



Molly McKibben

GREENE BROILLET & WHEELER, LLP

Bias in consumer litigation

RECOGNIZING BIAS AND ASSUMPTIONS MADE ABOUT YOUR CLIENTS' CASES AND DAMAGES – WOMEN IN PARTICULAR – IN ALL STAGES OF LITIGATION

Bias is a concept that trial lawyers are supposed to be familiar with. A savvy attorney discusses it with potential jurors during voir dire and spends time honing how to address it in a way that encourages jurors to be honest about how their biases may affect their ability to serve on a particular case.

Yet despite that familiarity with the concept, many attorneys fail to recognize the biases that are the foundation for the assumptions they or the defense makes about a plaintiff's case. Missing these biases can prevent clients from receiving the equal treatment they deserve from everyone – from medical providers to members of the jury. It can result in clients receiving inadequate compensation for their harms and losses. It can even cause attorneys to overlook potential legal theories or avenues of recovery. It is critical that lawyers examine the bases of the information they are relying on or assumptions they are making so they can obtain full justice for their clients.

Bias is simply the tendency toward or against someone or something. It is a cognitive shortcut the brain uses to streamline our thinking so we can quickly make sense of the world. A person's brain uses what it learns from their environment and experiences to make quick decisions about who to trust, how to behave, what to say, etc.

People can have positive biases that help them navigate the world or stay safe; but often, biases are based on stereotypes rather than actual experience or real knowledge of a person or circumstance. Relying on shortcuts that aren't based in fact can result in prejudgments that lead to uninformed, impulsive decisions and discriminatory rules or practices. When left unchecked and reinforced, bias can take over and form the basis for laws, policies, systems, and procedures that are unfair

and can yield devastating consequences.

Below is a non-exhaustive list of ways in which bias influences plaintiffs' cases in civil litigation.

Damages

Bias underpinned lost-earnings damages calculations for years. To determine projected lost earnings, most economists have typically relied on the Bureau of Labor Statistics' Current Population Survey, which considers race and gender when projecting earnings potential. By doing this, experts are reinforcing gender pay gaps and workforce discrimination and thus perpetuating systemic inequality. An analysis by the Washington Post in 2016 found that the use of the biased tables for earnings projections would mean that (assuming identical claims involving identical injuries for plaintiffs with identical educational levels) a 20-year-old Black female plaintiff would recover only \$1.24 million in future lost wages, while a 20-year-old white male plaintiff would recover \$2.28 million.

In 2018 Oregon passed Revised Statute section 31.770 which makes inadmissible calculations of future earning potential based on race or ethnicity. Similarly, in 2020 California addressed this bias by enacting Civil Code section 3361, which bars the calculation of future lost earnings in personal injury and wrongful-death cases based on race, gender, and ethnicity. But currently the rest of the United States still allows economists to make their damages estimates using biased data.

The importance of eliminating these biased sources of information for economists cannot be overstated. As the California Legislature noted in the Legislative History for section 3361,

this affects not only compensation after the fact, but helping ensure fair distribution of risk beforehand. The Legislature used the example of a waste-management company searching for a site for disposal of hazardous waste who evaluates the risk an accident could pose to the surrounding community and consider potential liability. If race-based data is used to do that, there is motivation to put the facility in an area where residents would be awarded lower damages. It's vital that a plaintiff's race and gender are not considered when calculating damages.

Workplace safety

It's axiomatic that safety clothing and safety equipment help avoid accidents and prevent injuries. But for clothing and equipment to perform these functions, it has to properly fit the wearer.

Women are becoming more and more involved in construction – from welders and pipefitters to electricians and equipment operators. During their apprenticeship, the programs give attendees protective clothing and equipment. And yet, almost all of it is designed for the average male. Harnesses, hard hats, fall protection systems, safety goggles, and gloves were originally created for male bodies and haven't been updated for the female size. Goggles won't stay up on women's faces or have gaps around the edges; flame-resistant clothing doesn't fit close to the body; safety vests fall off their shoulders. Ill-fitting safety equipment can cause or contribute to injuries. When equipment that is meant to protect turns into a hazard, women are forced to go without or spend their own money to buy items that are sized for their body.

A lack of appropriate PPE can also present employment issues – imagine

a female working on a construction job complaining about a lack of properly fitting equipment and that leads to retaliation or firing. In 2017, the ACLU filed a lawsuit against the Frankfort Police Department in Frankfort, Illinois after the department refused to provide a pregnant worker with protective gear that would fit her changing body, including a properly sized bulletproof vest. In 2015, a female shipyard worker sued her employer after they failed to provide her adequate equipment, alleging gender discrimination. These are just two examples of the way the failure to have properly fitting equipment can form the basis of a lawsuit.

Problems with bias in workplace safety aren't limited to just equipment. Issues can arise with the environment many people work in. Most workspaces were designed to fit the average white male. Airline cockpits are designed to fit the measurements and proportions of a male body – to operate the equipment, a person had to have a certain level of strength and be a certain height. One study of pilot workspaces found that 70% of female pilots could not reach the pedals, flight-deck controls, levers, and points of visibility. Similarly, female truck drivers can have issues with truck cabs that were designed for men, having difficulty reaching some controls or getting their seats adjusted while maintaining contact with the pedals.

This can also be relevant in medical-malpractice cases. Fifty percent of all medical-school applicants in the U.S. are women, yet most instruments were designed for male users. Men's thumbs can be as much as twice as wide as a woman's and women typically have less squeezing grip strength and finger-pinch strength. Female doctors who do not have the appropriately sized or calibrated equipment can have issues with their fingers floating in the finger holes, potentially causing, physical discomfort at best and, at worst, instability while performing a procedure.

Danger in the workplace can also arise out of bias based on race. A study on workplace fatalities found that worker deaths increased for all races

between 2015 and 2019. However, the disparity between races was stark: white worker deaths increased by only 1.7%, while Hispanic deaths increased by 20%, Black deaths by 28%, and Asian American deaths by a staggering 59%. This is sadly unsurprising, as workers of color are routinely assigned the most dangerous jobs. In addition, language barriers can lead to safety issues – instructions, warnings, and trainings are commonly provided in English and not in a worker's native language.

Employers and designers must consider whether the protective equipment used by workers and the spaces they'll be working in are designed with all bodies in mind, or risk lawsuits.

Insurance claims

Bias can show up in places litigators don't expect. Insurance and insurance bad-faith cases are not immune to many of the unfounded and sometimes racist assumptions that permeate society.

In 2022, the NYU Center on Race, Inequality, and the Law at NYU School of Law performed a study in partnership with Fairmark Partners law firm, a firm focused on civil rights and corporate accountability. The study was inspired by a December 2020 New York Times article describing the difficulties black homeowners had in getting insurers to pay their claims. The study was conducted over nine months with 800 participants. The study confirmed that black homeowners had a significantly harder time getting paid by their insurer after a claim.

Black homeowners had to do more paperwork and navigate more interactions with claims adjusters compared to white customers before the insurance company would agree to compensate them. For white customers, the process typically took fewer than three interactions before approval, and they were one-third more likely to have their claims paid out in less than a month. Black customers were 20% more likely to have to talk to a representative at least three separate times before being approved and more likely to have to submit extra paperwork.

Attorneys representing clients

in first-party bad-faith cases should examine whether race played a factor in how the insurance company treated their insured.

Emergency-room treatment

Lawyers representing clients who seek medical care at an emergency department need to be especially cognizant of the disparity in treatment between people of different genders and races. Some examples of how bias shows up in emergency care include the fact that CT scans are given to Latino patients at a lower rate than other races; Black and Latino patients are less likely to be given pain medication; women with chest pain waited 29% longer to be seen than men with chest pain; and women with abdominal pain were 25% less likely to be prescribed opioids than men.

Simply because an emergency department did not perform a particular course of treatment or respond to a client in a certain way doesn't negate their symptoms or injuries. It could be due to these systemic differences – a lawyer may discover that a Black client who was never seen at the emergency department after a collision actually went there, and after waiting for hours to be seen, decided to leave. That doesn't mean they weren't injured, or that their injuries weren't serious, but rather that they received unequal care and that should be addressed in discovery and cross-examination.

Pain

Even something as simple as how a person's subjective reports of pain are documented and evaluated can be affected by bias. Studies show that women and minorities experience discrimination when it comes to reporting and obtaining treatment for pain. Women's pain is often disregarded by health care professionals, who attribute their complaints to an emotional source rather than a genuine report of pain. In a study by the US Association for the Study of Pain, when comparing a patient's pain rating with an observer's rating, women's pain was consistently underestimated, and men's was

overestimated.

A study published in *The New England Journal of Medicine* in 2000 found that women are seven times more likely than men to be misdiagnosed and discharged in the middle of having a heart attack. This is because the concepts of most diseases are based on understandings of male physiology, and women have completely different symptoms than men when having a heart attack. Similarly, 70% of chronic pain sufferers are women, and yet eight percent of the studies on it are conducted on male mice and human men.

The data relied on by many scientists and medical professionals is often skewed because the public-health system has historically been biased toward the male perspective. In the 1970s, the U.S. Food and Drug Administration recommended that women of child-bearing age be excluded from clinical research. It wasn't until 1989 that the National Institutes of Health amended its policy to include women and minorities in research studies; it wasn't until 1993 that this policy became federal law; and it wasn't until 2016 that NIH implemented a policy *requiring* the consideration of sex as a biological variable in research.

The bias is even worse for Black women. Studies show that doctors don't believe their pain due to implicit biases against Black people – a dynamic that stems from slavery, during which many held the unfounded belief that Black people had a higher pain tolerance.

This all means that if a client is a woman or a minority, it's important to evaluate and examine whether a treat-er or expert evaluated them equally or considered bias in the data they relied on when rendering treatment or opinions.

Specific injuries

Often the data attorneys and their experts rely upon to evaluate a case or put together the damages picture of a client is inherently biased. For instance, it is now well understood that men and women recover differ-

ently from traumatic brain injuries. A TRACK-TBI study found that the severity and somatic symptoms from TBI was significantly worse in women. Women experience slower resolution of post-concussion symptoms, they experience more emotional symptoms, and they generally have worse outcomes than men.

Additionally, women have historically been underrepresented in TBI studies and clinical trials. If that's the case, and we know that women and men experience and recover from TBI differently, then the conclusions that are to be drawn from these studies and trials may not apply to women. For instance, if a study says that the majority of TBI patients recover in three months, but that study doesn't include women, how can it be used to form the basis of any opinion about the recovery trajectory of a client? Sex needs to be considered as a biological variable in TBI research and treatment.

Similarly, differences between the sexes mean that they experience and recover from spine injuries differently. Women's lumbar spine is more curved, as it's designed to support the uterus during pregnancy. The bigger curve means that a female is less stable, which can mean that it's more susceptible to fracture and dislocation. However, their cervical spine is typically more flexible than a man's, which leads to them having a greater range of motion that protects them from injury. When considering a client's case and the opinions of the opposing expert, it's important to understand whether the data they are relying on to disagree with a client's injury severity or prognosis is data that considers the client's biological characteristics.

Wanted: A female crash-test dummy

One of the most glaring examples of how bias has laid the foundation for unsafe practices and products is in crash-test design. Auto design is directly influenced by the results of safety testing; car companies design their cars to pass crash tests so they can market them as safe. Any bias in the way

cars are tested means bias in the way they are designed and manufactured.

Since at least the 1980s, crash-test designers have understood that male and female bodies perform differently in crashes. This is not surprising, as male and female anatomy is different – male and female pelvises have different geometry; men have more pronounced curvature of their necks in a seated position; male necks are stronger; female bone composition varies throughout their lifetime; etc. In addition, men and women are often positioned differently in the vehicle: women frequently sit closer to the steering wheel, their shorter height means that their heads hit the headrest at different places, and they may wear their seatbelts differently. Yet when it comes to crash-test design, until very recently researchers ignored these differences.

As a result, women are at greater risk of death or injury in a crash than men in the same vehicles. A study by the National Highway Traffic Safety Administration showed that a female driver or front passenger who is wearing a seatbelt is 17% more likely to be killed in a crash, 22% more likely to sustain a head injury, 44% more likely to sustain a neck injury, and 79% more likely to sustain a leg injury.

This is because crash-test dummies are all based on the male body. Dummies were created in 1976, and only male dummies were made (due to both a lack of funding and the belief that men drove more than women). The crash-test dummy has not been updated since they were created, which means that all automotive safety testing has been done on a 171-pound, 5'9" dummy from the 1970s (today, the average man is about 26 pounds heavier). After many starts and stops, a "female dummy" was created in 2003 and used in safety testing by the National Highway Traffic Safety Administration (NHTSA). But the one that was created was simply a scaled-down version of a male dummy. It represents only the smallest five percent of women by 1970s standards – so small, it could be a 12-year-old child.

As of mid-2025, the U.S. government authorized NHTSA to design a

female crash-test dummy. While the dummy that was created does more accurately reflect the differences in male and female anatomy and bone structure, it is very small, representing the fifth percentile of women in terms of height and weight. But more importantly, as of now, car manufacturers are not required to perform testing with this more-anatomically correct crash test dummy. And until the government requires it, there is little motivation for car manufacturers to do it. When considering an automotive design products liability case with a female client, weigh whether or not the vehicle was designed and tested for women.

Automated systems and artificial intelligence

Automated systems are not inherently neutral; rather, they reflect the preferences and biases of those who design them. If the data set on which an artificial intelligence technology

or an automated driving system is trained does not accurately reflect the human population, it will necessarily be biased.

This can affect cases attorneys have that are either based on an automated system or have some component of the case that is dictated by such a system or by artificial intelligence. For instance, a 2019 study out of Georgia Tech found that people with dark skin are more likely to be hit by a self-driving car than people with light skin. If an attorney were to represent someone with darker skin that was hit by a self-driving car, it would be important for them to do discovery on the data sets used to train the automated driving system. Where a client's case or the workup involves an automated or AI system, attorneys can't assume that they have been trained on bias-free data.

These are just a handful of examples of the ways in which bias can affect our client's case before it ever

makes it into a courtroom. Lawyers must critically examine their own bias, the assumptions of their experts, and the data and information relied upon by opposing counsel and opposing experts. ♦

Molly is a partner at Greene Broillet & Wheeler, LLP in Los Angeles, where her practice focuses on catastrophic personal injury and wrongful-death cases. She was chosen as Consumer Attorneys of California's Consumer Attorney of the Year in 2016. She is on the board of CAALA and Consumer Attorneys of California, and is a member of the American Association for Justice, the Association of Business Trial Lawyers, the Women Lawyers Association of Los Angeles, and the Academy of Truck Accident Attorneys.