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PERSPECTIVE

The COVID-19 effect on damages

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Life expectancy in the United States has decreased significantly since 2020 because of the COVID-19 pandemic. According to the Vital Statistics of the United States Life Tables, between 2018 and 2021 the life expectancy of Hispanic males decreased by almost three years for certain age groups. This change can significantly impact the economic value of life care plans and other measures of damages that are tied to a plaintiff's life expectancy. However, the decrease in life expectancy is largely variable, depending on factors such as race, age, vaccination status, and occupation. This article will explore how the recent decrease in life expectancy may affect damages calculations in civil cases, as well as why some plaintiffs should arguably not have their life expectancies lowered where COVID-19-related risk factors do not apply to them.

Between February 2020 and May 2022, over a million Americans died of COVID-19. (Sachin Siva, Eric Goosby, et al. "Assessing the impact of one million COVID-19 deaths in America: economic and life expectancy losses," Nature, Scientific Reports (2023).) The pandemic contributed to even more deaths than those directly attributed to the disease, as American mortality increased because of reduced access to healthcare, mental health crises, and widespread social and economic disruptionssuchasunemployment, foodinsecurity, and homelessness. (Steven H Woolf, Ryan K Masters, Laudan Y Aron, "Effect of the covid-19 pan-

demic in 2020 on life expectancy across populations in the USA and other high-income countries: simulations of provisional mortality data," BJM, 2021; 373 :n1343 doi:10.1136/bmj.n1343) Overall, these deaths contributed to an average 3.08-year reduction in the US life expectancy at birth. (Siva, et al. supra.) When separating the statistics for race and ethnicity, vulnerable minority groups such as the Black and Latinx populations suffered even larger reductions in life expectancy at birth, ranging from 3.79 years to 5.31 years, respectively, than did White and Asian populations. (*Id.*)

This recent decrease in life expectancy can have a significant impact on damages calculations in civil cases. Many catastrophic personal injury cases involve some level of future medical care, often for the rest of the plaintiff's life. The economic damages associated with this future medical care are typically calculated by taking the total annual costs of care and multiplying those by the plaintiff's remaining life expectancy. Certain non-economic damages, e.g., future pain and suffering, are likewise based on the plaintiff's life expectancy.

By way of example, our office represented a 64-year-old Hispanic male with permanent nerve damage. When his life care plan was priced out using pre-COVID statistics, the relevant life expectancy tables set his life expectancy as an additional 20.5 years. The life care plan for this plaintiff was approximately \$1,280,000. However, in updating the life care plan using the post-COVID 2020 life expectancy ta-

bles, this plaintiff's life expectancy decreased to only 17.6 additional years. The life care plan was then approximately \$1,040,000. The economic damages alone for this plaintiff decreased by \$240,000, all because of the increased mortality over the last few years in America due to the pandemic. He also would have "lost" 2.9 years of noneconomic damages.

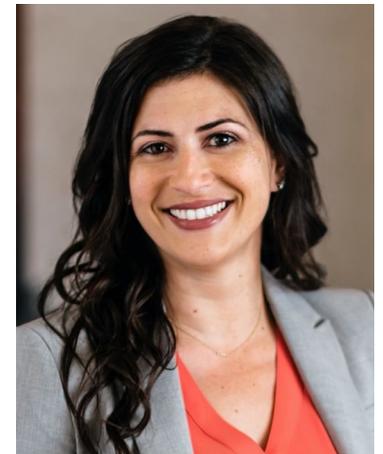
But this is not the complete story. While the statistics indicating a reduced life expectancy are generally discussed in terms of race and ethnicity, the reduced life expectancy is influenced by various socioeconomic and lifestyle factors that have a higher prevalence in those racial and ethnic groups, not the race or ethnicity itself. An individual's vaccination status, household size, occupation, salary, access to primary healthcare, and dependence on public transportation are all risk factors that can skew the life expectancy statistic in one direction or the other. (Theresa Andrasfay,

Noreen Goldman, "Reductions in US life expectancy during the COVID-19 pandemic by race and ethnicity: Is 2021 a repetition of 2020?" PLoS ONE 18(8): e0272973 (2022).)

Taking our same 64-year-old Hispanic male plaintiff mentioned above, consider that he did not have the same risk factors that contributed to the post-pandemic decreased life expectancy of Hispanic males. Specifically, he was quadruple vaccinated, lived with only his spouse, was not in a front-line occupation, had access to high-quality healthcare and antiviral medications such as Paxlovid, which studies show have significantly minimized life-threatening COVID outcomes, and drove his own car. For this plaintiff, relying on the 2022 Vital Statistics of the United States Life Tables, which account for the COVID mortality rates, arguably assumes a decreased life expectancy for a plaintiff who is not likely to be so affected by the pandemic's trends.

Not every plaintiff's circumstan-

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ces are going to align with the risk factors that are driving down the life expectancy in the last few years. Jury Instruction CACI No. 3932 is appropriate in this situation. CACI No. 3932-Life Expectancy, instructs: “If you decide Plaintiff has suffered damages that will continue for the rest of their life, you must determine how long they will probably live. According to [source], a [insert

number]-year-old person is expected to live another [insert number] years. This is the average life expectancy. Some people live longer, and others die sooner. This published information is evidence of how long a person is likely to live but is not conclusive. In deciding a person’s life expectancy, you should also consider, among other factors, that person’s health, habits, activi-

ties, lifestyle, and occupation.”

Applying the factors in CACI No. 3932, if a Plaintiff has received a COVID-19 vaccine and a booster and does not have any co-morbidities that put them at a higher risk of mortality with COVID-19, then arguably the 2018 pre-pandemic statistics would be a better predictor of their life expectancy than the 2021 tables. CACI No. 3932 broadly

allows jurors to consider health and occupation as well as “other factors.”

In conclusion, trial attorneys should discuss these issues with retained life care planners and medical doctors to determine whether it is reasonable to apply the newer 2021 tables to any particular plaintiff, or whether a longer life expectancy is appropriate based on the factors in CACI No. 3932 discussed above.