Before Bhopal: Explaining the Infrequency of Railway Accident Victim Compensation, 1889-1931: Karmic Fatalism or Colonial Law and Policy?

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Before Bhopal: Explaining the Infrequency of Railway Accident Victim Compensation, 1889-1931: Karmic Fatalism or Colonial Law and Policy? *1

In December 1984, a gas leak at Union Carbide’s pesticide plant in Bhopal, India, released tons of methyl isocyanate, which created a poisonous smog that settled on shanty towns in the vicinity, killing as many as 8,000 and leaving nearly 4,000 more permanently disabled. In 1989 Union Carbide reached an out-of-court settlement with the victims and the Government of India for 470 million US dollars, and 17 million for the construction of a hospital in the Bhopal community. Theoretically, the average settlement award to the victims was $40,000, but delays, lawyer’s fees, and administrative costs reduced this to closer to $20,000.1 Styled “the worst largest industrial disaster in history,” Bhopal stands as a benchmark in India and elsewhere for accidental consequences and corporate irresponsibility.

But it was not the first time that thousands had died in India for those sorts of reasons. This essay explores the unfolding record, stretching over one hundred years, of Indian railway accidents that killed and injured at least as many as suffered in the Bhopal disaster, and most of whom received little or no compensation whatsoever. It seeks to find answers for this lack of compensation, in striking contrast to the ways railway accident victims in the rest of the common-law British Empire and the United States were treated.

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Countless thousands experienced the loss or damage of property or suffered injury or death due to negligence on the numerous railways of the Indian Subcontinent during the 19th and 20th centuries. By 1905 some 27,000 route-miles of track for private, state, and princely-owned railways spanned the landscape, while the United Kingdom possessed over 20,000 miles and the United States some 130,000 route-miles of track by 1890.² Inevitably, there were many railway accidents in these regions and in the Antipodes.

There is no question that the accident rates involving Indian railways were sufficient to kill or main thousands of individuals every year: I detected two relevant documents in evidence on this score: One from the India Railways files in the Archives of India, an Abstract Return of Accidents for the year 1905 (Enclosure to Railway Board Order, 1906), the second from a similar file for the year 1909 (Enclosure 1 to the Railway Board’s Report of 20 April 1910). Each of these abstract returns was comprised of recorded accidents reported by some 24 government-related railways,³ providing a tabular listing of those killed and injured. These data were broken down into categories: passengers, railway employees, “strangers” (at crossings)⁴ and trespassers.⁵ The tables included, for the first two of these categories, the railway’s reckoning as to whether the victim had suffered due to the railways’ fault, or that of the victim. In 1905 in India a total of 441 passengers and workers were killed, 1,073 injured; in 1909 the figures were 555 killed, 1,276 injured. These figures were greater than those for the late nineteenth century in the United States and for 1877 in Great Britain.⁶
Limiting the analysis of these Indian railway victim figures to the categories of passenger and employee (“servant”) victims (there being no liability-breakdown provided regarding crossing victims or trespassers), I offer the following tables.

Tables 1 & 2 here

Thus the railways involved acknowledged their own negligence in nearly 25% of the reported incidents (681 out of 2,754 for the two years). “A Factual Review of Accidents on Indian Government Railways [from 1941 to 1958]” offered a similarly frank admission of railway liability in virtually all instances of accidents, due either to “failure of railway staff,” “failure of rolling stock,” or railway negligence at a “permanent way” and “level crossings.”

What is interesting is to note how little influence these data had on these Indian Railway administrators of the Colonial Era when it came for them to consider how passenger victims were to be dealt with.

However much the precise rates of injuries and fatalities due to Indian, U. S., and U. K. railway accidents in the 19th and early 20th centuries may have varied, the numbers of such accidents and victims were quite sufficient to warrant comparative analysis with regard to the manner in which victims of negligence were compensated.

In his study of the development of law in Pakistan, Alan Gledhill noted that “it is difficult to explain why, in the sub-continent there is a reluctance to bring suits in tort.” Similarly, in his Law of Torts, Ramaswamy Iyer observed that “physical injuries due to
negligence” were “not rare occurrences” in India, “but it is worth investigating why there are very few claims against them.”

Their observations were not limited to railway accidents, but inasmuch as such accidents surely constituted a significant percentage of actionable torts in the Subcontinent’s colonial era, their queries warrant answers.

There exists considerable data on such accidents and tort claims in a number of other common law nations. The author has utilized the legal department records for the 19th century of ten railway companies in archives in the United Kingdom, Canada, the United States, Australia and New Zealand and has read several hundred appellate decisions regarding railway accident tort litigation in the high courts of those states, provinces and nations. He has consulted the same sorts of records in the Archives of India, the Indian Law Society Library, both in New Dehli, and the India Office Library in London. He maintains, therefore that useful comparisons can be made to the Indian experience to establish whether Glenhill, Iyer, and others are correct with regards to the infrequency of Subcontinent Railway accident victims recovering compensation, at least by comparison with these other contemporary common-law jurisdictions.

The frequency with which victims of such railroad accidents pursued legal redress in Britain, the United States, Australia and New Zealand is quite clear. As James Ely puts it in *Railroads and American Law*, “rail accidents generated a flood of lawsuits….” Rande Kostal, Peter Karsten, and William Thomas offer similar observations about railway accident victims in Britain, the United States, Australia, Canada and New Zealand.

And the evidence of how well these victims fared is also unambiguous: Passenger victims fared well throughout the common-law world; those injured at railway
crossings secured compensation about as often as not; while the railway defenses against suits by injured railway workers significantly (but not entirely\textsuperscript{12}) denied such victims compensation. Most suits for damages were settled out-of-court, and those that resulted in verdicts for the plaintiff averaged twice the figure derived in the typical out-of-court settlement.\textsuperscript{13} Where such trials included juries, all such victim lawsuits in the United States and other common-law jurisdictions fared well, but while their approach varied from one state or province from another, trial and appellate court judges were generally receptive to the legal claims advanced by victim attorneys as well as well the size of jury awards.\textsuperscript{14} Be that as it may, As James Ely puts it, “On the whole, passengers received solicitous treatment from judges [and] juries sympathetic to injured claimants.” And Ely’s view does not differ from those of Kostal, Karsten, or Thomas.\textsuperscript{15} For example, in 1875 railway companies in England and Wales paid out £381,038 for personal injuries, or an average of about £400 for each injured or killed individual.\textsuperscript{16} Moreover, personal injury payments by the London & Northwestern Railway in 1864 & 1865 in England significantly exceeded railway company payments for lost or damaged goods and livestock by a ratio of about 6 to 1 while the numbers of such property-related legal actions were greater those for personal injury by a ratio of 3 or 4 to 1!\textsuperscript{17} These figures appear quite similar to those detected by the author of this essay in several American, Canadian, and New Zealand railway legal counsel records.

The evidence that Indian railway victims secured compensation at a significantly lower rate than their counterparts in the other common-law jurisdictions constitutes the next section of this essay. It is drawn from the reported cases of the various published Indian Court Reports of the 19\textsuperscript{th} and the first half of the 20\textsuperscript{th} centuries, and the archival
Records of the Indian Railways in the Archives of India and the India Office Library as early as records of this sort appeared to have been filed (1885),\(^\text{18}\) for some fifteen years, with an additional “post-holing” year (1931), to determine whether any change in the pattern of payments had occurred.\(^\text{19}\)

In *P & O Steam Navigation Co. v Sec. of State for India-in-Council*\(^\text{20}\) the Sovereign Immunity accorded the East India Company was upheld by Barnes Peacock, CJ, for acts done in the exercise of its sovereign powers.\(^\text{21}\) The result: when someone was injured or suffered damage to his property on a post-Mutiny road authority or [maps of railways in British India, 1868 & 1931 here, if deemed appropriate]

railway, that individual was unlikely to succeed in court-- that is, until the passage of legislation in 1890 which clearly voided such immunity.\(^\text{22}\)

This appears to constitute evidence of an enduring lack of financial (as well as public) pressure in India for the sorts of improvements in railway safety throughout the 20\(^\text{th}\) century seen elsewhere in the common-law domains.\(^\text{23}\)

The Indian Railways sometimes acted as a kind of English Court of Request for those with grievances. The records indicate that both the privately- and publicly-owned Indian railways provided victims with modest *solutia, ex gratia* (“of grace” as it is sometimes put in the records) -- that is, in equitable fashion that *may* have antedated\(^\text{24}\) the termination of the quasi-sovereignty of the East India Company and the establishment of Imperial rule.
This situation changed, at least theoretically, for those negligently injured on railway trains with the passage of the India Railways Act of 1890, which required: all accidents causing injuries to be reported to railway inspectors and local government; suspect plaintiffs to be ordered “by any Court or person having by law or consent of the parties authority to determine that claim” to be examined by a “duly qualified medical practitioner” to verify the extend of their injuries; and compensation to be paid to all negligently-injured military personnel and paying passengers. Hence we would expect that the railway records of the late 19th and early 20th centuries would contain substantial evidence of such payments to railway passenger accident victims, as do those of the other common-law nations’ railway records.

An East Indian Railways Memorandum in 1898 contained a description of the policy regarding gratuities for employees who had suffered on-the-job injuries, as well as those gratuities provided to retiring employees. Injured employees were to be awarded up to 6 months pay, up to a total of 150 Rupees. Retiring employees with 20 or more years of service were to receive a sum not to exceed 500 Rupees; those retiring with less than 20 years of service, up to 5 months pay.

There are several fine studies of India’s railways, but in the six richest such works, I found only three brief references to accidents, and not a word on how any of the victims may have sought to be compensated. (Recall from Tables 1 & 2 that the railways’ records acknowledged their fault).

What follows is my attempt to both illustrate and summarize what I found in the Indian railway records for the years 1886, 1887, 1888, 1894, 1896, 1897, 1898, and in a “posthole” look at these records for a later date, 1931, on this subject.
Semi-annual reports of accidents and expenses from the Assam Railway for the first half of the years 1886 and 1887 appear in the India Office Library, London, and neither report indicates any personal injuries. But “Law Charges” of 933 Pounds for the 1st half of 1886, and 204,659 Rupees for the same period in 1887 are recorded, and the only expenditure in the record in the nature of “compensation” is 31 Pounds “for goods” (stolen, lost or damaged). Accounts of the Bareilly-Pilibhit State Railway note the payment of 20 Pounds 9 shillings 6p for “personal injury” during the 2nd half of 1886, but reported no such injuries in the first half of 1887. The Bengal-Nagpur Railway reported no personal injuries for the year 1886. It paid 15 Pounds in the 2nd quarter of 1887, but 13 Pounds 15 shillings of that was for “goods.” At least six other railways company records in the India Office Library in London had no line items at all for legal expenses for the first half of 1887.

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**Photo 1 here**

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East Indian Railway Company records for 1886 and 1887 indicated no payments for personal injuries in the first half of 1886, but incurred substantial law charges in the second half of the year. The only payment recorded, however, was for 300 Rupees in early 1887 (as well as pension payments to some 52 “coolies.”)

In short, I was unable to detect any significant grants to anyone injured in a railway accident until 1894. In that year the records of the Bombay, Baroda & Central
Indian Railway included several “compassionate grants and gratuities”: one of 21 Rupees to the widow of Bahadoor a Mali who was killed on duty after ten & a half months service, another of 444 Rupees, equivalent to six months pay, to the widow of Taj Mahomed, “traffic pointsman,” and several sums of three months pay, totaling 1,400 Rupees, to survivors of others killed on duty. Other Public Works Department gratuities were reported in the Index to the PWD’s Proceedings for 1895: One for 900 Rupees went to the family of a Brit, guard H. S. Bartels of the Northwestern Railway, killed in the line of duty; as did another grant, of 2,520 Rupees (12 months pay) to the widow of one Rumsfather, a driver. An unspecified grant may have gone to another Brit, Mr H. Were, miner, for injuries working for a feeder line, the Mushkaf-Bolan Railway. Other (again unspecified) grants went to families of deceased employees of the East Indian Railway, killed in the Jubbulpore [Jalalpur] accident, and to the widows of Nund Kumai Lall, draftsman for the Bengal and Northwestern Railway, “killed in the line of duty,” and Roopan, gatekeeper for the Ouhd & Rohilkhand Railway, killed in an accident. 

PWD records for the East Indian Railway (the product of a merger of several companies) for the years 1895, ’96, and ’97 included authorizations of three substantial pension “gratuities,” one of 2,000 Rupees for Treasurer Babu Nobocoomar Mookerjee with 38½ years of service, and two for Locomotive Department foremen A P Nicoll and W Jenkins of 1,800 Rupees each. Law charges averaged 2, 600 Rupees per year, and compensation for goods damaged or lost averaged nearly 13,000 Rupees per year, but the expenses for “personal injury” for each years was recorded as “0.”
Bombay, Baroda & Central India Railway’s Minutes for 1896 included fourteen payments that appeared to be to retiring personnel (such as the ones of 84 Rupees to Naroo Babaji, Naik, with 33 years of service, and 112 Rupees to Aba Wani, Muccadum, with 28 years of service), as well as a grant of 68 Rupees to Gubba Betcher, oiler, “incapacitated because of injuries at Bodeli, 12 Jan. 1896,” three grants of 30 Rupees, two for the widows, one to an injured employee, and one other such grant of 102 Rupees to a third widow. 37

The PWD Index for 1896 included an entry of “compensation” for an “alleged injury” due to the “E Tramway Co.” [which appears to be called a railway elsewhere] in crossing the line of the Northwestern Railway at Karachi; a grant of 3 months pay to Mr. William Harris, ex-guard of the East Indian Railway, for “injuries on duty;” and an unspecified grant to a guard named Crossby of the E-I Railway, injured in the accident. 38

PWD records for 1897 reported no expenses for personal injury for the Oudh & Rohilkhand State Railway in the first half of the year, and indicated no compensation paid to the five survivors of individuals killed or the three who were injured in what must have been a collision with an East Bengal State train, but did indicate that the East Bengal State Railway bear the costs for damage to the rolling stock involved (some 45,000 Rupees). 39

PWD records for 1897 included (unspecified) gratuities made by officials of the East India Railway to widows of bat driver G A Durran, “killed on duty,” and G Appadu, turner in the Locomotive Workshop, killed “in execution of duty,” as well as a grant of six months pay equivalent to the families of six telegraph department men killed in an
accident on January 14, 1897, and 1 months pay to lineman Sarfriz Khan and Mr W Mitchell, Telegraph Master, injured in that accident.⁴⁰

The records also made note of the personal injury claims of Surgeon-General Raye and others for compensation for injuries suffered in the Phillour accident on a Northwestern Railway train (of which more, below).⁴¹

On February 4, 1898, Archibald Mckechie, Acting Secretary of the Bengal Central Railway Board, communicated with the Chief Engineer of the Bengal Central Railway, Calcutta, regarding a collision on the 28th of January at mile 65 in which 4 persons were killed and 4 injured, all of them railway employees. The Board was upset “at the apparent defective, if not entire absence of responsiveness resting on the minds of the Station staff at the 2 stations [Canal and Dum Dum Junctions].” The train had been sent with a “line clear” despite a lack of contact between the two stations of 40 minutes. In short, railway personnel were clearly at fault. But no record appears in this railway’s legal records for 1898 or 1899 of any compensation paid to victims of this collision.⁴²

Bombay, B, & C India Railway Minutes for 1898 included gratuities to the widow of Lalla Duyal, carriage fetter, who had served for 16 years (60 Rupees) and the widow of Dhama Lall, clerk, who had served for 12 years (80 Rupees), as well as various gratuities (of 3 months pay equivalents) to 10 other employees, but it was not clear whether they were all due to involvements in accidents.⁴³

In 1932 the same Government of India’s Index to the Proceedings of the Railway Department summarized actions taken regarding gratuities provided to those injured and to the families of those killed in accidents in 1931, as had the records of the late 19th century. We learn from these that it was the still the practice of railways under “gratuity
rules” to pay a *solatium* “in addition to any compensation for injury or death in the line of
duty.” Thus a proposal was approved to provide a “compassionate gratuity” of 2,500 Rupees (6 months pay) to the widow of M P Desai, Temporary Bridge Inspector, despite his having less than 4 years of service. Another compassionate grant of 3,000 Rupees went to the family of Mr Pala Singh, Temporary Sub-Division Officer of the Bengal-Nagpur Railway, killed in an accident rebuilding the Khorkai Bridge, despite the fact that he was said to have been contributorily negligent, and it was noted that his widow, five children and four in-laws were to receive 15,875 Rupees from his Provident [insurance] Funds. A compensatory grant of 6 months pay went for J. Robertson, Assistant Engineer of the A. B. Railway, for a serious “fall from an uncovered bridge” at Rasidpur; another for 1500 Rupees to Mr. T. Holland, Production Engineer for the East Indian Railway Workshops, for a puncture to his left eye; a grant to Ala Rakha, fireman, and three grants to the widows of a “gang cooly” employed by the S. S. Light Railway, a wheelman in Ghaziabad, and a chargeman in the Lucknow Locomotive Shops.  

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The recorded gratuities detected in the Archive records are modest in number. It may be that there were other grants made to passenger accident victims, appearing only in local railway records. But the one study of such surviving local railway company records mentioned no such payments, nor did any other records or historical accounts I identified, and I could not locate any other surviving local railway records, and, in any event, such locally-provided payments should have appeared as entries in the respective railway’s main semi-annual reports, as was the case in the English, American, Canadian, Australian and New Zealand railway legal branch files I examined. They do not. In this
regard then, these company records differed from those of railway administrators elsewhere in the Empire who regularly offered such payments to secure releases from victims who might otherwise have taken legal action.  

**Hypotheses**

Two explanations for these differences have been proposed. (1) Cultural ones: These include: the propensity to view one’s turning to legal remedies in India as a “slot-machine;” with few chances to gain, and expenses to lose, associated with the effort for those (perhaps Moslems?) considering suits; *Dharma* “duty” norms that dissuaded many Hindus from litigating “until social pressures had been tried and exhausted;” and fatalistic “karmic vision,” variously attributed to *Sanchita Karma* and *Prarabdha Karma* (or more generally “Hindu fatalism”), which is said to lead injured parties to accept their lot and decline to sue for damages. Theoretical support for this hypothesis would be the fact that the typical poor Hindu and Moslem accidents victim may have grasped that, in the event, they would be generally be unable to secure competent legal counsel to represent them given their lack of financial resources. Their earnings were too low to attract such legal representation, and while “pain and sufferings” awards were being sanctioned by state courts in the United States, British courts were much stingier in that regard, eliminating the remaining potential “playing card” for potential legal counsel.

(2) British Imperial policies and law: These include: (1) The statutory prohibition in India of contingency fee contracts in 1872, which essentially eliminated the likelihood of the emergence of a “plaintiffs’ bar,” and the appearance at railway accidents in India
of so-called “ambulance-chasers” who emerged by the late 19th century in the U. S. (and less formally in England and New Zealand);\(^2\) The consistently low ratio of available courts to potential litigants. (3) The Railways’ capacity to avoid jury trials in tort cases (a benefit to the railways, in that tort damage awards by juries in the rest of the common-law jurisdictions were about three times larger than those awarded by trial court judges);\(^3\) the “loser pays winner’s fees” rule; and the Indian Court Fees Act of 1870, which required of plaintiffs filing fees, averaging 8% of the damages sought.

Some of these bars to tort actions may have been due to the lack of a Code of Civil Wrongs for India. Following the Imperial take-over of India from the administration of the East India Company in the wake of the Bengal Mutiny, the British Government authorized the drafting of law Codes suited to the legal culture of the Sub-continent, as it was understood at the time, some reflecting “legal pluralism.” Several such codes were thereupon authorized by Parliament and were drafted and adopted by India’s Imperial government for a number of legal domains. The last, untouched issue – torts – was discussed during meetings of the Fourth Law Commission on Indian Codification, July 17, 1879. That discussion was minuted by the chief figure of that codification movement and author of *The Ancient Law*, Sir Henry Maine.\(^4\) Maine could “hardly understand the spirit in which a system of law could be framed for India with a law of contract enacted, but a law of tort omitted.” He noted that civil wrongs are suffered every day in India, and though men’s ideas on the quantity of injury they have received may be vague, they are quite sufficiently conscious of having been wronged some how to invite the jurisdiction of courts of justice. The result is that unless the legislature does legislate, the courts of justice will have to legislate, for, indeed, legislation is a process which perpetually goes
on through some organ or another whenever there is a civilized government, and which cannot be stopped.

Maine allowed that such a codification of law by a foreign power such as the UK, “under the thralldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate, and for a different civilization,” would be problematic. But he just as vigorously argued that a codification sensitive to Indian customary law would serve a vital and necessary purpose, inasmuch as it might serve to introduce rules, with clear examples that might lead to judicial action where little had thus far been observed. He looked “with dismay, therefore, upon the indefinite postponement of a codified tort for India.”

Maine clearly perceived the role such a Code might play in a colony subject wholly to Parliamentary direction and without a truly independent judiciary – more akin to the Civil Code nations of Europe and Latin America than to the UK.

An apparently reluctant Crown administration in India thereupon sanctioned such a tort code proposal, and Maine asked Fredrick Pollock to provide the Government of India with such a document, which Pollock offered, in 1883. Pollock’s proposed code is remarkable in its willingness to alter extant English common law in a number of ways that are not of great relevance here. Sufficient to say, he clearly incorporated into it (accompanied with India-located hypotheticals) the full range of tort possibilities but including several rules that were at variance with extant English common law rules he deemed to be unsuitable to the legal culture of the Subcontinent. He did this with the advice of Judge Syed Mahmood and two notable British veterans of Indian judicial experience, Sir William Markby and Arthur Macpherson. But for reasons that included
the fear of a surfeit of such suits, the Crown’s administrators in India declined to adopt his codification. As Pollock reported (from reports he had received): “a considerable majority of the opinions which have lately been collected from judicial and other officers in India are unfavorable to action.”

How well do our two hypotheticals explain the low level of tort actions involving railway accidents in the Subcontinent? The first of these (short name: “fatalism”) is certainly a plausible enough one, as the evidence in the records do not reflect the sort of avid lawsuit-culture that some students of railway accident victims and law have reported on elsewhere in the 19th century British Empire and United States. But inasmuch as I have found little evidence regarding evidence of “fatalism” as a bar to lawsuits in printed or manuscript records associated with the subject in my sortie into the research arena, I confess to be unable to assess its presence or significance with any confidence. Hence this essay necessarily focuses on the second body of potential explanations (short name: “policies and law”). I maintain that however potent the power that culturally-based fatalism may have been, this second body of explanations is at least sufficient to answer the relatively low rate of compensation for railway accident victims. The existence of a system of ex gratia payments was, after all, available, but appears to have been unutilized except for railway employees, who thus fared better than passenger victims. Fatalistic views, of course, thus remain potential additional explanations.

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What can we learn from the 41 reported “compassionate gratuities” to employees or their survivors said to be due to railway accidents for the mid to the late 1890s and the year 1931? The first question that arises is why there were few such gratuities for
injuries or deaths noted in the records for the 1880s and an increase in their frequency in numbers in the 1890s and 1931.

The first answer to that question may, at least in part, be that those I detected in the 1890s and thereafter appeared in the Government of India’s Public Works Department’s records (in the Archives of India). The leaner ones, from the 1880s, limited to issues of pensions, were located in the records of the managing directors of the companies in London (consequently ending up in the India Office Library there). It seems that only a handful of those sorts of cases were sent to the directors in London for decisions or approval. The more straightforward ones, including all the accident-related gratuities, appear to have been dealt with by railway officials in India itself. But remember: These gratuities were limited in number, and there was no entries for the sorts of on-the-scene payments doled out elsewhere in the Empire and in the United States in these years by agents of railways seeking releases form injured passengers.

But the increase was almost certainly also due to the provision in the India Railway Act of 1890, stipulating that negligently-injured passengers were entitled to compensation.

\textit{India Railway Passengers}

\textit{Court Cases}

The records of Indian courts from 1889 to 1932 contain some 425 case reports involving railways.\textsuperscript{61} The vast majority of these were suits filed by shippers to recover
damages for lost or stolen goods. Another substantial number involved criminal cases. Only 6 of these 425 case reports dealt with passenger\textsuperscript{62} suits.\textsuperscript{63} 

The two cases that particularly captured my attention were \textit{Mack v Railway} (1923) and \textit{Tikkoo and Others v Railway} (1919).\textsuperscript{64} In the former, a British Indian Civil Service member fractured his knee, falling from pile of debris left on dark platform while waiting for train. He was taken to hospital and treated, but, as the justice’s summary noted, he “couldn’t go snipe-hunting as a consequence.” Offered 750 Rs. The justice observed that he “most properly rejected it.” The Court sanctioned a 3,000 Rs. award. In the later case, an Indian plaintiff’s wife and child fell through a passenger-car door, held to have been negligently left-open by the railway staff, killing the wife and injuring the child. The Court held the railway negligent, but nonsuited the plaintiff on the grounds that his counsel had submitted a faulty plea, in contract (based on the passenger fares) rather than in tort, (in failing to rely on the Fatal Accidents Act of 1855). This expensive\textsuperscript{65} procedural error on the part of the man’s counsel may have struck him as akin to his \textit{Kharma}, but it was due to English Common Law rules of pleading.

The legal branches of the Indian Railway records contain numerous references to reports of payments for lost, stolen or damaged freight. And, as we have seen, there were also individualized line-item mentions of gratuities paid to \textit{employees} or their survivors as accident-related \textit{ex gratia} compensation (or as pension bonuses). There were very few reports in these records of passenger injuries. Injured passengers or their survivors may well have requested compensation, but only a handful of recorded mentions of such
requests appear in the reports. Only two mentions appear of actual payments to such passengers by those preparing semi-annual reports.

The account of one of these is worth detailing: Surgeon-Colonel Raye was injured and suffered “severe nervous shock the effects of which are known to be far reaching” in a railway collision in early January 1896 at Phillour. He sought compensation for his loss of professional abilities (his salary was 1882 rupees) and permanent injury to his shoulder. A doctor’s letter to the Manager of the Northwestern Railway dated 10 January 1896 spoke as well of the “severe nervous shock” he had experienced, “the effects of which are known to be far reaching.” The manager, Colonel G F Boughey, proposed a settlement of 5000 rupees to the Director General of the Railways on January 11. Four months later Raye wrote again, seeking a year’s pay. In late April a member of the Railway Board, A. Cadell, noted that a “pleader” by the name of Tek Chand, “a man of much lower position” with lesser injuries had received 2500 rupees in June 1892. No decision had been made regarding Dr. Raye’s claim for a full year when mention of the matter ceased to appear in the records, probably because railway counsel had become aware that Privy Council had rejected “nervous shock” as an actionable issue in a tort claim.

A number of other Indian railway accident plaintiffs lost because the railways there had legal defenses unavailable to railways in the United States (and some of the Empire’s dominions) by the late 19th century. Here are three such defenses: In 1924 a seven year old girl, carrying a basket of grass on her way to her grandmother’s house near Wallajah Road Station, was run over by a locomotive crossing the tracks through an open gate. She lost an arm and a leg, and was awarded 3500 rupees by Coutts-Trotter,
J. The trial court’s judgment was reversed on appeal in *Madras & S, Maratha Ry. v Jayammal.*

Spencer, CJ, rejected the Allurement Doctrine advanced by plaintiff’s counsel and applied by the trial court judge, and imputed the parents’ contributory negligence to the child. By the fin de siècle nearly all of the state Supreme Courts in the U.S. had adopted the Allurement Doctrine (called the “Attractive Nuisance” Doctrine there) and had also refused to tolerate defense efforts to impute parental negligence to a child. The English and most of the Commonwealth courts were reluctant to embrace either of those positions in these same years.

But *Jayammal* had at least managed to be granted standing. For countless others, this would not be possible, because of the most serious cause of the paucity of suits against railways in British India: Section 65 of the Government of India Act of 1858. This section limited the liability of the Imperial Government to that enjoyed by the former East India Company, effectively imposing protection from tort suits for the negligent acts by employees of government agencies on the grounds of Sovereign Immunity.” Railway companies (unlike “king’s highways”) both publicly and privately-managed throughout both the rest of the Empire and the United States, were not protected by such a Doctrine.

In 1912 Mrs. E. C. Blanchett, the widow of an English locomotive engineer killed in a Oude Rohilakhand Railway accident sued the Government of India, claiming the railway administration’s negligently employed incompetent servants were responsible for her husband’s death. The Allhabad High Court judge nonsuited her by accepting the railway’s defense, the common employment rule. This rule was called the fellow-servant rule in the United States, where several state Supreme Courts had created and
were applying the “incompetent servant” exception to that rule, a fact that proved to be of no help to Mrs. Blanchett.

I readily admit, of course, that the reluctance of British Imperial judges to adopt American exceptions to English common-law rules does not go very far in explaining the inability of plaintiffs in India to secure compensation. But it mattered to those who might have prevailed had this not been the case.

_The case of the Missing Settlements_

The archival records of India railways contain no evidence of settlements, unlike those of the ten railway records I’ve utilized in Great Britain, Canada, the United States, Australia and New Zealand. In all of these domains railway agents appeared with some regularity at accident sites to secure liability waivers in exchange for small sums; these figures appeared in the legal counsel files. There are no such entries in any of the Indian railway records I examined. Injured passengers in India appear to have been forced to sue for damages, and given the legal constraints involved for one who sought to litigate for redress of civil wrongs in the Colonial Subcontinent, it is not surprising that, generally, only the more affluent victims seem to have pursued such a course.

It may also be the case that those who did possess the requisite financial resources and chose to sue railway authorities in India for substantial damages faced still another, somewhat intangible obstacle - the propensity of administrators and British-trained jurists to regard suits against government entities with chagrin or disdain. A suit brought in 1860 by Edwin Bray & Co. against the Scinde [Sindi] Railway Company,
seeking 300,000 Pounds for alleged breach of a construction contract, was ordered to arbitration by Exchequer. In the arbitration’s sixth year, one unsympathetic railway board official complained to his superior of “this scandalous case”: “I suppose if the defendants in this case were a private person instead of a company backed by a government with the revenues of India, some way or other would be devised of cutting short this systematic robbery.” The Railway directors wanted to bring the arbitration process to a conclusion, he wrote, but “that course has always been deprecated by [the plaintiff company’s] legal advisors.” The company by this time was “judgment proof; hence the whole [costs] will probably fall on us whether we win or lose….The [plaintiff’s] solicitor has everything to gain. All the lawyers concerned are making their fortunes out of us, and care nothing for our remonstrances….” On the 168th day of arbitration they were questioning Sir Bartle Frere about the geography of Scinde.  

Some plaintiffs in the 19th century appear to have been aware of the difference between their chances of success in jury trials when the defendant was a government-owned railway rather than a for-profit quasi-public railway, steamship or stagecoach one. Karsten calculated median awards in some 477 jury verdicts to plaintiffs injured in railway accidents in the United States, Australia, New Zealand and Canada between 1840 and 1910, and some 58 juryless (judge-ordered) awards to such plaintiffs in the same jurisdictions. The jury awards were over five times as large as those made by trial court judges.
In New Zealand, for example, one ultimately successful plaintiff, Mr. W. Harding, wrote to his solicitor in July 1899 regarding the injuries members of own his family had suffered in the accident at Rakaia:

Were I claiming from a private individual who may be poor and consequently greatly inconvenienced or perhaps unable to pay the sums required, the matter would be different, but as these demands will be satisfied from the public funds, there can not be the slightest inconvenience to anyone and, of course, no question of ability to pay the whole of the loss to the Colony arising from the disaster will be as a drop to the ocean, and I feel convinced these facts would be taken into consideration by any jury or assessor giving damages to these cases.

Mr. Harding’s hunch was right; he rejected substantial settlement offers and won jury awards for himself and three members of his family ranging from 750 to 1500 Pounds (while securing awards of only 75 and 100 Pounds for two other family members in actions tried before a judge). Plaintiffs in the Common-Law world like Harding simply had fewer financial risks and greater expectations of compensation, given the structure of the judicial systems and their rules in the various Imperial domains, than did any less-than-affluent plaintiff in the Subcontinent.

We know that it is no significant exaggeration to say most of those indigenous to Subcontinent were treated little better than the animals in the freight cars when travelling on 3rd class tickets. As the Najmu-I-Akbar news reported in 1892, “a shepherd shows more consideration to his sheep than do railway officials to native passengers.” This language suggests, and so do I, that racial distinctions between Indigenous victims on the Subcontinent and those elsewhere in the White Common-Law world may explain some
(if not all) of the legal distinctions reported in this essay. But, unable to offer more substantial proof of this assertion, I leave it only as my opinion.

**Indian Railway Employees**

Table 3 here

How did Indian railway employees fare, compare to the ways railway employees fared elsewhere in the Empire? To get a clearer comparison here, let’s begin by considering the income levels of Indian railway employees. It is perfectly clear, both from the table on the average monthly salaries of road workers in Awahd, 1843-1858, and the comparison of railway employee salaries in India, England, Ireland, and other Commonwealth nations, prepared by a railway accountant or engineer at the turn of the century, that the ratio of salaries from the (invariably British) Chief Engineer to the lowest paid worker in Colonial India was greater in India than anywhere else in the Empire. This was in part due to (1) the lower standard of living in the Subcontinent, (2) the omnipresence among railway personnel of Imperial racial discrimination (see Table 3), and (3) the fact that the necessary highly skilled railway personnel recruited from Britain and elsewhere were offered additional sums to induce them to work there.

Further evidence: The railway company records for the 2nd half of 1886 include these two observations regarding British engineers: The first: H. R. Carter of the Madras Railway, earned 1450 Pounds per annum, “out of which he is remitting no less than 1200 pounds [to an English bank], making it appear that he is able and content to live in India
and to maintain his position upon an income of 250 pounds a year.” Another: 1st Chief Engineer E. W. Stoney of the same company, earned 950 Pounds, “out of which he is…remitting 840 [to Union Bank] leaving a margin in his case for living in India of 110 pounds per annum.”

Nonetheless, Indian-born railway employees were reported to be sufficiently satisfied or pleased with their jobs to be reluctant to apply for positions in non-railway industrial jobs as they began to appear. Railway management in India provided company towns, Provident insurance systems, and long-term employment for millions of Indian workers in the 80-odd years of railways and the Raj. And the “compassionate gratuity” process, however paternalistic, was more visible in India than in the records of most of the railways in the British Isles and the Antipodes.

As such, this practice appears to have served to soften somewhat the railway companies’ contributory negligence, fellow-servant, and assumption of risk defenses that railway workers in the British Isles and the Antipodes faced and, those in India would have faced had they been forced to rely on lawsuits alone.

*Summing up*

It is clear that the vast majority of *individuals* who suffered due to railway accidents in Colonial India did not pursue legal remedies in anything like those pursued by their contemporary counterparts in the Imperial jurisdictions of Great Britain, Canada, Australia, or New Zealand, or in the similar common law world of the United States. And how did those fare who sought damages against Indian railway companies?
When the damage was to freight, shippers were under some disadvantages, due to terms of the Indian Contract Act of 1872 (sections 151, 152 & 161) and the Indian Railways Act of 1890 (section 72) which granted the railways “bailee” status as “private carriers,” fixing greater “owner’s risk” on shippers than “common” [that is, lawfully “public”] carriers. These measures freed the railways from some of the stricter legal conditions of common carrier liability. Nonetheless, the shipper plaintiffs still appeared to have secured significant compensation, amounting to the lion’s share of all compensation that the companies paid out. And note that this pattern is the opposite of the one revealed in the British and American railway records, where personal injury payments trumped property lost/damaged payments by wide margins. (see fn. 19)

When it came to railway employees, the companies appear to have provided at least as much ex gratia compensation (proportionate to their income levels) for injuries or death as was meted out to those elsewhere in the British Empire. But they were not as fortunate as those employees in the United States who managed to make use of one or another of the “principled exceptions” to the assumption of risk and fellow-servant rules.

When it came to passenger victims, compensation for all but the most affluent of these was not in evidence in any of the company records, and only a handful of those who could manage to sue secured awards.

Dharma “duty” norms or “kharmic vision” may well have been in the mindset of some or most of the potential third class passenger plaintiffs. But if they looked upon their situation with “fatalism,” it may be because they were aware of the low likelihood of their succeeding in securing any compensation for their injuries. The Empire’s policies and legal “cards” were simply “stacked against” them.
In short, the railway system of British India appears to have been more concerned with satisfying the shippers of freight, a major source of revenue and an important reason for the very existence of the railways,\textsuperscript{90} than they were for those who used the train for passage.

All of this deals with the Colonial years. But given what this evidence has demonstrated, might these findings with regard to railway accidents not be seen as a kind of foreshadowing of the fate of the post-Colonial Bhopal Disaster victims?\textsuperscript{91}


\textsuperscript{2} K. K. Saxena, \textit{Indian Railways} (Bombay: Vora & Co. 1962), 194; Chauncey Depew, ed., \textit{One Hundred Years of American Commerce} (D. O. Haynes, 1895), 111.

In the 1950s, railways accidents per million miles travelled in India were 5 to 6 times per year larger than those in the UK or the US.

More recently \textit{The Guardian} reported that “about 15,000 people are killed each year” while crossing Indian railway tracks \textit{The Guardian}, February 2012. And see www.socialpulse.com/Indian_Train_Accidents/blog/lang/us?page=3, accessed May 24, 2012.
These were the Cooch Behar, Morvi, Hyderabad-Godwari Valley, Dibru-Sadiya, Eastern Bengal State, Assam-Bengal, Bengal & North-Western, Bengal & Dooars, B.-G.-J.P., Burma, Cawnipore-Bwhwal, Deoghur, Bengal-Nagpur, Bombay, Baroda & Central India, Eastern Bengal State, East Indian, Great Indian Peninsular, Indian Midland, Madras & Southern Mahratta, North Western State, Nizams Guaranteed State, Oudh & Rohilkhand, South Indian, and the Tapti Valley.

A few of these, like the Great Indian Peninsular Railway, had begun as private enterprises. (The Great Indian Peninsular was taken over in 1900.)

Some 77 individuals were killed, 55 injured, at crossings in these two reports.

Note the number of trespasser deaths: 661 for 1905 and 1,116 for 1909, or nearly 60% of the total deaths. This was comparable to the figures for railway accident fatalities in the United States: In 1890 48% of such fatalities were “trespassers;” in 1900, 55%. Aldrich, *Death Rode the Rails*, 120-21.

Some of these “trespasser” deaths in India may have been due to the temptation of those travelling on foot to utilize the railway tracks as the surest path to a destination; others may have been individuals who jumped aboard (as migrant workers, known as hobos, did, sometimes to their peril, in the United States), or they may have fallen while hanging on the side of a railway car without paying. Still others may have been suicides.
In the United States in the late 1870s the average number of passengers and workers killed in railroad accidents was 189; in the 1898-99 years the average was 422. Aldrich, *Death Rode the Rails*, 17-19, 120.

A British Royal Commission on Railway Accidents in 1877 reported that some 1,308 people were killed each year and 4,236 injured on approximately 10,000 miles of track in the years from 1872 to 1875. Over half of those killed and injured were railway employees (741 killed; 2,252 injured). Of the remaining fatal victims were 1,010 trespassers. Only an average of 39 passengers were killed. (A Board of Trade report for the same period has the figure as 42 passengers killed “by causes beyond their control.”) Roderick Bagshaw, “The Development of Traffic Liability in England and Wales,” in *The Development of Traffic Liability*, ed. Wolfgang Ernst (Cambridge University Press, 2010), 13-14.

7 Saxena, 196.

8 See Mark Aldrich, *Death Rode the Rails* (Johns Hopkins University Press, 2006), pp. 17-18, & 120 for such massive comparative figures of British and American worker, passenger, train-crossing & trespasser victim figures, for 1846-1900.

See the list of these archives in the Appendix.


A number of “principled exceptions to the fellow-servant, assumption-of-risk, and contributory-negligence rules were created by courts over the last 75 years of the nineteenth century in the United States. Several of these were also adopted in some Australian and Canadian provinces. See Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth Century America* (University of North Carolina Press, 1997), 95-101, 108-127; and Karsten, *Between Law and Custom*, chapters 7 & 8.

See below, note 12.

See below, note 74.

On the size of awards and judicial acceptability of such awards in the U. S., Canada, Australia and New Zealand, see Karsten, *Heart versus Head* and *Between Law*
Custom, chapter 8; Ely, Railroads and American Law, 216, 221; and Thomas, Lawyering for the Railroad, 77, 149, 158-59.


17 This generalization is derived from Kostal’s data on the legal records of the London & Northwestern Railway for the years 1864 and 1865 (Kostal, 377).

18 There were little relevant data in those records on this subject until the late 1880s.

19 The 1931 data didn’t appear to have altered in any significant way from the findings for the first decade of the 20th century. But my search of the published case reports on railway accident suits covered the entire period from the late 1880s to 1932.

20 5 Bombay HC, App. 1 (1861).

21 (East India Company workers had damaged property of the P. & O. Steam Navigation Company in repairing one of its ships.) But see Lyell v Ganga Dai, 1 India LR, Allamabad Series, 60 (1875): explosion of box delivered to railway; wife sued for wrongful death of husband. Judge awarded 5223 rupees. Affirmed; and Sec. of State
v Moment, 40 LR Ind. App. 48 (1912) (East India Company sovereign immunity doesn’t extend to wrongful interference with plaintiff’s property, and Indian statute to that effect is *ultra vires*, because in conflict with Parliamentary India Act of 1858).

There were several private for-profit railways in India not fully protected in this fashion, but the question of eligibility for gratuities was addressed in the Pala Singh case (*supra* n. xxx). The railway that employed Singh, the Bengal-Nagpur, was “co-managed,” not a state-owned one. That did not preclude the Government Board from approving the compassionate grant of 3,000 Rupees nor did it lead to the Provincial High Court reducing or voiding it. (*Ry. Dept. (Financial), 1931*, File #7483F.; G of I, *Index to Proc. of Ry. Dept., 1932: Establishment*, Decision of High Court of Judiciary of Patna re liability to attachment of railway workers gratuity, Sept. 840/F-1-3-B [K])

22 Two examples:

(1) In *McInerny v Sec. of State* (Ind LR, 38 Calc. 799 (1911) the plaintiff sought damages when he fell over a government-owned post on the tramlines in Kyd Street, Calcutta in 1910. His suit was dismissed at trial on the grounds that the Sovereign could not be sued.

(2) In *Sec. of State v Cockcraft* (AIR 1915 Madras 993 at 995) the plaintiff was injured when his carriage overturned when it struck a stack of gravel on “the military road.” He was awarded 1000 Rupees at trial, but this was disallowed on appeal; Wallis, J, explained that the government was protected from such a suit by the Sovereign Immunity it had inherited from the East India Company, which, in its turn, had been “derived from the
Native Rulers of India” and later held by the East India Company “in Trust for the Crown.” His colleague, Seshagiri Aiyar, J, confessed (at 997) to having “doubts” about what he felt were conflicting views on the definition of what constituted Sovereign power regarding the roads in English precedents. Consequently, he “examined the American law to find out under what category of duties the maintenance of roads comes in,” and thereby concluded that the government was not liable. This was remarkable, given that most American state courts had abandoned Sovereign Immunity for nonfeasance on municipal roads and bridges. Aiyar, J, must have had available to him an edition of a treatise that was quite dated. The process was well underway in the United States in the mid-nineteenth century. See Karsten, Between Law and Custom, 368-88.

In his chapter on “The Law of Torts” (1978) S C Thanvi expressed satisfaction that in post-colonial India “the fetish of Sovereign Immunity” was “an anachronism and must be relegated only to the historic past while we chant the mantra of fundamental rights and see the shining spectrum of directive principles of state policy.” (Thanvi, in The Indian Legal System, ed. Millatur, 603.) And who could disagree? But for many accident victims in the nineteenth century “the historic past” had indeed been subject to that fetish.

British railways led the pack in improved rail, wheel, carriage, coupling, air brakes, switch innovations, and employee color-blind testing. American railways adopted these same measures about a decade or two after the British, as the public, railway engineers, innovative manufacturers, railroad journals, newspapers, railroad labor guilds, and legislators pressed for greater railway safety in such measures as the U.S. Safety Appliance Act of 1893 and the British Regulation of

Amba Prasad calculated the accident rates for the period 1929-1939 per million passenger miles of the three major types of Indian railways – (1) state-owned and state-managed, (2) state-owned but private-company managed, and (3) private-company owned and managed. The first type had the worst record; the second better, but not as good as the third type. The East Indian Railway (state-owned, some segments state-operated, others private-company operated) kept in service XB engines in the 1930s despite their record of derailments (hunting and distorting the track). Prasad, *Indian Railways: A Study of Public Utility Administration* (University of Delhi, 1960), 194-95.

24 The concept of *ex gratia* payments was not entirely foreign to a related Dharma principle that it was the ruler’s duty to award damages *ex gratia*, while the victim had no corresponding “right” to expect them. *The Indian Legal System*, 630.

25 Sovereign Immunity from damage suits persisted with regard to the Imperial Government itself under section 65 of the Government of India Act of 1858 and section 32 (2) of the Government of India Act of 1915, limiting liability of government action and inaction to that enjoyed by the East India Company. But the Indian Railways Act of 1890 appears to have excluded government-owned railways from this protection.
Govt. of India, Legislation Dept., *The India Railways Act of 1890 (Act No. IX of 1890) as modified up to 1909* (Bombay, 1912) Ch. VII, sections 79, 80 & 82A (Responsibility of Railway Administration as Carriers). And see Ch. VIII, sec. 83: All accidents causing injury must be reported to Local Government and the Railways Inspector; sec. 85: railway administrators must send reports to the Gov. General in Council; sec. 86: railway administrators can compel plaintiffs to submit to a “duly qualified medical practitioner.”

In the late 19th and first half of the 20th century the Crown sought to fix the rate of exchange of Pounds and Rupees at a ratio of 10 Rupees to 1 Pound, but the informal rate ranged to from that ratio to one of 12 to 1.

As in East Indian Ry. Memo to Agent, Calcutta, 28 Jan. 1898, p.8, signed A P Dunstan. India Office Library (IOL), L/PWD/6/534/181. (It’s not always clear in the records that the “gratuity” was for an injury or death *solatium* to the widow, or for one who was retiring for some sort of disability, but the records *usually* include that information.)

Robert Varady’s PhD dissertation at the University of Arizona in 1981, “Rail and Road Transport in 19th Century Awadh: Competition in a Northern Indian Province,” offers a brief comparison of accident fatalities and injuries per million passengers and employees on Awadh lines in 1869 (31 passengers killed; 79 injured, per 1.9 million; 48 trespassers and 109 employees killed) and concludes that “these statistics were hardly alarming,” as they demonstrated that railway travel was not “dangerous.”

P. S. A. Berridge mentions a collision of two Northwestern Railway trains with defective 4-4-0 M class locomotives on December 25, 1907, between Ludhiana and Ladhowal (see photo), but offers no further details relevant to the questions addressed in this essay (Couplings to the Khyber: The Story of the Northwestern Railway (N. Y., 1969), 290.) John Harrison’s valuable account of research into Indian railway records at the provincial company archival level, “The Records of Indian Railways: A Neglected Resource,” South Asia Research, 7, no. 2, 1987, 105-121, mentions that “accidents” were noted in the semi-annual reports of the Bengal and Northwestern Railway, but provides no information on the subject. (109, 119) There is no mention of railway accidents at all in the two most recent important studies, Our Indian Railways: Themes in India’s Railway History, eds. Roopa Srinivasan, Mannish Tiwari, & Sandeep Silas (Foundation Books, New Delhi, 2006), and 27 Down: New departures in Indian Railway Studies, ed. Ian Kerr (Orient Longman, Hyderabad, 2007).

30 IOL, L/PWD/6/255/115.
A P Dunstan, Secretary for the East Indian’s Directors in London, reported in a June 1888 memo that Gopul Chemder Dass, a printer for the company for 20 years, was to be granted 6 months pay (120 Rupees) and to receive his 172.9 Rupee from the Provident Insurance Fund (he had contributed 70 Rupees), in that he had become incapacitated with double cataracts.33

Archives of India, Govt. of India, *Index to Proceedings of the PWD for 1895*, pp. 13, 14, 114. (The widow of Khetter Cheforbutty, a railway clerk with nineteen & a half years service, was granted 120 Rupees, (3 months pay), (p. 166) but it is not clear whether he died of natural causes of due to a railway accident of some sort.)


PWD/6/535/432, p. 92.


43 B, B, & C I Ry. Minutes of Meeting for 1898, National Archives of India, pp. 12, 13, 54, 87, 100, 179.


45 Govt. of India, *Railway Dept. (Financial)*, File #7483F (July 1931). The Provident Fund was said to be insufficient to provide for his family; hence the additional grant.

46 *Index...1932: Establishment*, March 7998-F/1-3-B (42); *Index...1932: Finance*, p. 144, July 7483-F/1-3, A; Nov. 7918-F/1-3,B (40); 7496-F/1-6, B (45); 4812-F/40-42, B (38); Jan. 7030-F/1-3, B (45); Jan. 7097-F/1-4, B (38); Nov. 7496-F/1-6, B (45);
The 1931 report also contains a proposal to grant compensation, “as an act of grace,” to railway employees who suffered loss of property due to a recent earthquake. Moreover, the last of these citations was an entry sanctioning a grant compensating an unnamed Northwestern Railway “peon” during his recent ziarat [holy Muslim pilgrimage]).


fees prior to the Court Fees Act, and its potential for dissuading litigants from initiating suits). One popular belief among Hindus is that Brahma, the Creator, writes one’s fate on one’s forehead at birth. Another, Sanchita Karma, is that one’s fate is a function of the unfinished Karma of previous lives.

(www.hinduwebsite.com/hinduism/h_fatalism.asp accessed 3/26/12)

There apparently were exceptions made to this English “champerty” bar to such contingency fee contracts, however. Both before and after the 1872 statute, Indian courts sometimes sanctioned such arrangements “in furtherance of right and justice” and “to resist oppression,” rather in the fashion of American state courts. And the post-statute Condoo decision was upheld by Privy Council. See R. G. Singh v K. Singh, 4 SDA Rep 12 (1825); B. B. Singh v R. T. Singh, 6 SDA Rep 131 (1836), M. Z. Khanum v R. L. Mitter, 6 SDA Rep 298 (1840); and Sir Montagu Smith J in Condoo v Mokerjee, 2 AC 1886 at 210 (1876).

For an example, see Sir Frederick Pollock’s remarks in Theobald v Railway Passenger Assurance Company (18 Jurist 583, at 585-86, Ex. 1854).

See Peter Karsten, “Enabling the Poor to have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940,” 47 Depaul Law Review 231-260 (1998); Karsten, Between Law and Custom, 483; Kostal, Law & English Railway Capitalism, 378.
53 See Karsten, *Between Law and Custom*, 474-487, especially Table 8.1.

54 Mahabir P. Jain, *Outlines of Indian Legal History* (Bombay, N. M. Tripathi, 1972), 575.


56 See his draft (“Pollock’s Model version of Tort Law,” The Online Library of Liberty, http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php&title=2123&search=%22draft+of+a+civil+wrongs+bill%22&chapter=165108&layout=html#a_2933176 accessed 3/11/14) for illustrative examples of each rule of tort law, several of which appear to come closer to the more plaintiff-friendly rules of United States common law than those extant in English courts in the 1870s. While digging through files in the India Office Library, London, I noted, with a touch of “foreshadowing,” a notation in the Legal Adviser’s Account of Disbursements, May 1877-Dec. 1883, L/PND/L/L/4/1, the payment on Nov. 23, 1883, of 105 Pounds to “Mr. F Pollock” for “a Bill for the Codification of the Law of Torts in India.” (Incidentally, that file contained no disbursements in any of those years to any party for anything associated with a railway accident in India.)

57 Mahmood was educated for the law at Lincoln’s Inn in the early 1870s and served as Judge on the High Court of North-West Territory. Markby served as Judge on the
High Court of Bengal from 1866 to 1878 and held the newly created Readership in Indian Law at Oxford from 1879 to 1900. Macpherson served as Judge on the High Court at Calcutta from 1864 to 1877 and served as legal advisor to the Secretary of State for India from 1879 to 1882).


60 As I was not able to identify any evidence in the records of such views to assess, I encourage others to explore that perspective.

61 In calculating this figure I utilized the printed reports available in the Indian Law Institute’s Library in New Delhi and the vast online database at legalcrystal.com.

62 These were: Kally Das Mookherjee v East Indian railway, ILR 26 Cal 465 (1899) (award to father for death of son in passenger carriage due to explosion of other passenger’s fireworks, overturned by Judicial Committee of Privy Council on grounds railway had no special duty to prevent such a passenger-caused accident).
Sanghani v E. G. I. P. Railway, 2 Bom L 73 (1910) (two 3rd class passengers injured when passing train with door open struck their elbow which were resting on the window ledge. Bearman, J, in an extensive review of case law, noted that a Pennsylvania report (New Jersey RR v Kennard, 20 PA 283) had held the railroad liable in circumstances virtually identical to those in this case, but, citing English (and New York) authority that held otherwise, concluded that the plaintiffs were contributorily negligent and nonsuited them); J. M. Lali v B. B. & C. I. Railway, 15 Bom LR 252 (2013) (Indian stockbroker passenger on 2nd class ticket guilty of contributory negligence); Shiam N. Tikkoo & Others v B. B. & C. I. Railway, IR 1919 All 419, LR 61 All 488 (1919) (Wife and child fell through negligently open passenger-car door, killing wife and injuring child. Court held railway negligent but nonsuited plaintiff for submitting faulting plea, in contract rather than in tort); Vishnu Paluskar v B. B. & C. I. Railway, AIR 1924, 4 Bom 278 (1923), 25 Bom LR 80 (Ladder that fell and injured a passenger in a lower berth of a sleeping car, but railway not held liable and passenger held contributorily negligent); Edmund Mack v Madras & Southern Mahratta Railway, 75 IndCas 705, 45 MLJ 424 (1923) (British Indian Civil Service member fractured knee falling from pile of debris left on dark platform waiting for train. Offered 750 Rs. Court sanctioned a 3,000 Rs. award).

Note that the Indigenous plaintiffs all lost and the sole British plaintiff won.

63 One other was a criminal case concerning an Assistant Station Master sentenced to a year in prison for gross negligence that led to an accident (Emperor v Sheo Baran Singh, AIR 1924 All 438, 81 Ind Cas 705), another with a railway engine driver killed on the
job, nonsuited on the grounds that his death was due to a fellow worker’s negligence

(Blanchett v Secretary of State, 13 Ind Cas 417 (1912), and another dealt with the first (and unsuccessful) employee injury suit under the Workmen’s Compensation Act of 1923 (G. I. P. Railway v Chimnaji, AIR 1928 Bom 1, 29 Bom LR 1544). (A more successful Workmen’s Compensation Act case doubled an award of 50% of prior earnings (to a British gunner guard in a shunting yard) to 100%. Agent, E. I. Railway v Maurice Cecil Ryan, AIR 1937 Cal 526, 173 IndCas 655.)

In the United States for the years 2018-2010 there were a total of 88,203 railroad employee awards for disability or death. Some 95% were settled under the guidelines of the federal railroad workers compensation act (Federal Employers Liability Act (FELA), 45 U.S.C. §51 (1908)), averaging $1,157; those that were contested successfully received an average of $2,536. (Aldrich, Death Rode the Rails, 190-91.)

64 See fn. 63.

65 He was ordered to pay his share of the costs-of-court. But he got a bit of a break: Because of its negligence, the railway company was ordered to pay its own share.

66 It was not until 1949 that the Government of India created local Claim Commissioners to hear railway accident claims and award compensation, based on funds made available by the relevant railway. (Act 56 of 1949) (These officials appear to have been associated in the statute with the Workmen’s Compensation Act of 1923, but they may have served passenger claimants as well.)
(By the 1980s the Consumer Tribunals, Motor Accident Claim Tribunals, and Lok Adalts were handling tort claims, but ex gratia payments continued to be made, as Marc Galanter points out in section 8 of his brief on behalf of the Bhopal victims before the Federal District Court in New York.)


68 Govt. of India, Ry. Bd., PWD, Calcutta, 1897, General, Jan., #s 152-198 & 111-114, B, Archives of India. This report included the observation that in accordance with paragraph 9a, Ch. 2 of the Office Manual, the law officers of the government had to be consulted when such claims were made, that railway managers had originally been permitted to pay only 50 rupees on the own authority, that this had been increased to 5000 rupees in 1886, and then reduced to 500 rupees in 1888.


Such a claim had been accepted as sound in several American state Supreme Courts by the early 1890s, but these decisions would not have been of use to a plaintiff in a British court. Between Law and Custom, 410-11.
British India's jurists clearly weren't prepared to defy established English Common Law rules and adopt American innovations, but they did occasionally signal their distress in having to do so, as when Spencer CJ, recommended “sympathetic consideration of the Agent of the Company,” and “rejoice[d] to hear from the appellant’s counsel...that the company have decided to give her some from of compassionate...gratuity of a substantial amount.” And see *Strefsohn v Brookebond Co.*, 5 Tim. LR 68 (1889), for a similar expression.
76 See Karsten, Between Law and Custom, chapter 8; Kostal, Law & English Railway Capitalism, chapter 8 & Appendix. And see Thomas, Lawyering, 158-59, for examples in the American South in these years.

77 I did note one exception to this generalization, but it is not clear how often this exception was effectively utilized, as it was the only such use of this exception I detected. In B. B. & C. I. Ry v Mitthu, AIR 1931, All 659 (1931), Mukerji, J, denied a railway’s appeal from a lower court holding that two railway accident victims could successfully plead their status as “paupers” to forgo the payment for “court-fee stamps.”


This was, obviously, a major lawsuit: Edwin Bray’s firm had already spent 15,000 Pounds by late 1859. The equipment the railway company had appropriated and utilized when Bray left Karachi in June 1959 for England was appraised by two engineers at 13,300 Pounds value. The arbitrators in the case earned 3 guineas per day. The railway company sent four engineers from India in April 1862 to the arbitration to be available as witnesses whose salaries averaged 400 Pounds per year.
See Karsten, *Between Law and Custom*, Tables 8.1 and 8.2 at p. 475 & 477, for the comparisons.

Harding to his solicitors, Acton, Adams & Kippenberger, July 24, 1899, sagely shared by them with legal counsel for the New Zealand Railways; Series 4, 99/1009, Pt. 1, p. 4, Railway Ministry MSS, Archives of New Zealand, Wellington NZ.

Karsten provides data indicating that nineteenth-century English jurists were less generous than their American counterparts when it came to damage awards for pain and suffering due to railway and stagecoach accidents (*Between Law and Custom*, chapter 8). In *Theobald v Railway Passenger Assurance Company* (18 *Jurist* 583, at 585-86, Ex. 1854) Sir Fredrick Pollock CB interrupted counsel for a bookseller injured in an English railway accident in 1853 during oral argument:

“...A jury most certainly have a right to give compensation for bodily suffering unintentionally inflicted, and I never fail to tell them so. But when I was at the bar [the 1830s and ‘40s] I never made a claim in respect of it, for I look upon it not so much as a means of compensating the injured person as of damaging the opposite party. In my personal judgment it is an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share.”

Indeed, by the mid-20th century plaintiffs’ attorneys in tort actions in the UK itself were speaking of the difficulties they faced with trial court judges who were “ex-rugby-playing public school boys – quite tough...some...terribly mean...Spartan sorts of judges....They are not so keen on pain and suffering or loss of amenity.” (Genn, *Hard Bargaining*, 78).
As quoted in Ina Derbyshire’s essay in *27 Down*, 306.

In fact, an Indian railway analyst noted as late as in 1947 that third class carriages were often “loaded to the brim, passengers on the top and the foot-boards, huddling like cattle inside and scaling like monkeys outside.” D. Pant, “The Indian Railway Transport,” a paper read at the All India Commerce Conference (1947), cited in Saxena, 204.


Indian Railways, Admin. Report, 1907, 385, IN 2.

Concrete evidence for (2) with regard to employment and differential pay is available in *Our Indian Railways*, ed. Roopa Srinivasan, Manish Tiwari & Sandeep Silas (Foundation Books, New Delhi, 2006), 64-67, 158; and visible in the replacement of higher-paid skilled and semi-skilled “Europeans” over time by lower-paid Indians in Table 3.

L/PWD/6/255/133, Emanation of Home Accounts of …Railway Companies, 1 July-31 Dec., 1886.

Harrison, 111, 117.
In the United States, there were a few compassionate railway owners. Charles Perkins, President of the Chicago, Burlington & Quincy Railroad from 1881 to 1901, was one. Karsten counted 23 such gratuitous payments to injured employees or their survivors sampling the C. B. & Q.’s records from 1885 to 1888. (Between Law and Custom, 466-67). See also Aldrich (Death Role the Rails, 160) for similar examples from the records of the Reading Railroad, the New York Central, the Pennsylvania Railroad, and the Santa Fe.

David Lightner detected payments totaling $26,902 to 411 Illinois Central Railroad employees for injuries suffered in 1898, and $52,564 paid to 1,833 such victims in 1899. These amounted to an average payment of $38, which looks more like a “dole,” “gratuity,” or solatia than a “settlement” to avoid a lawsuit. (Lightner, Labor on the Illinois Central Railroad, 1852-1900 (Arno Press, 1977), 372-73)

Kostal identified two English railways (the Great Western and the London & Northwestern) that made such payments, including on-the-spot ones to injured passengers in exchange for releases, while he noted that another railway (the London, Brighton & South Coast) was less generous. Kostal, Law & English Railway Capitalism, 374-78.

In 1923 Indian railway employees injured on the job were covered under the Workmen’s Compensation Act of that year (Act 8 of 1923).

Karsten notes the use of such “compassionate gratuities” to injured or killed railway workers in the English and American railway company records, as well as the wide variation among such railways in their degree of generosity/”compassion” in chapter 8 of *Between Law and Custom*.

British India’s jurists clearly weren’t prepared to defy established English common law rules and adopt American innovations, but they did occasionally signal their distress in having to do so, as when Spencer CJ, recommended “sympathetic consideration of the Agent of the Company,” and “rejoice[d] to hear from the appellant’s counsel…that the company have decided to give her some from of compassionate…gratuity of a substantial amount.” And see *Strefsohn v Brookebond Co.*, 5 Tim. LR 68 (1889), for a similar expression.

89 Saxena, 83-84.


91 See Galanter, “Legal Torpor...,” note 46.
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legalcrystal.com

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*G. I. P. Railway v Chimnaji*, AIR 1928 Bom 1, 29 Bom LR 1544

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*Madras & S, Maratha Ry. v Jayammal*, 85 IndCas 969, 12 AIR 1925 304 (1924)

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Strefohn v Brookebond Co., 5 Tim. LR 68 (1889)

Theobald v Railway Passenger Assurance Co., 18 Jurist 583 (Ex. 1854)


### Tables 1 & 2

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Photo 1

**TABLE 3**
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