Assessing Damages under Uncertainty – Applying Tort Theory to the Use of Statistical Data

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In personal injury cases, courts often use statistical data in order to assess the harm done to the plaintiff when no case-specific evidence is available. Although this is a common practice, rarely do courts examine the underlining assumptions of the statistical figures used in the process of calculating damages. Often a gap exists, as it were, between the explanation courts give when calculating damages, and the statistical data that they put to use.

This phenomenon manifests itself in two distinct ways. First, courts sometimes fail to examine the underlying assumptions used in the construction of the database. This in turn often causes courts to draw a wrong conclusion from the data. For example, when courts are presented with evidence about the plaintiff's future income they take into account the possibility that the plaintiff might have been unemployed, but for the accident. However, when courts are presented with no evidence, they use the average income to calculate lost earning capacity, completely ignoring the possibility that the plaintiff would have been unemployed.

Second, courts sometimes use one measure of central location, the weighted mean, while the argument they use calls for the use of another, the median. Specifically, when courts measure lost earning capacity and remaining life expectancy, they often argue that the damages should be calculated in accordance with principles of corrective justice, i.e., in a way that restores the plaintiff to her condition before the accident. I argue that this reasoning calls for the use of the median; however, courts use the weighted mean when calculating damages. I present a number of typical mistakes regarding the calculation of damages, and offer guidelines that should be adopted in order to avoid such mistakes in the future.