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"BUT YOUR HONOR, HE'S AN ILLEGAL!"
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CAN THE UNDOCUMENTED WORKER'S ALIEN STATUS BE INTRODUCED AT TRIAL?

by
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*Actual quote from a recent case

The Immigration Debate

According to a recent report by the U.S. Department of Homeland Security, it was estimated that 8.5 million unauthorized immigrants were living in the United States in 2000.[1] This figure grew by approximately 250,000 persons each year.[2] As of 2009, the number of unauthorized immigrants living in the United States was approximately 11.8 million.[3] Immigrants from Mexico account for about 6.7 million of the total unauthorized immigrants living in the United States.[4] It is estimated that between 2000 and 2009, approximately 2 million people illegally entered the United States from Mexico.[5] There are an additional 170,000 people legally entering this country from Mexico each year.[6] These numbers are the spark that has produced a firestorm of controversy.

As the United States Supreme Court recently stated in the March 2010 decision of *Padilla v. Kentucky*, "[t]he landscape of federal immigration law has changed dramatically over the last 90 years....The Nation's first 100 years was a period of unimpeded immigration."[7] The 2010 Census, which is currently underway, may indicate that the number of undocumented workers living in the United States will reach between 12 to 13 million.

Migrant workers, whether legal or illegal, play an important role in the United States' economy. The average undocumented family pays more than $4,200 in annual federal taxes while earning less than the average annual salary of $36,700.[8] Fifty to eighty-five percent of the country's 1.6 million farm workers are undocumented.[9] Immigrant workers play a critical service in keeping hotels operating affordably by taking jobs American-born workers do not want. Of the 12 million food service workers in the United States, 1.4 million are believed to be immigrants, with 500,000 of them from Mexico.[10] Forty percent of the workers in the New York restaurant industry are undocumented.[11] Undocumented workers from Mexico tend to be young, predominately male, struggling with the English language, and employed in the construction, manufacturing and hospitality industries.[12] The reality of undocumented workers in America stands in stark contrast to the fears engendered by their presence.

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The fear associated with undocumented workers is not new. Courts throughout the Nation have examined, and attempted to insulate against, the prejudices that a plaintiff, who is an injured undocumented worker, encounters in trying to obtain a fair trial. The debate over illegal immigration, however, is currently at the forefront of the policy in the United States, and attorneys who represent injured undocumented workers must be acutely cognizant of the prejudices that the American people are exposed to during this debate.

Evidence of an Individual's Alien Status in the Courts

In the course of a hotly contested trial, lawyers often "pull off the gloves." Professional and ethical conduct, however, requires that there be limitations on the extent to which counsel may go into prejudicial and inadmissible matters. Rule 403 of the Texas Rules of Evidence, as well as the Federal Rules of Evidence, require that the trial court balance the risk of unfair prejudice against the probative value of the evidence seeking to be admitted.[13] Most courts across the country following Rule 403 have determined that the trial court is to admit relevant evidence unless the probative value of that extraneous evidence is substantially outweighed by the danger of unfair prejudice.

Evidence Used to Inflame the Jury

"Cases ought to be tried in a court of justice upon the facts provided; and whether a party be a Jew or gentile, white or black, is a matter of indifference."[14] During the last 100 years, the Texas Appellate Courts have uniformly condemned arguments that invoke prejudice based on race, ethnicity, religion, or national origin. This condemnation extends to arguments that seek to highlight or give weight to a person's alien status. Although the manner in which the prejudicial appeal is presented has varied through the years and from case to case, the response thereto has remained relatively unchanged.

Recent Texas cases

TXI Transp. Co. v. Hughes - Texas Supreme Court

In the historic case of *TXI Transp. Co. v. Hughes*, decided in March 2010, Justice David Medina, writing for a unanimous Texas Supreme Court, held that the trial court erred in admitting evidence impugning defendant Ricardo Rodriguez's character on the basis of his immigration status.[15] According to the Court, "[s]uch error was harmful, not only because its prejudice far outweighed any probative value, but also because it fostered the impression that Rodriguez's employer [TXI] should be held liable because it hired an illegal immigrant."[16]

In *TXI*, Kimberly Hughes was driving with several members of her family when her vehicle collided with a TXI gravel truck driven by Ricardo Rodriguez. The collision killed everyone in Hughes' vehicle except for one passenger. Hughes' husband sued TXI and Rodriguez.

At trial, evidence of Rodriguez's immigration status was admitted over TXI's objections. Evidence was introduced regarding Rodriguez's prior deportation, his use of a false Social Security number, and the fact that he lied to obtain a commercial driver's license by using a false Social Security number, among other evidence. TXI complained that Rodriguez's immigration status was not relevant to any issue in the case, and that evidence of his status was highly prejudicial. Hughes argued that evidence of Rodriguez's immigration status was relevant to the issues of negligent hiring and negligent entrustment, and also as impeachment evidence.

Justice Medina analyzed whether evidence of Rodriguez's immigration status was relevant to the issues of negligent hiring and negligent entrustment. The Court concluded that neither Rodriguez's immigration status nor his use of a fake Social Security number to obtain a commercial driver's license caused the collision.[17] Thus, his immigration status was not relevant to either issue.

The Court then went on to analyze whether evidence of Rodriguez's immigration status, offered for impeachment purposes as prior inconsistent statements, was admissible. Justice Medina concluded it was not, for at least two different reasons. The Court first pointed out that Rodriguez's immigration status was a collateral matter—that is, it did not relate to any of the claims–thus, it was inadmissible impeachment evidence.[18]

Second, the immigration-related evidence was also inadmissible under Texas Rule of Evidence 608(b).[19] This rule provides that specific instances of conduct of a witness for the purpose of attacking his or her credibility may not be proved by extrinsic evidence. As the Court noted, "[f]or over 150 years, 'Texas Civil Courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative of truthfulness.'"[20] Thus, evidence of Rodriguez's immigration status and deportation was inadmissible.

The Court held that even if evidence of Rodriguez's immigration status had some relevance, its probative value was outweighed by the risk of unfair prejudice. Therefore, the trial court erred in admitting evidence of Rodriguez's immigration status and the error was harmful.[21]

As Justice Medina so eloquently wrote,

> Such appeals to racial and ethnic prejudices, whether "explicit and brazen" or "veiled and subtle" cannot be tolerated because they undermine the very basis of our judicial process.[22]

Republic Waste Services, Ltd. v. Martinez – Texas Court of Appeals for the First District

Following the Texas Supreme Court's decision in *TXI*, the Court of Appeals for the First District of Texas, in a landmark case, affirmed a trial court's ruling to exclude evidence of a decedent's immigration status. In *Republic Waste Services, Ltd. v. Martinez*, Elida Martinez sued Republic, a non-subscriber to the Texas Workers' Compensation Act, for the wrongful death of her common law husband, Oscar Gomez.[23] Gomez was an immigrant from El Salvador and was working for Republic Waste in Houston, Texas, when a co-worker ran over him with a garbage truck, killing him.

Before trial, Martinez filed a motion in limine, which the trial court granted, to exclude evidence of Gomez's illegal immigrant status, asserting that it was irrelevant and highly prejudicial. Republic relied on evidence of a federal immigration raid at its facilities just two weeks after Gomez's death, which resulted in 50 to 55 workers being detained. Republic asserted that Gomez likely would have been deported after the raid and argued that this evidence was probative of whether Gomez's future income would be earned in the United States, where he earned $33,000 per year, or in El Salvador, where he had earned $1,000 per year. The jury found for Martinez and awarded $1,408,491, including $1,275,000 in future pecuniary losses.

Republic appealed, arguing that the trial court erred in excluding evidence of Gomez's illegal immigrant status. The court of appeals noted that "the issue of immigration is a highly charged area of political debate" and then went on to state that "[t]he probative value of evidence showing only that the plaintiff is an illegal immigrant, who could possibly be deported, is slight because of the highly speculative nature of such evidence."[24] The only evidence presented by Republic of Gomez's possible deportation was the federal immigration raid at its facilities, which did not, "without engaging in speculation and conjecture, rise to the conclusion that Gomez would have been deported, even if he had been detained."[25] The court concluded that the probative value of Gomez's immigration status was slight and was outweighed by its prejudicial effect. Thus, the trial court did not abuse its discretion in excluding evidence of Gomez's immigration status and the judgment was affirmed.

Other States' Decisions on the Admissibility of Immigration Status

Courts outside of Texas have rendered opinions espousing the same concerns as Texas courts on the issues of introducing evidence of a person's status as an undocumented worker.

For example, one Florida Court of Appeals held that any probative value of immigration status was "thoroughly outweighed by unfair prejudice, confusion of the issues, and misleading of the jury."[26] The California Supreme Court held in a 1985 decision that immigration status, "even if marginally relevant…was highly prejudicial."[27]

Similarly, the Delaware Supreme Court held in 1999, that even if immigration status is relevant to impeach a witness, the court must still determine if the probative value is outweighed by unfair prejudice.[28] A New York court excluded evidence of immigration status because any probative value the evidence might have was far outweighed by its prejudicial impact.[29] The Wisconsin Supreme Court, in a 1987 decision, affirmed the exclusion of undocumented status based on its prejudicial effect.[30]

A California Court of Appeals held that prejudice from evidence of undocumented status is "manifest and substantial" and noted that "there is unequivocally an inherent bias among certain segments of society against illegal immigrants."[31] One Virginia court stated that "the danger of a jury unfairly denying [Plaintiff] relief based on his status alone outweighed the probative value of the evidence that he acted dishonestly in the past."[32]

Courts in other jurisdictions have similarly held that the use of a witness's immigration status to attack the witness's character is not admissible.

A New York court found that there was no authority to support the conclusion that evidence of undocumented status "impugns one's credibility."[33] Thus the evidence was not admissible for impeachment purposes. One Illinois court did not allow evidence of undocumented status to impeach a witness.[34]

Likewise, a California Court of Appeals found immigration status inadmissible to attack a party's credibility.[35] The Fourth Circuit held that an individual's status as an alien, legal or otherwise, did not brand the individual a liar.[36]

Recent Supreme Court of the State of Washington case–*Salas v. Hi-Tech Erectors*

In *Salas v. Hi-Tech Erectors*, decided in April 2010, by the Supreme Court of the State of Washington, Alex Salas was working at a construction site when he slipped from a ladder erected by Hi-Tech.[37] He fell more than 20 feet to the ground and was severely injured. He sued Hi-Tech for negligence. Salas sought to exclude evidence of his immigration status at the trial court. The trial court admitted evidence of his immigration status because Salas was seeking lost future income. The court determined that the evidence was probative of whether Salas's future income would be in U.S. dollars or in his home country's currency. The jury found that Hi-Tech was negligent but was not the proximate cause of Salas' injuries. The Court of Appeals affirmed.[38]

Justice Fairhurst, writing for the majority Supreme Court of the State of Washington, noted that there was no evidence of pending deportation proceedings.[39] In addition, Salas had been in the country since 1989, had lived without a visa since 1994, had purchased a home, and had children living in the United States. The only risk of Salas being deported was his immigration status. As the Court pointed out, "immigration status alone is not a reliable indicator of whether someone will be deported," considering that even when an undocumented alien is apprehended, he or she must still go through removal proceedings, which may or may not result in deportation.[40] Based only on Salas' immigration status, Salas' risk of being deported was very low. Nonetheless, the Court concluded that, although Salas' immigration status only minimally increased the likelihood that his labor market would be outside the United States, that was enough to make his immigration status relevant to the issue of lost wages.[41]

However, the Court then went on to analyze whether the low probative value of Salas' immigration status was substantially outweighed by the risk of unfair prejudice. The Court pointed to California and Wisconsin cases where the courts found that evidence of immigration status was prejudicial. The Court held that with regard to lost future earnings, the low probative value of immigration status was greatly outweighed by the danger of unfair prejudice.[42] The Court reversed and remanded, and held that the trial court abused its discretion in admitting evidence of Salas' immigration status.

The argument in favor of excluding evidence of immigration status was best articulated by Justice Fairhurst, writing for the majority in *Salas*:

> We recognize that immigration is a politically sensitive issue. Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation. In light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great. Consequently, we are convinced that the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice.[43]

Recent Fifth Circuit case—*Bollinger Shipyards, Inc. v. Rodriguez*

It is worth noting that, although not related to the issue of relevance or prejudice, the Fifth Circuit decided in April 2010, that the undocumented status of an injured longshoreman will not be a bar to the recovery of benefits under the Longshore and Harbor Workers' Compensation Act.

In *Bollinger Shipyards, Inc. v. Rodriguez*, the Fifth Circuit held that undocumented immigrants are eligible for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA").[44] Jorge Rodriguez was working for Bollinger as a pipefitter when he fell while welding the wall of a ship. Due to the injury, he was only able to perform light duty work for about a month, and eventually had to stop working. He sought benefits under the LHWCA.[45]

At the administrative trial, Bollinger's vocational rehabilitation expert testified that because of Rodriguez's status as "an undocumented immigrant," he "had suffered no loss of *legal* earning capacity, as he had no *legal* earning capacity prior to being injured."[46]

The administrative law judge ("ALJ") held that undocumented immigrants are eligible for LHWCA benefits and ordered that Bollinger pay benefits from the date of the accident to the present, among other things. The Benefits Review Board ("BRB") affirmed the ALJ's order and also held that undocumented immigrants are entitled to benefits under the LHWCA. Bollinger petitioned for review of the BRB's decision.[47]

Bollinger argued that undocumented immigrants are "per se ineligible to receive indemnity benefits under the LHWCA, as any such benefits 'would be based on illegally obtained wages.'"[48] Bollinger went so far as to compare Rodriguez to a drug dealer, a pirate, and a Mafioso in regards to "ill-gotten wages."[49]

The LHWCA provides workers' compensation benefits to an "employee" if disability or death "results from an injury occurring upon the navigable waters of the United States…"[50] "Employee" is defined in the Act as "any person engaged in maritime employment…"[51] Further, the Act also states that "compensation under [the LHWCA] to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents..."[52] As the Fifth Circuit pointed out, the Act makes no reference to "illegal" or "undocumented" nor does it exclude undocumented immigrants from the definition of "employee."

The Court reviewed its 1988 decision in *Hernandez v. M/V Rajaan*, where the Court affirmed a district court's award of lost future wages despite the Plaintiff's status as an undocumented immigrant.[53] According to the Court, *Hernandez* "stands for the proposition that undocumented immigrants are eligible to recover workers' compensation benefits under the LHWCA."[54]

Bollinger further argued that the BRB's ruling undermines the Immigration Reform and Control Act of 1986 ("the IRCA"). The Court then reviewed the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.[55] In *Hoffman*, the Court held than the IRCA precluded the National Labor Relations Board from awarding backpay to an undocumented immigrant under the National Labor Relations Act ("the NLRA"). The Court noted that 1) the employee qualified for the backpay award only by remaining in the United States illegally and 2) the employee could not mitigate damages, as required, without violating the IRCA.[56]

The Fifth Circuit disagreed with Bollinger for three reasons. First, the LHWCA is a non-discretionary, statutory remedy, unlike discretionary backpay under the NLRA. Second, the LHWCA is an injured longshoreman's exclusive remedy and thus, is a substitute for tort claims. An undocumented immigrant would have the right to sue in tort. Therefore, "the remedy provided by the LHWCA is merely a substitute for the negligence claim that an employee could otherwise bring against his employer in tort."[57] Third, the plain language of the LHWCA provides for compensation to nonresident aliens and aliens who are about to become nonresidents. Also, unlike NLRA cases, an injured longshoreman does not have to mitigate damages under the LHWCA nor does the employee have to remain the United States to qualify for benefits. Therefore, awarding benefits to an undocumented immigrant under the LHWCA does not undermine the IRCA.[58]

After reviewing the statutory text of the LHWCA, previous Fifth Circuit decisions, and the Supreme Court's decision in *Hoffman*, the Fifth Circuit was "convinced that Rodriguez [was] eligible to receive benefits under the LHWCA" and therefore, denied Bollinger's petition for review in all respects.[59]

Conclusion

The terms "illegal alien," "illegal immigrant," and "undocumented worker" now more than ever, create a great deal of fear and distress in our society. This fear will, undoubtedly, find its way into a courtroom, and prejudice an injured undocumented worker's right to a fair trial. As illustrated by the recent decisions of the Texas Supreme Court and the Supreme Court of the State of Washington and other cases cited therein, the courts throughout this nation, from East to West, recognize the prejudice that is engendered within the terms "illegal alien," "illegal immigrant," and "undocumented worker," and have tried to strike a balance between this prejudice and its possible relevance. Texas and Washington, however, have made their position clear—any relevance that the alien status of an injured worker may have in a particular case is likely outweighed by its prejudicial effect.

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[1] Michael Hoeffer, Nancy Rytina & Bryan C. Baker, U.S. Dep't of Homeland Sec., Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009* (Jan. 2010).

[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] Benny Agosto, Jr. & Jason B. Ostrom, *Can the Injured Migrant Worker's Alien Status be Introduced at Trial?*, 30 T. MARSHALL L. REV. 383, 384 (2005).
[7] *Padilla v. Kentucky*, 599 U.S. ___ (2010).
[8] Agosto & Ostrom, *supra* note 6, at 385.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] TEX R. EVID. 403; FED. R. EVID. 403.
[14] *Moss v. Sanger*, 75 Tex. 321, 12 S.W. 619 (Tex. 1889).
[15] *TXI Transp. Co., et al. v. Hughes*, 2010 Tex. LEXIS 212, *at *36.*
[16] *Id*.
[17] *Id*. at *24.
[18] *Id*. at *26.
[19] *Id*. at *27.
[20] *Id*.
[21] *Id*. at *36.
[22] *Id*.
[23] *Republic Waste Services, Ltd. v. Martinez*, ____ S.W.3d ____ (Tex. App.—Houston [1st Dist.] 2011).
[24] *Id*.
[25] *Id*.
[26] *Maldonado v. Allstate Ins. Co*., 789 So.2d 464, 466, 470 (Fla. Ct. App. 2001).
[27] *Clemente v. State*, 707 P.2d 818, 829 (Cal. 1985).
[28] *Diaz v. State*, 743 A.2d 1166, 1184 (Del. 1999).
[29] *Klapa v. O & Y Liberty Plaza Co*., 645 N.Y.S.2d 281, 282 (N.Y. Supp. Ct. 1996).
[30] *Gonzalez v. City of Franklin*, 403 N.W.2d 747, 759-60 (Wis. 1987).
[31] *People v. Martin*, No. B164978, 2004 WL 859187, at *6 (Cal. Ct. App. Apr. 22, 2004).
[32] *Romero v. Boyd Bros. Transp. Co*., No. 93-0085-H, 1994 WL 287434, at *2 (W.D. Va. June 14, 1994).
[33] *Mischalski v. Ford Motor Co*., 935 F. Supp. 203, 208 (E.D.N.Y. 1996).
[34] *First Am. Bank v. W. Dupage Landscaping, Inc*., No. 00-C-4026, 2005 WL 2284265, at *1 (N.D. Ill. Sept. 19, 2005).
[35] *Hernandez v. Paicius*, 134 Cal. Rptr. 2d 756, 761–62 (Cal. Ct. App. 2003).
[36] *Figeroa v. I.N.S.*, 886 F.2d 76, 79 (4th Cir. 1989).
[37] *Salas v. Hi-Tech Erectors*, 2010 Wash. LEXIS 341, at *1.
[38] *Id*. at *3.
[39] *Id*. at *5.
[40] *Id*. at *5–7.
[41] *Id*. at *7.
[42] *Id*. at *11.
[43] *Id*. at *10–11.
[44] *Bollinger Shipyards, Inc. v. Rodriguez*, ___F.3d___ (5th Cir. 2010).
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] 33 U.S.C. § 903.
[51] 33 U.S.C. § 902.
[52] 33 U.S.C. § 909.
[53] *Hernandez v. M/V Rajaan*, 841 F.2d 582, *amended after rehearing*, 848 F.2d 498 (5th Cir. 1988).
[54] *Bollinger Shipyards, Inc. v. Rodriguez*, ___F.3d___(5th Cir. 2010).

[55] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 138 (2002).
[56] *Id*.
[57] *Bollinger*, __F.3d at __.
[58] *Id*.
[59] *Id*.

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Trial Team Diversity:
The Power of Making Room at Counsel Table

I. Diversity in the Legal Industry

Law Schools

Minority enrollment in law schools has increased over the past two decades – more than 160% between 1987 and 2014. That same time period has also seen a dramatic increase in JDs awarded to minorities – from 8.6% in 1984, to 27% during the 2013-2014 academic year. That figure increases to 30% at top law schools that feed students to elite firms. In addition, close of 50% of the JD's awarded to law school graduates now belong to women.

Law Firms

Minority and female attorneys in private practice have also seen gains during this time period, although the figures are lower than their representation in law school. Statistics show that that almost 30% of all lawyers are women, while close to 15% are minorities.

The diversity gap at law firms, however, widens substantially as you reach the partner level. Overall, research shows that women only comprise on average 17% of equity partners, while minorities comprise just over 8% of all partners (equity and nonequity).

Trial Teams

While men and women have been graduating from law school and entering private firms at about the same rate for many years, on a clean slate we would expect men and women to progress at about the same rate into lead counsel roles. But the trial bar continues to have a substantial gender gap. A recent study found that for lawyers entering their appearance as trial attorney, 73% were male and 27% were female.

Little empirical data exists for the percentage of minorities appearing as trial counsel, but based upon the lower percentages of minorities who are entering law firms and transitioning into senior positions in law firms, these figures are undoubtedly substantially lower.

II. Reasons Behind the Disparity

What is it that accounts for the dearth of minorities and women representing clients in the courtroom during trial? A number of issues are likely at play.

Lack of Retention and Experience

When women and minorities enter law firms in lower numbers than white males, their representation in the courtroom at trial will naturally be decreased. Add to that the difficulty that many larger law firms have in retaining female and minority attorneys, and there simply are fewer candidates from whom to choose for trial chair roles. For example, a recent study indicates that more African Americans at larger law firms leave in much higher percentages than their white counterparts, seeking out other employment, worrying about retention, and citing a scarcity of quality work as the main reason for finding a position outside the firm. Women also cite similar reasons for leaving, including a perceived lack of opportunity to advance and be considered for both partnership and leadership positions within a firm that would include trial counsel.

As shown by surveys conducted by the National Association of Women Lawyers (NAWL), men are less likely than women to leave private practice, men are more likely than women to advance beyond the associate ranks and become partners, and men earn more than women. These same results occur even more dramatically when looking at minority attorneys. Such disparities in advancement and compensation can stem from factors outside the control of women and minorities (such as implicit bias), affecting the types of assignments they receive, performance evaluations, and even an ability to meet billable-hour requirements. The result will be a cumulative negative impact on the ability of women and minority litigators to receive increasingly better assignments and greater opportunities to serve in lead roles in the courtroom.

It is also well known that few civil cases actually go to trial. For example, statistics obtained from the Florida Office of the State Courts Administrator shows that in fiscal year 2010-2011, less than 0.2% of civil cases in that state (not including probate, family court, or civic traffic infraction cases) were disposed of through a jury or bench trial.

The fact that the opportunities to go to trial are few and far between, in conjunction with what many corporations view as the high risk stakes to take a case through trial, leads many companies to send a message (whether

implicitly or explicitly) that only the most seasoned trial attorneys can represent their interests at trial. With so few opportunities to gain trial experience in a law firm environment and with most law firms focused on utilizing associates to bill hours and handle day to day tasks on cases, it naturally follows that only attorneys with prior experience in trial will continue to serve as trial counsel. When law firms look amongst their ranks for those candidates, female and minority attorneys necessarily fall to the bottom. Not because they aren't as bright or capable, but simply because they are vastly fewer in number and have not been provided with the opportunities that will give them the experience to satisfy the demands of their clients. It becomes a "chicken and egg" game.

Lack of Motivation Within Law Firms

Increasing diversity within law firms does not happen overnight. Similarly, developing programs that will train and provide experience to women and minority attorneys that will enable them to serve as trial counsel, takes time, effort and resources on the part of a firm. In order to make that type of investment, law firm leaders need to understand there will be an upside to effecting change. Absent education as to the demographics of juries and benefits of diverse trial attorneys (addressed below), in conjunction with hearing from corporations who hire and pay them that diversity within the firm and in the courtroom in particular, is not only requested but demanded, there will be little incentive to alter the status quo.

III. Benefits/Necessity of Diversity in the Courtroom

Why Diversity is Necessary

Census data shows that millennials, who are defined as adults born between 1980 and 1996, are a more diverse group than in prior generations. Almost 40% of millennials are minorities, and one in five same sex couples are millennials. According to Law360, millennials recently became the largest share of the total United States workforce, and research shows that they think about inclusion as a culture of "connectedness that facilitates teaming, collaboration, and professional growth." Millennials are now the largest generation, having overtaken baby boomers last year. As the population of millennials has multiplied, so has their presence in jury pools and on juries.

Trial attorneys are the face of corporations in the courtroom. Juries closely watch the presentation of a case through counsel and the changing demographics of jurors reveal that they may be more drawn to attorneys perceived as being more like themselves and who present themes that they perceive as relevant to them.

Corporations that continue to ignore the demographics of juries and who choose to staff trials with non-diverse attorneys run the risk of perpetuating

the outdated image of a profit driven, corporate controlled, grey suited, monolithic machine that companies most fear when facing juries. Failure to allow diverse attorneys to take the lead in trial also does not allow companies to benefit from the unique perspectives, perceptions and character that female and minority lawyers bring to the courtroom.

Biases in Decision Making in Choosing Trial Teams

When making decisions about lead lawyers, corporations often are focused on the wrong questions. Often, corporations will think that they should bring in a minority lawyer when trying a case in an area with a high population of minorities. Often, jury consultants are asked to conduct matched tests where the only variable is the race, gender or ethnicity of the lead trial lawyer. These tests usually show that the face, gender or ethnicity of the lead lawyer had no impact on juror decision making. These types of exercises show that simple identification is not the main reason for having a diverse trial team. It is not enough to simply have a lead lawyer that matches the race or ethnicity of the venue. Instead, the inclusion of diversity in the trial team allows for the generation of thematic elements that will appeal to individuals of diverse backgrounds. A patent case in federal court in a large Midwestern city can provide some insight into how a lack of diversity in the trial team can impact the outcome of the case. The trial team for the defendants in the patent case regarding Internet browser technology were white males. The plaintiffs had a diverse trial team including women and minorities. The jury ended up being heavily female and also included several minority members. The verdict was for tens of millions of dollars for the plaintiffs. When interviewed after the trial, the jurors explained that the plaintiffs had explained the technology and how the infringement occurred in ways they could understand, while the defense arguments seemed technical and did not connect with them. The more diverse trial team found ways, both in generating the themes of the case and by having female and minority attorneys examine several key witnesses that resonated with the jurors. This example shows the importance of thinking beyond simple representation and instead realizing that the only way to understand what themes and evidence will be important to a diverse jury is by having diverse trial teams.

IV. Programs/Action Items to Increase Diversity

Corporations/Insurers

Emphasize the Importance of Diversity to Law Firms

In-house counsel and insurance carriers can use their considerable economic clout with law firms to relay the message that diversity is important and that the diversity of staffing on their matters will be monitored and taken seriously. This includes annual collection of demographics and discussions with law firms about specific goals that are expected to be achieved, including at the partner and trial attorney

level. Corporations need to be willing to take action if they do not see the needle being moved in this regard. On the flip side, certain corporations have created incentive programs to reward law firms who progress as requested, either through bonuses or higher volumes of work.

Implement Corporate Diversity Supplier Programs

Supplier programs assist an organization to reach business owners that are reflective of the demographics of its employees and customers in an impactful way. The process to do this needs to be coordinated with all staff who have oversight for external spend. Once process and structure are in place this program can be marketed by an organization and these efforts are often accretive to a company's brand.

Actively Engage in Succession Planning by Executives

Talent management is a critical aspect of ensuring an organization is maximizing the full capability of its workforce in a consistent manner. This must be aligned with executive leader and board level priorities and accountabilities for sustained impact.

External Research and Manager/Employee Development Programs

Increasingly, strategic talent management planning requires a lens on external research and data elements beyond the scope of any individual organization. Sponsorship and participation in external studies aligned with talent objectives can provide tools and resources that assist program design and deliverables, which can also expedite progress.

Law Firms

Training

Law firms can focus on specific training for women and minority litigators, recognizing that traditional means of obtaining trial experience may no longer suffice. Diverse lawyers should be strongly encouraged to participate in trial training and advocacy programs, those conducted both in-house or by outside organizations, such as the National Institute of Trial Advocacy (NITA) and bar association groups.

It is also important that law firms use metrics to track the professional development of their associates, so they receive the appropriate amount and level of trial experience, and take action to remedy any deficiencies.

Certain communities offer partnerships between law firms and district attorney and public defender offices, whereby associates are "loaned" out for a period of up to six months and attorneys gain valuable courtroom experience.

Law firms also should have open and honest communication with their clients about their commitment to diversity in order to allow women and minority litigators the opportunity to gain valuable courtroom experience. This can be accomplished by serving as second chair trial attorneys (where a second chair is justified and appropriate).

Law firm leaders can also support programs within the firm that encourage attorneys to participate in pro bono opportunities that allow for participation in a courtroom environment.

Promoting Diversity

Actions speak louder than words. To encourage the hiring and retention of minority and female attorneys, law firms need to do more than merely say they have a commitment to diversity. For example, some firms have developed diversity action plans that includes holding senior leaders accountable for retention and promotion. Other firms have established diversity and inclusion committees staffed by both senior level partners and associates.

V. Looking Toward the Future

The legal industry has lagged behind corporate America when it comes recognizing the value and necessity of increasing diversity within its ranks, particularly at the trial team level. Recognizing the issue and the various factors that have led to the disparity is important but only the first step in the process. Now is the time for corporations, insurance companies and law firms to work together to implement programs and initiatives that will increase the representation of women and minorities at counsel table, to everyone's benefit.

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Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007

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Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007

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I. INTRODUCTION

This essay addresses a void in torts scholarship and pedagogy—the relationship between remedies and race in U.S. tort law. In virtually all torts scholarship and teaching, the unspoken assumptions are that race and racism are extrinsic to the torts system and that all parties are white unless otherwise specified. Torts scholars and casebooks discuss important cases from the early part of the twentieth century, and invariably mention the historical context of technology and industrialization. Yet, historical and contemporary context about torts and race generally is absent in scholarship and teaching.

This essay, part of a larger effort to explore issues of race and gender in torts, proceeds in two parts.[1] First, I challenge the

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1. Martha Chamallas and I are writing a book on this subject. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND THE LAW OF TORTS (forthcoming 2008). Other already published and forthcoming works that discuss some of these issues are Martha Chamallas, *The*

boundary between rights and remedies by highlighting a stunning but previously overlooked 1959 instance of an individual tort remedy serving as a significant civil rights remedy in the integration of public transportation throughout the South.[2] Second, I outline the whiteness of the civil justice system and focus on neglected material concerning the relationship between race and damages from 1865 to the present.[3] The torts system provided access to indigent plaintiffs, black and white, during periods when poor people were otherwise denied legal representation in every other context. Yet, the system worked by means that resulted in the classic torts remedy, money, being less readily dispensed to black plaintiffs than to other tort plaintiffs. Recent evidence suggests that tort remedies are still affected by race in ways that merit more exploration.

The methodological barriers to making definitive statements about the torts system are familiar and significant. Tort litigation involves individualized adjudication of liability and damages. Comparing liability decisions and damage awards in different

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Architecture of Bias: Deep Structures in Tort Law, 146 U. PA. L. REV. 463 (1998); Martha Chamallas, *Civil Rights in Ordinary Torts Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005) [hereinafter Chamallas, *Civil Rights*]; Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99 (2005) [hereinafter Wriggins, *Torts*]; Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 13 (2005) [hereinafter Wriggins, *Feminist Revision*]; and Jennifer B. Wriggins, *Whiteness, Equal Treatment, and the Valuation of Injury, 1900–1949*, *in* FAULT LINES: TORT LAW AND CULTURAL PRACTICE (David Engel & Michael McCann, eds., forthcoming 2008). Thanks to Martha Chamallas and Deborah Tuerkheimer for reading drafts of this essay, to my research assistant Erin Krause, to the librarians of the Garbrecht Law Library at the University of Maine School of Law, and to Douglas Laycock for his work on this symposium.

2. Bullock v. Tamiami Trails Tours, Inc., 266 F.2d 326 (5th Cir. 1959).

3. This essay focuses on cases involving those perceived to be African-American and Caucasian. Cases involving those perceived to be of other races have not been researched for this essay, although that is an important area for future study. "African-American" and "black" are used interchangeably. This essay does not take a position on whether race is something biologically "real" or not. In these cases, litigants are not explicitly challenging the racial designation applied to them. For further discussion, see the excellent book IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) and Wriggins, *Torts*, *supra* note 1, at 100 (discussing the incompleteness of conventional understandings of the tort system because of erroneous assumptions regarding the extent and effect of race in the system).

decisions to see if injuries are treated consistently is rarely done. Enforcement is decentralized and occurs almost exclusively through private attorneys. Settlements and verdicts are often unreported. There is no comprehensive databank, and in the late nineteenth century and the first half of the twentieth century there was even less information available than there is now. Moreover, comprehensive information about the incidence of injury, as well as wage data, is not readily available for the late nineteenth century and the first half of the twentieth century. In addition, determining the race of tort litigants is not necessarily easy. Although appellate judges in torts cases during the late nineteenth and early twentieth centuries routinely referred to the race of plaintiffs and witnesses when other than white, they did this less frequently after 1950.[4] Bearing in mind that comprehensive conclusions would be premature, tort law and race are intertwined in crucial ways. Tort law played an unheralded but significant role in desegregating interstate public transportation, as described in Part II. Further, race and racism have affected the calculation of damages, largely to the detriment of African-American claimants, as shown in Parts III and IV.[5] The essay concludes with reflections on the implications of the racial history of tort damages for contemporary efforts to make tort remedies more consistent.

II. RACE, REMEDIES, AND RECOGNITION

The recognition of an individual, private wrong can be a broad remedy in itself with significant ramifications for racial

4. BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920 (2001) (discussing hundreds of cases from the early twentieth century identifying the race of black plaintiffs); Wriggins, *Torts*, *supra* note 1, at 105 (discussing appellate courts' practice of referring to African-American plaintiffs as "colored" or "negro" in the first half of the twentieth century).

5. One common question is whether judges applied race-based torts principles and standards of liability. My preliminary answer is generally in the negative. *See* Wriggins, *Torts*, *supra* note 1, at 105 n.26 (discussing cases in which a race-based liability rule was claimed by the plaintiffs, yet not adopted by the courts); *id.* at 113 n.53 (noting that more stringent standards of liability or specific doctrinal rules were not applied to black plaintiffs, with the possible exception of self-defense).

equality. The Fifth Circuit decision in *Bullock v. Tamiami Trail Tours, Inc.* reflects this.[6] This case deserves to be widely taught and included in citations to duties of common carriers. It is a tort remedy for an individual case, but its wide implications demonstrate its importance as a civil rights remedy.

The events at issue in the case took place on an interstate bus in Florida at the same time that the Montgomery bus boycott was taking place.[7] A married couple from Jamaica came to Florida as tourists in late summer 1956, intending to travel by bus to New York in order to "see more of the country-side."[8] They arrived just seven months after the Interstate Commerce Commission (ICC) had ordered integration of interstate public transportation, including the very bus on which they were going to take their sightseeing trip.[9] They boarded a bus in Miami, and sat together in the front.[10] The husband, Reverend Bullock, "was dark or black," while the wife "though a Negress, appeared" to be white.[11] Not far from Miami, a white passenger complained to the driver about where Reverend Bullock was sitting, and the driver asked him to move to the back of the bus.[12] He refused to move back.[13] When the bus stopped in the middle of the night at a northern Florida restaurant that was used as a bus stop after midnight, the bus driver told some people in the restaurant about the Bullocks' presence in the front of the bus and

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6. 266 F.2d 326 (5th Cir. 1959), *rev'g* 162 F. Supp. 203 (N.D. Fla. 1958). This case is discussed further in Wriggins, *Feminist Revision*, *supra* note 1, at 148–152. The Fifth Circuit's decision contains much fascinating detail that space limitations make it impossible to discuss fully here.

7. CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 108–24 (1983). The Montgomery Bus Boycott, an important early victory in the struggle for racial equality in the twentieth century, began after Rosa Parks, on December 1, 1955, refused to move to the back of the bus. African-American residents of Montgomery, Alabama organized a boycott of the city's segregated buses which lasted over a year and eventually resulted in a United States Supreme Court decision affirming a Fifth Circuit decision holding that segregation in public transportation was illegal and in successful integration of the buses. Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956); BARNES, *supra*, at 108–127.

8. *Bullock*, 162 F. Supp. at 204.

9. BARNES, *supra* note 7, at 98.

10. *Bullock*, 162 F. Supp. at 204.

11. *Bullock*, 266 F.2d at 328.

12. *Bullock*, 162 F. Supp. at 204.

13. *Id.*

about how they had refused to move to the rear.[14] Milton Poppell, a white farmer who lived nearby, overheard the conversation, bought a ticket, boarded the bus, told the Bullocks to move to the rear, and when they declined, he slapped Mrs. Bullock and beat Rev. Bullock, injuring his face and body.[15] Mr. Poppell later testified that he was particularly incensed, not only that a black man would ever sit in the front of a bus, but also that a black man was married to and sitting with a white woman in the front of the bus.[16] When the Bullocks sued the bus company for their injuries, Federal District Judge DeVane ruled against them, holding that the attack was unforeseeable and the bus company could not be held responsible.[17] Calling segregation in public transportation a voluntary preference of the black population, the judge termed this the only instance of unprovoked assault in the four-year history of desegregating public transit in Florida and the South.[18]

The Fifth Circuit reversed and actually found the bus company liable, remanding only for a determination of damages.[19] The court was called upon to apply Florida law to the case, and found the attack foreseeable, largely because of the social conditions of the day.[20] Judge Rives wrote that "the folkways prevalent in Taylor County, Florida . . . would cause a reasonable man, familiar with local customs, to anticipate that violence might result if a Negro man and a seemingly white woman should ride into the county seated together toward the front of an interurban bus."[21] Context was everything; "mischief was hovering about,"[22] and the bus company did not do enough to prevent the attack.

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14. *Id.* There was a factual dispute about whether the people the driver told included a police officer or not. *Id.*

15. *Id.* at 205.

16. *Bullock*, 266 F.2d at 338 n.1.

17. *Bullock*, 162 F. Supp. at 205.

18. *Id.*

19. *Bullock*, 266 F.2d at 332.

20. *Id.*

21. *Id.*

22. *Id.* at 331. The damages remedy would not have been available for a truly random attack. To begin to convey a sense of the taboo attached to interracial couples, at the time of the attack, Florida had a statute forbidding racially mixed heterosexual couples from habitually occupying the same room "in the nighttime" which was in effect until struck down by the Supreme Court in 1964 in *McLaughlin v. Florida*, 379 U.S. 184 (1964). Extensive violence that

The damages remedy for the Bullocks was an individual, retrospective remedy and hopefully provided some compensation for their physical and psychological injuries. But the Fifth Circuit's liability determination against the bus company was, in effect, a broad remedial order. The order finding liability for the individual bus company could be reworded to state as follows: "We remind all interstate bus companies that they have to allow black people, interracial couples, and couples who appear to be interracial to sit in the front of buses as the ICC has previously ordered. Second, all interstate bus companies are hereby ordered to protect such passengers from attacks by other people including other passengers, and if they fail to do so they will be liable for damages to the injured passengers." The court order was a broad affirmative injunction as well as a doctrinal recognition that this particular bus company was liable for these particular past injuries. If future bus companies violated this de facto injunction, the remedy would be compensatory damages. Coming from the Fifth Circuit at this time, when it was comprised of not only Florida, but also Alabama, Mississippi, Georgia, Louisiana, and Texas, this decision was a significant part of the court's work in dismantling legal segregation in the South.[23]

While the issue of whether and to what extent tort liability actually deters behavior is perpetually debated, it seems unassailable that this particular remedy was the kind of tort remedy most likely to act as a deterrent.[24] This is because it was a clear public statement, by a court that covered a broad geographic area, against the precise type of defendant—an interstate bus carrier—that the judges most likely wanted to affect.[25]

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accompanied desegregation of public transportation has been well documented. *See, e.g.*, BARNES, *supra* note 7, at 38–40, 62 (citing incidents of violence between people of different races on public transportation).

23. *See, e.g.*, Charles Clark, *Forward: The Role of the United States Court of Appeals for the Fifth Circuit in the Civil Rights Movement*, 16 MISS. C. L. REV. 271 (1996) (describing the role of the Fifth Circuit as a forerunner in starting a new era of race relations, particularly in regard to employment and education).

24. *See, e.g.*, Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does the Tort System Actually Deter?*, 42 UCLA L. REV. 377, 416–19 (1994) (citing several examples of commercial landowners instituting protective measures in response to the liability threat).

25. The Fifth Circuit's opinion contains some rather equivocal language about preventive measures that the bus company could have taken to prevent the harm; for example, that the driver could have told the Bullocks why he wanted them to move. *Bullock*, 266 F.2d at 332. However, given that the judges found

Significantly, three years before the *Bullock* opinion was written (and two months before the Bullocks were attacked), Judge Rives, who wrote the Fifth Circuit's opinion in *Bullock*, had written the initial decision in the Montgomery bus boycott case. The opinion, holding that the laws and ordinances requiring segregation on Montgomery's buses were unconstitutional, was later upheld by the U.S. Supreme Court.[26] In *Bullock*, by ruling that the bus company breached its duty by failing to protect the couple and warn them of possible violence, the court in effect "sided" with persons who were defying the segregation customs of the day. It signaled that the court would be willing to do so on other occasions and foreshadowed the struggle over integration of public facilities. By reshaping the duty to protect, the court afforded a broad prospective civil rights remedy in tort for private racial violence.

III. 1865–1950, DAMAGE REMEDIES: A PRELIMINARY PICTURE

A. The Whiteness of the Civil Justice System

One of the obvious ways in which whiteness was the norm in tort remedies is that, until the first half of the twentieth century, the decisionmakers in civil cases—jurors, lawyers, and judges—were almost exclusively white and male.[27] Particularly following the beginning of the twentieth century, the wider culture was divided by discriminatory laws, policies, and customs, and by a race-based caste system that placed African-Americans below whites, allowed

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that the Bullocks should have been protected from attack in the actual circumstances of the case, when Mr. Bullock had been asked to move and had declined, it seems unlikely that they would have been barred from recovery if the driver had told them the reason for moving and they had still refused to move.

26. Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956).

27. *See, e.g.*, Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 75–93 (1990) (describing how Southern states created laws aimed at precluding African-Americans from serving as jurors); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844–1944, app. 2, tbl. 13 (1993) (showing that the number of black lawyers in the United States in 1940 was less than one percent of the number of white lawyers).

pervasive violence by whites against them, and denied them political power.[28]

Another way in which whiteness was the norm is that the race of litigants and witnesses was not mentioned in appellate tort opinions unless it was other than white. "Colored" man or woman, "Negro" man or woman, and occasionally "Negress," were terms used to describe litigants and witnesses who were not white.[29] Contemporary readers sometimes can infer that a litigant was white from the location of the tort or the descriptive language. For example, in one wrongful death case the decedent was struck by a flying timber while "in the waiting room for white passengers."[30] In another opinion, a wife who was sitting in the "ladies' waiting room" of a railroad station and who was insulted by a "negro woman" attendant necessarily was white.[31] Railroads in the early twentieth century often had a specific waiting room for white women, customarily known as "the ladies' waiting room."[32] The plaintiff's location in that waiting room while being attended by an African-American employee of the railroad established her as white. Appellate judges did not articulate these inferences. The norm to appellate judges was that people were white, and only departures from that norm needed identification.

B. Access to Tort Remedies—Legal Representation

Beginning in at least the late nineteenth century, African-Americans won tort cases before juries and appellate courts in every region. Part of this success must be due to one of the enforcement

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28. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 114–22, 280–348 (2002) (pointing to widespread laws hostile to African-Americans effectively barring them from participation in civil, political, and social life); WELKE, *supra* note 4, at 365 (describing justifications for segregation laws including the allegation that race-mixing would lead to violence and social disruption); C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 98 (1974) (discussing discrimination and segregation laws).

29. *See* Wriggins, *Torts*, *supra* note 1, at 111 n.48 (describing references to litigants' race and terms used to describe African-Americans).

30. Taylor v. Vicksburg, Shreveport & Pac. Ry. Co., 91 So. 732, 732 (La. 1922).

31. Gulf, C. & S.F. Ry. Co. v. Luther, 40 Tex. Civ. App. 517, 519, 90 S.W. 44, 45 (Tex. Civ. App. 1905).

32. WELKE, *supra* note 4, at 276–277. White women's children and husbands were also permitted in the waiting room. *Id.*

mechanisms of torts—contingency fee agreements. Contingency fee agreements have been widely used in tort litigation since at least the middle of the nineteenth century.[33] Since lawyers were almost universally white, it was white lawyers who represented black plaintiffs in tort cases soon after slavery ended. While long criticized as fomenting litigation,[34] contingency fee agreements were and are an egalitarian feature of the legal system. Contingency fee agreements, because they aligned, to some degree, the financial incentives of plaintiffs' tort lawyers with those of their clients, allowed poor clients who could not pay a lawyer's fees to have some access to the tort system. The United States African-American population has always been disproportionately poor.[35] The contingency fee system provided access to tort remedies for African-Americans at a time when no other part of the legal system supplied lawyers for them.

These early tort cases were brought and won during periods when poor litigants, of whatever race, lacked attorneys. They were brought long before *Gideon v. Wainwright* mandated lawyers for indigent criminal defendants charged with serious crimes,[36] before states began supplying lawyers to indigent parents in child protective cases,[37] and before the Legal Services Corporation provided some

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33. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 231 (1998).

34. Herman Melville in his 1846 book, *Typee*, includes tort lawyers in a list of the maddening and unfortunate aspects of 'civilization,' in contrast to the idyllic life on the Marquesa Islands which the book chronicled: "There were none of those thousand sources of irritation that the ingenuity of civilized man has created to mar his own felicity . . . no assault and battery attorneys, to foment discord, backing their clients up to a quarrel, and then knocking their heads together." HERMAN MELVILLE, TYPEE 242 (1846), *reprinted in* HERMAN MELVILLE, TYPEE: A PEEP AT POLYNESIAN LIFE; OMOO: A NARRATIVE OF ADVENTURES IN THE SOUTH SEAS; MARDI: AND A VOYAGE THITHER (G. Thomas Tonselle ed., Viking Press 1982). While Melville did not explicitly mention contingency fee agreements, his implication is that the attorneys had a financial incentive to create tort suits, which is a perennial criticism of contingency fee attorneys.

35. *See, e.g.*, ARNOLD ROSE, THE NEGRO IN AMERICA 68–73 (1948) (describing geographic and employment factors as well as traditional exploitation of blacks by whites as creating a dire economic situation for blacks).

36. 372 U.S. 335, 348 (1963).

37. *See, e.g.*, Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 34 (1981) (citing sources from the 1960s and 1970s recommending such appointments and noting

representation in civil cases for clients who lacked resources to hire attorneys.[38] In terms of poor people's access to legal representation, the contrast between the torts system and the rest of the legal system could hardly be more extreme.

This is not to say that the contingent fee system was perfectly egalitarian. Its financial incentives meant that cases with lower financial values attached to them would have been less attractive for lawyers to bring. To the extent that claims of black men and women were valued less by the tort system than the claims of white men and women, the blacks' claims would have been correlatively less attractive for contingent fee lawyers to pursue. Preliminary information suggests that black plaintiffs were underrepresented as plaintiffs relative to their proportion in the population, although more information is necessary to draw firm conclusions as to the reasons for this.[39] Moreover, much conduct that was tortious as well as criminal could not be pursued through the torts system because of political and other barriers.[40]

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that as of 1981, 17 states did not require appointment of counsel for termination of parental rights cases).

38. The federal Legal Services Corporation was founded in 1974. 42 U.S.C. § 2996 *et seq*. (1974).

39. For example, Louisiana's black population ranged from 47.1% in 1900 to 32% in 1950. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1790 to 1990, For the United States, Regions, Divisions, and States* (Working Paper No. 56, tbl. 33 (2002)), *available at* http://www.census.gov/population/www/documentation/twps0056.html (last visited Mar. 5, 2008). By contrast, in appellate wrongful death cases that featured published opinions regarding the measure of damages, black claimants comprised only 17.1% of the total claimants. *Id.* It is also very difficult to estimate accident rates in the nineteenth and early twentieth century. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 25, 59 (2003) (citing family employer self-reporting and the boom of personal injury cases at the turn of the century as complicating estimations of the actual accident rates).

40. One of the few civil cases involving damages from a lynching involved the lynching of a white man. Williams v. Great S. Lumber, 277 U.S. 19 (1928); *see also* Wriggins, *Torts*, *supra* note 1, at 106 n.28 (noting the conspicuous absence of any reported cases in which black plaintiffs sought compensation for lynchings).

C. Access to Tort Remedies—Money Damages

The classic tort remedy, of course, is money to compensate for an injury. The traditional dichotomy is between economic damages and noneconomic damages. Both noneconomic and economic damages have a long history as remedies.[41] Broadly speaking, economic damages generally have included lost wages, lost future earnings, pecuniary loss, medical expenses, and the like. Noneconomic damages have included pain and suffering, mental anguish, loss of consortium, and in some states and contexts, grief. Instructions given to jurors as to the measure of damages have long been vague.[42] Jurors have been told to make an individualistic determination of the damages remedy, particular to the plaintiff, and not based on group-based schedules of projected compensation. However, when it is difficult to make an individual projection of what a person would have earned in the absence of injury, such as when a person has no track record of earnings or dies or becomes disabled at a young age, courts and juries often resort to group-based data, such as earnings tables or mortality tables. Group-based data such as mortality tables have been used to inform damage determinations in cases of death and permanent disability for more than one hundred years.[43] Values determined by jurors who actually decide cases have long been influential in determining settlement values.

Focusing solely on economic damages, one would expect African-Americans' tort claims to be valued less than whites' tort claims because of the lower earnings of African-Americans.[44]

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41. *See* Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 362–67 (2006) (comparing historical examples of torts that award economic damages with torts that award noneconomic, "intangible" damages).

42. *See id.* at 374 ("In the realm of accident law, model jury instructions on compensatory damages offer no clue as to a methodology for calculating pain and suffering awards.").

43. *See, e.g.*, Central Law Journal et al. eds., *Admissibility of Life or Mortality Tables in Evidence in Cases of Death or Permanent Injury, for the Purpose of Estimating the Amount of Damages*, 55 CENT. L. J. 101, Col. 2 (Aug. 8, 1902) (noting that the general rule is to admit mortality tables in all cases of personal injury).

44. *See* ROSE, *supra* note 35, at 68–73 (discussing the historic reasons behind African-American poverty).

However, class and economic inequality do not tell the whole story. Noneconomic damages were available for many torts, and these damages allowed consideration of factors other than earnings. But the award of this type of damages was affected by a myriad of psychological and cultural mechanisms that devalued the losses suffered by black plaintiffs and seemed, from whites' perspectives, to call for a lesser remedy.

1. Pre-Trial Settlement

Published information about race and settlement during this period is scarce but provocative. For example, according to a 1905 article in the Street Railway Journal, 4.7% of the cases settled by the Philadelphia Rapid Transit Company in 1904 involved black claimants, but only 2.3% of the damages paid actually went to these claimants.[45] This is a significant disparity, but it could stem from differences in pre-accident earnings, seriousness of injury, or many other factors. More study of this would be useful, particularly as it involves other large defendants like railroads, in view of those defendants' importance as actors in the torts system.

Since most tort cases for decades have been resolved through pretrial settlements, the behavior and attitudes of people employed to settle cases against powerful defendants like railroads were significant. Perhaps such railway claims agents, now called claims adjusters, made race matter to the disadvantage of blacks even if blacks' earnings were the same as whites. According to an influential 1927 manual for railway claims agents, "The Constitution of the United States guarantees its citizens the equal protection of the law and provides that legally no difference shall be made between citizens on account of a difference in race or color. But some of these guarantees have come to be greatly modified in the actual life of the nation. . . . *A brakeman is not always a brakeman. A white brakeman is a brakeman; but a negro brakeman is most likely only a negro.*"[46] This language identifies the injured white brakeman's

45. *Claim and Other Departments*, 26 STREET RY. J. 526, 533 (1905).

46. SMITH R. BRITTINGHAM, THE CLAIMS AGENT AND HIS WORK 271 (1927). It is not clear why workers' compensation is not referenced here, since almost all states had workers' compensation programs by 1921. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 80, at 573 (5th ed. 1984) (discussing movement for the passage of workers' compensation legislation).

occupation ("brakeman") as the dominant factor.[47] But for the injured African-American brakeman, it singles out his race ("only a negro") as the dominant factor.[48] This seems to suggest that claims agents should focus on an African-American plaintiff's race rather than his occupation in settling an African-American's injury claims.[49] This in turn implies that even when an injured white person and a similarly injured black person had the same job with the same salary, their claims might be treated differently by settlement agents. This differential focus would have pointed in the direction of lower compensation for African-American claimants.

While the race-based discount in individual cases was not necessarily always large, its cumulative effect may have been. If an injured white brakeman and an injured black brakeman were paid less for the same injury, that kind of difference could have ripple effects over many years. Hypothetically, one injured person might lose his house for lack of funds, while the more generously compensated person might be able to retain his house. This in turn could provide potential wealth for the person's children, and in turn, grandchildren, equity for future education loans, tax benefits, and psychological benefits that would be lacking for the person who lost his house. If one then thinks about the thousands of railway and streetcar injuries that occurred in the first half of the twentieth century, the magnitude of the harm caused by disparate recovery becomes more visible. This is not to say that the recovery provided to the injured white brakeman was adequate or generous. It was the opposite.[50] However, to get less than the pittance provided the injured white brakeman is to get little indeed.

2. Victories at Trial, and Race-Based Remittitur

Black plaintiffs won in front of juries for various types of tort claims in all regions, and appellate courts often affirmed those verdicts.[51] Many involved claims against large defendants such as

47. BRITTINGHAM, *supra* note 46, at 271.

48. *Id.*

49. *Id.*

50. *See* WITT, *supra* note 39, at 64 ("The rise of faultless injuries [in work-accident cases] precipitated a compensation crisis.").

51. Wriggins, *Torts*, *supra* note 1, at 100 n.7.

railroads for severe physical injuries.[52] Some recovered for injuries that did not involve actual physical harm or contact.[53] These types of tort claims involved psychological and dignitary injuries, and resulted in recovery of mental distress damages.[54] Not all claims were against large defendants. In one Louisiana case, for example, parents of a nine-year-old "colored boy" fatally shot by a fourteen-year-old child of a neighbor playing with a gun recovered $5,000 from the parents of the neighbor.[55] It is currently impossible to calculate figures like relative success rates at trial, reversal rates on appeal, and the like, because of the methodological issues mentioned earlier.

Given the racial caste system, it would not be surprising if many white actors in the torts system were more reluctant to recognize and compensate injuries to the psyches and dignity of African-Americans than to recognize and compensate their physical injuries. One example suggesting this possibility was a 1909 case seeking compensation for false imprisonment brought by a black Pullman porter falsely accused of stealing tickets and money.[56] A rich white financier, James Brady, made the false accusation, which resulted in porter Frank Griffin being briefly imprisoned before he was freed.[57] Since Griffin had neither suffered physical injury nor lost his job, the damages were essentially either mental distress damages, punitive damages, or both. The jury recognized Griffin's injury and awarded him $2,500.[58] The trial judge, former

52. Public recognition of these successes was important to some African-Americans, as the NAACP reported on some of them in *The Crisis* magazine. *Id.* at 107 n.33.

53. *See, e.g.*, Wilson v. Singer Sewing Mach. Co., 113 S.E. 508 (N.C. 1922) (upholding a black woman's battery verdict against Singer Sewing Machine for actions of rental agent in trying to repossess sewing machine by grabbing machine from plaintiff's hands while in her own home); Brown v. Crawford, 177 S.W.2d 1 (Ky. Ct. App. 1943) (affirming successful assault case of black former employee of distillery for manager charging after him and shooting at him, although manager missed).

54. Prosser and Keeton wrote about the tort of assault that "the plaintiff is protected against a purely mental disturbance . . . ." KEETON ET AL., *supra* note 46, § 10, at 43 (5th ed. 1984).

55. Sutton v. Champagne, 75 So. 209, 210–11 (La. 1917).

56. *Negro Not Equal to White: Suffers Less Humiliation in False Arrest, Court Holds*, N.Y. TIMES, May 22, 1909, at 16, col. 2.

57. *Id.*

58. *Id.*

Congressman Dugro, reduced the verdict to $300, stating, "[i]n one sense, a colored man is just as good as a white man, for the law says he is, but he has not the same amount of injury under all circumstances that a white man would have."[59] Because blacks in the first place have a lower status, he asserted, the damage caused by being falsely imprisoned was necessarily less.[60]

The judge imposed a race-based standard to measure the damages remedy and reduce compensation to the black plaintiff.[61] Tellingly, his remittitur was affirmed in three appellate opinions, none of which discussed the substance of his action.[62] The trial court and appellate decisions received considerable critical attention in newspaper editorials across the United States, but minimal attention in contemporaneous legal scholarship.[63] The fact that the judge's explicitly racist reduction was affirmed by appellate courts, but criticized by the press, sent the following two-part message to judges deciding cases after *Griffin v. Brady*: first, if you think damage verdicts for black plaintiffs excessive because you think black plaintiffs deserve less than white plaintiffs, go ahead and reduce the verdicts pursuant to your discretion; second, do not be overt about your reasons for reducing the verdicts, or you may be loudly criticized in the press. It is almost impossible to know how frequently this kind of reduction happened in the wake of *Griffin*, but the common law system worked by just this kind of mechanism, where appellate decisions both resolved past cases and gave forward-looking messages to judges about what would be acceptable and what would be beyond the pale. It is plausible to assume that the message sent by *Griffin* was received and acted on by some jurists.

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59. *Id.*

60. *Id.*

61. *Id.*

62. Griffin v. Brady, 117 N.Y.S. 1136 (App. Div. 1909) (mem.), *aff'd per curiam*, 118 N.Y.S. 240 (App. Div. 1909) (denying motion for reargument), *aff'd*, 126 N.Y.S. 1139 (App. Div. 1910) (mem.).

63. *E.g.*, *Discrimination on a Wrong Basis*, N.Y. TIMES, May 24, 1909, at 6 (evaluating Justice Dugro's analysis); Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 43 AMER. L. REV. 869, 905 (1909). This case is discussed further in Wriggins, *Torts*, *supra* note 1, at 130–35.

3. Use of Segregated Precedents

By and large, the tort remedies for African-American plaintiffs were determined by the usual tort approach of individualized, case-by-case settlement or trial. As in other tort contexts, the notion of rigorously comparing case outcomes to determine whether like cases were being treated alike was alien. Notwithstanding this general practice, some judges at times have attempted to make decisions on damages through comparing damage amounts awarded in similar cases.[64]

A comparative approach to remedy makes the choice of a comparison framework central to the analysis. Demonstrating this importance, some Louisiana courts in the 1930s, in determining damage amounts in wrongful death cases for black decedents, chose as their comparisons only cases involving prior deaths of black people. For example, the Louisiana First Circuit Court of Appeals overturned a defense verdict and awarded money to the parents of a black twenty-nine year old killed by a night watchman, stating in part,

> [I]n the . . . case of *Shamburg v. Thompson, Trustee*, we affirmed an award of $3200 to the mother of a twenty two year old colored boy who was injured by the train at nine o'clock in the morning and died in the afternoon of the same day. The parents of a twenty-nine year old colored boy were allowed $6,000 for loss of love and affection, support etc., and for the pain and suffering of the deceased in the case of *Rousseau v. Texas & Pac. R. Co., et al.* We have

64. *See, e.g.*, Jutzi-Johnson v. U.S., 263 F.3d 753, 759 (7th Cir. 2001) ("To minimize the arbitrary variance in awards bound to result from [the typical] throw-up-the-hands approach, the trier of fact should . . . be informed of the amounts of pain and suffering damages awarded in similar cases. And when the trier of fact is a judge, he should be required . . . to set forth in his opinion the damages awards that he considered comparable. We make such comparisons routinely."); Seffert v. L.A. Transit Auth., 364 P.2d 337, 346–47 (Cal. 1961) (Traynor, J., dissenting) ("Although excessive damages is an issue which is primarily factual and is not therefore a matter which can be decided upon the basis of the awards made in other cases, awards for similar injuries may be considered as one factor to be weighed in determining whether the damages awarded are excessive.") (internal quotations omitted).

> decided to fix the award in this case at $3500, which amount we believe to be proper under the facts and circumstance of the case."[65]

Prior damage awards for deaths of white people decided by the same court were treated as not relevant to determining the appropriate remedial amount for deaths of black people.[66]

It is easy to see now how problematic and objectionable this is. The deaths of black people were placed in a different category from deaths of white people. Moreover, using "black-only" precedent to determine damages, going back in time to earlier periods not long past slavery where education and wage disparities may have been even more pronounced, and applying those decisions to more recent torts, clearly reinscribes past discrimination on more recent cases. This use of precedent to determine damage amounts should give us pause because of the choice of framework and because it imposes past values on recent harm.

4. Mortality Tables, Race, and Pecuniary Loss

A New York admiralty case about a boat crash on a foggy night in the early twentieth century contains an extraordinary discussion about mortality tables that shows how racially influenced judgments about the value of a person's life have affected courts' views of the proper methodology to use in valuing such lives. The case, *The Saginaw and the Hamilton*, resulting from a collision between two boats in fog caused by the fault of both pilots, included discussion of the wrongful death cases of the eight people who drowned.[67] Six of the eight were "colored" and two of the eight were "white." Although the case eventually reached the United States Supreme Court and resulted in an affirmance by Justice Holmes, the trial judge's analysis of race and mortality tables was not mentioned in the appellate opinions.

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65. Young v. Broussard, 189 So. 477, 481 (La. Ct. App. 1939) (internal citations omitted).

66. Wriggins, *Torts*, *supra* note 1, at 125.

67. 139 F. 906 (S.D.N.Y. 1905). The liability portion of the analysis is contained in *In re Clyde S.S. Co.*, 134 F. 95 (S.D.N.Y. 1904).

The damage law that applied to this collision was that of Delaware, which allowed only pecuniary loss damages to the surviving family members in wrongful death actions.[68] An admiralty commissioner made a preliminary decision on damage amounts, using standard mortality tables to estimate the life expectancies of the drowning victims, and in turn to gauge the pecuniary loss of the surviving family members.[69] Federal District Judge Adams, handling an appeal by the ship companies from the commissioner's decision, substantially reduced the damages for the surviving family members of both the black and the white decedents.[70] Judge Adams flatly rejected the use of mortality tables, although they were already commonly used in litigation for just this purpose.[71] Adams wrote that mortality tables "are very useful in insurance matters, but seem to afford little real aid in determining the duration of life in such cases as are now presented . . . . I have no confidence in, and less respect for, these tables made up by insurance agents, in which, of course, large allowance must be made for heavy commission, expenses, and profit. *And this is especially true where colored persons are concerned*."[72] He then quoted and included in his published opinion racially specific life expectancy tables based on census data from the 1896 book by Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro*.[73] These showed shorter life expectancies for "colored" people and purportedly showed "the difference in the vitality of the two races."[74] Frederick Hoffman is remembered for having claimed that the black population would eventually die out altogether because of its race-based "immorality," based on statistical analysis of comparative mortality and other figures,[75] and for being a prominent proponent of what

68. *The Saginaw*, 139 F. at 906 ("The measure of damages is such a sum as the deceased would probably have earned in his business during life, and would have gone to his next of kin, taking into consideration the age of the deceased, his ability, disposition to labor, habits of living and expenditure.").

69. *Id.* at 914–15.

70. *Id.*

71. *Id.*

72. *Id.* at 913–14 (emphasis added) (internal quotations omitted).

73. *Id.* at 914.

74. *Id.*

75. Brian Glenn, *The Shifting Rhetoric of Insurance Denial*, 34 LAW & SOC'Y REV. 779, 790–91 (2000). Glenn quotes the following passage from the Hoffman book on which Adams relied:

now is often termed "scientific racism."[76] Judge Adams thought that using "blended," race-neutral mortality tables, which presumably combined mortality data on whites and blacks, to estimate blacks' life expectancies, would overestimate blacks' life expectances.[77] To then base pecuniary loss estimates on those tables would be too generous to the surviving family members of black decedents, because of the shorter life expectancies of blacks.[78]

Judge Adams, significantly, did not substitute race-specific mortality tables from the census data.[79] Those race-specific mortality tables would have made the lost wage calculations lower, and hence the pecuniary loss calculations lower, than would using the mortality tables the commissioner applied.[80] Adams' assumption seems to have been that even using race-specific mortality tables based on past census data would overestimate black life expectancies

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> For the root of the evil lies in the fact of an immense amount of immorality, which is a race trait, and of which scrofula, syphilis, and even consumption are the inevitable consequences. So long as more than one-fourth (26.5 per cent. in 1894) of the births for the colored population of Washington are illegitimate,—a city in which we should expect to meet with the least amount of immorality and vice, in which at the same time only 2.6 per cent. of the births among the whites are illegitimate,—it is plain why we should meet with a mortality from scrofula and syphilis so largely in excess of that of the whites. And it is also plain now, that we have reached the underlying causes of the excessive mortality from consumption and the enormous waste of child life. It is not in the conditions of life, but in the race traits and tendencies that we find the causes of the excessive mortality. So long as these tendencies are persisted in, so long as immorality and vice are a habit of life of the vast majority of the colored population, the effect will be to increase the mortality by hereditary transmission of weak constitutions, and to lower still further the rate of natural increase, until the births fall below the deaths, and gradual extinction results.

Id.

76. Beatrix Hoffman, *Scientific Racism, Insurance, and Opposition to the Welfare State: Frederick L. Hoffman's Transatlantic Journey*, 2 J. GILDED AGE & PROGRESSIVE ERA 2 (2003), *available at* http://www.historycooperative.org/cgi-bin/justtop.cgi?act=justtop&url=http://www.historycooperative.org/journals/jga/2.2/hoffman.html (last visited Oct. 7, 2007).

77. *The Saginaw*, 139 F. at 914.

78. *Id.* at 914–16.

79. *Id.*

80. *Id.*

because, according to Hoffman, blacks' lifespans were further decreasing due to the "difference in vitality"[81] of the two races.

Ironically, instead of using "better" race-specific mortality tables from the census to calculate the pecuniary loss remedy, he used an intuitive method, judging for himself how long he thought the decedents would have lived if they had not drowned, and meting out what he thought the surviving family members of each decedent would have received from the decedent.[82] He rejected the use of tables altogether to arrive at a sum that seemed fitting.[83] Although he lowered all the awards, on average he lowered the awards for the deaths of blacks ten percent more than the awards for the deaths of whites and he slashed three of the awards for blacks by forty percent or more.[84]

From today's perspective, Judge Adams and Frederick Hoffman were clearly wrong in their projections into the future. Judge Adams' approach, particularly given his seeming agreement with Frederick Hoffman's analysis, is also problematic because its individualized, intuitive method of determining remedies allows race and racism to have tremendous influence in ways that are nearly impossible to prove. While the idea of using group-based tables or generalizations to make decisions about damage remedy amounts is appealing in order to escape from the subjectivity of the intuitive method, any decision to use a group-based projection into the future as the basis for a damage remedy also involves normative judgments about the relevant frame of reference and the rate of future change.[85]

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81. *Id.* at 914.

82. For example, regarding one victim, Sarah Elam, he wrote:

> The deceased was a colored stewardess on the Saginaw. She was 53 years of age and earned $10 per month with board. The latter was worth to her about $17 per month. She left three children who were more or less dependent upon her for support. The claimant was allowed $2,500. In view of the age of the deceased and her small earning capacity, I think the award was excessive and should be reduced to $1,500.

Id. at 915.

83. *Id.*

84. *Id.* at 914–916.

85. Chamallas, *Civil Rights*, *supra* note 1, at 1446.

5. Wrongful Death and Survival Damages in Louisiana

In order to examine how damages remedies may have been affected by race and racism, I read all the Louisiana appellate wrongful death and survival cases published between 1900 and 1950 dealing with the amounts of damages, of which there were 152. Twenty-six were brought by families identified as "Negro" or "colored," while the remaining 126 were brought by whites.[86] Louisiana's pertinent code provision allowed surviving family members in a wrongful death case to recover not only for pecuniary loss, grief, and loss of consortium, but also allowed the decedent's pain and suffering and lost wages to be recovered.[87] Louisiana cases were particularly rich with detail because, since Louisiana is a civil code state rather than a common law state, appellate review allowed judges to closely review facts, make their own factual determinations, and decide damage amounts.[88] Damage amounts awarded to surviving black family members overall were less than half amounts awarded to surviving white family members. The median award for black family members per case was $3,200, while the median award for white family members per case was $7,021. The average award for black family members per case was $3,559, while the average award for white family members per case was $8,245. The highest awards for both blacks and whites were for the deaths of husband-breadwinners, who had been supporting a wife and children, and the highest white award was more than double the highest black award. No clear pattern emerged as to appellate courts reversing jury verdicts for blacks or whites. Indeed, on occasion appellate courts reversed defense verdicts against black plaintiffs and ordered judgments in favor of black plaintiffs. Comparison of some contemporaneous cases from the same courts suggests "racially selective empathy,"[89] in which judges seem to value pain and

86. The Louisiana materials are discussed in more detail in Wriggins, *Torts*, *supra* note 1, at 110–29. I also reviewed cases from 1865–1900 dealing with amounts of damages, of which there were less than five. This research is also part of a larger project on wrongful death cases generally.

87. LA. CIV. CODE ANN., art. 2315 (2005).

88. *See* Wriggins, *Torts*, *supra* note 1, at 110–30 (discussing appellate review of Louisiana wrongful death cases from 1940–1949).

89. Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment,*

suffering and even lost wages of white decedents more highly than that of black decedents.

IV. 1950S–NOW

Methodological problems mentioned earlier continue to make definitive conclusions elusive. The race of litigants is mentioned in appellate tort opinions less and less frequently from 1950 on. No longer is the civil justice system 'white' in exactly the way it was earlier. African-Americans can be jurors, and there are some African-American lawyers and judges. Anecdotal information, however, suggests devaluation patterns endure.[90] Race-specific worklife expectancy tables are used in cases where plaintiffs have no established work history, and these clearly disadvantage minority plaintiffs since they project lower earnings for racial minorities.[91] Empirical studies on the effect of race on damage outcomes point in contrasting directions.

One of the few studies with data on race and tort remedies is the well-known "Cook County Study."[92] The Cook County study was an analysis of over 9,000 civil jury trials in Cook County, Illinois that took place between 1959 and 1979.[93] Focusing only on race in terms of black and white, the authors found that "race seemed to have a pervasive influence on the outcomes of civil jury trials," that black plaintiffs lost more often than white plaintiffs in similar cases, and that the disadvantage for black plaintiffs was not less near the end of the study period.[94] This study noted that successful black plaintiffs received awards only 74% as large as white plaintiffs'

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and the Supreme Court, 101 HARV. L. REV. 1388, 1420 (1988); *see* Wriggins, *Torts*, *supra* note 1, at 122–24 (discussing case comparisons).

90. Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 780 (1996).

91. Chamallas, *Civil Rights*, *supra* note 1, at 1438–39. Canadian jurisprudence has much more directly explored the ramifications of using race- and gender-specific worklife expectancy tables, as discussed in Chamallas, *Civil Rights*, *supra* note 1.

92. AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (1985).

93 *Id.* at v.

94. *Id.* at viii.

awards in comparable cases.[95] The authors also found that black plaintiffs were underrepresented relative to their proportion in the population, suggesting contingent fee lawyers may have been less willing to take their cases.[96] If so, perhaps this was because damages like lost wages were low, the authors suggested.[97] Neil Vidmar has criticized the supposition that juries discriminate against black plaintiffs, and suggested other possible explanations. He posits that perhaps less competent lawyers represented blacks, perhaps black clients could not afford economic or other experts to demonstrate the cost of their injuries, or perhaps black litigants had lower economic losses.[98]

A fascinating, more recent study concluded, based on an impressive array of data, that average jury verdicts significantly increased as black county poverty rates increased.[99] It also found that jury verdicts increased as Hispanic county poverty rates increased, although the authors were less sure of that conclusion because of definitional issues.[100] Noting the paucity of research on race and the civil justice system in contrast to the better-studied relationship between race and the criminal justice system, the authors' general hypothesis is that jury population affects tort awards.[101] The study did not include actual jury composition but inferred higher black jury populations from higher black and Hispanic populations in certain counties.[102] It also did not have data on the race of plaintiffs or defendants. The study also noted that increases in the white poverty rate actually led to decreases in verdict

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95. *Id.*

96. Neil Vidmar, *Making Inferences About Jury Behavior from Jury Verdict Statistics*, 18 LAW & HUM. BEHAV. 599, 606 (1994).

97. CHIN & PETERSON, *supra* note 92, at ix.

98. Vidmar, *supra* note 96, at 606.

99. Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 26, 51–52 (2003). One large state court dataset dealt with trials from 1997–1998, a smaller federal court dataset dealt with trials from 1988–1997, and an additional state court dataset covered trials from 1991–1992. *Id.* at 29–32. The study also found that increases in the black poverty rates increased settlement amounts in those counties. *Id.* at 50. What the authors mean by "black poverty rate" is the "number of in-poverty blacks as a percentage of the county population." *Id.* at 38.

100. *Id.* at 47.

101. *Id.* at 38.

102. *Id.* at 52.

size.[103] The authors did not draw conclusions about causation, but they did control for many variables that might have influenced the result.[104] The authors note that "[o]ne hypothesis that could explain our results is that poor black and Hispanic jurors decide cases differently from white jurors of all poverty levels. Given the different life experiences of poor black and Hispanic jury members relative to whites of all poverty levels, it appears plausible that the decisions of such jurors about justice and due compensation could differ significantly from those of other jurors."[105] One revealing observation is that while some may argue that these data show that verdicts are 'too high' in poverty-stricken areas with predominately black and Hispanic populations, this 'too high' conclusion is only sound if you take the proper norm as being the norm in other areas. If you take the verdicts from black and poor, and Hispanic and poor areas reported in the study as the norm, verdicts elsewhere are 'too low.' Particularly given the seemingly disparate conclusions of the various studies, more research into contemporary dynamics of race and civil justice remedies is necessary.

V. CONCLUSION

The most common tort remedy is money damages for individuals. When black plaintiffs brought damages cases, tort remedies for individuals could, and did, have broad implications for persons other than the plaintiffs. An outstanding example of this is the important Fifth Circuit case of *Bullock v. Tamiami Trails Tours*, where the Fifth Circuit in 1959 held that a bus company was liable for injuries that a black married couple seated in the front of a bus suffered when a white passenger assaulted and battered them.[106] Tort law in this case served as a civil rights remedy, putting other interstate bus companies on notice that their obligations included protecting black passengers sitting in the front of buses.

Given the importance of race and racism in our nation's legal history, it would be astonishing if race and racism played no role in the assessment of damages. New attention to race and damages,

103. *Id.* at 43.
104. *Id.* at 41–49.
105. *Id.* at 52.
106. 266 F.2d at 332.

particularly from Emancipation to 1950, paints a complex picture showing that race and racism are not extrinsic to torts but are as surely a part of it as is industrial development. Torts used an individualized market mechanism, the contingency fee agreement, which broadened access to remedies beyond what it would have been in the absence of that mechanism. Yet that same commitment to individualized remedial measures allowed great subjectivity, variation, and bias in settlements, trials, and appeals. In other words, the system allowed great latitude for like cases to be treated differently. Indeed, claims brought by African-American plaintiffs often seem to have been valued for less than comparable claims brought by whites. Moreover, the cumulative effect of even small differences in damage remedies may be great over time. The individualized enforcement mechanism and corresponding room for subjectivity, variation, and bias remain past 1950. More recent evidence is somewhat contradictory but does confirm the conclusion that race is significant in tort remedies.

The contemporary quest for ways to make damage remedies more consistent should be informed by examples from the racial history of tort law. The decision to use a particular framework of comparison is key, as we see in the "black-only" precedents chosen by some Louisiana courts in the 1930s to value (and devalue) the loss of black lives. Moreover, our search for neutral and consistent group-based predictions to estimate life expectancy and lost earnings is bound to be hounded by normative judgments. Federal Judge Adams' decision in early twentieth century New York, refusing to apply race-neutral mortality tables to pecuniary loss calculations for deaths of black people because he thought the black race would die out, is emblematic of the challenging nature of this search. If decisionmakers are attuned to the assumptions animating the choices of frameworks, tort remedies may hold promise for greater equity in the future.

3.05 Impeachment by Proof of Conviction of Crime

The credibility of a witness may be attacked by introducing evidence that the witness has been convicted of a crime. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

Comment

Proof of conviction for purposes of impeachment is no longer limited to proof of infamous crimes. In *People v. Montgomery*, 47 Ill.2d 510, 516, 268 N.E.2d 695, 698 (1971), the Illinois Supreme Court held that the provisions of the 1971 draft of Federal Rule of Evidence 609 (51 F.R.D. 315, 393 (1971)) would henceforth be the test for determining the admissibility of prior convictions used for impeachment.

After *Montgomery*, such crimes include those punishable by imprisonment for a term in excess of one year (felonies) and crimes involving dishonesty or false statement. Thus, impeachment is now proper with misdemeanors, such as theft, that have as their basis lying, cheating, deceiving, or stealing. *People v. Spates*, 77 Ill.2d 193, 201; 395 N.E.2d 563, 567-568; 32 Ill.Dec. 333, 337-338 (1979); *People v. McKibbins*, 96 Ill.2d 176, 187; 449 N.E.2d 821, 826; 70 Ill.Dec. 474, 479 (1983); *People v. Malone*, 78 Ill.2d 34, 38; 397 N.E.2d 1377, 1379; 34 Ill.Dec. 311, 313 (1979); *People v. Dalton*, 91 Ill.2d 22, 31-32; 434 N.E.2d 1127, 1132; 61 Ill.Dec. 530, 535 (1982); *People v. Poliquin*, 97 Ill.App.3d 122, 135; 421 N.E.2d 1362, 1372; 52 Ill.Dec. 290, 300 (1st Dist.1981); *People v. Elliot*, 274 Ill.App.3d 901, 909; 654 N.E.2d 636, 642; 211 Ill.Dec. 174, 182 (1st Dist.1995).

Montgomery limits the time which a conviction can be used for impeachment to a period within 10 years of the date of the conviction or the release from confinement, whichever is later. However, in each case, the judge must exercise his discretion as to whether or not to allow the impeachment by weighing the probative value of the evidence of the crime against the danger of unfair prejudice. *People v. Ramey*, 70 Ill.App.3d 327, 332; 388 N.E.2d 196, 199; 26 Ill.Dec. 572, 575 (1979); *People v. Tribett*, 98 Ill.App.3d 663, 675; 424 N.E.2d 688, 697; 53 Ill.Dec. 897, 906 (1st Dist.1981); *People v. Jones*, 155 Ill.App.3d 641, 647; 508 N.E.2d 357, 361; 108 Ill.Dec. 196, 200 (1st Dist.1987).

Impeachment by use of prior criminal convictions is proper in civil as well as criminal cases. *Knowles v. Panopoulos*, 66 Ill.2d 585, 589; 363 N.E.2d 805, 808; 6 Ill.Dec. 858, 861 (1977); *People v. Stover*, 89 Ill.2d 189, 194-195; 432 N.E.2d 262, 265; 59 Ill.Dec. 678, 681 (1982); *Taylor v. Village Commons Plaza, Inc.*, 164 Ill.App.3d 460, 464-465; 517 N.E.2d 1164, 1167; 115 Ill.Dec. 478, 481 (2d Dist.1987) (burglary and misdemeanor retail theft convictions properly used); *Ryan v. Mobil Oil Corp.*, 157 Ill.App.3d 1069, 1082; 510 N.E.2d 1162, 1170-1171; 110 Ill.Dec. 131, 139-140 (1st Dist.1987) (discretion properly exercised to exclude 9-year-old drug conviction).

A good review of the law concerning this subject is found in *People v. Kellas*, 72 Ill.App.3d 445, 449-452; 389 N.E.2d 1382, 1386-1389, 28 Ill.Dec. 9, 13-16 (1st Dist.1979); *People v. Stover*, 89 Ill.2d 189, 199-201; 432 N.E.2d 262, 268-269; 59 Ill.Dec. 678, 682-683 (1982); *People v. Williams*, 161 Ill.2d 1, 39, 45; 641 N.E.2d 296, 312; 204 Ill.Dec. 72 (1994); People v. Kunze, 193 Ill.App.3d 708, 728; 550 N.E.2d 284, 297; 140 Ill.Dec. 648, 661 (4th Dist.1990); *Housh v. Bowers*, 271 Ill.App.3d 1004, 1006-1007; 649 N.E.2d 505, 506-507; 208 Ill.Dec. 449, 450-451 (3d Dist.1995).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARIA JIMENEZ, LOURDES JIMENEZ, and JOSE JIMENEZ,	)	
Plaintiffs,	)	
v.	)	Case No. 06 C 5943
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER
ON MOTIONS IN LIMINE

The Court has before it several motions in limine filed by the parties in anticipation of trial. The Court will address each in turn.

I. Standard of Review

District courts have broad discretion in ruling on evidentiary questions presented before trial on motions in limine. *Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002). The power to exclude evidence in limine derives from this Court's authority to manage trials. *Luce v. United States,* 469 U.S. 38, 41 n. 4 (1984). Evidence should be excluded in limine only where it is clearly inadmissible on all potential grounds. *Id.* "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F.Supp. 1398, 1400 (N.D. Ill. 1993). Thus, the party moving to exclude evidence in limine has the burden of establishing that the evidence is not admissible for any purpose. *Id*. Denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. *Id*. at 1401. Rather, denial simply means the court cannot

determine whether the evidence in question should be excluded outside of the trial context. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989); *Broom v. Bozell, Jacobs, Kenyon & Eckhardt*, 867 F. Supp. 686, 690-91 (N.D. Ill. 1994). Accordingly, this Court will entertain objections as they arise at trial, even if the proffer falls within the scope of a denied motion in limine. See also *Robenhorst v. Dematic Corp.*, 2008 WL 1766525, at *2 (N.D. Ill. April 14, 2008).

II. Discussion

A. Plaintiffs' motion in limine regarding immigration status

Plaintiffs filed a motion in limine [57] seeking to bar any testimony concerning the immigration status of any of the Plaintiffs as irrelevant to any matter at issue, including Defendant's liability and the scope of injuries sustained by any of the Plaintiffs. The Court fails to see how Plaintiffs' immigration status can bear on any of those issues. Moreover, it appears, from Defendant's response brief as well as from defense counsel's comments at the final pre-trial conference on July 30, 2008, that Defendant proposes to use such testimony only to rebut certain proposed opinion testimony of one of Plaintiffs' witnesses, Dr. Hector Machabanski, concerning what Plaintiffs told him about how the accident has affected their lives. As explained below, the Court will exclude the testimony of Dr. Machabanski to the extent that his testimony is offered to "tell [Plaintiffs'] story" to the Court in regard to how their lives have been affected by the incident that gave rise to this lawsuit; Plaintiffs themselves are far better situated to provide that kind of testimony. In the absence of any such testimony from Dr. Machabanski, the proffered justification for Defendant's proposed testimony concerning Plaintiffs' immigration status appears to have been largely, if not entirely, eliminated. See Fed. R. Evid. 402.

Accordingly, the Court rules that all witnesses and the parties' counsel shall refrain from mentioning Plaintiffs' present or past immigration or citizenship status at trial on the ground that it is irrelevant to any issue in this case. To the extent that Defendant believes that the circumstances of Plaintiffs' lives other than the accident involving the postal truck are relevant to Plaintiffs' mental state, they may explore those circumstances without making reference to Plaintiffs' immigration or citizenship status.

B. Plaintiffs' motion in limine regarding pre-existing conditions

Plaintiffs have moved [58] to bar Defendant from presenting any evidence, unless supported by competent medical testimony, that any of Plaintiffs' injuries were caused by anything other than being struck by Ms. Hankerson's car. In support of their motion, Plaintiffs cite Illinois case law that stands for the proposition that absent a causal link between a pre-existing condition and an injury at issue, which in most instances must be established through the use of expert testimony, evidence of a pre-existing condition is inadmissible.

In their brief in opposition, and again at the final pre-trial conference, Defendant contended that Plaintiffs' motion regarding pre-existing conditions misunderstood Defendant's position and intentions. As clarified during the final pre-trial conference (Tr. at 7-11), the parties anticipate that the issue of pre-existing conditions will be injected into the case through the testimony of Plaintiff's treating physicians that the inactivity caused by the accident exacerbated the pre-existing conditions (diabetes and hypertension) of one of the Plaintiffs. If that is the extent of testimony concerning pre-existing conditions, Defendant will be permitted to cross-examine the treating physicians on such testimony. See, *e.g.*, *Felber v. London*, 803 N.E.2d 1103, 1107 (Ill. App. 2nd Dist. 2004); see also *Lagestee v. Days Inn Mgmt. Co.*, 709 N.E.2d 270, 280 (Ill. App. 1st Dist. 1999). The parties have not identified any other anticipated uses of

testimony concerning pre-existing conditions, and the Court notes that Defendant does not have any medical experts on its witness list. Thus, the motion to exclude will be denied without prejudice. Should any issues concerning pre-existing conditions arise during trial other than those identified above, Plaintiffs are free to renew their motion.[1]

C. Defendant's motion in limine to bar Plaintiffs' physicians from testifying as experts

Defendant seeks to bar Plaintiffs' treating physicians from testifying as expert witnesses [56], arguing that Plaintiffs failure to comply with Federal Rule of Civil Procedure 26(a)(2) deprived Defendant of the opportunity to adequately prepare for trial. In response to Defendant's motion, Plaintiffs acknowledge that they did not disclose their treating physicians as experts or provide expert reports as required by Rule 26(a)(2). However, Plaintiffs point out that the sanction of exclusion is not mandatory and ask that the Court consider the lesser sanction of limiting the treating physicians to the opinions expressed in letters that were disclosed to Defendants in an administrative proceeding that predated this court action. In support of their request, Plaintiffs rely on a case from the Central District of Illinois, *Dereak v. Don Mattox Trucking, LLC*, 2007 WL 3231417 (C.D. Ill. Oct. 30, 2007), which Plaintiffs contend arose in similar circumstances.

After reviewing all of the briefing, including Defendant's reply brief, and studying the *Dereak* opinion, the Court concludes that the circumstances here do not present nearly as compelling a case for departing from the ordinary rule in the Seventh Circuit that, absent a showing of substantial justification or harmlessness, the consequence of failing to properly disclose experts under Rule 26 is exclusion. See *Musser v. Gentiva Health Servs.*, 356 F.3d 751,

[1] As explained below, because Plaintiffs failed to identify their treating physicians as experts (or, more precisely, Rule 702 opinion witnesses), those physicians will not be permitted to offer Rule 702 opinion testimony. That ruling may affect the extent to which *Plaintiffs* may establish the existence of a pre-existing condition that may have been exacerbated by the accident.

757-58 (7th Cir. 2004) ("even treating physicians and treating nurses must be designated as experts if they are to provide expert testimony"). *Musser* supports Defendant's contention that compliance with Rule 26 "is not easily excused," and Plaintiffs have not shown that this case is closely analogous to *Dereak*, where the court did have a reasonable basis for imposing a lesser penalty for a party's failure to strictly comply with the Rule. In *Dereak*, the case began in state court, and while the case remained pending in state court the plaintiff provided sufficient notice under the applicable state court rules that certain medical witnesses would provide expert testimony. After the case was removed, the federal court refused to bar those witnesses because (i) the parties in *Dereak* agreed that the answers to the state court interrogatories did not need to be duplicated in the federal Rule 26 process, and (ii) the defendant in *Dereak* was on notice of the probable expert testimony and could have deposed the witnesses accordingly.

Conversely, this case began in federal court and Rule 26 always has applied. Although Plaintiffs claim that the parties agreed orally that prior disclosures through the administrative process would constitute their Rule 26 disclosure – a claim that Defendant disputes – Plaintiffs have not attempted to explain the procedures that apply in an administrative action. Accordingly, the Court has no way of knowing what steps Plaintiffs took to reveal their treating physicians as experts at the administrative phase. Nor is there any basis for overlooking the absence of strict compliance with the federal rules because the rules under which the parties previously were operating ensured substantial compliance, as appears to have been the case in *Dereak*.

What the Court can ascertain from the record is that at no point in federal court has Defendant been given notice that Plaintiffs would attempt to elicit Rule 702 opinion testimony from any of the numerous physicians who have treated Plaintiffs. During discovery, Defendant

served interrogatories and requests to produce on Plaintiffs. Interrogatory No. 4 asked Plaintiffs to list all witnesses, including expert witnesses, and Plaintiffs responded by stating that they would supplement their witness list during the period allowed for the disclosure of experts. Plaintiffs later informed Defendant that they intended to call Gary Skoog, Pamela Chwala, and Hector Machabanski as experts, and Defendant deposed these individuals and retained rebuttal experts for Skoog and Chwala. However, despite repeated extensions of the expert disclosure deadline, Plaintiffs never supplemented their answer to Interrogatory No. 4 to identify Dr. Silver or Dr. Treister as experts.

Rule 26(a)(2) is designed so that a party does not have to assume that each of the opposing party's treating physicians might be called as expert witnesses at trial. See *Musser v. Gentiva Health Servs*., 356 F.3d 751, 757 (7th Cir. 2004). Exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless the non-disclosure was justified or harmless. *Id*. at 758. Because the Court does not find this case to be closely analogous to *Dereak* and cannot find that Defendant would not suffer substantial prejudice from the introduction of expert testimony that was not properly disclosed, the Court respectfully declines Plaintiffs' suggestion to follow *Dereak* and instead grants Defendant's motion in limine to bar Plaintiffs' treating physicians from offering at trial testimony that falls within the scope of Rule 702. See *Musser*, 356 F.3d at 757 n.2 ("a treating doctor (or similarly situated witness) is providing expert testimony if the testimony consists of opinions based on 'scientific, technical, or other specialized knowledge' regardless of whether those opinions were formed during the scope of interaction with a party prior to litigation"). Accordingly, Plaintiffs' treating physicians will be limited to testimony within their personal knowledge concerning initial observations and follow-up diagnosis and treatment, as reflected in medical records – in short, testimony that

reflects their "involvement in the facts of the case." *Id*. at 757; see also *Griffith v. Northeast Illinois Regional Commuter Railroad Corp.*, 233 F.R.D. 513, 518-19 (N.D. Ill. 2006). As Defendant stated in its reply brief, it "does not object to the testimony of the treating physicians in regard to the facts of the medical records" and in fact has "stipulate[d] to the authenticity of the medical records." Reply at 4-5. However, the treating physicians may not offer Rule 702 testimony – for example, on matters such as causation, permanency, or future disability. See *Griffith*, 233 F.R.D. at 519.

D. Defendant's motions in limine to exclude Plaintiffs' disclosed Rule 702 opinion witnesses

Defendant has filed two motions [52 and 55] seeking to exclude the testimony of Plaintiffs' disclosed Rule 702 opinion witnesses.[2] As an initial matter, the Court recognizes the Seventh Circuit's teaching about the critical distinction between a jury trial and a bench trial with respect to the Rule 702 inquiry:

> Where the gatekeeper and the factfinder are one and the same – that is, the judge – the need to make such decisions prior to hearing the testimony is lessened. See *United States v. Brown*, 415 F.3d 1257, 1268-69 (11th Cir. 2005). That is not to say that the scientific reliability requirement is lessened in such situations; the point is only that the court can hear the evidence and make its reliability determination during, rather than in advance of, trial. Thus, where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.

In re Salem, 465 F.3d 767, 777 (7th Cir. 2006); see also *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself"). Under this sensible approach, the judge in a

[2] Defendant also filed a third motion in limine [51] to exclude Pamela Jo Chwala's testimony regarding a life care plan for Plaintiff Zenaida Mendoza. However, on August 14, 2008, the parties notified the Court that they have settled Ms. Mendoza's claims and that Defendant withdraws it motion in limine as to Chwala.

bench trial may choose to allow the presentation of borderline testimony, subject the testimony to the rigors of cross-examination, and decide later whether the testimony is entitled to some consideration or whether it should be excluded as irrelevant, unreliable, or both.

1. Defendant's motion in limine to exclude the testimony and report of Gary Skoog, Ph.D. [55]

Plaintiffs offer the testimony of Gary Skoog, Ph.D., to evaluate the economic loss incurred by Plaintiff Maria Jimenez as a result of injuries sustained in the accident. Defendant points out a number of criticisms of Skoog's methods, most specifically that his reliance on subjective testimony and speculation without regard to Plaintiffs' objective medical and financial history is not characteristic of the standard practice of economics. Those methods can be tested by cross-examination and Skoog's opinions can be disregarded by the Court if they are not well supported, credible, or based on reasonable methods and logical reasoning. For example, the dispute between Plaintiffs and Defendant concerning Skoog's reliance on a lifespan of 110 years for some of his calculations can be explored at trial, with the Court able to reserve ruling on admissibility until during or after the trial because this case will not be tried to a jury. Therefore, at this stage, the Court denies Defendant's motion to exclude the testimony of Gary Skoog, Ph.D.

2. Defendant's motion in limine to exclude Plaintiffs' Witness Hector Machabanski, Ph.D. [52]

Plaintiffs offer Hector Machabanski, Ph.D., a clinical psychologist, as an expert who will testify as to the effect of Plaintiffs' injuries on their lives and their emotional health. Defendant contends that Machabanski should not be permitted to speak on behalf of Plaintiffs because they are able to speak for themselves at trial and because his testimony is based solely on Plaintiffs' subjective statements.

At this stage, the Court fails to see how any testimony from Dr. Machabanski that simply summarizes his conversations with Plaintiffs would be helpful to the trier of fact, as it must be to be admissible under Rule 702. See *Walker v. Soo Line Railroad Co.*, 208 F.3d 581, 586 (7th Cir. 2000). Plaintiffs are able to testify for themselves during trial, and the Court will be in a position to hear their testimony (even if through an interpreter) and to observe their demeanor and credibility unfiltered through a paid expert witness. In the Court's view, the testimony of Plaintiffs would be much more helpful than listening to someone else recount their daily activities, feelings, and descriptions of injuries and pain. See, *e.g.*, *Hammond v. Coleman Co.*, 61 F. Supp. 2d 533, 539 (S.D. Miss. 1999) ("Dr. Rosenhan's repetition of Plaintiff's testimony is not helpful to the jury. The Plaintiff himself can testify to what happened to him.").

At the final pre-trial conference, counsel for Plaintiffs stressed that "even though a lot of Machabanski's report was things that the plaintiffs told him, he also did diagnose them with depression and Maria Jimenez with post-traumatic stress syndrome." Tr. at 5. Based on the briefing on that aspect of Dr. Machabanski's proposed testimony, the Court is skeptical of Machabanski's opinions because he did not perform any psychological tests or tests demonstrating chemical indicators of mental illness when diagnosing. Nor is there any indication that Dr. Machabanski consulted any of Plaintiffs' medical records. Rather, he appears to have relied exclusively on self-reports by Plaintiffs. However, because this is a bench trial and because Plaintiffs have represented that they anticipate that their direct examination of Dr. Machabanski will consume only thirty minutes of trial time, the Court will allow the proffered testimony of Dr. Machabanski's diagnoses, along with cross-examination of that testimony, "subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702." *In re Salem*, 465 F.3d at 777.

E. Defendant's motion in limine to exclude the testimony of family members and medical providers as cumulative

Defendant has moved to exclude [53] the testimony of family members, first responders, and medical providers listed on Plaintiffs' witness list as being cumulative. Defendant notes that it has agreed to stipulate to the authenticity of the entire medical records file and documents from Plaintiffs' medical providers, obviating the need to call certain medical witnesses. Defendant also contends that the testimony of family members as to Plaintiffs' injuries, pain, and suffering will be repetitive of medical records and testimony given by Plaintiffs themselves.

At the final pre-trial conference, the Court asked Plaintiffs to file a revised witness list, which included a description of the scope and subject matter of the proposed testimony for each witness as well as the anticipated length of direct examination of each witness. Plaintiffs provided their revised list, which included twenty-two witnesses that they intend to call. However, Plaintiffs indicated that two of the witnesses would be withdrawn if Defendant stipulated to a paramedic report (Paramedic Michelle Polanco) and nursing home records (Fernando Ojea, M.D., of Woodbridge Nursing Pavilion). Additionally, six others are listed as "May Call." The total time estimated for all of the Plaintiffs' witnesses to testify is 12.75 hours, and the total time estimated without the "May Call" witnesses is 10.25. Although the allotted time does not include cross-examination, the Court finds this estimation to be reasonable and cannot conclude at this time that any of the witnesses identified will provide cumulative testimony or will unduly lengthen the trial. Furthermore, as Plaintiffs acknowledged in their brief, if testimony becomes cumulative, the Court may impose limits and direct counsel to move the witness along. Therefore, based on Plaintiffs' revised witness list and the reasonable time estimations proposed by Plaintiffs, the Court denies Defendant's motion in limine to exclude the testimony of family members and medical providers as cumulative.

F. Defendant's motion in limine to exclude "Day in the Life" video

Defendant has moved to exclude [54] from trial a video containing footage of Maria Jimenez walking down the stairs of her former house as well as taped statements from Zenaida Mendoza, Maria Jimenez, and Jose Jimenez. The statements on the video are in Spanish and are not translated. Defendant seeks to exclude the video on the grounds that it is hearsay under Federal Rule of Evidence 802 and because it creates dangers of unfair prejudice.

Having reviewed the video, the Court is not persuaded that the video will be particularly helpful in assessing Plaintiff Jimenez' injuries. However, the Court will admit into evidence (and allow to be used at trial) those portions of the video that depict Maria Jimenez in "ordinary day-to-day situations," because those situations are of the greatest probative value. *Bannister v. Town of Noble*, 812 F.2d 1265, 1269 (10th Cir. 1987). The Court will exclude the conversations with attorneys and statements; any testimony of that nature that Plaintiffs wish to elicit is more properly presented through live testimony at trial. To the extent necessary, the Court will provide specific guidance on what parts of the video may be shown and discussed on the first day of trial.

III. Conclusion

For the reasons stated above, the Court grants Plaintiffs' motion in limine regarding immigration and citizenship status [57] and denies without prejudice Plaintiffs' motion in limine regarding pre-existing conditions [58]. The Court grants Defendant's motion in limine regarding Rule 702 opinion testimony of treating physicians [56], denies Defendant's motions in limine on Gary Skoog, Ph.D. [55] and cumulative witnesses [53], and grants in part and denies in part Defendant's motions in limine on Hector Machabanski, Ph.D. [52] and the "day in the life" video [54]. Defendant's motion in limine as to Pamela Jo Chwala, R.N. [51] is withdrawn.

Dated: August 14, 2008

Robert M. Dow, Jr.
United States District Judge

Senate Bill No. 41

CHAPTER 136

An act to add Section 3361 to the Civil Code, relating to damages.

[Approved by Governor July 30, 2019. Filed with Secretary of State July 30, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

SB 41, Hertzberg. Civil actions: damages.

Existing law authorizes a person who suffers a loss or harm to that person or that person's property, from an unlawful act or omission of another to recover monetary compensation, known as damages, from the person in fault. Existing law specifies the measure of damages as the amount which will compensate for the loss or harm, whether anticipated or not, and requires the damages awarded to be reasonable.

This bill would prohibit the estimation, measure, or calculation of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death from being reduced based on race, ethnicity, or gender.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares the following:

(a) The principals of equal protection and due process are fundamental to our democracy and the concept of civil liberty.

(b) California has been a pioneer in civil rights, leading the way in prohibiting discrimination on the basis of race, ethnicity, gender, and other protected categories.

(c) However, in tort actions around the state and country, race, ethnicity, and gender are routinely used in calculating damage awards that are meant to provide restitution to victims. For example, since women in America earn lower wages, on average, than men, the damages awarded to women are substantially lower than those received by men.

(d) Nearly one-half of economists surveyed by the National Association of Forensic Economics said they consider race, and 92 percent consider gender, when projecting earning potential for an injured person, including children. Future lost earning potential is a significant component of the damages awarded in tort actions.

(e) To determine projected lost earning potential, court experts typically rely on the Bureau of Labor Statistics' Current Population Survey. The results are a reflection of gender pay gaps and workforce discrimination, and they fail to account for possible progress or individual achievement.

(f) The consequence of this bias—to use averages that represent generations of discriminatory practices—is to perpetuate systemic inequalities. These practices disproportionately injure women and minority individuals by depriving them of fair compensation.

(g) Using race and gender-based tables can, by some estimates, under-value women and minorities by hundreds of thousands of dollars, including children who have not yet had the opportunity to work or identify career options. Specifically, these practices greatly disadvantage children of color, who are more likely to be impacted by environmental hazards created by the industrial facilities and factories located in low-income communities.

(h) Any generalized reduction of civil damages using statistical tables alone, based on a plaintiff's membership in a protected class identified in Section 51 of the Civil Code, is counter to the public policy of the State of California.

(i) This act shall not be construed to explicitly permit the generalized reduction of damages for lost earnings or impaired earnings capacity based on protected classifications not identified in the Bureau of Labor Statistics' Current Population Survey unless otherwise permitted by existing law.

SEC. 2. Section 3361 is added to the Civil Code, to read:

3361. Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender.

O