for children of employees on its tracks, though they reside in the company's houses on its premises near the track. The
court also stated ordinarily a coal mining corporation is under no duty, in the handling of its coal cars and motors on its private railway between the mouth of the mine and its yards or tipple, to keep a look out for children of employees on such track. This court opinion demonstrates that the court's mercy to children was limited in cases involving mining towns. In such places, the coal company, which is a major industry in the state, is not compelled to place a high regard for their young lives. The Dickinson case is a good example of Horwitz's thesis in action since industry was subsidized by not being held liable as ruled upon by a pro-industry Supreme Court.

In conclusion, personal injury cases show the West Virginia Supreme Court behaved in a pro-industry manner as stated in the aforementioned opinions. The high court did however, find itself siding with the plaintiffs, when they were children who did not reside in mining towns. So, during this time period only children from non-mining towns had a good chance obtaining compensation from the high court.

IV. Conclusion

To summarize my findings one need only look at the perspectives of two justices during this time period, Justices Marmaduke Dent and Henry Brannon who occupied opposite ends of the ideological spectrum. Dent, who served on the court
from 1893-1904, often wrote dissents and very few opinions during his tenure because he was a plaintiff's justice. He was a man who acknowledged the law above all else, including industry, because his values were rooted in Scripture, and were non-materialistic (Reid, p.171). This ideology was reflected in his views upon the railroads and their public duty:

'In the exercise of its franchise, the public permits it to rush its heavy trains with immense speed over track through all portions of the country, but as a precedent condition thereto, imposes on it the duty of keeping a lookout for unwary and helpless trespassers upon its right of way' (Reid, p.135).

One can clearly see by this statement that Dent was in favor of railroads acting responsibly to prevent injury. This is why he wrote so many dissenting opinions.

To counter the influence of Dent on the Supreme Court, there was Brannon. He was formerly the president of Weston and West Fork Railroad Company and a proponent of industrial development (Reid, p.140). In five significant railroad cases Brannon sided with the railroads each time, while Dent did so only three times (Reid, p.139). Brannon's ideology in regards to plaintiffs versus industry can be summarized in this statement:

'By these等 authorities the dead are found strewn all along the highways of business and commerce. Has it always been so? Will it always be so? The evolution of the future must answer. What its evolution will be in this regard we do not yet know; but we do know that thus far the law of survival of the fittest has been inexorable. Human intellect, human laws cannot prevent these disasters. The dead and wounded have
no right of action from the working of this imperious law. This is a free country; liberty must exist. It is for all. This is a land of equality, so far as law goes, though some men do in lust of gain get advantage. 'Who can help it?' (Reid, p.57)

This quote reveals Brannon's laissez-faire attitude, with social Darwinian undertones in regards to plaintiffs versus corporations. He was, therefore, considered sensitive to the perils of the business community, and also had a financial stake in the railroad industry. Therefore, he along with a majority of the high court was considered to be pro-industry and their decisions reflect that position.

In conclusion, the West Virginia Supreme Court, through its decisions and the make up of its justices, was overwhelmingly pro-industry. This attitude by the court leads me to conclude Horwitz's thesis is applicable for the state of West Virginia. The historical common law standard of strict liability which favored plaintiffs was abandoned and replaced by a defendant centered negligence standard. Therefore, the West Virginia Supreme Court did subsidize railroad companies by their rulings even though the lower courts were more plaintiff centered.
References


