

In person-injury cases, race and gender can be weighed in assessing future losses



The Brooklyn Federal Court where G.M.M.'s case was tried. Andrew Combort/EPA (Andrew Gombert/EPA)

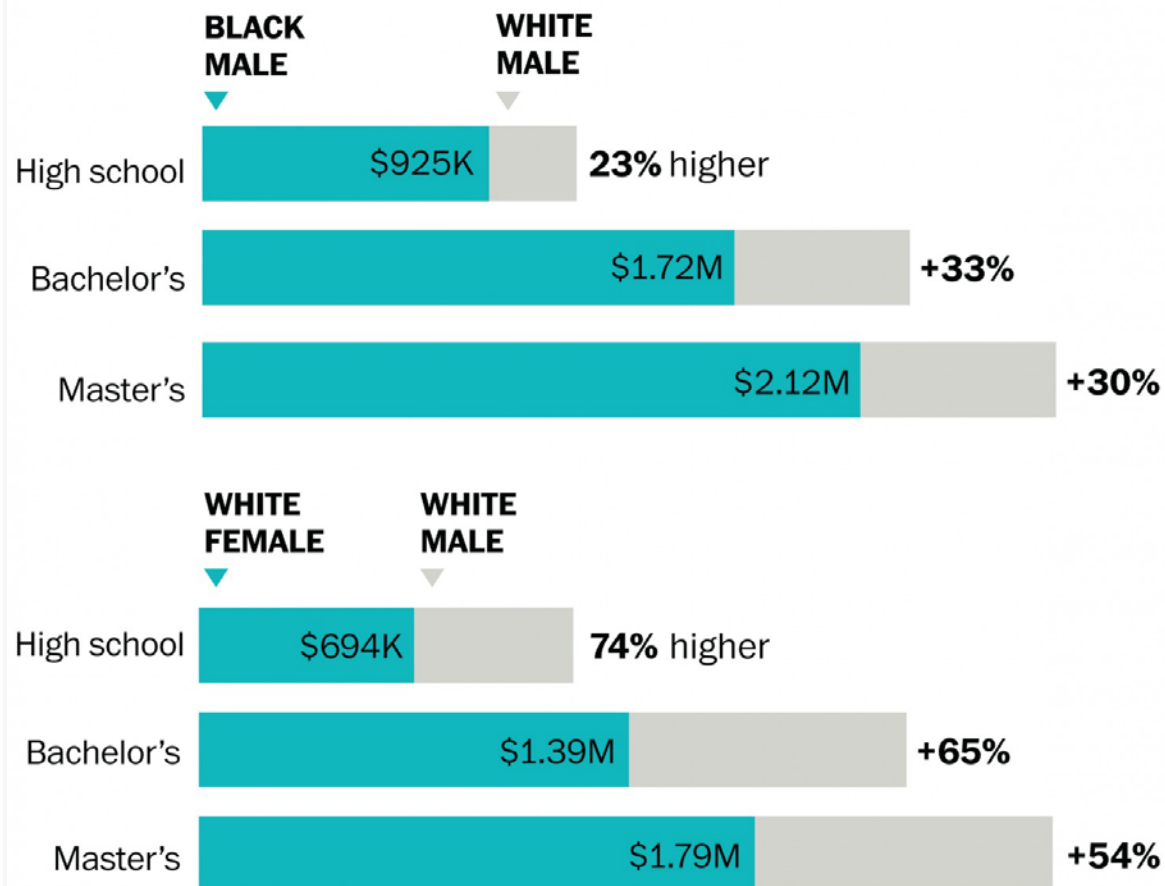
By [Kim Soffen](#) October 25 at 8:57 PM

The 4-year-old boy was mentally disabled, unable to speak in complete sentences and unable to play with other children because of his violent fits of hitting and biting.

The decision facing one Brooklyn jury last year was how much a landlord should pay in damages to the boy — named “G.M.M.” in court documents — after an investigation showed he had been living in an apartment illegally coated with lead paint. To determine that, the jury would have to decide how much more the boy would have earned over his lifetime without the injury.

People of color and women receive less compensation

Estimated future lost income, based on The Post's illustrative model



Note: This uses a simplified version of a future lost income model with an average race and gender bias. Assumes victim is under 25 with no work history and cannot work in the future.

Sources: Census Bureau; Krueger and Slesnick, "Total Worklife Expectancy".

THE WASHINGTON POST

Attorneys for G.M.M. said \$3.4 million was the right number, arguing that the boy would have had a bright career ahead of him; both of his parents had graduated from college and his mother received a master's degree, according to court records. But the landlord's defense put the figure at less than half that — \$1.5 million. Attorney Roger Archibald noted that because the boy was Hispanic, G.M.M. was unlikely to attain the advanced education that would garner such a large income.

“The [proportion] of Hispanics attaining master’s degrees was in the neighborhood of 7.37 percent,” Archibald told the court.

The 4-year-old’s case is a rare public look at one corner of the American legal system that explicitly uses race and gender to determine how much victims or their families should receive in compensation when they are seriously injured or killed.

As a result, white and male victims often receive larger awards than people of color and women in otherwise similar cases, according to more than two dozen lawyers and forensic economists, the experts who make the calculations. These differences largely derive from projections of how much more money individuals would have earned over their lifetimes had they not been injured — projections that take into account average earnings and employment levels by race and gender.

In one case, when a 6-year-old girl and a male fetus were killed in the same car crash, the settlement for the fetus was calculated to be up to 84 percent higher than the girl’s, according to court documents.

The debate over this use of demographic averages pits two tenets of the American justice system — fairness and accuracy — against each other.

Martha Chamallas, a law professor at Ohio State, called the practice reminiscent of “something Ruth Bader Ginsburg and civil rights advocates [fought] in the 1960s.” Jennifer Wriggins, a law professor at the University of Maine, said it “reinforces past discrimination and pushes it out into the future and endorses it.”

Defenders say it is the most accurate way to make calculations about the losses people incur when they are injured. “If there’s a difference in society, it is what it is. It’s a difference, and the economist’s job is to figure out what would have happened,” said James Woods, a forensic economist in Houston.

Law professors who study the practice in the United States say it deserves a fresh look, given America's increasing awareness of the role race plays in the justice system — as well as the progress women have made in closing other economic disparities. Some countries, including Canada and Israel, have moved away from using the averages in the name of equality.

And the United States has banned the use of race and gender averages in other calculations. The Affordable Care Act, for example, outlawed the practice of charging women more for health insurance than men.

“As you peel the onion of discrimination, you realize how embedded it is in our legal system and our society,” said Michael Meyerson, a law professor at the University of Baltimore.

Although G.M.M.'s case took place in open court, 95 percent of personal injury cases are settled behind closed doors, according to Lawrence Spizman, the president of the National Association of Forensic Economics. These settlements — which largely make up the \$35 billion personal-injury industry, according to IBIS World — are almost always attached to confidentiality agreements preventing the victims from discussing the terms reached.

George Barrett, a forensic economist in Charleston, W.Va., said “the overwhelming majority” of economists account for gender, and though less universal, it's “absolutely” common for race-based tables to be used. He called employing demographics averages “the industry standard.”

In a 2009 survey by the National Association of Forensic Economics, 44 percent said they considered race and 92 percent said they considered gender when projecting the annual wage for an injured child. Race and gender also come into play in many other calculations.

Still, even some economists acknowledge the practice has problems. For example, most economists don't attempt to account for how the earnings and

employment gaps between men and women will change over time. “If I had used [averages] for females back in 1970, I probably would have underestimated their incomes substantially,” said Bill Brandt, a forensic economist in Washington state.

For a typical 20-year-old woman in 1970, for instance, her future earnings would have been underestimated by as much as 28 percent.

‘I was scared’

In May 2011, G.M.M.’s parents trekked out of their Bedford Avenue apartment across Brooklyn to Macdonough Street. She was six months pregnant, and they were ready to get their own place and start a family. “We were very excited. We had been trying since we got married two years before,” his mother said in her testimony.

And the ground-floor Macdonough Street apartment was everything they were looking for — freshly renovated and affordable, with a garden in the back for their two dogs and soon-to-be son to enjoy, court records say.

That August, G.M.M. was born healthy. But a year later, his mother got a call. His physical examination at age 1, which had passed uneventfully, yielded a positive test for lead. She recalls in her testimony: “I was surprised. I was scared. I didn’t really know what was wrong.” The family declined to discuss the case.

The city’s health department tested the apartment. Lead was on the walls, doors, ceilings, closets, windows and cabinets in just about every room, according to a health department report. The home the family had made for themselves had been poisoning their son, the dust from the lead paint infiltrating his blood and brain with every breath. Within three days of the test, G.M.M. and his mother moved out, according to court records.

The family sued the landlord, alleging that his negligence and violation of the law — renting them an apartment coated with lead paint — caused their son's life-altering injuries. The landlord said he was not liable, blaming the family's dogs for unearthing lead inside the walls, where it was permitted.

Four years of legal battles later, the case was in federal court in Brooklyn — and became the latest public example of ethnicity becoming an issue in a personal-injury case.

Intricacies of assessing loss

The practice of using race and gender to determine personal-injury damages, which dates back at least a century, has produced some striking results.

The case of the male fetus and 6-year-old girl came in 1996, after a collision between a postal truck and a car left the car's passengers — the girl and her godmother, a pregnant 33-year-old — dead.

In the case, which was heard in a federal court in the Southern District of Georgia, both sides agreed the male fetus's award should be higher than the girl's, largely because of the difference in how much they were expected to earn over their lifetimes, commonly known as "future lost income." That is despite testimony that the girl "exhibited a level of intellectual ability and behavior that surpassed that of most other students" and had a college fund in the works. The fetus's mother had not completed college, and the father was unknown, according to court records.

In a 1991 case, the son of a U.S. Agency for International Development employee stationed in Liberia fell ill and suffered serious, permanent brain damage, allegedly because of the negligence of State Department doctors and other officials. The court ruled in the boy's favor, but when it came to assessing damages, there was an uncomfortable conflict: The boy's mother was white. His father was black. So what race was he?

The government argued that he qualified as black, which would have significantly decreased their liability. The plaintiff, with whom the judge eventually sided, pushed for considering both black and white statistics, according to court records.

Calculating future lost income takes into account the number of years a victim would have worked and his or her expected wages. Women and minorities are lower on both fronts.

Economists' calculations use these averages to varying extents based on the details of the case, also accounting for things such as the person's age and wage history. Demographic averages tend to play the biggest role in cases where lengthy work history, education and other variables aren't readily available — such as with children and people who (by choice or not) don't work.

One recent time that race and gender-based compensation came into public view, the variables were quickly removed amid the uproar.

Following the 9/11 terrorist attacks, Congress created the September 11th Victim Compensation Fund, which distributed taxpayer dollars to the injured and to the next of kin of the deceased. When the award formulas were announced, they relied on race- and gender-based tables, a fact that went unmentioned in the fund's public statements.

A flurry of public comments ensued. In a letter to the Justice Department, the National Organization for Women wrote, "This practice, we believe, threatens the constitutional rights of women and minorities, spinning into the future a history of state and private discrimination against these groups." The NAACP echoed the sentiment.

In response, the fund changed course, using race-neutral male tables to assess all damages.

In the small number of cases that make it to open court, race and gender considerations are likewise sometimes removed, economists say. “Saying, ‘Well, we don’t want to give the girl as much as the guy,’ it’s just not going to play [with the jury],” said Stan Smith, a forensic economist in Chicago.

‘Too general a category’

When Archibald, the landlord’s lawyer in the lead-poisoning case, brought up Hispanic averages in discussing the boy’s eventual education level, the judge interjected.

“I won’t allow you to continue along those lines. ‘Hispanics’ is too general a category,” said Judge Jack Weinstein of the Eastern District of New York. “We have professors as well as gardeners who are Hispanics.”

From then on, none of the discussion in court directly addressed G.M.M.’s demographics, according to court records. Yet that wasn’t the end of the story. Although the judge banned discussion of the boy’s ethnicity in the court, the jury still had access only to calculations of damages that included ethnicity as a component.

In a sign of how common the practice is, even the boy’s legal team accounted for his ethnicity but gave more weight to his family characteristics. The defense focused on outcomes of Hispanics nationwide.

“The jury was free to accept or reject whichever methodology was more in keeping with their conscience,” Archibald said in an interview.

Ultimately, the jury found the landlord liable and awarded the boy \$2 million in damages. After the landlord appealed, the case settled for \$1.9 million.

G.M.M., now 5, lives with his parents and younger sister in Dallas, where they moved in 2012 to be near extended family. He enjoys climbing trees and pretending to be a superhero, according to his mother’s testimony.

In an opinion written at the end of the case — which is a judge's prerogative but has no bearing on its outcome — Weinstein lashed out at the use of ethnicity in determining damages.

“Race and ethnicity are not, and should not, be a determinant of individual achievement. To support such a proposition distorts the American Dream,” he wrote. “A traditional, automatic, unthinking approach by experts in the field can no longer be tolerated.”