Blood on the Tracks

*Thomas D. Russell**

ABSTRACT

Streetcars were the greatest American tortfeasors of the early twentieth century, injuring approximately one in 331 urban Americans in 1907. This empirical study presents never-before-assembled data concerning litigation involving streetcar companies in California during the early twentieth century.

This Article demonstrates the methodological folly of relying upon appellate cases to describe the world of trial court litigation. Few cases went to trial. Plaintiffs lost about half their lawsuits. When plaintiffs did win,

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they won very little money. Regarding the bite taken out of the street railway company, the Superior Court was a flea.

Professor Gary Schwartz and Judge Richard Posner have presented inaccurate empirical data concerning early twentieth-century personal injury litigation. Professor Gary Schwartz was wrong to characterize tort law as generous. Likewise, Judge Richard Posner has been wrong to call tort law efficient. Like Professors Lawrence M. Friedman and Morton Horwitz, I see the amount taken from the street railway companies as quite small. However, I see no deliberate efforts to subsidize the industry.

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Their minds are filled with big ideas, images and distorted facts.[1]

–Bob Dylan

If general ideas and theories about what's going on in society are going to be anything other than moonshine, they have to be rooted in hard-bought knowledge of what in fact is happening in people's lives.[2]

–J. Willard Hurst

INTRODUCTION

Streetcar companies were the greatest American tortfeasors of the early twentieth century. In 1902, street and electric railways in the United States injured 47,429 persons: 130 per day.[3] Street railway companies killed another 1,218 that year, more than three per day.[4] By 1907, streetcar injuries and deaths had grown nearly 150 percent to 120,680.[5] That year, streetcars injured or killed nearly as many people as the railroads—prominent tortfeasors in the early twentieth century, as every law professor and first-year law student knows.[6] In 1907, railroads injured or killed 122,855 persons, and their urban cousins the street railways exacted almost as high a toll, 120,680 injuries and deaths.[7] The 1907 streetcar toll amounted to 324 non-fatal injuries and almost seven deaths per day. Streetcars injured or killed one of every 687 Americans or one of every 331 urban Americans that year.[8]

This study of Alameda County and Los Angeles County streetcars and the injuries and lawsuits they spawned is an exercise in empirical social

1. BOB DYLAN, IDIOT WIND (Columbia Records 1975).

2. Hurst quoted in Hendrik Hartog, *Snakes in Ireland: A Conversation with Willard Hurst*, 10 LAW & HIST. REV. 370, 390 (1994).

3. U.S. BUREAU OF THE CENSUS, STREET AND ELECTRIC RAILWAYS: 1902 15 (1905).

4. *Id.*

5. U.S. BUREAU OF THE CENSUS, STREET AND ELECTRIC RAILWAYS: 1907 89 (1910).

6. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928); Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66 (1927); Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934).

7. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957 437, ser. Q 141-152 (1961) [hereinafter HISTORICAL STATISTICS]; U.S. BUREAU OF THE CENSUS, *supra* note 5, at 89.

8. The Bureau of the Census estimates the 1907 population of the United States at 87,000,000. HISTORICAL STATISTICS, *supra* note 7, at 8, ser. A 22-33. I have calculated the urban injury rate using the Bureau of the Census figure for the urban population in 1910. The 1907 urban population was smaller than urban population in 1910, but the exact figure is not available. Were the smaller figure for 1907 available, the urban injury rate for 1907 would be higher than one in 331 persons. *Id.* at 9, ser. A 34-50.

science in the American legal realist tradition,[9] a research tradition that legal historian Willard Hurst[10] and his student Lawrence Friedman[11] have expanded. This Article is an example of what the great legal realist Karl Llewellyn would call "intensive" rather than "extensive" research.[12] The Article looks intensively at a particular industry, at a particular place and time, rather than looking extensively at numerous different industries or looking intensively at numbers of different cities and their railways.

This Article, and a companion article that focuses on claims-department data, serve as examples of the completeness with which both legal historians and scholars of contemporary tort litigation should collect data regarding injuries, claims, litigation, and appeals. I mean to criticize scholars who, relying only or primarily upon appellate reports, make seemingly empirical generalizations about the operation of trial courts and about the social and economic activities that lead to litigation. As specific examples of this strong, broad methodological criticism, I focus this Article on two authors' historical studies of tort. These works include two studies that the late Gary T. Schwartz published in the 1980s.[13] Torts scholars are widely familiar with Schwartz' historical studies of tort litigation. Richard Epstein exposes law students and their professors to Schwartz' studies by including a selection from his 1981 article in his leading torts casebook.[14]

Richard A. Posner is the other author whose methods and conclusions I specifically criticize. The focus of my attention will be Judge Posner's influential 1972 work, *A Theory of Negligence*.[15] This article by Posner is a founding article in the discipline of Law and Economics, and this piece is primarily a theoretical work. However, Posner links his theory to a substantial body of empirical data that he derived from appellate case reports concerning torts cases in the late nineteenth and early twentieth

9. *See generally* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

10. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836–1915 (1964); JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES (1977).

11. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (4th ed. 2019); *see also* LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870–1910 (1981).

12. Karl N. Llewellyn, *On What Makes Legal Research Worth While*, 8 J. LEGAL EDUC. 399, 402–03 (1956).

13. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717 (1981) [hereinafter *Tort Law and Economy*]; Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641 (1989) [hereinafter *Character of Tort Law*].

14. RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 304–05 (10th ed. 2012).

15. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

centuries. Despite this abundance of historical data, historians have not paid much attention to Posner's historical efforts. Schwartz believed historians have ignored Posner because Posner's thoroughgoing devotion to economics overwhelms his evidence. Schwartz commented that Posner's "economic ideology so dominates his historical exposition as to render that exposition unsatisfactory for those not already sharing his ideology."[16] "For the agnostic reader," Schwartz complained, "Posner's efficiency thesis seems to smother, rather than illuminate, his historical evidence."[17] As a consequence of this smothering, Schwartz commented that "It is . . . not surprising that historians like Friedman and Horwitz (and the scholars reviewing their works) have simply ignored Posner's account of the nineteenth century."[18]

Schwartz was right that Posner's ideology smothers data and probably right as to why legal historians have largely ignored Posner's historical treatment of torts. However, because Posner's *A Theory of Negligence* has reached and probably continues to reach a wider audience than the work of legal historians of torts, historians ought to take notice. Posner's historical exposition has considerable impact today, just as *Gone with the Wind* has distorted Southern history for generations. For this reason, I focus on Posner's article as an empirical, historical work. I leave theoretical developments in law and economics over the last half century to those whose theoretical inclinations extend to economics.

This Article shows that the views of tort law that Posner and Schwartz constructed using appellate materials are inaccurate. Posner and Schwartz rely on information from appellate reports to make claims about outcomes and compensation in the trial court realm and the general character of tort law. Posner also extends his generalizations to settlements. Most importantly, Posner and Schwartz misrepresent the success of personal injury plaintiffs. They exaggerate or misstate the frequency with which plaintiffs won cases and overstate the compensation of personal injury plaintiffs. Their reliance upon appellate opinions causes them to mischaracterize the trial court and claims realms below.

Posner and Schwartz' exaggerations lead them to mischaracterize the general nature of tort law. One word can represent each respective scholar's appraisal of tort law.

For Posner, that word is efficiency. Posner understands tort law as a regulatory system. For Posner, an efficient level of spending is one in which a potential tortfeasor spends an amount on safety precautions that roughly

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16. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1721.

17. *Id.*

18. *Id.* at 1721 n.28. *But see* Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. BAR FOUND. RSCH. J. 351, 352 (Friedman's discussion of Posner)

equals the discounted value of an injury, that is, the cost of precautions roughly equals the product of the probability of an injury and the value of the likely loss.[19] The goal is to get a potential injurer to spend the right amount of money protecting against injury, not inefficiently more and not negligently less.[20] In *A Theory of Negligence*, Posner argues that "the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety."[21]

Posner analyzes the efficiency of tort law using appellate cases. He bases his analysis upon 1,528 appellate opinions between 1875 and 1905.[22] He supplements these opinions by examining 111 trial court cases from Illinois' Cook and Du Page Counties.[23] The appellate cases were a sample of about 3.3 percent of all "appellate accident opinions" from the period.[24] From the appellate sample, Posner "hoped to obtain a representative view of the actual functioning of the negligence system."[25] Using these cases, Posner ultimately concluded that "The rules of liability seem to have been broadly designed to bring about the efficient (cost-justified) level of accidents and safety, or, more likely, an approximation thereto."[26] As a regulatory scheme, the tort rules were just about as they should be. As the text below makes clear, average trial court awards were substantially lower than the average amount awarded in the appellate cases Posner consulted, undermining Posner's thesis that tort litigation delivered efficient results.

Whereas efficiency is the single word that characterized Posner's view of tort law, the word that characterized the late Gary Schwartz' view of tort law was solicitude.[27] Schwartz saw solicitude toward the victims of injury. He argued that "with the important exception of worker injury cases, nineteenth-century tort law tended to be generous in affirming the tort

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19. Posner, *A Theory of Negligence*, *supra* note 15, at 32; Learned Hand articulated this economic definition of negligence. United States v. Carroll Towing Co., 159 F.2d 169 (2d. Cir. 1947).

20. Posner, *A Theory of Negligence*, *supra* note 15, at 32–33

21. *Id.* at 33.

22. *Id.* at 29.

23. *Id.* at 36. Although I am critical of Posner's methods and conclusions in this Article, he deserves recognition for the systematic character of the empirical methods that he used in his 1972 article. Posner noted that contrast between his approach and what he referred to as "the conventional approach in legal scholarship of analyzing 'leading' cases." *Id.* at 35. Had Posner stayed the methodological course he charted in *A Theory of Negligence*; he might have made a name for himself as an empirical socio-legal scholar. However, his scholarly interests took him in a different direction, where he has had some success.

24. Posner, *A Theory of Negligence*, *supra* note 15, at 34.

25. *Id.* at 35.

26. *Id.* at 73.

27. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1752–53, 1774; Schwartz, *Character of Tort Law*, *supra* note 13, at 665.

liabilities of emerging industry."[28] With his argument, Schwartz was responding principally to two different claims. First, Schwartz disbelieved Posner's argument that "efficiency" characterized tort law in the late nineteenth and early twentieth centuries. As noted above, Schwartz was contemptuous of Posner's doggedly economic inclination.[29] Schwartz regarded the history of tort as more complicated than Posner.[30] In Posner's terms, Schwartz' conclusion that tort law was generous to injury victims suggests that plaintiffs were overcompensated and, therefore, the negligence system operated inefficiently as too heavy a regulatory hand.

Schwartz' principal target was not Posner. Instead, Schwartz challenged those historians—most importantly Lawrence Friedman and Morton Horwitz—who have characterized tort law in the nineteenth century as a subsidy to emerging industrial enterprises.[31] As Schwartz explained in his 1989 piece, the subsidy thesis "states that nineteenth-century tort law witnessed a major vindication of negligence at the expense of strict liability and the development of a variety of other harsh, liability-limiting doctrines . . . ."[32] Schwartz explained the alleged reason for these doctrinal shifts. Proponents of the subsidy thesis, he said, have argued that "the judicial motive for all of this was to provide subsidies for emerging industry, even when so doing required sacrificing the welfare of ordinary victims."[33]

Schwartz' criticism of the subsidy thesis has two principal parts. First, he "finds the claim of strict liability subversion largely unwarranted."[34] He finds instead that the negligence standard developed in what he calls "a basically evolutionary way."[35] This pattern of growth undermines the claim that pro-enterprise judges substituted a more lenient negligence standard.[36]

The second part of Schwartz' critique was more closely related to the empirical data that form the base of this Article. The second prong of his attack on the subsidy thesis was that by being generous to plaintiffs, tort law operated not as a subsidy but instead was closer to the opposite. Although he never said so directly, one gets the sense that Schwartz saw tort law as a tax on industry. He denied that there was a "tendency on the part of the judiciary to shelter emerging industries from what would otherwise be their liability in tort. If anything," Schwartz argued, "novel

28. Schwartz, *Character of Tort Law*, *supra* note 13, at 641.
29. *See* discussion *supra* note 17.
30. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1775.
31. *Id.* at 1717 n.1.
32. Schwartz, *Character of Tort Law*, *supra* note 13, at 641.
33. *Id.* at 641–42.
34. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1720.
35. *Id.* at 1722.
36. *Id.* at 1731.

forms of risktaking generated by the profit motive were viewed with enhanced, rather than reduced, suspicion."[37] Schwartz saw tort compensation as too generous; subsidy theorists see it as too small; and Posner concluded it was about right.

Like Posner, Schwartz relied upon appellate opinions as the principal source of his data. In his 1981 article, Schwartz considered "every tort case" that he could find in the New Hampshire and California Supreme Court reports for the nineteenth century.[38] In his 1989 piece, Schwartz extended his analysis to Delaware, Maryland, and South Carolina but limited his research to appellate cases before 1860.[39] More so than Posner, Schwartz presumed that the appellate cases he read represented the outcomes and activity in trial courts and the general character of tort law.

Schwartz, like Posner, supplemented his appellate data with a brief foray into archival trial court materials.[40] I will show that, like Posner, Schwartz failed to recognize that the empirical data he drew from the trial court realm called his appellate conclusions into question. Furthermore, had Schwartz been more careful and complete in handling trial court records, he would have derived data that contradicted the broad conclusions he drew from the appellate opinions. I present my own analysis of the Los Angeles County trial court records that Schwartz examined. I could not replicate his results because Schwartz made mistakes in the archives. Most importantly, I show that Schwartz reported an erroneously high figure for plaintiff successes.

The Oakland Traction data at the trial court level do not support Schwartz' claim that tort law was generous to plaintiffs. Instead, the data show that Alameda County's Superior Court was an institution that drew very little money from the street railway company. Although many plaintiffs filed suit against the company, very few plaintiffs won. When they did win, the awards were not generous. The empirical data do not support claims of judicial solicitude or generous compensation. Instead, the data show that the total amount of money the courts transferred from the company to injured plaintiffs was small.

Whether tort law in the late nineteenth century operated as a subsidy to business enterprises, the empirical data I will present below come closest to supporting the claims of the subsidy theorists. The early twentieth-century tort law regime did not force Oakland Traction to internalize—that is, pay for—much of the costs that third parties suffered in streetcar

37. *Id.* at 1774.
38. *Id.* at 1719.
39. Schwartz, *Character of Tort Law*, *supra* note 13, at 643.
40. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1764.

crashes.[41] Within such a regime, street railway companies and other enterprises benefited from being able to injure without having to bear much of the cost. When the street railway companies spilled blood on the tracks, injured persons transferred wealth to the company through uncompensated or under-compensated injuries.

I. STREETCAR INJURIES

Just as automobile injuries today are the most common source of personal injury lawsuits,[42] so were streetcar injuries in the late nineteenth and early twentieth centuries. In his study of Boston civil litigation, Robert Silverman estimated 1,400 suits against streetcar companies in 1900: a 93-fold increase from 1880 that amounted to one tort suit against a street railway company for every 400 Bostonians in 100.[43] These streetcar lawsuits comprised 42 percent of all Boston's accidental-injury suits in 1900,[44] with railroads adding another 5 percent.[45] Randy Bergstrom showed that in 1890—the innocent age when horses still drew trolleys—there were 12 deaths involving streetcars in New York City.[46] Bergstrom looked at personal injury judgments—as opposed to Silverman, who looked at the number of cases filed—and found that in 1890, railway companies were defendants in 29 of 112 (25.9 percent) personal injury suits that reached judgment in the city's principal trial court.[47] By 1910, streetcars, now with electric motors, killed 83 people in New York City, and the number of adjudicated cases involving street railway companies had climbed to 92.[48] Other rail vehicles—railroads, subways, and elevated trains—killed an additional 71 New Yorkers that year.[49] During the last two decades of the nineteenth century in Philadelphia, the City of Brotherly Love's street and steam railways supplied the coroner with a yearly average of 170 corpses—more than three per week.[50]

The danger of street railways captured a slice of the American popular imagination. Streetcars worked their way into New Yorkers' popular

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41. Thomas D. Russell, *Historical Study of Personal Injury Litigation*, GA. J. S. LEGAL HIST. 109, 120–21 (1991).

42. Thomas D. Russell, *Frivolous Defenses*, 69 CLEV. ST. L. REV. 785, 803–06 (2021).

43. ROBERT A. SILVERMAN, LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880–1900 105, 119, 189 nn.30–31 (1981) [hereinafter LAW AND URBAN GROWTH].

44. *Id.* at 106 tbl.20.

45. *Id.*

46. RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1890 21 tbl.5 (1992).

47. *Id.*

48. *Id.* at 43 tbl.14.

49. *Id.*

50. Average derived from table 6 in ROGER LANE, VIOLENT DEATH IN THE CITY: SUICIDE, ACCIDENT, AND MURDER IN NINETEENTH-CENTURY PHILADELPHIA 40 (1979).

culture and lexicon. Trolleys proliferated in Brooklyn—home to the American Street-Railway Association—and Manhattanites referred to those who lived in Brooklyn as "trolley dodgers." With time, Brooklyn's professional baseball team—known early on as simply the Brooklyns—became the Brooklyn Dodgers.[51]

Foreign visitors to American cities noticed the peril of streetcars. In 1893, nearly two people died daily on Chicago's railroad and street railway tracks, with many others maimed.[52] William T. Stead, an English publisher and reformer who would die on the Titanic in 1912,[53] observed in his 1894 book *If Christ Came to Chicago!* that "The first impression which a stranger receives on arriving in Chicago is that of the dirt, the danger and the inconvenience of the streets."[54] The second impression, noted Stead, was "the multitude of mutilated people whom he meets on crutches . . . . Dealers in artificial limbs and crutches," he suggested, "ought to be able to do a better business in Chicago than in any other city I have ever visited."[55] Stead revealed that "those legless, armless men and women whom you meet on the streets are merely the mangled remnant of the massacre that is constantly going on year in and year out."[56]

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51. PETER C. BJARKMAN, BROOKLYN DODGERS-LOS ANGELES DODGERS, FROM DAFFINESS DODGERS TO THE BOYS OF SUMMER AND THE MYTH OF AMERICA'S TEAM, in ENCYCLOPEDIA OF MAJOR LEAGUE BASEBALL TEAM HISTORIES: NATIONAL LEAGUE 75 (Peter C. Bjarkman ed., 1991).

52. WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 373 (1991).

53. CHAMBER'S BIOGRAPHICAL DICTIONARY: THE GREAT OF ALL NATIONS AND ALL TIMES 877 (William M. Geddie & J. Liddell Geddie eds., Chambers 1950) (1897).

54. WILLIAM T. STEAD, IF CHRIST CAME TO CHICAGO! 187 (Living Books 1964) (1894).

55. *Id.* at 187–88.

56. *Id.* at 188.

George Luks, Annual Parade of the Trolley Cripple Club[57]

Another foreign visitor of sorts—White Fang—was struck, as Stead had been, by the abundant danger of the urban streets of the age. In Jack London's 1906 book, *White Fang*, the Article wolf came in from the wilderness, a creature void of form.[58] After arriving via Steamer, the wolf saw that "The streets were crowded with perils—wagons, carts, automobiles; great, straining horses pulling huge trucks; and monstrous cable and electric cars hooting and clanging through the midst, screeching their insistent menace after the manner of the lynxes he had known in the northern woods."[59] At the book's end, London returns to White Fang's first viewing of the electric streetcar. White Fang is injured while protecting his master from a convict who had escaped from nearby San Quentin.[60] As White Fang lay in recovery, "Bound down a prisoner, denied even movement by the plaster casts and bandages,"[61] a recurring dream plagued the wolf, a nightmare vision of "the clanking, clanging monsters of electric cars that were to him colossal screaming lynxes."[62] In the dream, the wolf would lie in wait, hunting a squirrel, but when "he sprang out upon it, it would transform itself into an electric car, menacing and terrible, towering over him like a mountain, screaming and clanging and spitting fire at

57. THE VERDICT 10–11 (1899 vol. 1 no. 14).
58. JACK LONDON, WHITE FANG 281 (1906).
59. *Id.* at 279.
60. *Id.* at 317–23.
61. *Id.* at 323–24.
62. *Id.* at 324.

him."[63] The nightmare vision of the electric streetcars of the early twentieth century returned to his dreams a "thousand times . . . and each time the terror it inspired was as vivid and great as ever."[64]

Just as in Boston, Chicago, New York City, and Philadelphia, turn-of-the-century street railways and railroads injured many people in California's Alameda County, which lies on the eastern shore of the San Francisco Bay and includes the cities of Berkeley and Oakland—where Jack London lived. Some of the injured people of Alameda County sought compensation by filing personal injury lawsuits in the county's Superior Court. Rail suits formed a majority of the county's trial court tort litigation at the turn of the century. Street railways and railroads were defendants in nearly 60 percent of the Alameda County Superior Court personal injury suits filed between 1880 and 1910.[65] Between 1898 and 1910—the years that are the focus of this study—Oakland Traction, Alameda County's principal street railway, was the defendant in 36 percent of all the Superior Court personal injury claims.[66] This street railway company—Alameda County's greatest tortfeasor and tort defendant in the early part of this century—is the subject of this article.

II. SOURCES

I mined the records of the Alameda County Superior Court to prepare this article. I have compiled data for all the personal injury suits filed in Alameda County's Superior Court between 1880 and 1910.[67] These data are not a sample of the trial court cases; they are the entire universe of Superior Court cases for these years. These data include every suit in which Oakland Traction was a defendant and all the other tort lawsuits from these years. This Article also includes information on the very few cases against Oakland Traction that traveled to California's Court of Appeals and Supreme Court.

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63. *Id.*

64. *Id.* at 325.

65. Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901–1910*, 34 AM. J. LEGAL HIST. 295, 298 (1990). There were 383 cases involving street railways and railroads, which comprised 57.2 percent of the 675 torts suits in Alameda County Superior Court between 1880 and 1910.

66. *Id.* at 296–99. This figure is a slight revision from Friedman and Russell. Between 1898 and 1912, the name of the street railway company changed with the acquisition of additional, competing street railway lines. The names, along with effective dates, were Oakland Transit Company (1898–1901); Oakland Transit (1901–1902); Oakland Transit Consolidated (1902–1904); Oakland Traction Consolidated (1904–1906); Oakland Traction Company (1906–1912). Throughout this Article, I will refer generally to the streetcar company as Oakland Traction.

67. Lawrence Friedman and I and others assembled these data. See Friedman, *Civil Wrongs*, *supra* note 18; Friedman & Russell, *More Civil Wrongs*, *supra* note 65.

For Los Angeles, a research assistant and I examined the trial court records of cases filed between 1889 and 1895 to replicate Professor Schwartz' research. We looked at all the lawsuits with street railway and railroad companies as defendants. As I describe below, we looked at the case files—the original pleadings, motions, orders, jury instructions, and verdict forms—and not merely at books that recorded the outcomes of trials.

Given his conclusion that trial court records were difficult to find and use,[68] Posner instead turned to appellate reports, which, as noted above, he supplemented with a tiny sampling of some Illinois trial court records. This Article presents empirical data—what Hurst called "hard-bought knowledge"—from the types of records that Posner was either unable to find or found too challenging to use.

III. OAKLAND TRACTION LITIGATION

In early 1903, attorney Harmon Bell reviewed a list of the pending lawsuits against Oakland Transit Consolidated, the Oakland, California street railway company that Bell represented.[69] The roster included seventeen cases: twelve in Alameda County Superior Court, the county's principal trial court,[70] and five smaller cases in two Justice's Courts,[71] which heard cases in which less than $300 was at issue.[72] The Superior Court suits and at least three of the five Justice's Court suits were tort suits. All but two of these tort suits were for personal injury. The litigants sought compensation for broken, dislocated, and otherwise damaged hips; a dislocated thumb; a broken collarbone, kneecap, and wrist (three different people); one disfigured and one lacerated face (two people); a child's injured left foot; internal bruises; broken ribs (two people); one broken and one amputated leg (different people); and two damaged wagons.

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68. Posner also notes that trial court records represent only a portion of all injuries, which of course is true, but he then turns to appellate records, which of course represent an even smaller proportion of all injuries. Posner, *A Theory of Negligence*, *supra* note 15, at 35–36.

69. "Actions pending against the Oakland Transit Consol. and its constituent corporations on the Twenty-Ninth day of January 1903." Harmon Bell, Carton 14, Papers of Harmon Bell (on file with the Bancroft Library, University of California, Berkeley) [hereinafter Carton 14].

70. Appendix A includes the full citation for Alameda County Superior Court cases. For ease of reference and to shorten what would otherwise be multi-page footnotes, citations of the trial court cases will simply use the plaintiff's last name and, if needed, the case number. Appendix A (*Vierra*; *Geary*; *Casper*; *Cameron*; *James*, ACSC# 18908; *Fought*; *Racey*; *Avery*; *Kennedy*; *Metzger*; *French*).

71. Bignami v. Oakland Transit Consol., Oakland Township Justice's Court [hereafter OTJC] # 19434 (Sept. 1, 1899); Mann v. Oakland Transit Consol., OTJC# 341, docket no. 41 (Feb. 17, 1900); Walker v. Oakland Transit Consol., OTJC# 184, docket no. 41 (Feb. 17, 1900); Fox v. Oakland Transit Consol., OTJC# 2793, docket no. 46 (Apr. 13, 1901); Jansen v. Oakland, San Leandro, and Haywards Electric Ry., Brooklyn Township Justice's Court # 7200 (Dec. 3, 1902).

72. Cal. Civ. Proc. Code § 114 (1872) (renumbered to § 112 in 1880).

The plaintiffs in the seventeen suits threatened Oakland Transit with $197,257.69 in damages, about $6.7 million in 2023.[73] The Superior Court suits accounted for nearly all of this total (99.7%), with an average demand of $16,381.67 in these twelve suits. This aggregate demand for damages amounted to 17 percent of the railway's gross revenue and over 73 percent of the company's net profit that year.[74]

As the street railway's attorney, Bell handled various matters, including real estate transactions, securities offerings, mergers, and the acquisition of municipal charters.[75] A business organization called "The Realty Syndicate" controlled Oakland Traction.[76] The Syndicate also owned the San Francisco, Oakland and San Jose Railway, which ran trains and operated ferries between the East Bay and San Francisco. The assets of the Syndicate exceeded $10.7 million in 1905.[77]

Due to the control of Oakland Traction by the Realty Syndicate, patrons sometimes referred to the street railway as the "Syndicate Railway."[78] F. M. "Borax" Smith was then president of the Syndicate, with Frank C. Havens, the vice president and manager. Smith—who earned his nickname while making his first fortune in Borax mining in Death Valley and elsewhere—and Havens were great East Bay capitalists who built much of the East Bay.[79] Their empire and vision extended infrastructurally to the street railways, a water company, the Oakland Harbor—which they unsuccessfully tried to control—to real estate development, of course, and also to the Idora Amusement Park.[80] Havens and Smith began construction of the Claremont Hotel, now an Oakland landmark, and Havens also participated in the ill-conceived venture of planting eucalyptus trees in the

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73. Throughout this paper, the dollar amounts can be roughly compared to 2023 dollars using a multiplier of 34, the implicit price deflator for 1903 dollars based upon consumer price indexes. CPI Inflation Calculator, IN2013DOLLARS.COM, https://www.in2013dollars.com [https://perma.cc/WK5K-PNUZ]; U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995 491–92 (1995); JOHN J. MCCUSKER, HOW MUCH IS THAT IN REAL MONEY? A HISTORICAL PRICE INDEX FOR USE AS A DEFLATOR OF MONEY VALUES IN THE ECONOMY OF THE UNITED STATES 329, 332 (1992).

74. In 1903, Oakland Traction's gross revenue was $1,137,041 and its net income, after operating expenses, interest, and taxes, was $268,382. FREDERIC NICHOLAS, STREET RAILWAY JOURNAL, AMERICAN STREET RAILWAY INVESTMENTS, 1904 12 (vol. 11 1904).

75. SAN FRANCISCO: ITS BUILDERS PAST AND PRESENT 151–52 (1913); PAST AND PRESENT OF ALAMEDA COUNTY CALIFORNIA 478–82 (1914). *See generally* discussion *infra* note 83.

76. THE REALTY SYNDICATE 2 (1905); *see also* Carton 14, *supra* note 69.

77. PAUL C. TRIMBLE, INTERURBAN RAILWAYS OF THE BAY AREA 25 (1977).

78. *Id.*

79. *See generally* Dallas Walker Smythe, An Economic History of Local and Interurban Transportation in the East Bay Cities with Particular Reference to the Properties Developed by F. M. Smith, (1937) (unpublished Ph.D. dissertation, Economics, University of California, Berkeley).

80. *See infra* note 83.

Oakland Hills.[81] These trees contributed to the acceleration of the fire that nearly destroyed the Claremont Hotel in October 1991.[82]

The variety of Bell's practice is something unknown to lawyers today. Harmon Bell did all or at least most of the legal work of Havens, Smith, the Realty Syndicate, and the street railways that the Syndicate controlled. However, Bell was not just an office attorney. He served as Oakland Transit's defense counsel in the many tort suits against the company and was a very able trial attorney.

The papers of Harmon Bell, which the Bancroft Library of the University of California, Berkeley holds, are a treasure trove concerning litigation against Oakland Traction.[83] Harmon Bell's papers also include rich information regarding the overall operation of the street railway, which is less directly related to legal matters. His papers include information concerning the operation of the claims department, which I discuss in a separate article.

The operations data include figures for fiscal operations of the street railway, including the gross and net profits of the company, and figures for various costs associated with operating the street railway. These data put in perspective the cost of the judgments and awards that successful plaintiffs garnered in the Superior Court.

Before Bell began handling the railway's legal matters, the company's officials kept little systematic track of the amounts they paid in damages to injured claimants. After Bell began handling these matters, he experimented with several ways to track the cost of injuries. By 1910, these costs had settled into a permanent column in the company's ledgers.

The post-filing history of the twelve Superior Court cases on the 1903 list that Bell reviewed presents concerns more typical of street railway cases.[84]

First, the plaintiffs did not pursue at least five cases for unknown reasons.[85] Their attorneys filed the complaints, and then nothing more happened. Neither the trial court records nor the company's records contain evidence that the plaintiffs reached any settlement in these cases. The disappearance of these five cases illustrates why historians using trial court

81. Harold Gilliam, *A Tree that Changed California's Face*, S.F. CHRON., July 18, 1965; *Borax King Passes, Colorful Career Ends, This World 28*, OAKLAND POST-ENQUIRER, Aug. 27, 1931 (n.p).

82. *See* Alexander Cockburn, *Beat the Devil: Oakland, California Fire*, THE NATION (1991).

83. The Harmon Bell papers are stored in physical cartons with the Bancroft Library. *See Collection Guide: Harmon Bell Papers, 1852–1979*, ONLINE Archive CAL., https://oac.cdlib.org/search?style=oac4;titlesAZ=h;idT=Ucb112111403 [https://perma.cc/HVN3-WU88] [hereinafter *Papers of Harmon Bell*].

84. I have not located the Justice's Court case files.

85. Appendix A (*Vierra*; *Geary*; *Gardner*; *Avery*; *Metzger*). The case files for two cases were missing, so I cannot say what happened with these. Casper v. Oakland Transit Co., ACSC# [N/A] (Sept. 16, 1901); French v. Oakland Transit Consol., ACSC# [N/A] (n.d.).

records should look at all cases filed and not just judgments. Not presenting data for the number of cases filed inflates the rate of plaintiffs' successes. In Alameda County, for example, just 19.7 percent of the personal injury suits plaintiffs filed in Superior Court—those against Oakland Traction and all others—went to trial and verdict.[86] After completing all the post-trial motions and appeals, the plaintiffs won under half of the cases that went to trial.[87]

To say that plaintiffs won about half of all the personal injury cases is a distortion since the plaintiffs' wins amounted to about ten percent of all the *filed* cases. One hundred and eight of the 335 personal injury suits filed between 1901 and 1910—32.2 percent of the total—disappeared from the docket books without a trace.[88] These "disappeared" cases amounted to 40 percent of those that never went to trial.[89] The five cases on Bell's list that disappeared are among these. For these cases, the trial court records offer no way to be sure whether the parties just gave up or settled without leaving a record of the settlement.

Seven of the Superior Court cases disappeared, and plaintiffs dismissed another two.[90] The dismissals suggest that the plaintiffs settled with Oakland Traction sometime before trial. There were dismissals in just over one-half (51.3 percent) of the entire universe of the 1901–1910 Superior Court personal injury cases.[91] Two of the 12 cases on the 1903 Oakland Traction list are part of this mass of dismissed and presumably settled cases. For one of the cases, in which the plaintiff alleged to have been crippled for life by the dislocation of his hip and sought $5,000 in damages,[92] the claims department records show that the claims agent paid $22 regarding his injury, $20 of this amount for medical expenses and a $2 court fee. In the other case that the plaintiff dismissed,[93] the records show a payment of $10 to an unknown payee. Once again, although the records do not specifically indicate a settlement, this does not necessarily mean that there was no such settlement. The records of the settlements must just not be extant.

The two dismissed cases demonstrate why the evaluation of settlements has proven to be difficult for legal historians. Trial court records do not typically contain specific information regarding settlements.

86. Friedman & Russell, *More Civil Wrongs*, *supra* note 65, at 307.

87. *See infra* Table 2.

88. Friedman & Russell, *More Civil Wrongs*, *supra* note 65, at 307.

89. *Id.*

90. Cameron v. Oakland Transit Co., ACSC# 18599 (Jan. 30, 1902); Racey v. Oakland Railroad Co., Oakland Transit Co., and Oakland Transit Consol., ACSC# 19308 (Oct. 9, 1902).

91. Friedman & Russell, *More Civil Wrongs*, *supra* note 65, at 307.

92. Avery v. Oakland Transit Consol., ACSC# 19373 (Oct. 29, 1902).

93. *Racey*, ACSC# 19308.

In just under one-third of all the 1901–1910 Superior Court cases was there any evidence of settlement. Somewhat remarkably, the trial court records contained figures for settlement for 40 percent of this subset of cases.[94] Due to the general rarity of settlement information, historians and other scholars interested in settlements usually can only speculate about the dollar amount and frequency of settlements.[95] The claims-related materials I found in Harmon Bell's papers are sources that legal historians and scholars have never used. I discuss these claims data in a separate article.

Only three of the twelve Superior Court cases on Bell's 1903 list went to trial.[96] These three trials reveal the grisly character of streetcar injuries and provide some detail regarding post-injury medical procedures. These cases reveal important information about the conduct of the trials, their dramatic character, the publicity that attended them, and the lengthy delays that a successful plaintiff might face before collecting a judgment from Oakland Traction. The cases show how the status of the plaintiff—in terms of youth and gender and the status of the injured as an employee of the company—influenced the course of litigation. The cases also reveal some problems that clashes of new and old technologies posed and suggest that the new, faster technology of the streetcar gained a privileged position as people on the streets were expected to get out of its way. The cases also begin to reveal some of the incidental costs litigants faced as they participated in litigation. Finally, the cases also are a reminder of the harshness of traditional tort defenses, especially contributory negligence.

Of the three plaintiffs on the 1903 list who went to trial, Rosie James was the first to be injured. She was thirteen years old on the evening of April 26, 1900, when she went out with a brother, a sister, her mother, and many other friends as part of a six-car trolley party that the Knights of the Maccabees, a social organization, hosted.[97] James' trolley traveled south from Berkeley into Oakland. As the car neared 27th and Grove Streets, James was standing on the open front platform of the car.[98] A trolley from the other direction began to pass, and a jolt propelled James into the air—exactly how was a matter of dispute.[99] The teenager testified using an analogy to childish play: "the sensation was just as if I was going up in a

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94. Friedman & Russell, *More Civil Wrongs*, *supra* note 65, at 305–06.

95. Samuel R. Gross and Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 321 (1991).

96. James v. Oakland Transit Consol., ACSC# 18908 (Apr. 24, 1902); Fought v. Oakland Transit Consol., ACSC# 19027 (June 10, 1902); Kennedy v. Oakland Transit Consol., ACSC# 19229 (Dec. 3, 1902).

97. Transcript on Appeal at 126, James v. Oakland Traction Co., S.F. # 4811 (May 1907), 2071 Records of the Supreme Court (on file with the University of California Law San Francisco Law Library).

98. *Id.* at 24–25

99. *Id.* at 106.

swing," she said.[100] A passing streetcar struck her, and her face smashed through one of the passing car's windows. The collision split James' nose, knocked out teeth, and tore off one side of her face. She also broke her right leg.[101]

Rosie James' attorneys filed suit in April of 1902, two years after the injury.[102] They argued that the trolley's excessive speed and the unsafe condition of the tracks caused James' launch from the car.[103] They asked for $50,000 in damages, equaling the largest suit the street railway company had ever faced.[104] Bell defended the company by arguing that James had been leaning out from the platform when the passing trolley struck her and so had contributed to her own injury and was therefore entitled to no damages.[105]

The *James* trial was front-page news. The *Oakland Tribune* reported that the trial "was of a highly dramatic character and surgically interesting to spectators and the court."[106] Maybe the plaintiff's attorneys were planting stories in the press; likely, there was no need, as sensational stories already interested reporters and their editors. The surgical techniques of Dr. W. S. Porter, James' physician, were innovative.[107] To repair her cheek, Dr. Porter grafted flesh from her right arm. Porter accomplished the graft by binding her right arm, near the shoulder, to her cheek. The surgeon then put his patient in a plaster cast until her cheek and arm had adhered.[108] After three months, the surgeon cut her arm and cheek apart, leaving skin grafted onto her cheek.[109]

The technique that Dr. Porter used on Rosie James was still innovative when New Hampshire's Dr. McGee used it on young George Hawkins in

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100. *Id.* at 107.

101. *Asks Heavy Damages*, S.F. CHRON., June 16, 1903, at 11; *Marred Beauty Wins Damages*, S.F. CALL, July 9, 1903, at 9 [hereinafter *Marred Beauty*]; *Scars Before Jury*, OAKLAND ENQUIRER, June 17, 1903, at 1.

102. Complaint, James v. Oakland Transit Consol., ACSC# 18908 (Apr. 24, 1902).

103. *Id.* at 3.

104. *Id.* at 5. The plaintiffs in Kinsner v. Oakland Transit Company, ACSC# 16434 (Sept. 1, 1899) also sought $50,000 in damages.

105. Answer to Amended Complaint at 4, *James*, ACSC# 18908.

106. *Rosie James Tells Her Story to the Jury and Asks for $50,000*, OAKLAND TRIB., June 17, 1903, at 1.

107. The *Oakland Enquirer* reported: "At the time of the accident the medical journals of the country used columns to describe the operation by him and the success attendant upon it. Dr. Porter was asked if the skill required to perform a like operation were not the highest type of surgical skill. At the question he blushed like a school boy reciting before the trustees and asked if the question could not go unanswered or be put in some different form. The attorney for the defense came to the rescue and admitted that it wos [sic] conceded to be the highest known medical or surgical skill." *Scars Before Jury*, *supra* note 101.

108. *Rosie James Tells Her Story to the Jury and Asks for $50,000*, *supra* note 106.

109. *Id.*

1922.[110] That surgery, as Contracts students have learned for generations, left Hawkins with a hairy hand and led to the 1929 appellate opinion in *Hawkins v. McGee*.[111]

That Oakland's Jack London may have read of Rosie James' trial and incorporated her surgical experience into his 1906 novel *White Fang* is not farfetched.[112] Her 1903 trial was front-page news in Oakland.[113] Like Rosie James, the wolf protagonist of London's novel spent considerable time bound up in plaster as he recovered from injuries. Electric streetcars may have haunted the dreams of Rosie James as she slept, partly encased in plaster, waiting for the graft to take. Her sensational trial may have impressed London.

During his testimony, Porter illustrated how he performed the graft. Rosie James' attorneys presented her as fair-skinned and precious as a child. In the courtroom, the doctor and lawyer had her remove the upper portion of her dress, baring her bodice so jurors could see how the plaster cast had held her bare arm against her cheek.[114] The jurors learned of the operation's success but saw that the surgery had left James with a two-square-inch patch of lighter skin on her cheek, a disfigured face, and a scarred arm.[115]

Newspaper accounts emphasized the lost promise of James' youthful feminine beauty.[116] During his closing argument, Melvin Chapman drew the jurors' attention to the beauty of James' undamaged sister. They kept looking at the side of her face in the trial spotlight so clear. According to the account in William Randolph Hearst's *San Francisco Examiner*, Chapman "turned suddenly to the other, and as he drew a terrible picture of [Rosie's] sufferings and disfigurement, the girl fell to the floor in a swoon." Rosie James was then carried from the courtroom.[117]

After receiving instructions from Judge Henry Melvin in the afternoon of July 8, 1903, the jurors took just one hour to return a verdict in favor of the young plaintiff.[118] The *Oakland Tribune* reported that the jurors had unanimously found the corporation responsible on the first vote. Two jurors favored giving her the full $50,000 for which she had asked,

110. Jorie Roberts, *Hawkins Case: A Hair-Raising Experience*, 66 Harv. L. Rec. 1, 7, 13 (1978).

111. Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929); JOHN P. DAWSON, WILLIAM BURNETT HARVEY & STANLEY D. HENDERSON, CONTRACTS: CASES AND COMMENTS 3 (11th ed., 2019).

112. *See* discussion *supra* notes 58–64.

113. ROBERT BARLTROP, JACK LONDON: THE MAN, THE WRITER, THE REBEL (1976).

114. *Scars Before Jury*, *supra* note 101; *Rosie James Tells Her Story to the Jury and Asks for $50,000*, *supra* note 106.

115. *Rosie James Tells Her Story to the Jury and Asks for $50,000*, *supra* note 106.

116. *Marred Beauty*, *supra* note 101; *Company Must Pay for Her Lost Beauty*, S.F. EXAMINER, July 9, 1903, at 9.

117. *Company Must Pay for Her Lost Beauty*, supra note 116.

118. *Id.*

with another voting for $30,000, and four for $25,000. The eleventh ballot revealed a consensus of $15,000, which the jury awarded. She also received $570.70 in costs.[119] This verdict was the largest Superior Court award in any of the 1901–1910 personal injury cases.

Bell moved for a new trial two weeks after losing the James trial. He claimed irregularities in the jury proceedings and plaintiff's proceedings, jury misconduct, accident or surprise, excessive damages, and errors in law. He also argued the evidence was insufficient to support the verdict and that the verdict was against the law.[120] In September of the same year, Bell appealed the judgment against the company directly to the California Supreme Court,[121] which in 1903 he could do because intermediate appellate courts did not exist until 1904.[122] Just why Bell could appeal to the Supreme Court while awaiting a ruling on his motion for a new trial is unclear.

The trial judge did not hold a hearing on Bell's motion for a new trial until almost three years later, in January of 1907. The judge denied Bell's motion. Bell then appealed the denial of a new trial to the Supreme Court. The Supreme Court justices consolidated his two appeals into one action, which the justices did not hear until late 1908 or 1909. Bell assembled a 538-page Transcript on Appeal and three additional typeset documents totaling 183 pages.[123] His documents have the unmistakable feel of a resource-rich appellant trying to bury a successful plaintiff in paper.

Although there is no record of the Supreme Court's disposition, later documents indicate that the Supreme Court sent the matter back to the Superior Court, where the judge again denied Bell's motion for a new trial. Bell then appealed to the new District Court of Appeal, which affirmed the judgment in July 1909.[124] Again, Bell appealed to the Supreme Court.[125] Finally, on September 7, 1909, less than a month before James' twenty-third birthday and more than nine years after her injury, the Supreme Court denied Bell's petition to hear the case again.[126] Superior Court documents indicate that four days after the Supreme Court decision, the railway

119. *Gets Verdict for Fifteen Thousand Dollars*, S.F. CHRON., July 9, 1903, at 11.

120. Notice of Motion for New Trial, James v. Oakland Transit Consol., ACSC# 18908 (Apr. 24, 1902).

121. Notice of Appeal from Judgment, *James*, ACSC# 18908.

122. CAL. CONST. art. VI § 4, cl. 2 (amended by plebiscite and adopted on Nov. 8, 1904).

123. Transcript on Appeal, *supra* note 97.

124. James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082 (Cal. Ct. App. 1909)

125. *Id.*

126. Beatty, C.J., Supreme Court of California, Denial of Petition to Hear Appeal, James v. Oakland Traction Co., Civ. No. 501, San Francisco No. 4,811, WPA # 22576, (Sept. 7, 1909) (California State Archives).

company finally paid Rosie James $22,398.02, satisfying the judgment rendered on July 9, 1903.[127]

The second of the three cases on Bell's list that went to trial illustrated different issues. This case shows that at this time, Oakland Traction handled cases involving workers within the same system used for passengers and others. There was no separate mechanism for compensating injured workers: no workers' compensation.[128] The claims department records concerning this case make possible the calculation of the various costs to Oakland Traction of defending a personal injury suit.

Of the three plaintiffs on Bell's 1903 list whose cases went to trial, William Fought was the second to be injured.[129] Fought was a machinist for the railway company. On November 3, 1901, he was not working and riding on a free pass when an Oakland Traction powerhouse boiler exploded. The explosion catapulted debris through the air and onto Fought while he was sitting in an open part of a nearby streetcar.[130] Flying pieces of iron broke both of the bones in his right leg about five inches above his ankle, shattering one of them.[131] An *Oakland Tribune* story during the trial indicated that Fought's case was "being closely watched by mechanics all over the country, as it is expected that it will show to what extent employers are responsible for the safety of their employes."[132]

Fought's attorney filed his lawsuit in June of 1902 and asked for $5,000 in lost earnings due to Fought's permanent disability and $10,000 in general damages for his physical suffering.[133] Harmon Bell argued that because Fought was riding on a free pass, he was not entitled to damages as a fare-paying passenger might be, and Bell also claimed the company had settled with Fought before he filed the lawsuit.[134] The claims department, Bell said in his answer to Fought's complaint, had already paid $836.10 to Fought or on his behalf for medical bills, clothing, wages, and incidentals.[135] Bell also argued that the company had given Fought a life position at an increased salary, which position Fought had quit after just a month back on the job.[136]

The jury in William Fought's case returned a verdict in his favor, but they awarded him only a fraction of the $15,000 he sought: $300 in

127. Satisfaction of Judgment, James v. Oakland Transit Consol., ACSC# 18908 (Apr. 24, 1902).
128. *See* FRIEDMAN, *supra* note 11, at 663.
129. Fought v. Oakland Transit Consol., ACSC# 19027 (June 10, 1902).
130. *Wants Damages*, OAKLAND ENQUIRER, March 26, 1903, at 2.
131. Complaint, *Fought*, ACSC# 19027; *Wants Money for Injuries*, OAKLAND TRIB., March 25, 1903, at 4.
132. *Wants Money for Injuries*, *supra* note 130.
133. Complaint, *Fought*, ACSC# 19027.
134. *Wants Damages*, *supra* note 130.
135. Answer to Complaint, *Fought*, ACSC# 19027.
136. *See id.*

damages plus court costs in the amount of $141.55, for a sum of $441.55.[137] Fought probably paid from one-third to one-half of this amount to his attorney as his fee,[138] so he received from $150 to $200 as compensation for his broken limb, pain, and foregone income. Bell managed somehow to satisfy the judgment and costs with a payment of two dollars less—$439.55.[139] Bell indicated to an *Oakland Tribune* reporter that he was satisfied with the verdict and would pay the damages without further appeal.[140]

The third of the three cases that went to trial was the most dramatic and grisly.[141] As with *James v. Oakland Transit*, the plaintiff in the third case was a young woman. On July 2, 1902, Mary W. Kennedy accompanied an older man named Machefaux when he went from the island of Alameda to Oakland to load his wagon with hay.[142] On their return, Kennedy lay on the hay in the back of the wagon while Machefaux drove the horse across the Park Street bridge to Alameda.[143] As they neared the Alameda side of the bridge, a streetcar from the opposite direction approached at a speed of 15 to 25 miles per hour.[144] The Alameda side was too narrow to accommodate both vehicles. The narrowness might not have mattered because Machefaux claimed that the height of the rails above the roadway prevented him from steering the cart out of the tracks.[145] Machefaux tried to get his horse to pull the wagon out of the rails, and by a simple twist of fate, either the streetcar struck the wagon or the hay fell off as his horse, the wagon, and young Mary Kennedy went under the streetcar's wheels.[146] The car dragged her 60 feet before stopping, cut and bruised her, and crushed the bones of one leg so badly that doctors amputated above the knee.[147]

Kennedy, through a guardian ad litem and through her lawyer J. H. Smith, filed a $30,000 lawsuit against Oakland Traction two months after her injury.[148] For unclear reasons—but perhaps because the form of his complaint was defective—Smith dismissed this suit and then refiled a

137. *Got Small Award for Injuries*, OAKLAND TRIB., Mar. 27, 1903, at 3.

138. *See generally* BERGSTROM, *supra* note 46, at 89–91 (discussion of attorneys' fees).

139. *Fought*, ACSC# 19027.

140. *Small Damages*, OAKLAND TRIBUNE, Mar. 27, 1903, at 1.

141. Kennedy v. Oakland Transit Consol., ACSC# 19322 (Oct. 15, 1902); Kennedy v. Oakland Transit Consol., ACSC# 20310 (Oct. 22, 1903).

142. *Oakland Traction Con. Wins Important Case*, OAKLAND HERALD, Nov. 26, 1904, at 2.

143. *See id.*

144. *Id.*

145. Complaint, *Kennedy*, ACSC# 20310.

146. Complaint, *Kennedy*, ACSC# 19322; *Asks Heavy Damages*, OAKLAND ENQUIRER, Apr. 28, 1903, at 8.

147. Complaint, *Kennedy*, ACSC# 19322.

148. *Kennedy*, ACSC# 19322.

complaint on the day of the dismissal, asking for $35,000 in the refiled suit.[149] Five months later, Kennedy replaced J. H. Smith with Mortimer Smith, who tried the case in April 1903, three months before Rosie James' trial.[150] The case generated considerable publicity, partly because of the horrifying injury and because Kennedy was part of an old Oakland family. The *Oakland Enquirer* noted, "One of the features of the case has been the daily appearance in court of 'Auntie' Kennedy of East Oakland."[151] The article indicated that "'Auntie' Kennedy [was] one of the pioneers of [the] city," meaning that she had been among the first white settlers of Oakland.[152] Bell was also a pioneer white person and may have been the first white child born in Oakland.[153]

Kennedy's testimony was dramatic. An *Oakland Tribune* story described the direct examination of Kennedy by her attorney.[154] "The sight of a girl in the heyday of her youth forced to go through life on crutches," the writer noted, "has been the most stubborn fact which the attorneys for the company have had to combat."[155] Mortimer Smith concluded his direct examination by asking: "Will you pull up your dress so that the jury may see; turn a little further around, so that they may see where your leg is taken off."[156] Like Rosie James, the young woman plaintiff of late Victorian America revealed a typically covered part of her body to the jury. The sympathetic newspaper writer noted, "With maiden modesty, the dress was drawn so that the loss of the limb was unmistakably apparent, and the most trying part of her ordeal was over with."[157]

Kennedy's maiden modesty in showing the stump of her amputated leg to the jury impressed Judge Greene, too, but he threw out her lawsuit.[158] Judge Greene ordered a nonsuit just before the case was to go to the jury.[159] The *San Francisco Call* reported that Kennedy fainted.[160]

Kennedy refiled her suit in May of 1903, with M.C. Chapman joining Mortimer Smith are her counsel.[161] If they could show that the streetcar

149. *Kennedy*, ACSC# 20310.

150. *See* Notice of Substitution of Attorneys, *Kennedy*, ACSC# 20310.

151. *Upon Its Merits*, OAKLAND ENQUIRER, Apr. 30, 1903, at 2.

152. *Id.*

153. *See* Eileen Delmore Murphy, *A Missionary to Wild West: Bell Family Has Distinction of First Native Son Born in Oakland*, OAKLAND TRIBUNE, May 4, 1952, at 1-S; *Harmon Bell is Dead at 74*, OAKLAND TRIB., Apr. 12, 1929, n.p.

154. *See generally Raised Her Dress with Maiden Modesty*, OAKLAND TRIB., May 1, 1903, at 2.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Transit Co. Wins*, OAKLAND HERALD, May 2, 1903, at 5; *Wins Important Case*, OAKLAND HERALD, Nov. 21, 1904, at 1.

159. *Transit Co. Wins*, *supra* note 158; *Maiden Modesty*, *supra* note 154.

160. *Railroad Wins Victory in the Kennedy Suit*, S.F. CALL, May 2, 1903.

161. Complaint, Kennedy v. Oakland Transit Consol., ACSC# 20310 (Oct. 22, 1903).

driver had acted intentionally, Kennedy's attorneys could overcome the obstacle of contributory negligence.[162] Her attorneys should have made this argument the first time around. Exactly how her attorneys overcame the bar of *res judicata* is unclear. By November 1904, though, Bell succeeded in getting Judge Melvin to nonsuit Kennedy.[163] Like Judge Greene, who had granted Bell's motion for a nonsuit in the earlier case, Judge Melvin agreed that Kennedy had been contributorily negligent. The *Oakland Herald* reprinted Judge Melvin's order in a front-page story about the case.[164] Early in the order, Melvin expressed sympathy for the plaintiff. He wrote that "I most earnestly echo Judge Greene's sentiments of sympathy for this young plaintiff, who, he said, testified so 'Fairly and modestly' in the other case, as she certainly did in this one. . . ."[165] But, wrote Melvin unsolicitously, "this is a question not of sentiment, but of law."[166]

The matter of law that Melvin addressed was contributory negligence. He denied the plaintiff's lawyers' argument that whether a plaintiff was guilty of contributory negligence was always a question for the jury.[167] Judge Melvin noted that he believed Machefaux had been negligent as he drove down the highway, down the tracks. However, the judge did not impute Machefaux's negligence to his passenger Kennedy.[168] However, Melvin also clarified that "the driver being in charge does not excuse the party riding from exercising ordinary care to protect themselves [sic] under the circumstances."[169] Kennedy, he decided, was "visiting this old gentleman, going out in all kindness and happiness, to see him load a little hay, and then ride back, enjoying the situation, takes absolutely no care to protect herself, throws herself in the load of hay."[170] Melvin declared that "it was her duty to have placed herself upon the wagon, knowing that the bridge was there and the tracks upon it, and the cars liable to come back

162. Bailey v. Market St. Cable Ry. Co., 110 Cal. 320, 326 (1895); Esrey v. Southern Pac. Co., 103 Cal. 541, 544 (1894).

163. Grant of Nonsuit, *Kennedy*, ACSC# 20310.

164. *See generally Wins Important Case*, *supra* note 158.

165. *Id.*

166. *Id.*

167. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 567 (1902) ("whether or not he was negligent . . . under the circumstances of the case is a question for the jury"); Franklin v. Southern California Motor Rd. Co., 85 Cal. 63, 70 (1890) ("whether there was contributory negligence in any given case is generally a question for the jury to pass upon and determine"). *But see* Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291, 298 (1890) ("Ordinarily the question of contributory negligence . . . is a question for the jury, but when the evidence tending to establish it is undisputed . . . it becomes a matter of law for the court to determine.").

168. *Wins Important Case*, *supra* note 158.

169. *Id.*

170. *Id.*

and forth, it was her duty to have placed herself in a position that she could look out and care for herself."[171]

Because Kennedy had been contributorily negligent, she would lose any suit alleging the negligence of Oakland Transit unless, as noted, she could prove that the company's agents had been willfully or wantonly negligent.[172] Chapman sought to use the high speed of the streetcar to prove willful negligence. Until the year before the injury, the state speed limit for streetcars had been eight miles per hour.[173] The legislature had dropped that limit and substituted a standard of reasonableness for speed.[174] In his argument, Chapman apparently had argued that street railways had been selfishly instrumental in removing the speed limit. Bell responded to the inference "that some hidden hand has been effective in getting this change in the law—evidently the hand of some grasping, overpowering, manslaughter-committing corporation" by saying that the California legislature passed that law "not at the dictation of any corporation. They

171. *Id.* Less than two years later, Melvin himself was injured in circumstances that suggested that he might have been more careful. On September 26, 1906, Melvin was riding in an automobile with four other people, including his wife Sarah and state Senator G. Russell Lukens. *Five Are Injured as Result of Auto Accident in East Oakland*, S.F. CHRONICLE, Sept. 27, 1906, at 1 [hereinafter *Five Are Injured*]. They were on their way to San Jose for a meeting of the Benevolent Protective Order of Elks—Judge Melvin was the national Grand Exalted Ruler of the antlered herd at the time. *Id.*; F. L. DuShane, *Oakland's Antlered Herd*, 48 OVERLAND MONTHLY 303 (1906). At East Sixteenth Street and Ninth Avenues, the car collided with a streetcar. The auto was reported to have been moving at 35 miles per hour. Carlton Wall, an Alameda millionaire with a reputation for recklessness and a broken hand from a recent accident in the very same automobile, was driving the auto, although chauffeur Henri Norami was a passenger. *Id.*; *Five Are Injured*, *supra* note 171; *Mrs. Melvin May Die of Her Injuries*, S.F. CHRONICLE, Sept. 28, 1906, at 1; *Wife of Judge Melvin Fatally Hurt in Smashup of Automobile*, S.F. CALL, Sept. 27, 1906, at 1. Mrs. Melvin was thrown through the air and impaled on a picket fence. She suffered a fractured skull and was initially expected to die. *Five Are Injured*, *supra* note 171. Senator Lukens also suffered a fractured skull and Judge Melvin was seriously hurt. *Mrs. Melvin May Die*, *supra*. A year after the injury, Judge Melvin, Mrs. Melvin, and Senator Lukens filed lawsuits against Oakland Traction in Alameda County's Superior Court, that is, in Judge Melvin's own court. *Lukens and Melvin Seek Heavy Damage*s, S.F. CALL, Sept. 27, 1907; *Brings Big Suit Against Company*, S.F. CHRONICLE, Sept. 26, 1907, at 13; *Melvin and Lukens Sue for $319,445*, OAKLAND EXAMINER, Sept. 26, 1907; *Melvin v. Oakland Traction Co*., ACSC# 26014, (Sept. 25, 1907); *Melvin v. Oakland Traction Co.*, ACSC# 26015, (Sept. 25, 1907); *Lukens v. Oakland Traction Co.*, ACSC# 26016, (Sept. 25, 1907). M. C. Chapman, *Mary Kennedy's lawyer*, represented Judge and Mrs. Melvin as well as Lukens. One year after the filing of the suit, Judge Melvin became an associate justice of the state's Supreme Court. BAILEY MILLARD, HISTORY OF THE SAN FRANCISCO BAY REGION 89 (1924). In 1911, Justice Melvin filed dismissals of his and his wife's suits. *Justice Melvin Files Dismissals of Suits*, S.F. CHRONICLE, Jan. 26, 1911, at 4. Presumably Oakland Traction settled with the Supreme Court Justice, but there is no record of the amount.

172. *See* discussion *supra* note 162.

173. Civ. Code Cal., Corporations § 501 (1872) (amended 1901).

174. Cal Stat. sec 143 (1901) (eliminating the speed limit); Act of March 22, 1905, ch. 612, Cal. Stat. 816 (regulating the operation of motor vehicles on public highways).

passed the law," he said, "because California, thank God, is a progressive state."[175]

Mary Kennedy's case offers different views of the legal system than Rosie James' or William Fought's. Kennedy's case presented the conflict between the new, faster technology of the electrified streetcars compared to the horse-drawn wagons of the passing age.

Mary Kennedy's case showed the privileging of the speeding, forward motion of the streetcar; there was no inquiry as to whether the motorman should have slowed or stopped the car. Instead, young Kennedy or her driver should have stayed out of the streetcar's way.

Kennedy's suit also offers a stark example of just how harshly the rule of contributory negligence might operate. Schwartz wrote, "Only rarely did the defense of contributory negligence bar a street railway victim from recovery."[176] At the very least, Mary Kennedy's case is an example of the rare successful use of contributory negligence as a defense. Schwartz might be right that a defendant's successful use of contributory negligence was relatively rare. However, the reasons for the rarity are different than Schwartz imagined. Schwartz believed that tort law and the decisions of judges and juries offered solace and generosity to personal injury plaintiffs. For Schwartz, the relative rarity, *in the appellate reports,* of cases in which defendants successfully used the contributory negligence defense at the trial court level was evidence he used to support his characterization of tort law as generous.

However, as shown below, fewer plaintiffs won their cases than Schwartz imagined. Contributory negligence was but one of many arrows in the quiver of defense lawyers like Bell. Sometimes Bell won his cases with doctrinal tactics, as he did against Mary Kennedy. However, Schwartz overemphasized the determinative impact of doctrinal matters on trial outcomes. Today, a trial lawyer would not be surprised to learn that Bell usually won his cases with non-doctrinal weapons. Bell was a very skillful investigator and was good at developing narratives that cast plaintiffs in less than sympathetic light. He won many cases not with doctrine but with plain facts shaded by innuendo and prejudice.

Of the three cases on the 1903 list that went to trial, then, Bell won one. Bell successfully defended Oakland Transit against Mary Kennedy's $35,000 suit for the amputation of her leg by a streetcar, but in the other two cases, the plaintiffs' attorneys won. In the smallest of the cases—William Fought's $15,000 suit for his broken leg—Bell lost, and the jury awarded Fought $441.55, or just under three percent of the damages for

175. *Wins Important Case*, *supra* note 158. *See generally* GEORGE E. MOWRY, THE CALIFORNIA PROGRESSIVES (1951) (general discussion of Progressivism in California).

176. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1752.

which Fought had asked. In Rosie James' case against Oakland Transit—a $50,000 case in which she sought compensation for her disfigured face—the jury awarded James $15,000 plus she received $570.70 in costs, which amounted to 31 percent of the amount for which she had asked. In all, then, the 12 Superior Court suits on the 1903 list—cases in which the plaintiffs had sought a combined total of nearly $200,000—resulted in two losses for the company, with damages and costs totaling just over $16,000, which was 8.1 percent of the total amount that the plaintiffs in the 17 cases had sought and which was less than the average amount of damages sought in each of the Superior Court cases.

From a street railway company's point of view, one might think that Bell's results with the cases on the 1903 list were pretty good, but Bell and his employers were probably dissatisfied. If, at the end of the decade, Bell happened to come across the memo with the list of 1903 cases, he would likely have shaken his head in sorry disbelief. By the end of 1910, Bell had been handling the legal affairs of the Alameda County street railway company for 13 years. During those years, plaintiffs had filed 139 personal injury suits in Superior Court against Oakland Traction, an average of just over 10 per year.[177] Although one-quarter of the Superior Court suits on the 1903 list had gone to trial, Bell's 13-year average in this regard was considerably better, with only 27 of the 139 cases (19.4 percent) making it to trial.[178] For all the 1901–1910 Superior Court cases, which included many Oakland Traction cases, 19.7 percent of filed cases went to trial.[179] Bell was slightly more successful than average in keeping cases from trial.

Bell also had a better win rate than the success he experienced with the cases on the 1903 list. Counting Mary Kennedy's two suits as only one, the number of tried cases between 1898 and 1910 reduces to 26.[180] Bell won only one of the three 1903 suits, but he won just over one-half of the 26 suits that concluded with a judgment. He tried two cases before a judge sitting without a jury and won both.[181] In the 24 cases he tried before a jury, Bell achieved a hung jury in one suit, ending in dismissal as the parties settled.[182] Bell also persuaded the judge to take the case away from the jury by nonsuiting three plaintiffs—again counting the two Kennedy nonsuits

177. *See* Appendix A.

178. *See id.*

179. *See* discussion *supra* note 65, at 307.

180. Mary Kennedy was nonsuited twice, in two different cases, but as my argument is that plaintiffs fared less well in the trial courts than other scholars have claimed, I am counting the nonsuiting of Mary Kennedy only once; that is, regarding my argument, I treat the Kennedy nonsuits conservatively.

181. *See* Appendix B (*Barrett* and *Dickerson*).

182. *Id.* (*Cotter*).

only once.[183] In the remaining 21 cases, juries returned verdicts for the plaintiffs in 13,[184] but Bell succeeded in getting an order for a new trial in one of these cases and settled with the plaintiff before that new trial commenced.[185] In another of the 13 cases in which the initial verdict was for the plaintiff, Bell secured a reversal and an order for a new trial after appealing to the Supreme Court.[186] This case was one of two that Bell handled for Oakland Traction that resulted in a published appellate opinion.[187] This reversed case, like the case in which Bell succeeded with his motion for a new trial, appears to have settled. In the remaining 7 cases, the juries returned verdicts for Bell's company.[188]

In the final tally, the 21 jury trials Bell defended yielded three nonsuits; seven verdicts for the defendant; 11 verdicts for the plaintiffs; two plaintiffs' verdicts that ended up settling; and one hung jury. Including the bench trials, the overall final tally is Bell 12; plaintiffs 11; and three settled. If the two nonsuits of Mary Kennedy were counted twice, then Bell's wins would equal 13.

TABLE 1[189]
OAKLAND TRACTION:
RESULTS OF TRIED CASES, 1898–1910

Total Cases	147	
Cases Tried	26	
	Initial	Final
Plaintiffs' Wins	13	11
Defendants' Wins	12	12

Bell's success rate of 52.2 percent (or 54.2 percent if Kennedy's cases are counted twice) was typical of the outcomes of Alameda County Superior Court cases. Overall, plaintiffs won 32 of the 66 1901–1910 Superior Court personal injury suits.[190] That is, tort plaintiffs won less than half the time. These 32 plaintiffs' victories comprised 9.6 percent of all

183. *Id.* (*LeProtti*; *Kennedy*, ACSC# 19322; *Kennedy*, ACSC# 20310; and *Assalena*).

184. *Id.* (*McCann*; *Boone*; *Miller*; *James*; *Fought*; *Arthur*; *Nilson*; *Payne*; *King*; *Brinse*; *Eastman*; *Davis*; *Sugiura*).

185. *Id.* (*Davis*).

186. *Id.* (*Boone*).

187. *See generally* Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243 (1903).

188. *See* Appendix A (*Kinsner*; *Wolgamot*; *Walliser*; *Lynch*; *Joubert*; *Purdy*; and *Williamson*).

189. Data collected from the civil litigation files in Superior Court, Alameda County, California. *See* Appendix A.

190. Friedman & Russell, *More Civil Wrongs*, *supra* note 65, at 310.

personal injury suits filed during the decade.[191] In losing only 11 of 139 cases, Bell fared somewhat better as only 7.9 percent of the plaintiffs who filed against him ended up with a final judgment in their favor.

TABLE 2[192]
OAKLAND TRACTION AND ALL ALAMEDA COUNTY PERSONAL INJURY CASES: COMPARISON OF INITIAL AND FINAL TALLIES

	Alameda County 1901–1910		**Oakland Traction 1898–1910**	
Total Cases	335		147	
Cases Tried	66		26	
	Initial	Final	Initial	Final
Plaintiffs' Wins	35	32	13	11
Defendants' Wins	31	33	12	12

In terms of the number of wins and losses, Bell might thus have regarded his success with only one out of three of the tried cases on the 1903 list as an aberrant outcome. However, in terms of damages, the results were certainly worse. The $15,000 judgment in Rosie James' case was his biggest loss for the company between 1898 and 1910.[193] The second highest judgment, in a suit decided in 1909, was $4,000.[194] In that suit, a machinist's helper in an Oakland Traction machine shop sued after the amputation of his arm on the job. After these two cases, winning plaintiffs won judgments of $3,000 (twice),[195] $2,500,[196] $2,000,[197] $1,000,[198] $500,[199] $350,[200] $300,[201] and, in the smallest judgment, $1.[202] The average of the eleven plaintiffs' judgments between 1898 and 1910 was just over $2,877, with half under $2,000. In the 11 cases plaintiffs won between 1898 and 1910, the total (not average) damages and costs were $34,349.85. The

191. *Id.*
192. Data collected from the civil litigation files in Superior Court, Alameda County, California. *See* Appendix A.
193. *Cf.* Friedman & Russell, *More Civil Wrongs*, *supra* note 65, at 305.
194. *See* Appendix A (*King*).
195. *Id.* (*Arthur* and *Payne*).
196. *Id.* (*Nilson*).
197. *Id.* (*McCann*).
198. *Id.* (*Eastman*).
199. *Id.* (*Miller*).
200. *Id.* (*Sugiura*).
201. *Id.* (*Fought*).
202. *Id.* (*Brinse*).

court awards that Oakland Traction paid amounted to just 1.4 percent of the almost 2.5 million dollars plaintiffs sought in all 139 cases. Although the total amount for which plaintiffs sued sounded very threatening—the damages sought on the 1903 list nearly equaled three-quarters of the company's net profit that year—in the final tally, plaintiffs received a tiny fraction of the total amount they sought.

Concerning the fraction of the aggregate demand plaintiffs won, Bell failed to outperform the 1901–1910 Superior Court average. Bell's win rate was higher than average, but when he lost, his plaintiffs won a somewhat higher fraction of the amount that they sought when compared with other successful Alameda County plaintiffs. Over the decade, the total sum of plaintiffs' awards equaled only 0.9 percent of the aggregate demand that plaintiffs in all filed cases sought in their complaints.[203] Using round numbers that inflate somewhat plaintiff success rates, plaintiffs won almost one in ten of all the 1901–1910 Superior Court personal injury suits they filed, and the amount of money that successful plaintiffs won averaged about one percent of the total sum for which successful and unsuccessful plaintiffs asked. That is, the average value of each personal injury lawsuit filed in Alameda County Superior Court between 1901 and 1910 was one-tenth of one percent of the amount for which the plaintiff asked in the complaint.[204]

Overall, less than one in 12 plaintiffs won a judgment against Oakland Traction, and the company lost less than one case per year between 1898 and 1910. Alameda's Superior Court cost Oakland Traction an average of $2,642.30 in judgments and costs per year. In four cases that Bell won, he won not only a verdict for the defendant but also an award of costs *against* the plaintiff;[205] with these cases included, the Superior Court cost the street railway company $2,597.38 per year between 1898 and 1910. This annual average amounted to 50 percent of the average annual total of $5,902 in judgments and costs that the Superior Court awarded to all successful 1901–1910 personal plaintiffs.[206] Speaking very roughly, then, an average year of Superior Court personal injury suits between 1901 and 1910 included just three plaintiff successes,[207] with one being a streetcar case in

203. In the 335 1901–1910 cases, plaintiffs sought an average of $17,867 in damages. The aggregate demand was just about $6 million. The total (not the average) of all 1901–1910 plaintiffs' verdicts was $58,888. Friedman & Russell, *More Civil Wrongs*, *supra* note 65, at 296, 304, 305.

204. Of course, this is a rough figure that does not consider the transaction costs of litigation to the defendants or the costs of settlement. *See* Thomas D. Russell, *Claims on the Tracks* (unpublished manuscript) (on file with author).

205. *See* Appendix A (*Barrett*; *Kinsner*; *Walliser*; and *LeProtti*).

206. Friedman & Russell, *More Civil Wrongs*, *supra* note 65, at 306 tbl.8.

207. *Id.* at 305.

which the plaintiff won $2,600. The other two successful plaintiffs—in non-streetcar cases—divided the remaining $3,300.

The 1901–1910 Alameda County personal injury plaintiff success rate of just under 50 percent is strikingly lower than the plaintiff success rates that both Schwartz and Posner reported. The lower rate of plaintiff wins disposes of the claim that the system of negligence was an abundant source of liability. For the 1901–1910 Alameda County Superior Court personal injury suits and the 1898–1910 Oakland Traction suits, the ratio of plaintiff to defendant successes was not quite 1 to 1, with plaintiffs winning fewer than half the cases.

The Alameda County trial court figures contrast sharply with the figures that Schwartz reported in the 1981 *Yale Law Journal* article in which he examined California and New Hampshire cases. In New Hampshire, Schwartz found 147 plaintiffs' verdicts and only 22 defendants' verdicts, a ratio of 6.7 to 1.[208] In California, plaintiffs appeared to fare even better than in the Granite State. Schwartz reported an overall total of 248 jury verdicts for plaintiffs, with only 26 for the defense.[209] This ratio of 9.5 plaintiffs' verdicts for every defense verdict matched the appellate rail cases, where Schwartz found 111 plaintiffs' verdicts and 12 for the defense, a 9.25 to 1 ratio.[210] In a footnote, Schwartz referred to Posner's similar report regarding plaintiff successes. "Professor Posner's review of late nineteenth-century appellate opinions across the nation," Schwartz noted, "also yielded about a ten-to-one ratio of jury verdicts favoring the plaintiff."[211] Posner found 945 plaintiffs' and 98 defendants' verdicts in jury cases, a 9.6 to 1 ratio.[212] Posner found substantially fewer bench verdicts and found that in non-jury trials, plaintiffs won 59 and defendants 23, a closer ratio of 2.6 to 1.[213] Curiously, Schwartz reported no figures for the outcomes of bench trials.

In the face of 9 or 10 to 1 success rates of plaintiffs in their appellate samples, both Posner and Schwartz turned to their sample of trial court cases. Posner found that the plaintiffs' success rate in the appellate sample equaled that of his trial court sample. In a summary table of trial court outcomes, Posner reported a grand total of 1,093 plaintiffs' verdicts.[214] This

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208. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1764.

209. *Id.*

210. *Id.*

211. *Id.* at 1764 n.350.

212. Posner, *A Theory of Negligence*, *supra* note 15, at 51.

213. *Id.*

214. *Id.* at 95 tbl.4. Posner also offers 433 defense verdicts in his appellate sample, which exceeds the sum of the jury and non-jury defense verdicts he reported by 312. Probably some portion of the other verdicts were plaintiffs' and defendants' verdicts by stipulation of the parties, which suggests that the parties settled. *Id.* at 94 n.69.

figure exceeds the sum of the jury and non-jury verdicts that he reported by 89, which Posner did not explain. Posner's total number of verdicts represented a plaintiff success rate of 71.8 percent. Posner indicated in a footnote that "The percentage is the same in our trial-court sample."[215] Posner thus regarded the appellate reports as a good representation of the trial court results. However, earlier in the article Posner reported that in jury cases, where the appellate ratio was 9.6 to 1 in favor of the plaintiffs, the trial court sample yielded 19 plaintiffs' verdicts and 13 for the defense, a ratio of 1.5 to 1, and a plaintiffs' success rate of just under 60 percent.[216] This is puzzling. For the overall rate of plaintiff successes in the trial court sample to climb from 60 percent to the 70 percent figure that Posner suggested in a footnote, non-jury or bench verdicts—which Posner reported to number about one-quarter of the trial court cases[217]—would have to be nearly unanimously in favor of the plaintiffs. Perhaps, though, Posner regarded 60 percent and 70 percent as sufficiently equivalent and considered the tort-plaintiff success rate that he derived from the appellate reports to reflect the trial court rate accurately.

In *Tort Law and Economy*, Schwartz wrote, "my study of nineteenth-century tort law indicates that the negligence system was a surprisingly abundant source of liability."[218] The Alameda County trial court data from the early twentieth century contradict Schwartz' generalizations about the character of tort law, as do the Alameda County data for the last two decades of the nineteenth century. The total of Superior Court judgments and costs between 1880 and 1900 averaged $6,200 per year.[219]

Regarding the amount of compensation that personal injury plaintiffs received and considered with specific regard to what persons injured by streetcars received, the court system's redistribution of wealth was slight. Rather than an abundant source of liability, the court system was a flea. An excellent way to understand the relative smallness of the Superior Court's tax on Oakland Traction is to compare the average annual total of Superior Court judgments and costs against Oakland Traction to the company's revenue. Between 1902 and 1909, Oakland Traction's average annual net revenue was $533,972.[220] The annual Superior Court toll thus amounted to

215. *Id.*

216. *Id.* at 92.

217. *Id.* at 51 n.24.

218. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1770.

219. Friedman, *Civil Wrongs*, *supra* note 18, at 306.

220. STREET RAILWAY JOURNAL, AMERICAN STREET RAILWAY INVESTMENTS, 1903 10 (vol. 10 1903); STREET RAILWAY JOURNAL, *supra* note 74, at 12; STREET RAILWAY JOURNAL, AMERICAN STREET RAILWAY INVESTMENTS, 1905 12 (vol. 12 1905); STREET RAILWAY JOURNAL, AMERICAN STREET RAILWAY INVESTMENTS, 1907 15 (vol. 14 1907); STREET RAILWAY JOURNAL, AMERICAN STREET RAILWAY INVESTMENTS, 1908 16 (vol. 15 1908); STREET RAILWAY JOURNAL, AMERICAN

0.5 percent of the company's net revenue. To be sure, fleas are bothersome, but they do not take much flesh.

These Alameda County data thus offer empirical confirmation of Richard Epstein's largely theoretical reminder that "the intellectual and institutional constraints on common law adjudication require one to be very cautious in attributing major social and economic consequences to common law rules."[221] Epstein discusses arguments concerning "a choice between competing common law rules," and he notes that "Even if these choices do in theory redistribute wealth between social classes or encourage efficient behavior, their actual social impact is minimal."[222] Concerning Schwartz' thesis, combining the Oakland Traction empirical data with Epstein's theoretical argument leads to the conclusion that the solicitude and generosity that Schwartz alleges characterized tort law did not exist. Schwartz allowed the appellate cases to mislead him.

A better way to understand the appellate cases is that they misleadingly suggest that the negligence system was an abundant source of liability. Posner's argument that law's negligence standard operated as a regulatory system that yielded efficient results also seems unlikely given the minimal regulatory bite that the Alameda County court took from the county's greatest tortfeasor. Finally, though, despite Epstein's claims that the common law lacked sufficient social impact to operate as much of a subsidy,[223] the empirical data do not undermine the argument that the system of torts operated in a subsidy-like way insofar as tortfeasors need not internalize the cost of their injuries. Definitive evaluation of that claim would require an assessment of just what portion of the total demand for damages that all plaintiffs made they *ought* to have received, as well as an evaluation of what other proportion of claimants simply never filed claims given the obstacles that the court system threw in their path. I do not attempt to offer a thoroughly satisfying answer to that question in this Article.

IV. LOS ANGELES LITIGATION

Schwartz was slightly more cautious than Posner regarding the success rate for plaintiffs that the appellate reports suggested. In the face of an appellate ratio greater than 9 to 1 in favor of plaintiffs, Schwartz notes that "Because plaintiffs and defendants may have faced unequal incentives to appeal, the pattern of jury verdicts reviewed on appeal may not

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STREET RAILWAY INVESTMENTS, 1909 19 (vol. 16 1909); Letter from F. W. Frost to Harmon Bell (Sept. 19, 1910), Carton 14, *supra* note 69.

221. Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718 (1982).

222. *Id.*

223. *Id.* at 1719.

accurately represent the original ratio of jury verdicts at trial."[224] That corporations that were centralized sources of injury might have had greater resources and incentives to appeal is obvious.[225]

To his credit, Schwartz' observation that personal injury plaintiffs had won so many of the lawsuits that defendant railway companies appealed caused him to turn to trial court materials. He noted that "To evaluate this possibility [that losing defendants faced a higher incentive to appeal], I studied all jury verdicts in tort cases filed in Los Angeles County against railroad company defendants between 1889 and 1895."[226] Using these records, Schwartz found 26 plaintiffs' verdicts and 13 defendants' verdicts, a 2 to 1 ratio.[227] He noted, "[w]hile this two-to-one ratio is much less than the ratios reflected in the appellate reports, it still amply suggests that trial juries indulged a considerable preference for injured plaintiffs."[228] Schwartz used jurors' apparent exercise of their preference for plaintiffs as further evidence against the subsidy theorists. "The subsidy thesis," Schwartz wrote, "assumes a tort system under the tight control of a judiciary hostile to liability; this assumption is contradicted by the breadth of the decisionmaking powers that judges vested in juries combined with the evident direction of the juries' case-deciding sympathies."[229] Jurors, then, are an important source of the solicitude that Schwartz saw as characteristic of tort law.

Despite his finding that the nearly 10 to 1 ratio in favor of plaintiffs' judgments diminished to 2 to 1 when he looked into the trial court materials, Schwartz nonetheless persisted in reporting result ratios that he derived from the appellate cases as if these ratios offered meaningful information about trial court activity. For example, concerning contributory negligence, Schwartz reported that in New Hampshire, "not one victim was denied recovery for the sole reason of a finding of contributory negligence as a matter of law, and only two victims were denied recoveries for the sole reason of a contributory negligence finding by the jury."[230] Schwartz noted that "In over thirty personal injury cases, the Court affirmed jury verdicts rejecting the defendants' contributory negligence claims; in five other personal injury cases, the Court set aside as erroneous either directed verdicts or jury verdicts favoring defendants on contributory negligence grounds."[231] Here, Schwartz' language was sufficiently non-specific that

224. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1764.

225. *See generally* Marc Galanter, *Why the Haves Come Out Ahead*, 9 L. & SOC. REV. 165 (1994).

226. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1764.

227. *Id.*

228. *Id.*

229. *Id.* at 1765.

230. *Id.* at 1762 (citations omitted).

231. *Id.*

one could conclude that he was just concerned with the results in the appellate realm.

Schwartz' reporting of parallel conclusions for California made more apparent that he intended to generalize about the trial courts. "In almost ninety cases," Schwartz reported, "the California Court either approved the jury's finding of no contributory negligence or ruled that the contributory negligence issue was properly for the jury . . . ."[232] He then noted that "In sixteen cases, the jury evidently found the plaintiff guilty of contributory negligence," but in one-half of these cases, the solicitous justices of the California Supreme Court set aside the verdicts.[233] Schwartz presented California juries as overwhelmingly siding with plaintiffs concerning the issue of contributory negligence.

Richard Epstein, an influential New York University and University of Chicago torts scholar, endorses Schwartz' conclusion regarding the infrequency of plaintiffs losing due to contributory negligence. In his torts casebook, after including a four-paragraph selection from Schwartz' discussion of contributory negligence, Epstein summarizes Schwartz' conclusions as indicating that "Contributory negligence is rarely found as a matter of law; *jury verdicts for the plaintiff on this issue are both frequent and usually upheld;* jury verdicts for defendants are often set aside, typically because of a defect in jury instructions."[234] The discrepancy between the 10 to 1 appellate ratio and the 2 to 1 trial court ratio should have given Schwartz and Epstein pause before presuming that other appellate ratios might represent trial court outcomes.

The figures that Schwartz reports for *trial court* outcomes in the Los Angeles Superior Court tort cases with railroads and street railway companies as defendants are incomplete, inaccurate, and misleading. Correct figures for trial outcomes in these Los Angeles Superior Court cases do not support his argument that plaintiffs won cases twice as often as they lost. I attempted to replicate Professor Schwartz' research but found that plaintiffs lost slightly more often than they won. Once again, accurate trial court data prove the unrepresentative character of appellate reports of tort litigation. The trial court data undermine the argument that tort law was generous to plaintiffs.

To check the Los Angeles Superior Court results that Schwartz reported in his 1981 article, I investigated the Los Angeles County Archives that Schwartz had consulted. Schwartz did not offer precise information regarding the sources he consulted. As noted above, he indicated in his text that he looked at "all jury verdicts in tort cases filed in

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232. *Id.*
233. *Id.* at 1762–63.
234. EPSTEIN, *supra* note 14, at 304–06 (emphasis added).

Los Angeles County against railroad company defendants between 1889 and 1895."[235] In a footnote, he offered little information regarding these cases, indicating only that "[t]hese trial documents are available in the Los Angeles County Archives Office."[236]

Schwartz' citations were entirely inadequate regarding the possibility of replicating his research. This is a petty criticism, but one justified, perhaps, by Schwartz making the same criticism of Posner, who, Schwartz wrote in a footnote, "does not even furnish any case citations, or any actual excerpts from opinions. His reader thus faces a 'take it or leave it' option."[237] In one of his many books, Posner suggests that law professors ought to do more systematic social scientific work.[238] Presumably, Posner would tighten his methods if he undertook similar empirical research again.

Using what little information Schwartz offered, I consulted all the Los Angeles trial court records of cases filed between 1889 and 1895 with street railway and railroad companies as defendants. I later determined that Schwartz and his research assistants had been able to consult record books in which clerks had recorded the outcomes of all civil cases; the archivists called these, somewhat inaccurately, docket books. However, sometime after 1990, the Los Angeles County archivists destroyed these volumes by mistake, a result, the archivist said, of "not double checking what you were doing."[239]

My research assistants and I looked at the actual case files of the litigation rather than at the records made from the case files, as Schwartz and his assistants had done. For each case, the file consists of a rolled-up bundle of trial documents; the archivists refer to them as "round files" because of the shape that the documents take. Many of the round files we consulted had remained rolled since filing a century ago. According to the

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235. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1764.

236. *Id.* at 1764 n.353.

237. *Id.* at 1721 n.27. Like Schwartz, Posner offers a wholly inadequate citation to his trial court materials. Posner says merely that "a sample of 111 railroad and street-railway accident cases for the relevant period was drawn from the records of Cook County, Illinois (the county in which Chicago is located) and rural Du Page County to the west." Posner, *A Theory of Negligence*, *supra* note 15, at 36. He offers no further description of his trial court sources. The inadequacy of Posner's references to the sources he consulted might be a function of the primitive state of socio-legal research a half a century ago; as mentioned above, Posner was something of an empirical pioneer.

238. Posner writes that "In any sensible division of responsibilities among branches of the legal profession, the task of conducting detailed empirical inquiries into the presuppositions of legal doctrines would be assigned to the law schools. Too many constitutional scholars conceive of their role as that of shadow judges, writing, in the guise of articles, alternative judicial opinions in Supreme Court cases." RICHARD POSNER, OVERCOMING LAW 210 (1995).

239. I would prefer to leave this unattributed.

docket books,[240] there were 313 civil suits in which railroads and street railway companies were defendants.[241] Of these cases, 127 (40.7 percent) were tort suits.[242] For 31 of the 313 suits against the rail companies, no extant documents allowed me to identify the type of suit.[243] Undoubtedly some of these missing files were tort suits—12 of them would be if the same percentage held among the missing cases—but there is no longer any way to know what type of suits the missing cases were.

Although Schwartz did not mention the tort suits that did not go to trial, these cases constituted more than 60 percent of all the filed tort suits. Of the 127 Los Angeles rail tort cases, 15 disappeared without a trace after the complaint.[244] The Pacific Railway Company also succeeded in removing two cases to federal court.[245] Like Schwartz, I have not investigated the federal court files for Los Angeles. The court dismissed another 61 suits,[246] which suggests that the rail companies settled with the plaintiffs. That leaves 49 suits that went to trial.

Our look at the outcomes of the 49 Los Angeles rail tort suits that did go to trial suggests serious problems with Schwartz' research methods. One huge error in Schwartz' research was that he ignored nonsuits. In seven of the 49 cases that reached an adjudicated result, judges nonsuited the plaintiffs,[247] just as Judges Green and Melvin had in young Mary Kennedy's Alameda County suits for her lost leg. That is, judges threw out seven of the plaintiffs' suits with a final judgment before the cases had progressed very far. In tallying the results of trial court tort suits, Schwartz should have counted these cases among defendant successes, but Schwartz ignored them, which skewed his results toward the plaintiffs.

A second problem with Schwartz' trial court figures was that he did not follow cases beyond the initial trial verdict. He did not track the cases to see if the results remained unchanged through appeals. Schwartz should have followed the results of the cases through motions for new trials and appeals to higher courts. Schwartz' data—which showed that plaintiffs won two to one at trial but that in the appellate courts, there were nearly ten plaintiffs' verdicts for every defense verdict—should have confirmed his

240. Plaintiff Indexes, no. 1 (1880–89), no. 2 (1889–91), no. 3 1891-1893), no. 4 (1893–95), no. 5 (1895–97) (on file with the Los Angeles County Court Archives).

241. *See* Appendix B.

242. *See id.*

243. *See id.*

244. *See id.* (*Wise*; *Hartnett*; *Sayers*; *Weller*; *Miller*; *Sellenscheidt*; *Van Steenburg*; *Manchester*; *Bayley*; *Freemann*; *Speier*; *Manis*; *Butler*; *Snitjer*; and *Hanchel*).

245. *See id.* (*Stoddard* and *Cruz*).

246. *See id.*

247. *See id.* (*Moreno*, LASC# 12072; *Carsib*; *Cogswell*; *Sproule*; *Brown*, LASC# 17204; *Brown*, LASC# 18922; and *Guirado*).

hunch that losing defendants were more likely to appeal than losing plaintiffs.

Finally, a third substantial problem with Schwartz' handling of the Los Angeles trial court materials is that he only reported information regarding jury verdicts. As noted above, Schwartz did not report figures for bench trials, unlike Posner, who reports the verdict ratios that he drew from the appellate cases for both jury and bench trials. Why Schwartz would ignore tort suits tried before judges without juries is unclear. Perhaps Schwartz was interested in the outcomes of jury trials only. The outcomes of jury trials in tort cases is an important topic, but if that narrow topic were Schwartz' only concern, he failed to make that clear. Schwartz may have made a more fundamental and puzzling error. He may have assumed all tort trials were jury trials, ignoring bench trials altogether.

Schwartz reported 39 jury verdicts, with 26 plaintiffs' verdicts and 13 for the defendants.[248] He derived these figures from large record books in which the county clerks tallied trial outcomes—these values may have only recorded the results of jury trials. I found a similar figure of initial verdicts when I combined jury and bench trials: 29 plaintiffs' verdicts and 13 for the defense. These figures, though, ignore nonsuits and ignore all post-trial reversals. These initial verdict figures suggest that Schwartz and his assistants assumed all tort trials were jury trials. Schwartz may have had access to information regarding the 31 missing rail suits. With enough jury trials of tort suits among those cases, the possibility that Schwartz meant to report and did report only jury trials remains open. But again, reporting only jury trials distorts the results of trial court tort adjudication.

Among the 49 Los Angeles cases that reached an adjudicated result, I found seven nonsuits[249] and 42 cases[250] that reached a verdict. Ten of these cases were bench trials.[251] Plaintiffs won initial verdicts in six of these cases;[252] defendants won the other four.[253] In none of the cases in which defendants won did the unsuccessful plaintiffs attempt to secure a new trial or appeal the judgment. However, rail companies succeeded in obtaining reversals of two of the plaintiffs' verdicts.[254] Before judges, then, the rail companies ultimately won six of 10 suits.

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248. Schwartz, *Tort Law and Economy*, *supra* note 13, at 1764.

249. *See* Appendix B (*Moreno*, LASC# 12072; *Carsib*; *Cogswell*; *Sproule*; *Brown*, LASC# 17204; *Brown*, LASC #18922; *Guirado*).

250. *See id.*

251. *See id.* (*Rankin*; *Howland*; *Norton*; *Daneri*; *Cox*; *Blackington*; *McLean*; *Ramirez*; *Dial*; and *Stimton*).

252. *See id.* (*Norton*; *Daneri*; *Cox*; *Blackington*; *Dial*; and *Stimton*).

253. *See id.* (*Howland*; *McLean*; and *Ramirez*).

254. *See id.* (*Cox* and *Daneri*).

In cases that reached verdicts before juries, the rail companies fared less well than before judges. Indeed, the initial results favored plaintiffs even more than Schwartz believed. There were 32 jury cases.[255] Initially, plaintiffs won 23[256] of these.[257] The ratio of initial plaintiffs' to defendants' verdicts in jury trials was thus 2.6 to 1, greater than the figure that Schwartz reported. However, following these initial verdicts, defendants began to chip away at plaintiffs' successes. The rail companies appealed two cases to the Supreme Court and successfully got reversals.[258] The losing defendants filed motions in the trial court for new trials in 12[259] of the 23 cases. They got judges to order new trials in 5 of these cases.[260] One new trial resulted in a verdict for the plaintiff.[261] In the second, third, and fourth cases in which defendants succeeded with their motions for new trials, the plaintiffs appealed the order for a new trial to the California Supreme Court.[262] The Supreme Court affirmed the trial judge's order for a new trial in all three. For two cases, there is no further record in the trial court materials, which suggests that either the parties settled or that the plaintiff, faced with the prospect of litigating once again, gave up.[263] The remaining case was dismissed on remand, which suggests that the plaintiff settled the case.[264] In the fifth of the cases in which the plaintiff appealed an order for a new trial to the Supreme Court, the high court justices affirmed the order and remanded the case. The plaintiff won the new trial, which judgment the defendants appealed to the Supreme Court, where, finally, the justices directed a judgment for the plaintiff.[265] So, in the five cases in which the trial court judge granted a new trial, the plaintiffs eventually won two after successfully responding to appeals in the Supreme Court. The results are unknown in the third and fourth cases, and another case ended with dismissal.

In each of the seven cases in which the trial judge denied losing defendants' motions for new trials, the defendant rail companies appealed

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255. *See id.*

256. *See id.*

257. The initial verdict was for the defense in *Kavanagh*, *Koebig*, *Wilson*, *Scofield*, *Sansome*, *Coleman*, *Merrill*, *Schmidt*, and *George*. *See* Appendix B.

258. Cox v. Los Angeles Terminal Ry. Co., 109 Cal. 100, 41 P. 794 (1895) (LASC# 18843); Everett v. Los Angeles Consol. Electric Ry. Co., 115 Cal. 105, 46 P. 889 (1896) (LASC# 22438).

259. *See* Appendix B (*Stephenson*; *Sappenfield*; *Fox*; *Brymer*; *Neale*; *Daves*; *Lee*; *Baker*; *Gier*; *Cunningham*; *Davis*; and *Schramm*).

260. *See id.* (*Fox*; *Brymer*; *Lee*; *Davis*; and *Schramm*).

261. Davis v. California St. Cable R. Co., 105 Cal. 131, 38 P. 647 (1894) (LASC# 20828).

262. Lee v. S. Pac. R. Co., 116 Cal. 97, 47 P. 932 (1895) (LASC# 14035); Fox v. S. Pac. Co., 95 Cal. 234, 30 P. 384 (1892) (LASC# 12117); Schramm v. Los Angeles Terminal Ry. Co., LASC# 23432 (June 3, 1895).

263. *Fox*, 95 Cal. 234 (LASC# 12117); *Schramm*, LASC# 23432.

264. Brymer v. S. Pac. Co., 90 Cal. 496, 27 P. 371 (1891) (LASC# 12510).

265. Lee v. S. Pac. R. Co., 116 Cal. 97, 106, 47 P. 932 (1895) (LASC# 14035).

the judge's denial of their motions to the California Supreme Court.[266] The Supreme Court justices ordered new trials in five of these seven cases.[267] In another case, there had been two defendants; one the Southern Pacific, the other an individual. The Supreme Court granted a new trial regarding Southern Pacific's liability but left the judgment against the individual untouched.[268] In only one of the seven cases in which the defendant rail companies appealed a judge's refusal to order a new trial did the Supreme Court affirm the judge's order.[269] After all the appealing and retrying finished in these seven cases in which judges refused to grant new trials following plaintiffs' verdicts, the defendant rail companies won outright victories in two cases by securing dismissals after the cases returned to the trial court[270] and in another case, the plaintiffs either settled or folded following the Supreme Court's order for a new trial.[271] In two cases, the plaintiffs retried their cases and won,[272] and in the final case, as noted, the Supreme Court justices affirmed the judge's refusal to order a new trial.[273]

Defendants thus made post-trial motions and appeals in 12 of the 23 (52.2 percent) cases they initially lost before juries. By contrast, plaintiffs made post-trial motions for new trials or appeals in three of the nine cases they initially lost before juries.[274] The defendant rail companies successfully avoided retrial and kept their judgments from being disturbed in all of these cases.[275] Just as Harmon Bell sought to bury Rosie James with post-trial maneuvers, so did Los Angeles' rail lawyers maneuver against plaintiffs who had won judgments at trial.

In the final tally of *jury verdicts*, although the initial verdicts favored the plaintiffs by 23 to 9, a 2.5 to 1 ratio, after all the post-trial motions and appeals, plaintiff wins were reduced to 16, and defendant wins increased to

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266. Stephenson v. S. Pac. Co., 102 Cal. 143, 36 P. 407 (1894) (LASC# 09581); Sappenfield v. Main St. & A.P.R. Co., 91 Cal. 48, 27 P. 590 (1891) (LASC# 10532); Neale v. Depot Ry. Co., 94 Cal. 425, 29 P. 954 (1892) (LASC# 12602); Daves v. S. Pac. Co., 98 Cal. 19, 32 P. 708 (1893) (LASC# 12848); Baker v. Riverside Santa Ana & Los Angeles Ry. Co., LASC# 14400 (Jan. 8, 1891); Gier v. Los Angeles Consol. Elec. Ry. Co., 108 Cal. 129, 41 P. 22 (1895) (LASC# 19561); Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 P. 452 (1897) (LASC# 23663).

267. Stephenson v. S. Pac. Co., 102 Cal. 143, 36 P. 407 (1894) (LASC# 09581); Sappenfield v. Main St. & A.P.R. Co., 91 Cal. 48, 27 P. 590 (1891) (LASC# 10532); Baker v. Riverside Santa Ana & Los Angeles Ry. Co., LASC# 14400 (Jan. 8, 1891); Gier v. Los Angeles Consol. Elec. Ry. Co., 108 Cal. 129, 41 P. 22 (1895) (LASC# 19561); Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 P. 452 (1897) (LASC# 23663).

268. Daves v. S. Pac. Co., 98 Cal. 19, 32 P. 708 (1893) (LASC# 12848)

269. Neale v. Depot Ry. Co., 94 Cal. 425, 29 P. 954 (1892) (LASC# 12602)

270. *See* Appendix B (*Sappenfield* and *Baker*).

271. *Id.* (*Gier*).

272. *Id.* (*Stephenson* and *Cunningham).*

273. *Id.* (*Neale*).

274. *See* Appendix B (*Koebig*; *Merrill*; and *George*).

275. *Id.* (*Koebig*; *Merrill*; and *George*).

11. Two cases were dismissed and probably settled, with no further record for three. Thus, for the jury cases for which there is a record of a final judgment other than dismissal, the ratio of plaintiff to defendant wins was just under 1.5 to 1.

TABLE 3[276]
ALAMEDA COUNTY, OAKLAND TRACTION, AND LOS ANGELES RAIL CASES: INITIAL AND FINAL TALLIES IN PERSONAL INJURY CASES

	Alameda County 1901–1910		**Oakland Traction 1898–1910**		**Los Angeles (Rail) 1889–1895**	
Total Cases	335		147		127	
Cases Tried	66		26		49	
	Initial	Final	Initial	Final	Initial	Final
Plaintiffs' Wins	35	32	13	11	29	19
Defendants' Wins	31	33	14	13	20	23

When final outcomes of the jury trials, the bench trials, and the nonsuits are combined, I find that contrary to the arguments of Schwartz and Posner, plaintiffs lost more often than they won in tort suits against rail companies. In the final Los Angeles tally, plaintiffs won 19 cases and lost 23. Two cases ended with dismissals that presumably reflect settlements. In three cases, there is no further record in the trial court papers, which might mean settlement or that the plaintiffs gave up. Thus, in suits filed between 1889 and 1895 in Los Angeles County Superior Court against rail companies, plaintiffs won 45.2 percent of the cases for which there is a record of final judgment favoring one of the parties. The ratio of plaintiff to defendant success was less than one to one, well under the two-to-one ratio that Schwartz reported, and a universe distant from the nearly ten-to-one ratio of the appellate reports.

276. Data collected from the civil litigation files in Superior Court, Alameda County, California; and Superior Court, Los Angeles County Court Archives. See Appendix A and Appendix B.

TABLE 4[277]
TORT PLAINTIFF SUCCESS RATES

	Posner	**Schwartz**	**Russell**
Appellate Cases	71.8 % (U.S.)	90.5 % (CA) 90.2 % (NH)	—
Trial Court	60–70 % (IL)	66.6 % (L.A.)	45.2 % (L.A.) 45.8 % (O.T.C.) 49.2 % (Ala. Co.)

The conclusion that plaintiffs won something less than half the time in the two California trial courts I have studied is roughly consistent with other theoretical and empirical work concerning litigation outcomes. In Los Angeles, I have shown that plaintiffs in rail suits won just over 45 percent of their cases. Plaintiffs in suits against Oakland Traction won about the same fraction of cases. Overall, in the Alameda trial court's 1901–1910 cases, defendants' verdicts numbered one more than plaintiffs'. However, when the Oakland Traction cases are subtracted from that total, the yield for plaintiffs (21) is one greater than for defendants (20). In their well-known 1984 Journal of Legal Studies piece *The Selection of Disputes for Litigation*, George Priest and Benjamin Klein set out a theoretical model that predicts roughly equal win rates by plaintiffs and defendants and then successfully compare their model to some existing empirical data.[278] At first blush, the win rates of plaintiffs conform to Priest and Klein's prediction, but as Sam Gross and Kent Syverud have pointed out, Priest and Klein's model applies to cases that involve the determination of liability only and not the determination of damages.[279] Given this deviation from their theoretical model, I have not determined to what extent the tort cases I have examined meet other assumptions of the Priest and Klein model.[280]

The plaintiffs' success rates of around 50 percent in Alameda and Los Angeles tort cases are also close to figures that other scholars have derived for plaintiff success rates in tort cases. In his study of West Virginia trial courts,[281] Frank Munger reported that plaintiffs in suits against railroads

277. Data collected from Posner, *A Theory of Negligence*, *supra* note 15, at 92, 94–95; Schwartz, *Character of Tort Law*, *supra* note 13, at 1764; civil litigation files, Superior Court, Los Angeles County Court Archives.

278. George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

279. Gross & Syverud, *supra* note 95 at 323–27.

280. *Id.* at 327. For discussion of hypotheses regarding case selection, see NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY 83–92 (2010).

281. Frank W. Munger, *Social Change and Tort Litigation*, 36 BUFF. L. REV. 75 (1987).

and coal companies between 1872 and 1910 won less than half the time. In suits against railroads, plaintiffs won 27 of 56 tried 1872–1910 cases, a success rate of 48.2 percent.[282] Plaintiffs lost more often against coal companies during the same years, winning only 43.2 percent of their cases, 16 of 37.[283] Overall, plaintiffs in suits against West Virginia Coal Companies and Rail Companies won 46.2 percent of their cases,[284] about the same success rate as California plaintiffs.

The outcomes that Randy Bergstrom reported for New York City trial court litigation show that by the turn of the century, plaintiffs in tort suits won just about half of their cases. Bergstrom presented data for the years 1870, 1890, and 1910.[285] In 1870, plaintiffs won a whopping 92.3 percent of their cases against the horse-drawn street railways companies.[286] This was 12 of the 13 filed cases.[287] By 1890, the number of cases had increased, and the plaintiff success rate had fallen: 132 cases in all, with plaintiffs winning 57.1 percent of these.[288] By the end of the first decade of the twentieth century, the number of adjudicated cases had exploded to 595, and the plaintiff success rate had dropped to 45.5 percent.[289] During the two decades between 1890 and 1910, Bergstrom showed the plaintiffs' win rate dropped, falling below the 50 percent mark sometime between 1890 and 1910.[290] The findings of Munger, a socio-legal scholar, and Bergstrom, a historian, cluster around the figures that I have derived for plaintiff success rates in California cases, although Bergstrom's plaintiffs before the turn of the century did succeed more often than those in Los Angeles and Alameda County at the same time.[291]

Plaintiffs' win rates are not, of course, the only measure of plaintiffs' success. As Frank Brinse, the plaintiff who won $1 against Oakland

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282. *Id.* at 100 tbl.4.

283. *Id.* There are two problems in the table in which Munger reports this data. For Coal Company cases between 1901 and 1905, the data he presents account for only 91.2 percent of the total number of cases. I assumed that the remaining 8.8 percent of the cases were either settled or removed to federal court and so were not among the tried cases. Second, for the Coal Company cases for 1906–1910, the table appears to contain a typographical error. The percentage of cases removed to federal court reads 16 but, I believe, should instead be 1.6 percent.

284. *Id.*

285. BERGSTROM, *supra* note 46, at 159.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* Unfortunately, in his study of civil litigation in St. Louis, McIntosh does not report the overall win rate of plaintiffs in tort suits. WAYNE V. MCINTOSH, THE APPEAL OF CIVIL LAW: A POLITICAL-ECONOMIC ANALYSIS OF LITIGATION (1990); Wayne V. McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 L. & SOC. REV. 3 (1980). Nor does Silverman, LAW AND URBAN GROWTH, supra note 43.

291. It may be that Bergstrom has not followed the cases through all post-trial motions and appeals to the final tally, as I have. His book does not make this clear.

Traction, learned, the award is the second important component of plaintiffs' success.[292] In Alameda County, as noted above, the aggregate amount that successful plaintiffs received amounted to 0.9 percent of the total with which all plaintiffs threatened the company.[293] This figure was somewhat higher in Oakland Traction's suits, as the successful plaintiffs gained 1.4 percent of the total amount that all plaintiffs sought in their complaints.[294] Some combination of the severity of rail injuries and the deep-pockets effect likely accounts for the difference. In the Los Angeles County rail suits, plaintiffs recovered $54,273. This was 2.2 percent of the total of $2.4 million that all rail plaintiffs had sought and a recovery rate 50 percent higher than in the suits that Bell defended. I cannot account for the difference in recovery rates; Bell might have been a better lawyer than his Los Angeles counterparts.

As with the Alameda County results, the Los Angeles County results do not display the generosity that Schwartz claimed characterized tort law. Plaintiffs were successful much less often than Schwartz concluded. Rather than winning in a two-to-one ratio, they won less than half the time in their tort suits against rail companies. As with the Alameda County Superior Court, the annual toll that the Los Angeles court exacted upon Los Angeles rail companies was small in absolute terms: an average of just $7,750 over the seven years I studied.

Finally, the empirical data of this and the previous section make clear that reliance upon appellate reports as representations of the empirical contours of trial court outcomes is illegitimate.

CONCLUSION

Posner and Schwartz developed and presented largely erroneous characterizations of tort law in the late nineteenth and early twentieth centuries. Each developed views of the nature of tort law after reading published appellate opinions from various states. Appellate reports are suited to doctrinal studies and analysis of the behavior of appellate tribunals, but both Posner and Schwartz stretched beyond the topics for which they had relevant data. Posner derived a general theory about the relationship between law and economics. In Posner's view, efficiency characterized both the rules and the operation of the common law, and the negligence system served a regulatory function that optimized the level of injuries in society. However, as Schwartz suggested, Posner's theory drove his data too far. Schwartz' view of the history of tort law differed from

292. A third component would be the timeliness of their receipt of the award.
293. *See* discussion *supra* note 203.
294. *See* discussion *supra* notes 195–202.

Posner's. Schwartz saw tort as generous to injury victims in the late nineteenth century.

Posner supported his theory about efficiency, and Schwartz supported his notion of solicitude, using seemingly empirical generalizations derived from the appellate reports. "Their minds," as Nobel laureate Bob Dylan sang and as I have shown, were "filled with big ideas, images[,] and distorted facts."[295] Posner and Schwartz found a high ratio of plaintiff wins among the cases that appellate courts handled. Both scholars projected the ratio of appealed cases back into the trial courts. Each concluded that because defendants appealed many cases, tort plaintiffs had enjoyed considerable success in the trial courts. Posner found that plaintiffs coupled wins with efficiently high damage awards. Schwartz found that plaintiffs rarely experienced the brunt of the most threatening, case-ending legal doctrines. In both of their conceptions, plaintiffs did well. For Posner, they did just well enough. For Schwartz, the success and compensation that plaintiffs enjoyed were perhaps too much, operating as a tax on the enterprises that were often tort defendants.

The empirical data drawn from trial courts support neither Posner's theory of efficiency nor Schwartz' theory of solicitude. I have focused this paper on California street railway companies in Alameda County and Los Angeles County, California, in the late nineteenth and early twentieth centuries. In Alameda County between 1880 and 1910, rail companies—railroads and street railways—were defendants in one-half of all the tort suits filed in Superior Court. After the turn of the century, Oakland Traction, the county's principal street railway, accounted for most of these rail suits. However, regarding the amount of money the Superior Court took from Oakland Traction, the Superior Court was a flea. Oakland Traction's lawyer, Harmon Bell, allowed few cases to reach trial, and when he did, he allowed few plaintiffs to win. Overall, plaintiffs in suits against the traction company lost more often than they won, and when they did win, they usually won relatively small amounts. Solicitude did not characterize what plaintiffs experienced. The aggregate sum of the judgments and costs that Oakland Traction paid each year averaged one-half of one percent of the company's annual net profit, not much of a regulatory bite.

Although Harmon Bell appears to have been a very effective lawyer, the results in the Oakland Traction cases were not strikingly different from those in all the Alameda County tort cases. In cases against defendants other than Oakland Traction, plaintiffs won slightly more often than did Bell's adversaries; in the final tally, plaintiffs won just over one-half of their cases between 1901 and 1910. When victorious, though, plaintiffs in

295. DYLAN, *supra* note 1.

these other cases won a slightly smaller fraction of the total amount than they sought in damages. So, they won a bit more often but received a bit less. Overall, the Alameda County story was that few personal injury cases lasted until trial. Among those that did and reached a final judgment, plaintiffs and defendants split the number of victories roughly evenly, matching the result that some theorists have predicted.

In his 1981 Yale Law Journal piece, Schwartz reported that Los Angeles County Superior Court plaintiffs won twice as often as defendants in rail cases between 1889 and 1895. Schwartz investigated these trial court records to check whether the nearly 10 to 1 ratio of plaintiffs to defendant wins that he derived from the appellate reports was an artifact of differential incentives to appeal. Although the appellate ratio that Schwartz found was strikingly higher than what he discovered in the trial court, this difference did not give Schwartz pause in making empirical generalizations about trial court litigation based on his appellate results.

Something went wrong during Schwartz' visit to the archives. I revisited the data that Schwartz consulted and could not duplicate his results. My inability to do so may have resulted from the unfortunate destruction by the archivists of the records that Schwartz consulted. Alternatively, Schwartz might have meant only to focus narrowly on the results of jury trials, and other scholars—Richard Epstein, for example—may have erroneously assumed that Schwartz intended to expand his conclusions beyond jury trials. That seems implausible. I believe instead that Schwartz simply failed to count all the relevant outcomes. Most regrettably, he neglected to include judicial awards of nonsuits in his tally. Schwartz also failed to follow the trial court results through all the loops and turns of post-trial motions and appeals, despite clearly showing the much higher rate at which losing tort defendants appeared in appellate reports.

Although the record books that Schwartz consulted were unavailable when I visited, the original case files—the primary sources for examining trial court litigation—remained. Many of these had lain unopened since the cases closed a century ago. Using these files, I determined that the results of trial court litigation were not as Schwartz reported. As with cases against Oakland Traction, plaintiffs in suits against Los Angeles street railway and railroad companies lost more often than they won. In jury trials in which judges did not grant nonsuits to the defendants, juries' initial verdicts favored the plaintiffs in a ratio even more favorable to the plaintiffs than Schwartz reported. However, following the initial verdicts and judgments, losing rail company defendants maneuvered systematically with motions for new trials and appeals. This post-trial activity transformed an initial tally that favored plaintiffs into one that instead favored the defendants. As

in Alameda County, solicitude did not characterize the Los Angeles personal injury litigation outcome.

Appendix A: Alameda County Superior Court Cases

Albright v. Oakland Traction Co., ACSC# 34397 (Dec. 31, 1910).
Arthur v. Oakland Transit Consol., ACSC# 21625 (Feb. 3, 1905)
Assalena v. Oakland Transit Consol., ACSC# 20832 (May 3, 1904)
Atkinson v. Oakland Traction Co., ACSC# 27601 (June 8, 1908)
Avery v. Oakland Transit Consol., ACSC# 19373 (Oct. 29, 1902)
Baker v. Oakland Traction Co., ACSC# 29413 (Apr. 10, 1909)
Barrett v. Oakland Transit Co., ACSC# 15233 (June 15, 1898)
Bellerive v. Oakland Traction Co., ACSC# 28121 (Sept. 10, 1908)
Blewett v. Oakland Traction Co., ACSC# 28390 (Oct. 20, 1908)
Boone v. Oakland Transit Co., ACSC# 15871 (Jan. 26, 1899)
Boone v. Oakland Transit Co., ACSC# 15897 (Feb. 6, 1899)
Bowers v. Oakland Traction Consol., ACSC# 23104 (Apr. 16, 06)
Bowley v. Oakland Transit Consol., ACSC# 20610 (Jan. 25, 1904)
Brasher v. Oakland Traction Co., ACSC# 26854 (Feb. 17, 1908)
Brasher v. Oakland Traction Co., ACSC# 32380 (May 27, 1910)
Brinse v. Oakland Traction Co., ACSC# 26609 (Jan. 13, 1908)
Brower v. Oakland Traction Co., ACSC# 24892 (Mar. 29, 1907)
Burke v. Oakland Traction Consol., ACSC# 23901 (Oct. 12, 1906)
Calavriotes v. Oakland Traction Co., ACSC# 25049 (Apr. 1907)
Calley v. Oakland Traction Co., ACSC# 29935 (June 29, 1909)
Cameron v. Oakland Transit, ACSC# 18599, (Dec. 24, 1901)
Campbell v. Oakland Traction Consol., ACSC# 22838 (Feb. 12, 1906)
Cardinet v. Oakland Traction Co., ACSC# 25020 (Apr. 11, 1907)
Carroll v. Oakland Traction Co., ACSC# 25440 (June 20, 1907)
Claresy v. Oakland Transit Consol., ACSC# 20876 (Apr. 26, 1904)
Cole v. Oakland Traction Co., ACSC# 25395 (June 14, 1907)
Cole v. Oakland Traction Co., ACSC# 25559 (July 12, 1907)
Conlon v. Oakland Traction Co., ACSC# 28032 (Aug. 29, 1908)
Cotter v. Oakland Transit Co., ACSC# 15128 (May 11, 1898)
Crawford Oakland Transit Co., ACSC# 16080 (Apr. 21, 1899)
Dabadie v. Oakland Traction Co., ACSC# 29372 (Apr. 6, 1909)
Dable v. Oakland Traction Co., ACSC# 30914 (Dec. 7, 1909)
Davis v. Oakland Traction Co., ACSC# 28965 (Jan. 29, 1909)
Dean v. Oakland Traction Co., ACSC# 26050 (Oct. 1, 1907)
Dickerson v. Oakland Transit Consol., ACSC# 18839 (Mar. 25, 1902)
Dillon v. Oakland Traction Consol., ACSC# 23810 (Sept. 26, 1906)
Eastman v. Oakland Traction Co., ACSC# 28377 (Oct. 16, 1908)
Eccleston v. Oakland Traction Co., ACSC# 27889 (Aug. 7, 1908)
Estes v. Oakland Traction Co., ACSC# 28745 (Dec. 18, 1908)
Etnier v. Oakland Traction Co., ACSC# 30021 (July 12, 1909)
Fitzgerald v. Oakland Transit Co., ACSC# 15134 (May 13, 1898)
Foster v. Oakland Traction Co., ACSC# 27914 (Aug. 2, 1908)
Fought v. Oakland Transit Consol., ACSC# 19027 (June 10, 1902)
Frantzen v. Oakland Traction Co., ACSC# 29022 (Feb. 5, 1909)

Fuchs v. Oakland Traction Co., ACSC# 32049 (Apr. 4, 1910)
Gard v. Oakland Traction Co., ACSC# 27777 (July 15, 1908)
Gardner v. Oakland Transit Co., ACSC# 16743 (Jan. 10, 1900)
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Gilmore v. Oakland Transit Consol., ACSC# 19704 (Mar. 20, 1903)
Grantham v. Oakland Traction Co., ACSC# 25833 (Aug. 28, 1907)
Grunwald v. Oakland Traction Consol., ACSC# 22650 (Dec. 29, 1905)
Halladay v. Oakland Transit Consol., ACSC# 20275 (Oct. 8, 1903)
Hammond v. Oakland Traction Consol., ACSC# 21960 (May 22, 1905)
Hansen v. Oakland Traction Co., ACSC# 25858 (Aug. 30, 1907)
Hanson v. Oakland Traction Consol., ACSC# 23025 (Apr. 2, 1906)
Hayward v. Oakland Traction Consol., ACSC# 24004 (Oct. 29, 1906)
Heine v. Oakland Traction Co., ACSC# 28337 (Oct. 12, 1908)
Helmstein v. Oakland Traction Co., ACSC# 25332 (June 5, 1907)
Henderson v. Oakland Traction Consol., ACSC# 22624 (Dec. 21, 1905)
Hickey v. Oakland Transit Consol., ACSC# 20539 (Dec. 30, 1903)
Howe v. Oakland Traction Co., ACSC# 25159 (May 8, 1907)
Huff v. Oakland Transit Consol., ACSC# 20110 (Aug. 4, 1903)
Izetti v. Oakland Transit Consol., ACSC# 21395 (Nov. 5, 1904)
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Kennedy v. Oakland Transit Consol., ACSC# 19322 (Oct. 15, 1902)
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Kinsner v. Oakland Transit Co., ACSC# 16434 (Sept. 1, 1899)
Kneier v. Oakland Traction Consol., ACSC# 22862 (Feb. 12, 1906)
Kowalsky v. Oakland Transit Co., ACSC# 16701 (Dec. 19, 1899)
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Lyons v. Oakland Traction Co., ACSC# 24613 (Feb. 9, 1907)
Marques v. Oakland Traction Co., ACSC# 31804 (Feb. 25, 1910)
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Merrill v. Oakland Traction Co., ACSC# 30641 (Oct. 25, 1909)
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Midgley v. Oakland Traction Con., ACSC# 24388 (Dec. 21, 1906)
Miller v. Oakland Transit Co., ACSC# 16736 (Jan. 8, 1900)
Nilson v. Oakland Traction Consol., ACSC# 22640 (Dec. 26, 1905)
Payne v. Oakland Traction Co., ACSC# 24318 (Dec. 8, 1906)
Peake v. Oakland Traction Co., ACSC# 30951 (Dec. 3, 1909)
Peterson v. Oakland Traction Co., ACSC# 27435 (May 12, 1908)
Potter v. Oakland Traction Co., ACSC# 26670 (Jan. 21, 1908)
Pring v. Oakland Traction Co., ACSC# 27533 (May 29, 1908)
Printzlow v. Oakland Traction Con., ACSC# 25095 (Apr. 26, 1907)
Profumo v. Oakland Traction Co., ACSC# 28480 (Nov. 4, 1908)
Purdy v. Oakland Traction Co., ACSC# 32232 (May 5, 1910)
Racey v. Oakland Transit Consol., ACSC# 19308 (Oct. 9, 1902)
Rinehart v. Oakland Traction Co., ACSC# 27797 (July 17, 1908)
Romo v. Oakland Traction Co., ACSC# 33525 (Aug. 30, 1910)
Rowland v. Oakland Traction Co., ACSC# 28397 (Oct. 21, 1908)
Sandholt v. Oakland Traction Co., ACSC# 30522 (Oct. 7, 1909)
Simon v. Oakland Traction Co., ACSC# 30719 (Nov. 5, 1909)
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Snow v. Oakland Traction Co., ACSC# 26252 (Nov. 25, 1907)
Sugiura v. Oakland Traction Co., ACSC# 29932 (Feb. 29, 1908)
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Taylor v. Oakland Traction Co., ACSC# 29660 (May 19, 1909)
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Vass v. Oakland Traction Co., ACSC# 26669 (Jan. 27, 1908)
Vierra Oakland Transit Co., ACSC# 16247 (June 27, 1899)
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Wolgamot v. Oakland Transit Consol., ACSC# 19868 (Apr. 23, 1903)
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Yori v. Oakland Traction Co., ACSC# 25469 (June 28, 1907)
Young v. Oakland Traction Co., ACSC# 26542 (Dec. 31, 1907)

Case notes for all available cases are on file with author.

Appendix B: Los Angeles Superior Court Cases

Amestoy v. Electric Rapid Transit Co., LASC# 14520 (Jan. 22, 1891)
Andre v. S. Pac. Co., LASC# 16367 (Oct. 28, 1891)
Atlas Assurance Co. v. Redondo Ry. Co., LASC# 14349 (Dec. 30, 1890)
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Baker v. California S. Ry. Co., LASC# 13809 (Sept. 19, 1890)
Baker v. Los Angeles Consol. Elec. Ry. Co., LASC# 23026 (Mar. 22, 1895)
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Becker v. San Gabriel Valley Transit Ry. Co., LASC# 13813 (Sept. 20, 1890)
Becker v. S. Pac. R.R. Co., LASC# 22791 (Feb. 12, 1895)
Bennett v. S. Pac. R.R. Co., LASC# 23150 (Apr. 12, 1895)
Bequett v. S. California Ry. Co., LASC# 17369 (Apr. 1, 1892)
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Blackington v. Los Angeles Terminal Ry. Co., LASC# 20352 (Nov. 2, 1893)
Blackman v. Electric Rapid Transit Co., LASC# 14592 (Feb. 2, 1891)
Blair v. S. California Ry. Co., LASC# 12674 (Mar. 21, 1890)
Blanchard v. Los Angeles Pasadena & Glendale Ry. Co., LASC# 16966 (Feb. 2, 1892)
Blanchard v. Los Angeles Pasadena & Glendale Ry. Co., LASC# 19487 (Apr. 28, 1893)
Blitch v. Los Angeles Ter. Ry. Co., LASC# 21811 (July 21, 1894)
Bohrmann v. Los Angeles Consol. Elec. Ry. Co., LASC# 22092 (Sept. 25, 1894)

Booher v. Pac. Ry. Co., LASC# 13071 (May 19, 1890)
Boswell v. Second St. Cable R.R. Co., LASC# 12727 (Mar. 28, 1890)
Boswell v. Second St. Cable R.R. Co., LASC# 12728 (Mar. 28, 1890)
Botillar v. Electric Rapid Transit Co., LASC# 13380 (July 1, 1890)
Bowen v. S. Pac. R.R. Co., LASC# 14479 (Jan. 19, 1891)
Brainard v. Redondo Ry. Co., LASC# 15613 (July 12, 1891)
Brearly v. Los Angeles Consol. Elec. Ry. Co., LASC# 23917 (Aug. 15, 1895)
Broderick, Bascom & Co. v. Second St. Cable Ry. Co., LASC# 11718 (Nov. 4, 1889)
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California Bank v. Los Angeles & Pac. Ry. Co., LASC# 11386 (Sept. 10, 1889)
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Carsib v. S. Pac. Co., LASC# 13441 (July 12, 1890)
Carter v. S. Pac. R.R. Co., LASC# 23793 (July 26, 1895)
Chapman & Hendrick v. Los Angeles Cable Ry. Co., LASC# 15165 (Apr. 25, 1891)
Chapman v. Los Angeles & Pac. Ry. Co., LASC# 10630 (May 27, 1889)
Charlton v. Los Angeles Cable Ry. Co., LASC# 11147 (Aug. 6, 1889)
Charlton v. S. Pac. R.R. Co., LASC# 13868 (Sept. 30, 1890)
Childress v. Los Angeles Elec. Ry. Co., LASC# 14166 (Nov. 25, 1890)
City of Los Angeles v. S. California Ry. Co., LASC# 14853 (Mar. 2, 1891)
City of Los Angeles v. S. California Ry. Co., LASC# 18793 (Dec. 10, 1892)
City of Pomona v. Orange Grove St. Ry. Co., LASC# 24014 (Sept. 4, 1895)
City of San Pedro v. S. Pac. R.R. Co., LASC# 16664 (Dec. 2, 1891)
City of South Pasadena v. Los Angeles Terminal Ry. Co., LASC# 16578 (Nov. 30, 1891)
Clinton v. Depot Ry. Co., LASC# 12678 (Mar. 22, 1890)
Cobb v. Pac. Ry., LASC# 16512 (Nov. 18, 1891)
Cogswell v. Los Angeles Pasadena & Glendale Ry. Co., LASC# 14192 (Dec. 2, 1890)
Coleman v. Los Angeles Consol. Elect. Ry. Co., LASC# 21912 (Aug. 17, 1894)
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Corn Exch. Bank v. Pac. Ry. Co., LASC# 16490 (Nov. 13, 1891)
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County of Los Angeles v. S. Pac. Branch Ry. Co., LASC# 14517 (Jan. 22, 1891)
County of Los Angeles v. S. Pac. Co., LASC# 18087 (Aug. 2, 1892)
County of Los Angeles v. S. Pac. R.R. Co., LASC# 14486 (Jan. 19, 1891)
Cox v. Los Angeles Terminal Ry. Co., LASC# 18843 (Dec. 21, 1892)
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Cruz v. Pac. Ry. Co., LASC# 14471 (Jan. 17, 1891)
Culver & Little Mfg. Co. v. Nevada S. Ry. Co., LASC# 21510 (June 4, 1893)
Cunningham v. Los Angeles Ry. Co., LASC# 23663 (July 9, 1895)
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Cuzner v. San Gabriel Valley Rapid Transit Ry., LASC# 14708 (Feb. 17, 1891)
Cuzner v. San Gabriel Valley Rapid Transit Ry., LASC# 14725 (Feb. 19, 1891)
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Daves v. S. Pac. Co., LASC# 12848 (Apr. 16, 1890)
Davis v. Los Angeles Consol. Elec. Ry. Co., LASC# 21559 (June 12, 1894)
Davis v. S. California Ry. Co., LASC# 20828 (Feb. 6, 1894)
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Dial v. S. California Ry. Co., LASC# 23471 (June 8, 1895)
Dillman v. Los Angeles, Pasadena & Glendale Ry. Co., LASC# 11771 (Nov. 9, 1889)
Dowler v. S. Pac. Co., LASC# 22664 (Jan. 17, 1895)
Downey v. S. Pac. R.R. Co., LASC# 20381 (Nov. 8, 1893)
Eachus v. Los Angeles Consol. Elec. Ry. Co., LASC# 15531 (June 17, 1891)
Edgar v. S. Pac. R.R. Co., LASC# 14478 (Jan. 19, 1891)
Edwards v. S. California Ry. Co., LASC# 19308 (Mar. 24, 1893)
Elisalde v. S. Pac. Co., LASC# 14935 (Mar. 24, 1891)
Engel v. S. Pac. Co., LASC# 21285 (Apr. 27, 1894)
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Favery v. S. Pac. R.R. Co., LASC# 19061 (Feb. 3, 1893)

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First Nat'l Bank of Monrovia v. Myrtle & Ivy St. Car Co., LASC# 17071 (Feb. 19, 1892)
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Fossek v. California Cent. R.R. Co., LASC# 09844 (Feb. 21, 1889)
Fox v. S. Pac. Co., LASC# 12117 (Dec. 31, 1889)
Frank v. S. Pac. Co., LASC# 17302 (Mar. 24, 1892)
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Fulton v. San Gabriel Valley Rapid Transit Ry., LASC# 10242 (Apr. 12, 1889)
Fyke v. Los Angeles Consol. Ry. Co., LASC# 22766 (Feb. 6, 1895)
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Gier v. Los Angeles Consol. Elec. Ry. Co., LASC# 19561 (May 17, 1893)
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Glassell v. Los Angeles Pasadena & Glendale Ry. Co., LASC# 19657 (June 3, 1893)
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Griffin v. S. Pac. R.R. Co., LASC# 20582 (Dec. 18, 1893)
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Jacobs v. S. Pac. R.R. Co., LASC# 23036 (Mar. 23, 1895)
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Jewett v. California Cent. Ry. Co., LASC# 12862 (Apr. 18, 1890)
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Jones v. Los Angeles & Pac. Ry. Co., LASC# 17421 (Apr. 9, 1892)
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Kavanagh v. Calfornia Cent. R.R. Co., LASC# 12179 (Jan. 10, 1890)
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Kinney v. Santa Monica Wharf & Terminal Ry. Co., LASC# 17782 (June 8, 1892)
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Los Angeles Oil Burning & Supply Co. v. Pac. Ry. Co., LASC# 19027 (Jan. 26, 1893)
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