

PRECISE JUSTICE AND ROUGH JUSTICE:
SCIENTIFIC CAUSATION IN CIVIL LITIGATION
AS COMPARED WITH ADMINISTRATIVE
COMPENSATION PLANS
AND MASS TORT SETTLEMENTS

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SUMMARY: I. The Ideology of Precise Justice. – II. Some Realistic Limits. – III. The Rough Justice of Administrative Compensation Mechanisms. – IV. Rough Justice Has Its Own Limits.

Civil liability systems of industrial nations increasingly address problems that are clouded by causal uncertainty. Because the ideology underlying all civil liability regimes rests on a commitment to do «precise justice», causal uncertainty presents a great challenge to those regimes. By contrast, administrative compensation mechanisms, adopted through legislation as alternatives to civil litigation, are ideologically understood to be practical solutions to pressing social problems. And, unlike the administration of civil trials, these plans appear committed to no more than the delivery of «rough justice». Because of this difference, scientific uncertainty is much less troubling for administrative compensation schemes than it is for civil liability systems. This paper will focus on experience in the United States.

I. *The Ideology of Precise Justice*

Civil justice systems, what we in the U.S. call tort law or personal injury law, traditionally seek precise answers to the questions «Did the defendant factually cause the victim harm?» and «How much harm did the victim really suffer?».

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The search for precise answers arises fundamentally because the ideology underlying civil justice systems puts a very high value on discovering the truth. The legal system, through all its elaborate procedures, is meant to provide «precise justice» by declaring exactly what happened.

This felt need to determine just what occurred is amplified because civil liability rests primarily on the principle of liability based upon fault. That is, the theory of liability underlying the civil liability system nearly everywhere requires showing that the defendant wrongfully harmed someone. Given that requirement, it would seem very unfair to the defendant to hold him liable, unless we are convinced that the victim would not have been injured had the defendant acted responsibly.

So, too, civil liability systems are committed to the idea that their job is to restore deserving victims to the status quo. Hence, knowing exactly how much of a loss the individual victim suffered is very important for justice to be done.

II. Some Realistic Limits

Despite the strong ideology of «precise justice», we must recognize that the civil liability system in practice is not perfect.

For example, we must candidly admit that, in many cases, money cannot really put the victim back in the condition he would have been in had the defendant not wrongfully harmed him. But, because money is really all we can usually award, we do the best we can to make an individualized determination of the victim's damages cast in financial terms.

Moreover, we do not make the victim prove beyond any reasonable doubt either that he was injured by the defendant or the extent of his injuries. We do put the burden of proof on him. But, at least in the U.S., we allow him to win by showing that the weight of the evidence is on his side. Hence, while we pretend that the judicial system always reaches the right answer, in fact close observers of the civil liability system realize that it sometimes makes mistakes in favor of victims who actually should lose their cases were «precise justice» achieved. We tolerate these errors, while downplaying them, because it would seem even more unfair if we always decided the case against the victim unless he could prove his case in an overwhelmingly convincing way.

Furthermore, in the U.S., we additionally disguise the system's mistakes by having juries decide questions of causation and damages, and by not requiring juries to explain how they reached their results. So, once again, uncertainty as to whether «precise justice» is actually achieved in the indi-

vidual case is deliberately hidden behind the ideology that juries, of course, fairly determine the truth.

Finally, anyone knowledgeable about the U.S. system realizes that most lawsuits are later either settled or abandoned. Some claims that should have been won are abandoned, typically for lack of the necessary evidence. The system downplays that problem, by officially assuming that someone who abandons his case is not really a deserving victim. Yet, experts realize this means that some victims are denied justice they would have received if they only could have presented to the legal system proof of what really occurred.

Individual cases are also routinely settled in ways that produce «rough justice». The parties often settle exactly because of the uncertainty about what really happened or how much the victim was hurt. Rather than taking a chance of the plaintiff winning nothing or the defendant losing a large amount of money, both sides conclude they are better off with a less risky compromise. This does not yield precise substantive justice. But it does lead to a solution that both sides prefer, and is viewed to be fair in that sense. Put differently, the consent of the parties is allowed to triumph over our ideal of achieving «precise justice».

Notice, however, that these limits on «precise justice» that are tolerated by the American civil justice system do not require judges openly deciding to hold defendants responsible for harms that we are not convinced that they caused. If courts did that, I believe it would cause a great deal of concern.

This threat to the ideology of «precise justice» is increasing as courts are forced to deal with more and more complex scientific issues. For example, in an extremely unusual New York case, dozens of manufacturers of a medicine called DES were held liable to each victim of the medicine based upon each company's national market share of the drug¹. So, put simply, if a company sold ten percent of the DES, it would pay ten percent of each victim's damages. This solution was adopted because most individual victims could not prove which drug company actually provided the medicine. This was a drug that their mothers took many years ago while pregnant, and records were understandably not kept for all those years. The court's idea was to achieve «precise justice» in a roundabout manner. If a company sold ten percent of the DES, and if all the victims of DES sued that company, then that company would, in total, wind up paying for ten percent of the harm from DES, which, in turn, was assumed to equal the total amount of harm that drug company actually caused. There would be no one-to-one match-

¹ *Hymowitz v. Eli Lilly and Co.*, 539 N.E.2d 1069, cert. denied, 493 U.S. 944 (1989).

ing of injurer and victim, and in that sense the normal ideal of «precise justice» was not achieved. But, taking all the victims and all the drug providers together, victims were meant to be fully compensated on an individualized basis and drug companies were meant to pay what they fairly owed.

This aspect of the case was unusual enough. But even more unusual was the New York court's decision that a defendant was not to be relieved from paying its, say, ten percent share of an individual victim's harm even if it could prove the medicine it manufactured did not injure that specific victim. For example, suppose its pills were red in color and the victim's mother who took DES recalled taking white pills, which were obviously made by some other drug company. The New York court decided that this fact must be ignored, even though, in an ordinary trial, such an admission would result in a defense victory. But, the New York court was obviously eager to promote prompt and efficient settlement of these cases, and if these individual facts were to be considered, it would not only mean complications and delays, but also it would imply a constant re-adjusting of market shares relevant to the remaining claims. Nevertheless, this dramatic rejection of «precise justice» and replacing it with «rough justice» was very troubling to the dissenting judge.

III. *The Rough Justice of Administrative Compensation Mechanisms*

To be emphasized now is that when it comes to administrative compensation schemes, we – in the U.S. at least – are much less concerned about achieving «precise justice».

Start with the causation question: Were you factually harmed in a certain way? Several American compensation mechanisms are based on only a vague link between some assumed source of injury and claimants as a group, in which an individual connection often need not be shown. Indeed, those who design these plans will acknowledge that there is often only an approximate, or perhaps even only a symbolic, connection between the source of the harm and those who are eligible for compensation.

Consider so-called «vaccine damaged» children. Under the National Childhood Vaccine Injury Act of 1986², children qualify for benefits if they are vaccinated against one or more of a list of diseases and then display certain specified symptoms shortly afterwards³. Yet, from the start it has

² 42 U.S.C. 300aa-10 (2000).

³ For details see (last visited May 9, 2003).

seemed clear that many children only coincidentally display those symptoms at the time of vaccination, and that the harms from which they suffer are actually completely unrelated to the vaccination. Nonetheless, the program regularly provides benefits to this class of seriously injured children without serious attention being paid to whether any specific child was actually harmed by the vaccine. Average payments are now about \$ 800,000 per successful claimant. This is what I call «rough justice». The U.S. Congress, when adopting the plan, believed that many children were victims of the side effects of vaccines, that it was important to encourage all families to have their children vaccinated, and that typically it was too difficult, and probably very expensive in any event, to try to determine on a case-by-case basis whether there actually was a causal connection between the vaccine and the child's disability. Hence, a presumption of causation was adopted on the understanding that this would inevitably lead to awarding benefits to a wider class than those who would have been eligible under a «precise justice» requirement of proof of individual causation. Yet, so long as it is assumed that most (or even many) of the successful claimants are really the victims of vaccine side effects, the «rough justice» of the scheme appears altogether acceptable as a political matter⁴.

Or consider workers' compensation benefits for firefighters. In most places in the U.S., if you are a fire fighter with a lung injury, it is presumed that this was caused by smoke you inhaled while fighting fires⁵. In fact, some firefighters have lung diseases that are caused by other than having inhaled smoke on the job. But these industrial injury plans are content not to require individualized proof as to the actual cause of the firefighter's disease. Once again, determining the precise contribution to the claimant's injury of smoke inhaled while fighting fires is considered too difficult to determine on a case-by-case basis, although it is assumed that most firefighters with lung injuries indeed are suffering from job-related disease⁶.

⁴ In theory, it is possible for a court to deny recovery under the Act even for those with symptoms presumed to be caused by the vaccine if the court administering the benefits decides that the symptoms were actually from a different cause. But, in practice, it is not clear that this happens often or even ever. At the same time, if a child's symptoms are not listed on the table of those symptoms presumed to be caused by the vaccine, the child, in theory, can still recover by offering proof of cause in fact. Again, it is not clear that many or even any succeed on this basis. In short, the law in action appears to be that the table serves as the way «causation» is decided.

⁵ S. SUGARMAN, *Disparate Treatment of Smokers in Employment and Insurance*, in *Smoking Policy: Law, Politics & Culture* (Rabin and Sugarman eds.) (Oxford 1993).

⁶ Incidentally, this helps explain why fire departments in the U.S. typically will not hire cigarette smokers and do not allow their fire fighters to smoke. Otherwise, many former fire fighters would collect work injury compensation benefits for lung injuries actually caused by smoking.

Hence, the presumption of causation adopted by the plan provides a politically acceptable form of «rough justice».

Another example comes from the so-called «Black lung» plan. This program was set up by the U.S. Congress in order to compensate miners for lung injuries arising from inhaling coal dust while on the job⁷. But the definition of who counts as a miner was at one time so broad as to include those who drove trains near mines but may have never been inside a mine in their life. Indeed, for a while those who worked in repair shops two kilometers away from any mine were covered. Certainly, in many of those instances, successful claimants were actually disabled from other than coal dust, frequently from non-occupational causes altogether. Nonetheless, they were in the mining industry and they were disabled, and, at least for a time, this «rough justice» was seen as politically acceptable.

This ready willingness to deal solve problems of scientific causation through «rough justice» applies as well to administrative compensation mechanisms that have been created in the U.S. as part of the settlement of many so-called «mass tort» claims.

Consider, for example, the administrative compensation plan that was created as a result of a class action brought by American soldiers who fought in Vietnam. They claimed that they were injured because of the chemical dioxin that was contained in a herbicide called Agent Orange («AO») that the U.S. military sprayed in great quantities during the war, hoping to destroy the Vietnamese jungle⁸.

Under this settlement, if you were in the U.S. military and performed service in areas in which AO was sprayed *and* if you eventually became fully disabled, then it is presumed that your injury came from AO exposure, *unless* your disability was evidently caused by some trauma, like being in an auto accident. At the time of the case, Judge Weinstein, who was the trial court judge and who brokered the settlement, concluded that there was actually little evidence that AO caused anyone harm. If he was right, then the entire class of disabled soldiers eligible for benefits under the settlement may be viewed as not causally connected to AO at all. But then why make ineligible for a share of the settlement those soldiers who were injured in

Alternatively, the presumption in the compensation plans about job-related smoke inhalation injury would have to be abandoned, putting true occupational injury victims in the very difficult position of having to prove causation on an individual basis.

⁷ Black Lung Benefits Revenue Act of 1977 as amended, 30 U.S.C. 901 (2000). A. Prunty & M. Solomon, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665 (1989).

⁸ P. SCHUCK, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (Harvard 1990).

auto crashes ten years later? The reason is that the plaintiff class had its own theory, however weak the evidence, that AO was dangerous and, under their theory, those injured in auto accidents were clearly disabled from some other cause.

And yet, merely excluding traumatic injury clearly left an over-inclusive claimant class. That is, many soldiers who fought in Vietnam clearly would have become disabled from, say, heart attacks or cancer or other injuries quite apart from exposure to AO *even if the plaintiffs were right that AO caused harm to some U.S. soldiers*. If nothing else, many of these soldiers later became disabled from smoking cigarettes. Yet these disabled soldiers were allowed to recover so long as they had been exposed to AO.

In the end, the plan paid about 50,000 claims an average of \$4000 each, for a total of about \$200 million. On the one hand this is a very small sum per claimant. On the other hand, it is extremely doubtful that anywhere near 50,000 veterans were totally disabled from AO exposure, even though the U.S. Veterans' Administration two decades later has agreed, for purposes of eligibility for Veterans' benefits programs, that some soldiers were injured by certain diseases linked to AO exposure through epidemiological evidence. The point is that, for purposes of the mass tort settlement, the principle of «rough justice» was all that the parties could imagine might be achieved by the administrative compensation mechanism they created.

As I argued earlier, the basic reason that administrative compensation plans have settled for «rough justice» is that those designing the plans have concluded that trying to make a truly accurate determination of causal connection would be too difficult, or at least too expensive, and furthermore that the plan administrators would make many mistakes in trying to make an individualized causal determination in any event. As a result, we make do with what are over-broad presumptions. But, when the practical realities are taken in to account, this failure to provide «precise» justice does not seem socially troubling.

Ultimately, as I argued at the outset, «rough justice» is thought sufficient because these plans are seen differently from the civil justice system. These plans are not understood to be ideologically resting on the need to find the truth as to each claimant. Rather, they are viewed to be more like broad social insurance plans in which eligibility is always determined on a rule of thumb basis. Put differently, because these administrative compensation systems do not rest on an ideology of «precise justice», we are quite content for them to embrace a rough sense of justice that is much easier to administer. Perhaps a further reason for the sufficiency of «rough justice» is that these administrative compensation plans are not fault-based, as is the civil justice system. Rather, they are no-fault plans or strict liability schemes.

Similar points may be made with respect to the question «How much were you harmed?» In the U.S. civil liability system, we are traditionally strongly committed, for example, to awarding the victim some money for non-economic loss, usually called pain and suffering, that is carefully based on the specific facts of the case. So, for example, the family of someone who was an airline passenger who knew his plane was going to crash for a few minutes before it did so would, in many states, be awarded far more money (for the terror suffered during the victim's final minutes) than would the family of a passenger on an airplane that was suddenly blown up killing all the passengers instantly⁹.

But, by contrast, with respect to the Fund created by the U.S. Congress after the September 11, 2001 acts of terrorism, the administrator of the Fund has decided to provide \$ 250,000 to the families of every person killed in those attacks, plus \$ 100,000 extra to every spouse and child of those who were killed¹⁰. Although some have complained about this decision, most commentators appear to agree that this is a far better solution for the fund than one which would focus on the individual circumstances surrounding each victim's death.

The September 11 Fund administrator also appears to be imposing something of a limit on the compensation the fund will provide by way of income replacement to the families of the very highest earners who were killed. The administrator has suggested that it would be unseemly to fully replace the earnings of victims beyond the equivalent of approximately 200,000 Euros a year, which is what two percent of the highest earning Americans are paid. He was sued over this approach, but so far he has been successful. As it true for other social insurance plans, we expect people with extremely high earnings to have made their own arrangements to insure against income loss, for example, by having purchased life insurance to protect their families. By contrast, imposing this sort of limit on wage replacement in the personal injury system would be seen in the U.S. as sharply contrary to the «making whole» value of that system.

So, too, in the U.S. childhood vaccine plan, discussed above, \$250,000 is typically awarded as a standard sum if a child is treated as having been seriously disabled or killed by the vaccine. Individualized determinations, as would occur in the civil liability system, are unavailable.

⁹ D. LEEBRON, *Final Moments: Damages for Pain and Suffering Prior to Death*, in 64 N.Y.U. L. Rev. 256 (1989).

¹⁰ 49 U.S.C. 401 (2001). For the September 11th Victim Compensation Fund website, see <http://www.usdoj.gov/victimcompensation/>.

Even the question of who pays to fund an administrative compensation plan is often solved on «rough justice» terms, rather than by trying to make «precise justice» determinations. A nice example of this is the funding of the AO plan. It was agreed that the various chemical companies that manufactured the AO that had been sprayed in Vietnam would pay. But how much should each company contribute? Monsanto, apparently, wanted the contribution based on each company's market share of the AO that was used during the war. Dow, which was the market leader, apparently wanted the contribution based on a determination of how much dioxin each herbicide provider contributed since that was the alleged cause of injury and, apparently, Dow's AO had considerably lower levels of dioxin than did Monsanto's. Judge Weinstein suggested a compromise — fund half the plan based on AO market share and half based on dioxin market share. The actual funding arrangement was confidential, but it has been speculated that the firms followed Weinstein's suggestion which seems quite fair on a «rough justice» basis.

IV. Rough Justice Has Its Own Limits

In conclusion, I want to emphasize finally that the «rough justice» tolerated by administrative compensation plans can only be so rough. For example, for most people it is not socially problematic that auto no-fault plans compensate pedestrians who are injured in auto accidents without requiring any contribution to the fund by pedestrians. A moment's thought reveals that at least some injured pedestrians were, for example, carelessly crossing the street when they were injured by careful drivers. Yet, only drivers fund these no-fault plans. Relevant is the practical reality that trying to collect money from pedestrians would be very cumbersome. This sort of «rough justice» — excusing pedestrian contributions — is not too rough.

Yet, at some point difficulties arise. For example, suppose it becomes widely believed (as many scientists already believe)¹¹ that most children's vaccines do not actually have bad side effects at all. Then it may cease to be acceptable (morally and politically) to select out these disabled children for compensation but not others whose disabilities make themselves known at other than during the few days after being vaccinated.

Similar pressures are likely to be put on the September 11 Fund. So long

¹¹ See, e.g., J. CHERRY, *Pertussis vaccine encephalopathy: it is time to recognize it as the myth that it is*, in 263 *JAMA* 1679 (1990).

as those acts of terrorism are viewed in the U.S. as uniquely horrifying, there is, at least for now, general public acceptance of a taxpayer-funded plan aimed only at those victims. Yet, already families of victims of some earlier terrorist attacks are asking why they are not also compensated; and some commentators have asked why equivalently generous benefits are not provided, say, to all victims of violent crime, or to the families of soldiers killed while on duty. Moreover, if terrorism were to become more widespread in the U.S., as it is in other parts of the world, singling out only September 11 victims may then become unacceptable.

In sum, I believe that, although administrative compensation plans need not meet the requirements of «precise justice», their legitimacy does depend upon a public appreciation that they at least satisfy our sense of «rough justice».