Chapter 6

Gender Impacts in Civil Proceedings as They Relate to Economic Consequences Including Fee Awards and Wrongful Death

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I. Summary

In 1989, the Washington State Task Force on Gender and Justice in the Courts identified potential gender disparities in wrongful death and loss of consortium awards. Due to small sample sizes and limits on time and resources, however, that Task Force concluded that "definitive answers are impossible."[1] Since then, the research on this topic has not grown much, but recent court cases and scholarly discussion have elevated concerns related to gender- and race-based discrimination built into wrongful death and loss of consortium awards.

One recent area of concern is that Washington law allows only legally married individuals or those in Registered Domestic Partnerships to recover for the wrongful death of their partner. Other couples are barred from recovering for the wrongful death of their partner regardless of how long-lasting the relationship was. Recent national data show that same-sex couples are less likely than opposite-sex couples to be legally married—indicating that same-sex couples are more likely to be unable to recover damages for the loss of their partner and relationship. In addition, a kinship caregiver who does not have legal guardianship of a child cannot receive damages for the child's wrongful death. This likely disproportionately impacts women, elders, Black, American Indian/Alaskan Native, and Hispanic/Latinx caregivers as these populations are disproportionally represented among kinship caregivers in Washington.[2]

Another area of gender and race disparity identified by the research is in verdicts for wrongful death and loss of consortium cases. The majority of the scholarship on this issue has focused on the use of gender- and race-based tables to predict a person's life expectancy, work life expectancy, economic loss, and the number of hours of lost household services per week. These tables are based on historical data showing women and Black, Indigenous, and people of color earn lower wages, with women of color having the lowest wages. Life and work life expectancy

[1] WASH. STATE TASK FORCE ON GENDER & JUST. IN THE COURTS, GENDER & JUSTICE IN THE COURTS 23 (1989), https://www.courts.wa.gov/committee/pdf/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf (hereinafter "1989 Study").

[2] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

are also shorter for Black, Indigenous, and people of color compared to white populations. These disparities are a result of historical and structural discrimination and inequities. Relying on such tables, however, institutionalizes these past errors and perpetuates them with lower awards. Recently, some courts have viewed the use of race- and gender-based statistics as a potential constitutional violation. These issues merit further study.

II. Introduction

The 1989 Study Task Force's Subcommittee on the Economic Consequences of Other Types of Civil Litigation (Subcommittee) sought evidence of gender bias in Washington state courts in three primary areas: wrongful death awards, loss of consortium awards, and attorney fee awards pursuant to the Washington Law Against Discrimination.[3] For each of the three primary areas reviewed, the Subcommittee used the following to identify potential gender bias:

1. "Jury Verdicts Northwest" (now titled "Northwest Personal Injury Litigation Reports");
2. Reports from the Superior Court Management Information System;
3. A survey of the Washington State Bench and Bar; and
4. Information from public hearings.

Due to the small sample sizes available and time and resource limits, the Subcommittee concluded that at the time "definitive answers are impossible" and instead, focused on identifying problem areas for future study.[4] Since 1989, the research on this area has not increased substantively, though court cases and scholarly discussion of this topic have elevated concerns related to gender-based and race-based discrimination built into wrongful death and loss of consortium awards. Anecdotal evidence from practitioners suggests that juries tend to give lower non-economic damages and loss of consortium verdicts to women, and Black, Indigenous, and people of color.

[3] ch. 49.60 RCW.
[4] 1989 Study, *supra* note 1, at 86.

III. Wrongful Death Awards

The 1989 Subcommittee hypothesized that "plaintiffs seeking monetary awards for the wrongful death of women receive lower awards than plaintiffs seeking awards for the wrongful death of men."[5] While the 1989 Study does not explicitly outline the reasoning behind this hypothesis, the background information included in the report points to lower wages and lower workforce participation among women, as well as anecdotal information indicating that loss of income was more highly valued than loss of services.[6] The Subcommittee recognized that other variables such as age, marital status, work experience, earning potential, and the number of dependents, would make it difficult to clearly test gender as a separate variable without more complex statistical analysis.[7]

To test their hypothesis, the Subcommittee examined 100 wrongful death actions from Washington courts dated 1984 to 1988 with data from the Superior Court Management Information System and *Jury Verdicts Northwest*. In the 100 cases, there were 98 separate verdicts involving 68 male decedents and 30 female decedents. Plaintiffs with female decedents won more often (63% for females versus 47% for males) but the mean award for male decedents was higher, $332,166 for males versus $214,923 for females. In the survey, 72% of lawyers and 43% of judges noted that survivors of male decedents generally win large awards, although the surveyed lawyers also noted employment outside the home by female decedents resulted in larger awards. The Subcommittee concluded that their analysis of the data does not clearly support a hypothesis of gender bias in wrongful death awards due to the inability to isolate the variable of gender without more advanced statistical analysis. Nonetheless, the evidence showed that male decedents generally win larger awards. This was found to be largely correlated with higher wages earned by men and a higher likelihood of employment outside of the home.[8] It is important to note that the 1989 Study did not address gender beyond the binary and did not at

[5] *Id.*
[6] *Id.* at 87-88.
[7] *Id.* at 93.
[8] *Id.*

all explore awards for transgender or nonbinary individuals—which was likely at least in part a function of the data limitations.

While no similar studies have been done since 1989, practitioners still report issues with juror bias and note that their female and Black, Indigenous, and clients of color often received lower non-economic damage verdicts. Clients who look and sound Hispanic are reported to have an especially difficult time. One lawyer noted that a female Hispanic client needed assistance from a Spanish interpreter at trial and that led some members of the jury to believe that the client was not in the country legally. For more on communication and immigration status barriers to justice see "Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts."

Further, issues with bias are not limited to the courtroom. Lawyers report that cases involving Black, Indigenous, or plaintiffs of color often receive lower settlement offers from insurance companies, many of which use proprietary software programs based on statistical data to calculate the value of non-economic damages. Those lower settlement offers leave female clients and clients of color with two options, neither of them good: Either (1) accept the low settlement offer likely based on biased data, or (2) end up in litigation, where Black, Indigenous, and people of color tend to do worse than their white counterparts.

A. Major changes to Washington's wrongful death laws since 1989

Washington has enacted several statutes allowing monetary recovery for certain family members for the wrongful death and the pre-death personal injuries of a deceased family member. The five different statutes are complementary and overlapping, which can create an analytical challenge:

- RCW 4.20.010: Allows recovery for wrongful death;
- RCW 4.20.020: Defines who may recover for wrongful death, typically referred to as the statutory beneficiaries;
- RCW 4.20.060: Special survival statute, which preserves all personal injury causes of action that result in death and allows recovery of the deceased person's pre-death

economic damages[9] and noneconomic damages,[10] as long as there are statutory beneficiaries;

- RCW 4.20.046: General survival statute, which preserves all causes of action a decedent could have brought before death, allows recovery for the deceased person's pre-death economic damages, and, if they are the statutory beneficiaries, noneconomic damages if the deceased later dies of unrelated causes; and
- RCW 4.24.010: Gives parents the right to sue for the injury or death of a child.

Before the Washington State Legislature implemented the wrongful death statutory scheme, the courts did not recognize a cause of action for wrongful death.[11] By enacting the wrongful death statutes, the Washington State Legislature provided a new cause of action to certain surviving family members.[12]

The wrongful death statutes allow certain classes of family members to recover their own damages caused by the wrongful death of the family member.[13] Currently, only two narrow classes of family members may recover their own damages for wrongful death.[14] The first tier of beneficiaries are the living spouse or children, including stepchildren.[15] If the deceased does not have a living spouse or children, then the second tier of beneficiaries who may recover are the surviving parents or siblings of the deceased.[16] Parents and siblings cannot recover if there are first-tier beneficiaries.[17] If none of the statutory beneficiaries exist, then no wrongful death

[9] Economic damages are "objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities." RCW 4.56.250(1)(a).
[10] Noneconomic damages are "subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship." RCW 4.56.250(1)(b).
[11] *Brodie v. Wash. Water Power Co.*, 92 Wash. 574, 576, 159 P. 791 (1916).
[12] *Id.*
[13] RCW 4.20.010(1).
[14] RCW 4.20.020.
[15] *Id.*
[16] *Id.*
[17] *Masunaga v. Gapasin*, 57 Wn. App. 624, 630, 790 P.2d 171 (1990).

action can be maintained, even if there are other family members dependent upon the deceased for support.[18]

The survival statutes focus on the damages suffered by someone who later dies, either from their injuries or from some other cause.[19] They were enacted to ensure the deceased's causes of action survived their death.[20] The special survival statute allows recovery of the deceased's economic and noneconomic damages arising out of personal injury resulting in death, but only if the deceased is survived by the statutory beneficiaries listed above.[21]

The general survival statute allows the estate to recover medical expenses and other economic damages of the deceased, regardless of whether the deceased is survived by any statutory beneficiaries.[22] If the deceased is survived by the statutory beneficiaries, then the estate can also recover the deceased person's pre-death pain, suffering, and other noneconomic damages arising out of personal injury.[23] If there are no statutory beneficiaries, then for purposes of the survival statutes, the deceased's pre-death noneconomic damages cannot be recovered.[24]

Only those who are legally married are spouses under the wrongful death and survival statutes.[25] Unmarried partners, regardless of how long-lasting the relationship is, may not recover for the wrongful death of their partner.[26]

Aside from RCW 4.24.010 and RCW 4.20.046, these statutes were largely identical in substance to the laws in place at the time the 1989 Study was released. The few amendments include the addition of state registered domestic partners to the beneficiary list,[27] and the corresponding addition of gender inclusive language (adding "her" to statutes so that they read "his or her") in 2008 and 2011.[28] In 2012, marriage of same-sex couples was approved and the status of

[18] *Tait v. Wahl*, 97 Wn. App. 765, 769, 987 P.2d 127 (1999).
[19] RCW 4.20.046; RCW 4.20.060.
[20] *Estate of Otani v. Broudy*, 151 Wn.2d 750, 755-56, 92 P.3d 192 (2004).
[21] RCW 4.20.060(1)-(3).
[22] RCW 4.20.046(1)-(2).
[23] RCW 4.20.046(2).
[24] *Tait v. Wahl*, 97 Wn. App. 765, 771, 987 P.2d 127 (1999).
[25] *Roe v. Ludtke Trucking*, 46 Wn. App. 816, 819, 732 P.2d 1021 (1987).
[26] *Id.*
[27] LAWS OF 2007, ch. 156.
[28] LAWS OF 2008, ch. 6; LAWS OF 2011, ch. 336.

Registered Domestic Partnership for same-sex couples was phased out. It now exists only for couples where at least one of the partners is 62 or older, so marriage is the primary mechanism that would entitle someone to recover for the wrongful death of their partner.[29] It is important to note that this "his or her" language still excludes gender non-binary individuals and other gender nonconforming individuals and "their" would be more inclusive terminology.

In 2019, the Washington State Legislature replaced gendered terms such as husband, wife, brother, sister, father, and mother with gender neutral terms such as spouse, siblings, and parent in RCW 4.20.020 and 4.20.060.[30] Terminology changes to statutes such as these acknowledge the fact that gendered language is often written into our policies, it has an impact, and is therefore worth amending to more gender neutral and inclusive language.

In 2019 RCW 4.20.010 was amended to allow the statutory beneficiaries to recover both economic and noneconomic damages for the wrongful death of a family member.[31] There is no appellate case law interpreting the new language, and it is too soon to say what, if any, impact this particular amendment will have on wrongful death awards.

The 2019 Legislature also heavily amended RCW 4.24.010 to clarify the recoverable damages for a parent or legal guardian when an adult child dies. Before this amendment, a parent could recover for the wrongful death of an adult child only if the parent was economically dependent on their child.[32] Now the statute allows recovery for the wrongful death of any adult child if the parent had a "significant involvement" in the child's life, defined as "demonstrated support of an emotional, psychological, or financial nature within the parent-child relationship, at or reasonably near the time of the incident causing death."[33] Finally, the 2019 Legislature changed the law such that "each parent is entitled to recover for their own loss separately from the other parent regardless of marital status, even though this section creates only one cause of action."[34]

[29] Tom Andrews, *Cohabiting with Property in Washington: Washington's Committed Intimate Relationship Doctrine*, 53 GONZ. L. REV. 293, 298 n.19 (2018).
[30] LAWS OF 2019, ch. 159.
[31] LAWS OF 2019, ch. 159, § 1.
[32] *Warner v. McCaughan*, 77 Wn.2d 178, 185, 460 P.2d 272 (1969).
[33] LAWS OF 2019, ch. 159, § 5.
[34] *Id.*

These changes recognize that the death of a child is a traumatic experience, no matter how old the child is. The changes also recognize the loss of a child is personal to each person and allows each parent to recover damages separately from the other, regardless of their marital status. These changes, however, still leave out "parent-like" relationships of those who are not related by birth or marriage.

For purposes of the survival statutes, prior to 1993, the noneconomic damages suffered by a decedent prior to death were not recoverable. The Washington State Legislature changed this to allow recovery of such damages but only if the deceased was survived by a spouse or children, and if not, then financially-dependent parents or siblings. If there are no statutory beneficiaries, there can be no recovery for the deceased's noneconomic damages. As with the wrongful death statutes, the limited definition of beneficiaries leaves out partners who live together but are not legally married.

Finally, in 2013 the Washington Supreme Court held that municipalities could be liable under tort law, including for wrongful death, for the actions of their police officers in serving an anti-harassment order where an officer fails to act reasonably to protect the victim from the foreseeable criminal conduct of the harasser.[35] In that case, the police officer served an anti-harassment order and then left, even though both the victim and the harasser were home at the same time, the order required the harasser to move out, and the harasser was known to have violent tendencies.[36] Later that day, the harasser murdered the victim and then killed himself.[37]

The court held that the officer created a situation that left the victim and the harasser together in a potentially explosive situation.[38] The purpose of imposing tort liability on police departments in serving antiharassment orders is to deter unreasonable behavior.[39] Because women; Black, Indigenous, and people of color; immigrants; those living in poverty; and Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning (LGBTQ+) individuals are the victims of harassment and abuse at significantly higher rates than their counterparts, this opinion in theory should help keep

[35] *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013).
[36] *Id.* at 739.
[37] *Id.* at 740.
[38] *Id.* at 760.
[39] *Id.* at 761.

these populations safer. See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence," for more information on rates of sexual abuse, and "Chapter 5: Gender and Employment Discrimination and Harassment," for more information on rates of harassment and abuse in workplaces.

IV. Loss of Consortium Awards

The 1989 Study Subcommittee also examined whether there was gender bias in loss of consortium cases.[40] Generally speaking, loss of consortium is the term used to capture the emotional loss of a spouse, parent, or child. For spouses, it means "the right of [one spouse] to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care services, companionship, including sexual companionship, as well as assistance from [one spouse] to the other."[41] For the loss of a parent, it means "[l]oss to [child] of the love, care, companionship, and guidance of [parent]."[42]

To determine whether there was gender bias in loss of consortium claims, the Subcommittee examined a total of 85 awards to determine if there were gender disparities in jury awards or in awards decided through arbitration[43]. It found that the average jury award for female claimants was $7,843 compared to $8,337 for male claimants (approximately $500 more per claim). However, cases decided through arbitration saw higher awards for female claimants than male claimants (the average awards in arbitrations were approximately $1,316 more per claim for female claimants). When surveyed for the 1989 Study, a majority of judges and attorneys thought that the awards were comparable whether the decedent was male or female. The Subcommittee concluded that "no determination can be made from the raw data provided here as to whether the differences are statistically significant" (without using more complex statistical analysis that

[40] Loss of consortium is an aspect of damages for both wrongful death and personal injury cases.
[41] 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 32.04 (7th ed. 2019) (WPI).
[42] *Id.*; WPI 32.05.
[43] Arbitration is a less formal, faster, and less costly way for the parties to resolve smaller disputes. It usually involves a lawyer appointed by the court to act as the decisionmaker. *See* Washington Superior Court Civil Arbitration Rules 1.1-8.5.

would have allowed them to control for potential confounding factors) but that "the data gives no indication of gender bias in loss of consortium awards."[44]

Washington's loss of consortium law has been relatively static since the 1989 Study with two exceptions. First, in *Sofie v. Fibreboard Corp*., the Washington State Supreme Court held that the legislative cap on recovery of noneconomic damages, including loss of consortium, codified at RCW 4.56.250(2), violated the Washington Constitution's right to a trial by jury, which gives the jury the "traditional function to determine damages."[45] This is significant as many tort scholars note that noneconomic damages were of particular importance for women and Black, Indigenous, and people of color.[46]

Second, in 1995, the Washington State Legislature amended a workers compensation statute, RCW 51.24.030, to ensure the spouses and children of injured workers were allowed to keep their loss of consortium awards.[47] That way, the Department of Labor and Industries could not take those loss of consortium awards as part of its right to recover benefits it paid to the injured worker.[48]

Practitioners still report that, in general, women are likely to have a lower value placed on their household work and services. Anecdotal evidence also suggests that the testimony of women in loss of consortium cases may be less valued by lawyers who represent them, whether because of the personal biases of those lawyers or a belief that jurors would value their testimony less.

V. Analysis of Gender Bias in Tort Awards in the Literature

The literature highlights three primary areas of concern related to wrongful death and loss of consortium awards: 1) the inability of couples who are not married and are not in a Registered Domestic Partnership to recover for the wrongful death of their partner, 2) the inability of

[44] 1989 Study, *supra* note 1, at 99.
[45] 112 Wn.2d 636, 638, 771 P.2d 711 (1989).
[46] Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 530 (1998).
[47] LAWS OF 1995, ch. 199.
[48] *See also Carrera v. Olmstead*, 189 Wn.2d 297, 401 P.3d 304 (2017); *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 115 P.3d 1031 (2005).

caregivers in kinship caregiving arrangements to recover for wrongful death and loss of consortium, and 3) the use of gender- and race-based tables to predict life expectancy, work life expectancy, economic loss, and the number of hours of lost household services per week which institutionalize historical and structural discrimination and inequities into tort awards.

A. Couples who are not married or in Registered Domestic Partnerships cannot recover for the wrongful death of a partner

As noted above, while the 2007 Washington State Legislature added Registered Domestic Partners to the wrongful death beneficiary list,[49] when marriage of same sex couples was approved in 2012 the status of Registered Domestic Partnership for same-sex couples was phased out. Because registered domestic partnerships in Washington now exist only for couples where at least one of the partners is 62 or older, marriage is the primary mechanism that would entitle someone to recover for the wrongful death of their partner.[50]

Other unmarried couples may not recover for the wrongful death or the loss of consortium of their partner. Some version of wrongful death legislation has been on the books since 1854—before Washington officially became a state.[51] it is useful to examine the Washington State Legislature's rationale for limiting who can recover for wrongful death.

Early on, the purpose of the wrongful death statute was purely to provide financial support to those who were deprived of economic support by the wrongful death of a family member.[52] Similarly, the origin of the consortium action was to allow the "master to recover for tortious injury to his servant, since the loss of the servant's services would result in a financial injury to the master."[53] Thus, damages for the wrongful death of a child were based on "the economic value of the minor child to the parents."[54] In addition, parents and siblings could recover for the wrongful death of a child/sibling only if they were financially dependent on the deceased.[55]

[49] LAWS OF 2007, ch. 156.
[50] Andrews, *supra* note 29, at 298 n.19.
[51] *Armijo v. Wesselius*, 73 Wn.2d 716, 718, 440 P.2d 471 (1968).
[52] *Dahl v. Tibbals*, 5 Wash. 259, 263, 31 P. 868 (1892).
[53] *Philippides v. Bernard*, 151 Wn.2d 376, 389, 88 P.3d 939 (2004) (citing *Frank v. Superior Court of Arizona*, 150 Ariz. 228, 231, 722 P.2d 955 (1986)).
[54] *Id.* at 389 (internal citations omitted).
[55] *Masunaga v. Gapasin*, 57 Wn. App. 624, 628, 790 P.2d 171 (1990).

The more modern view has been to recognize the emotional aspect of the lost relationship. As the Washington Supreme Court recognized in 1963:

> [I]t is abundantly clear that the statute was not solely enacted to provide a means of support during life for the beneficiary due to the loss of a breadwinner. Other factors are important in determining damages, *e.g.*, companionship and society, services, care and attention, protection and advice. The action may be maintained even where the beneficiary was not dependent upon the injured deceased for support.[56]

As of 2021, the wrongful death and survival statutes protect the same narrow class of beneficiaries since at least 1917, with the exception of the addition of Registered Domestic Partnerships and stepchildren/stepparent relationships.[57]

Marriage rates in Washington have declined since 1989 (see "Chapter 7: Gender Impact in Family Law Proceedings" for more data on marriage rates), suggesting that marriage may be a less meaningful metric for wrongful death protections than it has been historically. In addition, national data indicates that same-sex couples may be less likely than opposite-sex couples to marry. National Gallup polls from 2020 indicate that the percent of LGBTQ+ adults living unmarried with a domestic partner was higher than the percent for all U.S. adults. Likewise, the percent of LGBTQ+ adults who were married was lower than the percent married for all adults in the U.S.[58] The 2019 Current Population Survey found that nationally, among same-sex couples living together, about 54% were married, and among opposite-sex couples living together, about 88% were married.[59] These disparities in marriage rates mean that LGBTQ+ and same-sex couples are disproportionately less likely to be permitted to recover damages for the loss of their partner. Due to a lack of publicly available local data, it is not clear if these trends exist in Washington, but

[56] *Gray v. Goodson*, 61 Wn.2d 319, 329, 378 P.2d 413 (1963).
[57] *See* LAWS OF 1917, ch. 123, § 2.
[58] Jeffrey M. Jones, *One in 10 LGBT Americans Married to Same-Sex Spouse*, GALLUP (Feb. 24, 2021), https://news.gallup.com/poll/329975/one-lgbt-americans-married-sex-spouse.aspx.
[59] Press Release, United States Census Bureau, U.S. Census Bureau Releases CPS Estimates of Same-Sex Households (Nov. 19, 2019), https://www.census.gov/newsroom/press-releases/2019/same-sex-households.html. The 2019 survey found there were 543,000 same-sex married couple households and 469,000 households with same-sex unmarried partners living together. *Id.* There were 61.4 million opposite-sex married and 8 million opposite-sex unmarried partner households. *Id.*

it merits further investigation. These national trends are particularly meaningful in the context of wrongful death awards given the income disparities experienced by LGTBQ+ communities (see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on financial disparities by gender and sexual orientation).

It may seem like a simple point to assert that same-sex couples now have a legal right to marry, thereby giving them potential access to damages for the loss of their partner. However, the scholarship in this area highlights complex considerations that may be unique to LGBTQ+ and same-sex couples as they decide whether to marry. For example, Professor Mary Bernstein asserts that the institution of marriage is a central part of the societal assumption that people will engage in oppositive-sex, monogamous relationships with the goal of marriage and children. Bernstein goes on to argue that this could create the feeling for same-sex partners that marriage means assimilation into this social expectation and therefore loss of one's identity. The author notes that the "dilemma" of assimilation may also intersect with race and class, thereby increasing the complexity of the decision-making.[60]

An analysis by Drabble et al. shows that research has consistently found that marriage equality has a positive impact on health outcomes for LGTBQ+ populations. The authors cite evidence showing couples have reported that marriage had decreased homophobic attitudes and increased their participation in society and ability to live more publicly. However, the authors also cite evidence showing that social stigma and discrimination against LGBTQ+ individuals persist.[61] And some same-sex couples have reported that their marriage, "caused disjuncture in relationships with their family of origin, as marriage made the relationship feel too real to family members and made their sexual identities more publicly visible."[62] This highlights that some same-sex couples may still feel they do not have access to marriage due to family and societal prejudice and stigmatization. Another study found that same-sex couples who "divorced after

[60] Mary Bernstein, *Same-Sex Marriage and the Assimilationist Dilemma: A Research Agenda on Marriage Equality and the Future of LGBTQ Activism, Politics, Communities, and Identities*, 65 J. HOMOSEXUALITY 1941, 1952-53 (2018).
[61] Laurie A. Drabble et al., *Perceived Psychosocial Impacts Of Legalized Same-Sex Marriage: A Scoping Review Of Sexual Minority Adults' Experiences*, 16 PLOS ONE 1 (2021).
[62] *Id.* at 10 (citing Heather MacIntosh, Elke D. Reissing & Heather Andruff, *Same-Sex Marriage in Canada: The Impact of Legal Marriage on the First Cohort of Gay and Lesbian Canadians to Wed*, 19 CAN. J. HUM. SEXUALITY 79 (2010)).

institutionalization of the right to same-sex marriage reported shame, guilt, and disappointment—given that they and others had fought so hard for equal marriage rights."[63] This added pressure on marriages for same-sex couples is just another example of a unique consideration that may be part of the decision-making for some couples. This small list of examples, while illustrative, is certainly not a comprehensive outline of the complex decision-making for LGBTQ+ and same-sex couples who are considering marriage.

In addition to the clear financial ramifications for someone who is not permitted to recover damages for the loss of their partner regardless of how long they have cohabitated, a lack of acknowledgement of their relationship in the wrongful death statutes may also cause unique mental health harms for members of an unmarried same-sex partnership. A national study found same-sex couples in relationships that were not legally acknowledged (i.e., because they were not married or in civil unions or registered domestic partnerships) were more likely to report higher levels of perceived unequal recognition[64] of their relationships. This perceived unequal recognition was in turn associated with psychological distress, depression, and problematic drinking. There was also a gendered effect with women experiencing greater symptoms then men. Transgender individuals were intentionally not included in the study due to the unique stressors these populations face.[65] Other research has found that interracial same-sex couples face additional challenges resulting from a lack of acknowledgment of their relationship resulting from racism and homophobic assumptions.[66] This suggests that race and sexual orientation may intersect and amplify adverse health outcomes.

While marriage for same-sex couples is now legal, the historical trauma and social stressors that emanate from long-time stigmatization and marginalization of same-sex relationships continue

[63] *Id.* (citing Kimberly F. Balsam, Sharon S. Rostosky & Ellen D. B. Riggle, *Breaking Up Is Hard to Do: Women's Experience of Dissolving Their Same-Sex Relationship*, 21 J. LESBIAN STUD. 30 (2017)).
[64] Perceived recognition of one's relationship was measured using a five-point scale on the following topics: "(a) Our relationship is treated like a "second-class" relationship by the federal government; (b) important milestones (e.g., buying a house or writing a will) are complicated for us; (c) it is difficult for us to keep up with the changing legal status of same-sex relationships; and (d) it is harder for us to file our tax returns than it is for other couples." Allen J. LeBlanc, David M. Frost & Kayla Bowen, *Legal Marriage, Unequal Recognition, and Mental Health Among Same-Sex Couples*, 80 J. MARRIAGE & FAM. 397, 401 (2018).
[65] *Id.* at 402.
[66] *See* AMY C. STEINBUGLER, BEYOND LOVING: INTIMATE RACEWORK IN LESBIAN, GAY, AND STRAIGHT INTERRACIAL RELATIONSHIPS (2012).

to impact the health of LGBTQ+ populations. The reliance of wrongful death statutes on the institution of marriage may further perpetuate both financial disparities for same-sex couples and the adverse health outcomes associated with a lack of perceived recognition of one's relationship.

B. Caregivers in kinship caregiving arrangements cannot recover for wrongful death or loss of consortium

The narrow definition of who can recover for wrongful death and loss of consortium claims excludes family members living in non-parent kinship care situations. Kinship care is "[f]ull-time care provided by a child's relative or close family friend."[67] A 2020 survey of kinship caregivers in Washington found that 89% of kinship care was "informal,"[68] meaning that the arrangement was organized by parents and other family members without involvement from a child welfare agency our juvenile court.[69] 90% of kinship caregivers who responded to the survey identified as female, 71% identified as grandparents, and a majority of respondents identified as white (80%).[70] However:

- Eight percent of caregivers who responded to the survey identified as Black,[71] compared to about four percent of the general Washington population in 2020;[72]
- Eight percent identified as American Indian or Alaskan Native,[73] compared to less than two percent in the general Washington population in 2020;[74] and

[67] ANGELIQUE DAY ET AL., PARTNERS FOR OUR CHILDREN, KINGSHIP CARE IN WASHINGTON STATE: A HISTORICAL COMPARISON 4 (2020), https://www.dshs.wa.gov/sites/default/files/ALTSA/hcs/documents/kinship/Report%20two-%20Kinship%20Care%20in%20Washington%20State.%20A%20historical%20analysis.pdf.
[68] *Id.* at 8.
[69] *Id.* at 4.
[70] ANGELIQUE DAY ET AL., PARTNERS FOR OUR CHILDREN, KINSHIP CARE IN WASHINGTON STATE 6 (2020), https://www.dshs.wa.gov/sites/default/files/ALTSA/hcs/documents/kinship/Report%20one-%20Kinship%20Care%20in%20Washington%20State_.pdf.
[71] *Id.* at 6.
[72] *Estimates of April 1 Population by Age, Sex, Race and Hispanic Origin*, WASH. STATE OFF. OF FIN. MGMT. (Feb. 2, 2021), https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin.
[73] DAY ET AL., *supra* note 67, at 6.
[74] WASH. STATE OFF. OF FIN. MGMT., *supra* note 72.

- 15% identified as having Hispanic, Latino, or Spanish origin,[75] compared to about 13% in the general Washington population in 2020.[76]

That a kinship caregiver who does not have legal guardianship of a child cannot receive damages for the child's wrongful death or loss of consortium, likely disproportionately impacts women, elders, Black, American Indian/Alaskan Native, and Hispanic/Latinx caregivers. The survey did not ask about the race or ethnicity of the child. However, to the extent that the race and ethnicity of the child may be reflected by their kinship caregiver, this suggests that Black, American Indian/Alaskan Native, and Hispanic/Latinx children may also be disproportionally excluded from accessing wrongful death damages upon the death of their primary caregiver.

While this survey did collect data for Asian, Native Hawaiian, and other Pacific Islander populations,[77] the report does not include analyses for these populations, likely due to small samples sizes. It is possible that these populations may also be disproportionally impacted.

C. Gender and race-based tables

It is important to note that only a small percentage of wrongful death and other tort cases are decided by a trial. A report by the Bureau of Labor Statistics using 2005 data found that, nationally, only 3.5% of civil tort cases were disposed of by bench or jury trial.[78] In 2019, 6,600 tort cases were filed in Washington, and 6,016 tort cases were resolved statewide.[79] However, merely 110 tort civil trails occurred in 2019.[80] Because many cases are filed and resolved in different years, we cannot use these 2019 numbers alone to calculate the proportion of tort cases that go to trial. Nonetheless, these numbers do demonstrate that only a small percentages of tort cases go to trial. The remaining cases were "dismissed for want of prosecution, granted default or summary judgments, settled or withdrawn prior to trial, settled through mediation or

[75] DAY ET AL., *supra* note 70, at 6.
[76] WASH. STATE OFF. OF FIN. MGMT., *supra* note 72.
[77] DAY ET AL., *supra* note 70, at 39–46 (Appendix 2. Statewide Caregiver Survey).
[78] THOMAS COHEN & KYLE HARBACEK, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005 2 (2011), https://bjs.ojp.gov/content/pub/pdf/pdasc05.pdf.
[79] SUPERIOR COURT 2019 ANNUAL REPORT: ANNUAL CASELOAD REPORT 89, 98 (2019), http://www.courts.wa.gov/caseload/content/archive/superior/Annual/2019.pdf#search=superior%20court%20case%20report.
[80] *Id.* at 103.

another method of alternative dispute resolution, or transferred to another court."[81] While the following subsection highlights some potential gender and race disparities in the cases that go to court, a broader scope, including cases that are settled, would address areas that impact a broader population of people involved in tort cases.

Although the 1989 Subcommittee was unable to isolate gender bias as the cause of lower tort awards for women compared to men, scholars in the intervening years have confirmed the Subcommittee's hypothesis. Thomas Koenig, a sociologist, and Michael Rustad, a law professor, have conducted a number of empirical examinations of American tort law and concluded that there is a "his" and "her" tort world based on gender roles. Medical malpractice often involves female plaintiffs and products liability often involves male plaintiffs, with significantly different outcomes in awards, victory rates at trial, and systemic improvement.[82]

The scholarship on this issue addresses two main areas where gender and other disparities in awards seem to emerge: 1) awards for pain and suffering, and 2) awards for lost earnings. The very limited research on these areas suggests that there are not significant gender disparities in awards for pain and suffering after controlling for other factors. However, one study did find that racial inequities were present, with jurors awarding Black plaintiffs about 41% of the damages for pain and suffering as white plaintiffs. Gender and racial inequities were also clear for lost earnings awards in this study. Jurors awarded Asian plaintiffs 850% of what they awarded white plaintiffs and awarded female plaintiffs 59% of what they awarded male plaintiffs. Research, such as this study, that uses broad race and ethnicity categories may mask disparities within diverse populations that have been grouped into one category such as "Asian." For medical expenses, neither race nor gender were significant predictors of awards. It is important to note that a major limitation of this study was that the researchers coded race and ethnicity based on surname rather than self-identified race and ethnicity.[83] Of note, research shows that people often assume

[81] COHEN & HARBACEK, *supra* note 78, at 9.
[82] Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 87 (1995).
[83] Erik Girvan & Heather J. Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION, CONFLICT & PEACE RSCH. 247 (2016).

Black people feel less pain than white people with similar injuries,[84] despite evidence that this assumption is not true.[85] It is possible that jurors could be influenced by this bias when determining damages for pain and suffering.

In an analysis of California, Florida, and Maryland caps on noneconomic tort damages, law professor Lucinda Finley explains that economic damages for lost wages benefit higher wage earners (white men) the most because wage projection data based on past race and gender specific wages assumes that "wage disparities will remain ensconced in the future."[86] Some scholars have questioned the ethics, constitutionality, and accuracy of using gender- and race-based projection tables. These tables are used to predict work life expectancy, economic loss, and the number of hours of lost household services per week. The tables are often presented by gender and race.[87] A 2006 national survey of forensic economists (who often serve as expert witnesses in tort trials) found that over 87% of respondents used gender-specific data to estimate economic loss, and over 45% used race-specific data for their estimates.[88] While the 2019 version of this survey did not ask a comparable question, it did ask how often a series of variables were used in calculating work life expectancy (0 being never and 100 being always). The answers to these questions also indicate that gender (mean=88, mode=100) was much more commonly considered than race (mean=25, mode=0) in these predictions.[89]

These tables are based on historical data which show women and Black, Indigenous, and people of color earn lower wages with women of color having the lowest wages (see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for further discussion of wage gaps). Life and work life expectancy are also shorter for Black, Indigenous, and people of color compared to white

[84] Sophie Trawalter, Kelly M. Hoffman & Adam Waytz, *Racial Bias in Perceptions of Others' Pain*, 7 PLoS ONE 1 (2012).
[85] Yulin Yang et al., *Racial-Ethnic Disparities in Pain Intensity and Interference Among Middle-Aged and Older U.S. Adults*, J. GERONTOLOGY: SERIES A (2021).
[86] Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004).
[87] David Schap, Michael R. Luthy & David I. Rosenbaum, *A 2019 Survey of Forensic Experts: Their Methods, Estimates, and Perspectives*, 26 J. LEGAL ECON. 23 (2020).
[88] Michael L. Brookshire, Michael R. Luth & Frank L. Slesnick, *2006 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, 19 J. FORENSIC ECON. 29 (2006).
[89] Schap, Luthy & Rosenbaum, *supra* note 87.

populations.[90] This creates several major issues. First, these historical data fail to take into account progress toward gender and racial equity in areas such as life expectancy and wages that would have happened or will happen over the course of a person's life, suggesting the tables lack predictive accuracy.[91] Second, these disparities are a result of historical and structural discrimination and inequities that are then being institutionalized into tort awards.[92] Third, this population-level data is being used to stereotype people based on their gender and race. While experts can make more individualized projections for adults with a long work history, for individuals without a work history (such as children) these projection tables can be very heavily weighted. Fourth, these tables create lower expected damages for women and Black, Indigenous, and people of color, potentially making them less desirable clients in our contingency-fee based system.[93] Lastly, gender- and race-based tables devalue the lives of women and Black, Indigenous, and people of color (with an amplifying effect for women of color) and create an incentive for people to prioritize mitigating risk for white men because the potential costs are higher if that population is harmed.[94] Loren Goodman provides an example:

> Ultimately, some scholars suggest that situations like these create perverse incentives for tortfeasors. Because the cost of injuring these populations is reduced, potential tortfeasors may be less cautious when dealing with them. For example, consider a landlord who owns two residential buildings: one whose residents are all Caucasian males and one whose residents are all Hispanic females. If lead-based paint is found and the landlord is sued, the residents in the Caucasian male building will cost the landlord much more in damages than the residents in the Hispanic female building. Thus, if given the opportunity to choose between protecting the two groups, the rational self-serving landlord will exercise

[90] Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL Into Tort Damages*, 96 NOTRE DAME L. REV. 1479 (2021).
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*; Loren D. Goodman, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 VAND. L. REV. 1353 (2017).

> greater care to prevent harms to the Caucasian males than to the Hispanic females.[95]

In addition, race- and gender-based tables as currently used inherently introduce inaccuracies because they present only binary sex data (male, female) rather than data that more accurately captures gender.[96] Transgender individuals also experience significant income and wages disparities (see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for analysis of wage disparities for transgender individuals), yet are not even represented in these tables. These tables devalue the lives of women, potentially without actually increasing accuracy given that they do not provide a comprehensive and accurate analysis of wages by gender. This is not to argue that the lives of transgender individuals should be devalued as women's lives are in these projections. That would further perpetuate the historical discrimination in wages as described above.

This same line of thought applies to race, a social construct which relies most commonly on five to six artificial categories. These categories, which lack granularity, fail to account for people of multiple races, those who do not identify with one of these races, or extreme variation in income and life expectancy between populations within these broad categories. In addition, it is not clear who would identify the person's race, particularly in cases such as wrongful death where someone cannot self-identify.

The one area where women are more highly valued then men is in projection tables for damages related to hours of lost household services. The 2019 forensic economist survey mentioned above found that 65% of respondents relied on the Dollar Value of a Day calculations to estimate lost hours of domestic work.[97] These tables indicate that women spend more time on domestic work each week based on time-use surveys, making women's dollar value per day for domestic work higher than for men (see "Chapter 4, The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for further analysis on the lack of parity in unpaid domestic labor

[95] Goodman, *supra* note 94, at 1370. *See also* Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 685-92 (2017); Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325 (2018).
[96] Goodman, *supra* note 94, at 1375-76.
[97] Schap, Luthy & Rosenbaum, *supra* note 87.

by gender). However, many of these tables do have higher hourly values for men's work than for women's work for all combined "household production."[98] These tables embody the societal devaluation of women and their time. These tables also have the same inherent problems as wage projection tables: 1) they assume that all people fit into these population level trends and stereotypical gender norms where women do more domestic work, and 2) they fail to account for future progress toward more equitable division of household work.

In theory, judges and juries can partially correct the gender and race disparities described above through noneconomic damage awards.[99] On the other hand, jurors are not given any standards by which to decide a party's noneconomic damages, which raises the potential for biases to come into play. For the wrongful death of a spouse, the Washington pattern jury instruction tells jurors this:

> You should also consider what [name of decedent] reasonably would have been expected to contribute to [spouse] in the way of marital consortium. Marital consortium means the fellowship of husband and wife and the right of one spouse to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.
>
> In making your determinations, you should take into account [name of decedent's] age, health, life expectancy, occupation, and habits [of industry, responsibility and thrift]. You should take into account [name of decedent's]

[98] EXPECTANCY DATA, THE DOLLAR VALUE OF A DAY: 2019 DOLLAR VALUATION (2020). For example, the 2019 Dollar Value of a Day tables show that married men of all ages, employed full-time (regardless of spousal employment) with a youngest child ages two through five do 12.57 hours of household work per week with an hourly value of $16.23, *Id.* at 18 (Table 2), while women in this same situation do 18.92 hours per week with an hourly value of $15.43, *Id.* at 133 (Table 117). From a mathematical perspective this disparity in hourly value by gender results from men reporting spending more time doing two subtasks under the "household production category" that are assigned a higher value per hour: 1) "Pets, Home & Vehicles" at $16.96 per hour and 2) "Obtaining Services" at $17.85 per hour. While women report spending more time on all other subtasks (e.g., inside housework, food cooking and clean up, etc.), most of these tasks are valued at less than $15 per hour. The exception to this is "Household Management" and "Travel for Household Activity" which are both valued at over $18 per hour. *Id.* at 18 (Table 2), 133 (Table 117).

[99] Chamallas, *supra* note 46, at 530.

> earning capacity, including actual earnings prior to death and the earnings that reasonably would have been expected to be earned in the future. In determining the amount that [name of decedent] reasonably would have been expected to contribute in the future to [spouse], you should also take into account the amount you find [name of decedent] customarily contributed to [spouse].
>
> The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.
>
> Your award must be based upon evidence and not upon speculation, guess, or conjecture.
>
> The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.[100]

The courts have recognized the difficult nature of valuing noneconomic damages, noting they are "not readily susceptible to valuation in dollars."[101] Anecdotal information from practitioners indicates that damage awards can be lower for women because traditionally women's work is seen as less inherently valuable.

Beyond questioning the ethics and accuracy of these race- and gender-based tables, some scholars and judges have questioned their constitutionality—though this debate is yet to be settled. For example, Professor Chamallas argues that the use of race and gender specific wage expectancy tables by courts violates the Constitution:

> Under the prevailing intermediate scrutiny standard for explicitly gender-based classifications, individual women are protected from damaging generalizations about their sex, unless the state proves that the classification is substantially related to the achievement of an important governmental objective. I contend

[100] 6 WASHINGTON PRACTICE: WPI 31.02.01 (7th ed. 2019).
[101] *Bingaman v. Grays Harbor Cmty. Hosp.*, 37 Wn. App. 825, 831, 685 P.2d 1090 (1984), *rev'd on other grounds by* 103 Wn.2d 831, 835, 699 P.2d 1230 (1985).

> that there is no persuasive justification – certainly not one that qualifies as a compelling or important justification – for relying on race-based or gender-based economic data in tort litigation. Equitable determination of loss of future earning capacity can be made by individualized determinations which look at the particulars of a plaintiff's situation. When such individualized determinations are not possible, courts and experts should rely on inclusive, race-neutral and gender-neutral statistical data.[102]

Several courts over the last few decades have addressed the inherent unfairness of the use of race-, ethnicity-, and gender-based statistics to determine life expectancy, work life expectancy, and loss of future earnings. For example, in 1987 in *Reilly v. United States*,[103] the plaintiffs sued the obstetrician for medical malpractice for the birth injury of their baby girl, Heather. At trial, one of the issues was of the lost earning capacity of Heather. The defendant's economist testified that it would be appropriate to reduce her earnings by 40% based on the work life table published by the Bureau of Labor Statistics showing that a female with 15 or more years of education would be active in the work force only 28 out of 48 years between the ages of 22 and 70.[104]

The trial judge rejected that proposition, noting that the reduction relied on outdated data and was legally suspect:

> As a factual matter, I seriously doubt the probative value of such a statistic with respect to twenty-first century women's employment patterns, particularly in light of current, ongoing changes in women's labor force participation rates. As a matter of law, moreover, I know of no case authority and none has been cited to me supporting [the defense economist's] 40% reduction. On the contrary, both federal and state authorities within the jurisdiction counsel against such disparate treatment.[105]

[102] Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994).
[103] *Reilly v. United States*, 665 F. Supp. 976 (D.R.I. 1987) *aff'd in part and rev'd in part on other grounds*, 863 F.2d 149 (1st Cir. 1988).
[104] *Id.* at 997.
[105] *Id.*

Similarly, in *Wheeler Tarpeh-Doe v. United States*, another birth injury medical malpractice case, the baby boy was born to a mother who was white and a father who was Black and from Liberia.[106] The defendant's economist argued that his future lost earnings should be based on the average earnings of Black men, instead of all men.[107] The trial court rejected that argument, noting it would "incorporate current discrimination resulting in wage differences between the sexes or races."[108] Instead, the judge decided to accept the calculation based on the average earnings of all people, which was "the most accurate means available of eliminating any discriminatory factors."[109]

Some courts have gone further, suggesting the use of race- and gender-based statistics is a potential constitutional violation. In 2005, in an opinion awarding restitution to homicide victims, the judge refused to consider the race or gender of the victims in calculating lost future earnings because of "possible constitutional and other problems in relying on race and sex assumptions."[110]

In 2008 and 2015, the use of race- and ethnicity-based statistics to predict life expectancy was expressly ruled unconstitutional. In *McMillan v. City of New York*, the trial court ruled that using race-based statistics for assessing tort damages violated both the Equal Protection clause and Due Process clause of the U.S. Constitution.[111] For purposes of the Equal Protection Clause, the judge reasoned the judicial use of race-based statistics was a classification based on race by the government, which is automatically suspect and subject to strict scrutiny.[112] Reliance on race for this purpose is unreliable given that race is largely a social construct and definitions change over time and is not the most important factor in predicting life expectancy.[113]

[106] *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427, 455 (D.D.C. 1991), *rev'd sub nom. Tarpeh-Doe v. United States*, 28 F.3d 120 (D.C. Cir. 1994).
[107] *Id.*
[108] *Id.*
[109] *Id.* at 456.
[110] *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1314 (D. Utah 2004), *rev'd on other grounds and remanded sub nom. United States v. Serawop*, 410 F.3d 656 (10th Cir. 2005).
[111] *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008).
[112] *Id.* at 255.
[113] *Id.* at 249-53.

For purposes of the Due Process Clause, the judge ruled there was a property right to compensation in negligence cases. To allow use of race-based statistics to calculate life expectancy would automatically burden a class of litigants based on race, which would be a denial of due process.[114]

Seven years later in *G.M.M. v. Kimpson*, the same court relied on *McMillan*, again ruling that minority-specific economic data "saddles those who do not conform to the data with adverse generalizations about their group, the very kind of stereotyping that antidiscrimination laws were meant to prohibit."[115] While noting that the court has not yet ruled on whether life, work life, and earnings tables based on other historically disadvantaged groups are permissible, the court quoted the rhetorical question of a professor related to the use of gender-based statistics:

> If [we] truly want[] to articulate a principle that would remove impermissible discrimination from the calculation of tort damages, I believe it is incumbent . . . to anticipate and answer the obvious question: If race cannot be used, what about gender? Statistically, both are correlated with dramatic differences in lifespan and earnings.[116]

The reliance on expert-testimony from forensic economists or others that uses suspect classifications to determine damages is an issue that should continue to be raised in judicial education and continuing legal education forums.

Legal scholars who have written about these issue have presented an array of possible solutions, including (1) statutory mandates requiring data used for projection calculations to be continually updated to avoid perpetuating historic systemic discrimination, (2) a ban on the use of race- and gender-based tables, (3) affirmative action-type calculations that would allow consideration of race and gender only if it raised the award for historically marginalized populations,[117] (4)

[114] *Id.* at 255.
[115] *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 141 (E.D.N.Y. 2015) (internal quotations omitted) (quoting Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1439 (2005)).
[116] *Id.* at 141 (alteration in original) (quoting Anthony J. Sebok, *Ruling Barring the Use of Race in Calculating the Expected Lifespan of a Man Seeking Tort Damages: An Isolated Decision, or the Beginning of a Legal Revolution?* (Oct. 22, 2008)).
[117] Goodman, *supra* note 94.

rejection of societal grouping statistics with a focus on more individual facts regarding the victim such as occupation or occupation of relatives,[118] (5) or the use of a uniform value of a statistical life that does not vary according to demographics.[119]

On this last point, Catherine Sharkey argues that a standard value of a statistical life (which has been largely adopted by federal agencies to conduct cost-benefit analyses using a range from $6-$9 million) is necessary to remove the effects of discrimination and inaccurate data that particularly devalue the lives of young Black, Indigenous, and women of color who don't have past earnings histories. Sharkey further argues that, "The adoption of a uniform [value of a statistical life] as a measure of tort wrongful-death damages would eliminate the perverse incentives for defendants to channel their most risk-laden behavior toward minority communities."[120] The use of a uniform value of life seems unlikely to be feasible in Washington, however, where the Washington State Supreme Court has already explicitly held the state constitution requires a jury to individually determine damages in each case.[121]

Some jurisdictions require—or have tried to require—the use of codified gender-neutral tables or have jury instructions that favor the use of gender-neutral tables.[122] The Federal Fair Calculations in Civil Damages Act of 2016 was introduced in the U.S. House and Senate. If adopted, the bill would have prohibited "courts from awarding damages to plaintiffs in civil actions using a calculation for projected future earning potential that takes into account a plaintiff's race, ethnicity, gender, religion, or actual or perceived sexual orientation."[123] The bill was reintroduced in 2019 but, again did not pass.[124] In July of 2019, California's Governor signed into law S.B. 41, which prohibits "the estimation, measure, or calculation of past, present, or

[118] Agustin Paneque, *Civil Rights and Tort Calculation: Challenging the Reliability and Constitutionality of Race-Based and Gender-Based Life Expectancy and Future Wage Earning Calculations*, 19 RUTGERS RACE & L. REV. 133 (2018).
[119] Sharkey, *supra* note 90.
[120] *Id.*
[121] *Sofie v. Fibreboard*, 112 Wn.2d 636, 638, 771 P.2d 711 (1989).
[122] Goodman, *supra* note 94; Sharkey, *supra* note 90.
[123] Fair Calculations in Civil Damages Act of 2016, S. 3489, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/3489#:~:text=Introduced%20in%20Senate%20%2812%2F01%2F2016%29%20Fair%20Calculations%20in%20Civil,gender%2C%20religion%2C%20or%20actual%20or%20perceived%20sexual%20orientation.
[124] Fair Calculations in Civil Damages Act of 2019, H.R. 4418, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/4418/related-bills.

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."[125]

Washington's Pattern Jury Instructions for life expectancy suggests the use of gender-based tables is required, but makes no mention of race-based tables.[126] While the Pattern Jury Instructions are intended to be an accurate and neutral statement of the law, they are not the law and are not required to be used by the trial courts.[127] Nevertheless, anecdotal evidence from attorneys suggests that in practice, it is often difficult to convince a trial judge to deviate from the Pattern Jury Instructions.

While there is a substantive amount of legal scholarship on the problems associated with race- and gender-based projection tables for damages, there is very little data or research that explores the many other areas where bias could be impacting tort cases. As described above, one study found racial disparities in pain and suffering damages, but this area is not well researched.[128] While the focus on projection tables is important, even if this cause of disparate awards for women and Black, Indigenous, and people of color could be addressed, it is unclear if disparities in awards would persist as a result of other biases in the system. However, the normalized allowance of race- and gender-based projection tables makes disparities in awards "acceptable" or at least expected, which could be masking other biases fueling these disparities. This is an issue deserving of more study.

VI. Attorney Fee Awards in Discrimination Cases

In 1989, the Subcommittee also examined attorney fee awards in discrimination cases to see if any disparities were present. The Washington Law Against Discrimination (WLAD) provides that successful litigants may apply to the court for an award of "reasonable" attorneys' fees.[129] While

[125] S.B. 41, ch. 136, Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB41.
[126] 6 WASHINGTON PRACTICE: WPI 34.04 (7th ed. 2019).
[127] *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 369, 119 P.3d 816 (2005).
[128] Girvan & Marek, *supra* note 83.
[129] RCW 49.60.030(2).

in most civil cases each party pays their own attorneys' fees, in certain important circumstances, the Washington State Legislature has allowed the prevailing party injured by a violation of a statute to recover the reasonable cost of their own attorneys' fees.

For purposes of the WLAD, the Washington State Legislature has declared that "discrimination is a matter of state concern" that threatens "the institutions and foundation of a free democratic state."[130] As a result, the Washington State Legislature sought "to enable vigorous enforcement of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations."[131] One of the ways it encourages vigorous enforcement of civil rights protections is to allow the recovery of attorney fees. This in turn incentivizes attorneys to take cases seeking the "vindication of citizens' right to be free of discrimination and the deterrence of unlawful discriminatory conduct."[132]

Reasonable attorneys' fees are calculated by determining the reasonable amount of time required for the case based on the complexity of the issues and multiplying the hours by the reasonable hourly rate.[133] To set the reasonable hourly rate, judges can consider the attorney's usual billing rate, prevailing market rates, the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case.[134] This amount is the so called "lodestar": the appropriate amount to be awarded unless other factors justify an increase. The judge may adjust the fee upward for risk and the quality of work performed.[135]

The Subcommittee in the 1989 Study analyzed 26 discrimination cases from "Jury Verdicts Northwest" along with attorney and judge surveys to try to determine whether fee awards to male and female attorneys in discrimination cases were comparable. They concluded that the small number of cases and survey responses "make generalizations difficult,"[136] but that the data,

[130] *Minger v. Reinhard Dist. Co.*, 87 Wn. App. 941, 948, 943 P.2d 400 (1997) (internal quotations and citation omitted).
[131] *Martinez v. City of Tacoma*, 81 Wn. App. 228, 235, 914 P.2d 86 (1996).
[132] *Minger*, 87 Wn. App. at 948.
[133] *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).
[134] *Id.*
[135] *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 315, 202 P.3d 1024 (2009).
[136] 1989 Study, *supra* note 1, at 105.

a public hearing, and survey responses flag fee disparity as an "area of substantial concern" especially given the "broad discretion given to the trial judge regarding reduction and enhancement of the lodestar figure."[137] There are no published Washington or national studies of gender bias in attorney fee awards nor Washington appellate cases that address the issue.

The attorney fee provision in the WLAD has not substantively changed since the 1989 Study except that it now allows remedies pursuant to the federal Fair Housing Act in addition to remedies under state law and the federal Civil Rights Act of 1964.[138]

VI. Analysis of Gender Bias in Attorney Fee Awards

Today there is still a lack of data or research on attorney fee awards based on gender or other demographic variables. The need for data collection or research in this area should be informed by attorneys with experience in this area who can comment on if they have observed any issues with unequitable allocation of fee awards.

VII. Recommendation

In order to eliminate discrimination based on gender, race, and ethnicity in the calculation of tort damages, stakeholders should study whether Washington courts should discontinue use of race- and gender-based life expectancy, work life expectancy, loss of household services, and historical earnings tables for the calculation of economic damages. If the conclusion of such further study is that the race- and gender-based tables should no longer be used, stakeholders should then determine whether to promote other means of calculating economic damages, instead.

[137] 1989 Study, *supra* note 1, at 106.

[138] *See, e.g.*, *Johnson v. State Dept. of Transp*., 177 Wn. App. 684, 313 P.3d 119 (2013) (attorney fees and costs awarded using lodestar method in sex discrimination and retaliation case with some reductions for time spent on unsuccessful administrative claim and for time spent and costs accrued after the date of defendant's offer of judgment).