

Underlying Biases in Consumer Litigation

By Molly McKibben

Bias is simply the tendency, inclination, or prejudice toward or against someone or something. It's how the human brain streamlines our thinking so we can quickly make sense of the world. A person's brain uses what it's learned from their environment and experiences to make quick assumptions about who to trust, how to behave, what to say, etc.

People can have positive and helpful biases; but oftentimes biases are based on stereotypes rather than actual experience or real knowledge of a person or circumstance. Relying on these cognitive 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.



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Bias is a concept that trial lawyers are intimately familiar with. They discuss it with their clients when preparing them for depositions or testifying at trial. They discuss it with mediators and opposing counsel when negotiating a case. But most importantly, they discuss it with potential jurors when they are picking a jury. Attorneys spend years perfecting how to discuss bias with jurors in a way that gives them insight into whether certain potential jurors will have too difficult a time ignoring their biases such that they cannot fairly serve on that attorney's specific case.

Yet despite that familiarity with bias, many attorneys fail to recognize the biases that are the foundation for the assumptions they make (or the defense makes) about their cases. These biases can prevent clients from receiving fair and equal treatment by everyone from medical providers to the jury. They can result in clients receiving inadequate compensation for their harms and losses. They can even cause attorneys to overlook potential legal theories or avenues of recovery. It's critical that lawyers examine the foundation of the information they are relying on or assumptions they are making so they can obtain true justice for their clients.

Crash Tests

Perhaps the most glaring example of how bias has laid the foundation for unsafe practices and products is in crash test design. This is covered wonderfully in Caroline Criado-Perez's book, "Invisible Women: Exposing Data Bias in a World Designed for Men," which outlines the adverse effects on women caused by gender bias in big data collection.

Auto design is directly influenced by the results of safety testing: car companies design their cars specifically to pass crash tests so they can market them as safe. Any bias in the way cars are tested translates into the way they are designed and manufactured. If tests don't consider the differences between male and female occupants, carmakers won't make changes to better protect them.

Since at least the 1980s, researchers have understood that male and female bodies perform differently in crashes. This is not surprising, as male and female anatomy is different in many respects – for example: 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. In addition, men and women are often positioned differently in the vehicle – women often sit closer to the steering wheel; women are typically shorter so their heads hit the headrest at different places; men and women 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



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were made (due to both a lack of funding and the belief that more men were driving than women). They have not been updated since they were created, which means that all safety testing was 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. But the one that was created was simply a scaled-down version of a male dummy. It represents only the smallest 5% of women by 1970s standards – so small, it could be a 12-year-old child.

There are efforts to make more anatomically accurate dummies for both male and female bodies, but until the government requires it, there is little motivation for car manufacturers to do it.

Damages

Bias has been the foundation of lost earnings damages calculations for years. To determine projected lost earnings, most economists would typically rely on the Bureau of Labor Statistics' Current Population Survey. The majority of experts surveyed stated that they considered race and gender when projecting earnings potential. By doing this, experts are reinforcing gender pay gaps and workforce discrimination and 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, a 20-year-old Black female plaintiff would recover only \$1.24 million in future lost wages, while a white 20-year-old white male plaintiff would recover \$2.28 million—almost twice as much—even holding constant the two plaintiffs' educational level.

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 (CACI 3906: "Lost Earnings and Lost Earning Capacity – Juror Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage)" mirrors the statute). Similarly, Oregon passed Revised Statute section 31.770 which makes inadmissible calculations of future earning potential based on race or ethnicity. But 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 helps ensure fair distribution of risk beforehand. The Legislature uses 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.

Workplace Safety

It's axiomatic that safety clothing and safety equipment help avoid accidents and prevent injuries. 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 equipment. And yet, almost all protective equipment 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 is too big; safety vests given to women are in a men's size small, which is oftentimes still too large. 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 worker on a construction job

complaining about a lack of properly fitting equipment 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 workplace safety aren't limited to just equipment. Issues arise with the environment many people work in. Most workspaces were designed to house 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 seventy percent of female pilots could not reach the pedals, flight deck controls, levers, and points of visibility. Similarly, female truck drivers often have issues with truck cabs that were designed for men. They have 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 US 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 smaller squeezing grip strength and finger pinch strength. Female doctors who do not have the appropriately sized equipment can have issues with their fingers floating in the finger holes, potentially causing at best physical discomfort 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.

Insurance Claims

Bias can show up in places many 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.

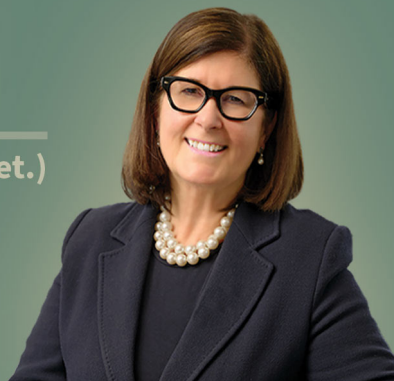
In 2022, the NYU Center on Race, Inequality, and the Law at NYU School of Law performed a study in partnership with Fairmark Partners law firm, a firm focused on civil rights and corporate accountability. The study was inspired by a December 2020 New York Times article describing the difficulties black homeowners had in getting insurers to pay their claims. The



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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.

Emergency Room Treatment

Lawyers representing clients who seek medical care at an emergency room 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, but just that they received unequal care and that should be addressed in discovery and cross-examination.

Pain

Even something as simple as a person's subjective reports of pain 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 can 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 80% 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 US Food and Drug Administration recommended that women of childbearing 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.

Specific Injuries

Often the data attorneys and their experts rely on 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 differently 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 3 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? Gender needs to be considered as a biological variable in TBI research.

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Similarly, differences between the sexes means 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 and 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 your client's injury severity or prognosis is data that takes into account the client's biological characteristics.

Conclusion

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. ■