

Monthly News & Updates

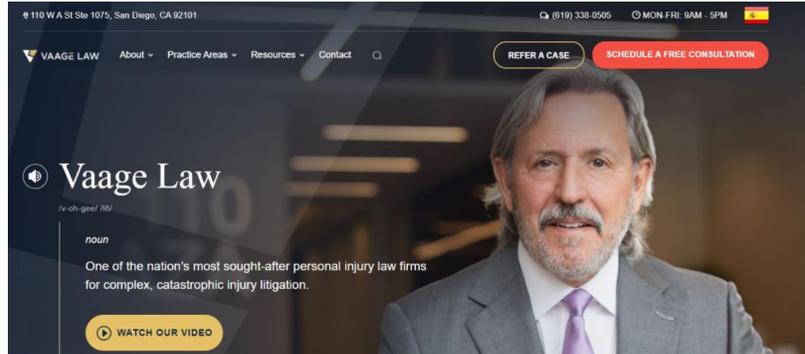
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Newsletter Topics

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Vaage Law Attorneys Receive Two Awards at CASD Trial Stars Evening

Vaage Law's two attorneys, Bob Vaage and Beth Teixeira, were both received Outstanding Trial Attorney and Outstanding Trial Advocate awards by the Consumer Attorneys of San Diego. For more information about the awards and to watch their interviews from the virtual awards event, visit Vaage Law's [About the Firm](#) page.

Weight Bias in the Courtroom

When people associate weight with perceptions of lack of self-control, lack of respect, and even guilt, then society's reaction and response to it become applicable to the courtroom. Trial attorneys are looking for biases, and one that is often overlooked during jury selection is weight bias. Weight bias can make us lie; make us judge; make us deny care. It can be toxic, and the courtroom is not impervious to stereotypes about size and shape.

This article explores how to deal with weight bias, especially if your client is overweight.

Weight Discrimination

Unfortunately, weight bias appears to be one of the last forms of discrimination that remains socially acceptable. “Unlike other stereotypes, for which there is pressure to conceal discriminatory attitudes, weight stereotypes are often openly acknowledged. This may be a function of perceived controllability of weight.”^[1]

Weight discrimination manifests at an early age. A study using Barbie-like dolls of different body types verified previous studies that found that an aversion to fatness and a preference for thinness is evident in pre-school girls even in an era where overweight and obesity among women and men currently dominate.^[2]

We know that weight discrimination exists in employment and, ironically, in health care. Overweight people reported health care discrimination more than employment discrimination.^[3] Consider this: An overweight patient goes in for treatment of a rash and gets an earful about weight loss. How likely will this patient return for his or her preventative care?

Instead of supporting medical care and treatment, society blames overweight people for their fate.

Attribution Theory of Discrimination

Study after study has found that weight bias is increasing at a rate that outpaces the rate of obesity. “American Society condemns size and weight because individuals [are] viewed as personally responsible for their bodies.”^[4] People attribute certain characteristics associated with weight. Overweight people are stereotyped as undisciplined, self-indulgent, unhealthy, lazy, untrustworthy, unwilling, and non-conforming.^[5] The most common stereotypes are that overweight people are mean, stupid, ugly, unhappy, less competent, sloppy, lazy, socially isolated, and lacking in self-discipline, motivation, and personal control.^[6]

Being overweight is seen as “a sign of moral and physical decay”^[7] and is often recognized as an emotional state.^[8] These attributions are not about physical limitations, but are predominantly about personal and moral flaws.^[9] Weight discrimination is more than a superficial preference for thin people; it’s a moral objection to perceived weakness of will.^[10]

Weight discrimination is the result of this causal misattribution that weight is related solely to choice. Society fails to realize that genetic factors play a significant causal role in size and shape, explaining roughly 70% of individual variations in BMI.^[11] Like other chronic diseases, being overweight results from an interaction between genes, environment, and personal choice.^[12]

Smokers are a great example of attribution discrimination. Smoking is a choice. You know it is bad for you. You know it causes cancer. Yet you still smoke. You made the choice so you should suffer the health consequences. So how are attorneys successfully trying cases against the tobacco industry? They change the narrative on attribution. It is no longer just a choice. The tobacco industry hid the

fact that their cigarettes are an addictive drug delivery system. It used advertising and other marketing tricks to get people addicted.

Being overweight is not just a matter of personal choice. If we are going to overcome weight discrimination, we need to change our thinking about causal attribution.



Studies Related to Weight Bias in the Courtroom

There are not a lot of studies of weight bias in the courtroom. I have read cases where courts upheld arguments by criminal prosecutors that they dismissed overweight African American female jurors not because of their race, but because of their weight, which apparently is not considered discrimination in some jurisdictions.

In my own cases, I have seen in medical records the phrase, “patient is an obese male [or female]...” Labeling someone as obese can have little connection to a person’s actual size and shape, but it can take on heightened significance, especially if your client’s weight is used to allege contributory negligence or reduced life expectancy or reduced work life expectancy.

A study reported in the *Obesity Research Clinical Practice* journal concluded that the weight of a plaintiff may affect juror perceptions of contributory negligence or personal responsibility. The study had 185 lean and overweight male and female adult participants. The findings suggested that “legal settings are not immune from weight bias and that juries may struggle to be objective in criminal and civil proceedings where the plaintiff/defendant is overweight, particularly if a jurist possesses preexisting weight bias.”^[13] Interestingly, as juror self-reported weight

bias increased, the more likely they were to find the plaintiff responsible.

Key Findings:

- Weight stigma is related to unfair treatment of individuals who are obese.
- Legal settings are not immune from weight bias.
- Juries are easily influenced by the physical characteristics of a plaintiff.
- The sex and attractiveness of a defendant affects the likelihood of conviction.
- Baseline weight bias was associated with greater responsibility by the plaintiff.
- People who believed that weight was controllable were more likely to attribute some responsibility on the plaintiff.

My takeaway from these studies is that weight discrimination is different from other types of discrimination that are based on group association or appearance, such as race, age, gender, or ancestry. Therefore, a legal response must be attuned to the fundamental uniqueness of weight discrimination.

Getting Past Weight Bias

If you think jurors may discriminate against your client based on his or her weight, make sure to discuss during voir dire latent biases against overweight individuals.

Make sure your jury is diverse. Surprisingly, people who have the greatest contact with overweight people, their own family members, are also the greatest source of discrimination.^[14] Consider dismissing jurors who self-report weight discrimination.

Use language to modify or alter what jurors see in your client. If you are challenging stereotypes based on weight, you need to focus on causal attributions and portray your client as being socially compliant.

Consider amending [CACI 113](#) on bias to add size or weight.

Weight bias in the courtroom can be subtle and pervasive. Be prepared to address it.

References:

[1] Nadler, Joel T., Voyles, Elora C. *Stereotypes: The Incidence and Impacts of Bias*. Praeger (January 23, 2020) at p. 226.

[2] Worobey, John, Worobey, Harriet. Body-size stigmatization by preschool girls: In a doll's world, it is good to be "Barbie." *Body Image* 11 (2014) pp. 171-174.

[3] Wang, Lucy. Weight Discrimination: One Size Fits All Remedy? *Yale Law Journal*, 117 *Yale L.J.* 1900 (2008), at p. 1936.

[4] Beety, Valena Elizabeth. Criminality and Corpulence: Weight Bias in the Courtroom. *Seattle Journal of Social Justice*, 11 *Seattle J. for Soc. Just.* 523 (2013) at p. 523.

[5] *Id.* at p. 529.

[6] Wang at pp. 1925-1926.

[7] Beety at p. 529

[8] *Id.* at p. 530

[9] Wang at p. 1926.

[10] *Id.* at p. 1918

[11] *Id.* at pp. 1906-1907

[12] *Id.* at p. 1910

[13] White, Darrell E., Wott, Carissa B, Carels, Robert A. [The Influence of Plaintiff's Body Weight on Judgments of Responsibility: The Role of Weight Bias.](#) *Obes Res Clin Pract.* 2014; 8(6): e599–e607. doi:10.1016/j.orcp.2013.11.003, at p. 10.

[14] Wang at p. 1917.

Vaage Travels

Musei Centrale Montemartini - Rome, Italy *Machines and Gods Exhibit*

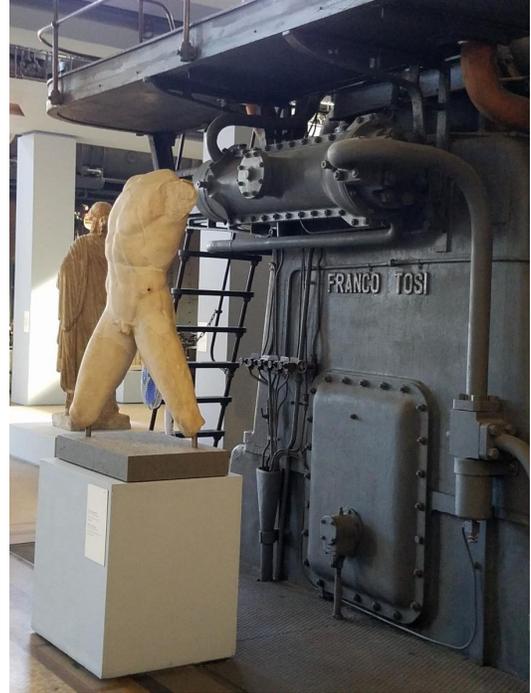
I have visited Rome several times. On my last trip, I was tired of the typical ABC (Another Bloody Church) tour, and I had already visited the Vatican Museum, Sistine Chapel, the Borghese Gallery, the main Capitoline museums, Pantheon, Parthenon, and Colosseum. I was looking for something unique and off the beaten trail. So, our art historian tour guide and friend who lives in Italy (Kate Parkinson - [TourRomewithKate](#)) took us to the [Musei Centrale Montemartini](#).

Paris has its Musee D'Orsay in an old train station. Centrale Montemartini is in a converted, old industrial power plant. The contrast between the ancient white marble statues (and other antiquities) and the huge turbines and boilers of the industrial era is striking and beautiful.

If you are in Rome, even for the first time, I would definitely recommend this museum. It's less crowded than the more well-known museums. I think there were only ten other people in the museum while we were there (pre-COVID). The exhibit has been expanded since I was last there to include carriages of the papal train from the mid-1800s.



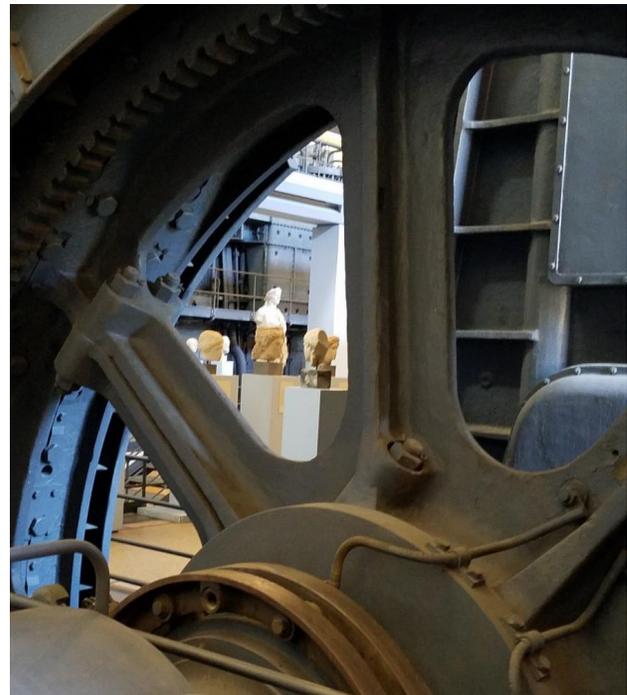
This statue of Dionysus Sardapanalus welcomes visitors to the permanent exhibition of *The Machines and The Gods*.



The contrast between the marble statues and the boiler room machines in this converted power plant is striking.



Marble group of two cows from a fountain dating back to the Augustan age.



Peek through huge turbines to see marble statues.

This Month's Tip

Officers Owe a Duty to Arrestees, per *Frausto* By: *Elizabeth Teixeira, Esq.*

A new case affirms as a matter of law a duty of reasonable care owed by law

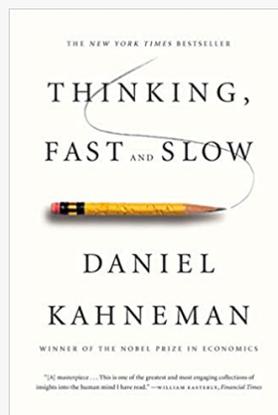
enforcement officers to an arrestee. In *Frausto v. Department of California Highway Patrol* (2020) 53 Cal.App.5th 973, the court of appeal upheld a jury verdict on behalf of the parents of an arrestee who died of a methamphetamine overdose. The officers took Norman Cornejo to jail rather than to the hospital after witnessing him ingest what they thought could have been a bag of methamphetamines at a traffic stop.

Government Code section 845.6 creates liability if an employee of a public entity, i.e., a law enforcement officer, knows or has reason to know that a “prisoner” is in need of immediate medical care and fails to take reasonable action to summon such care. Section 844 defines a prisoner as follows: “[A] lawfully arrested person who is brought into a law enforcement facility for the purposes of being booked, as described in Section 7 of the Penal Code, becomes a prisoner, as a matter of law, upon his or her initial entry into a prison, jail, or penal or correctional facility, pursuant to penal process.” In *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, the court held that a special relationship existed between a jailer and prisoner, because the prisoner is particularly vulnerable and dependent upon the jailer who has control over the prisoner’s welfare. *Id.* at 250-251.

As the *Frausto* court pointed out, there is a dearth of California cases addressing the relationship between an officer and an arrestee (as opposed to a prisoner) and the attendant duties that relationship creates as a matter of law. The court essentially found that while Cornejo was in custody, he was subject to the control of the officers and was no longer in a position to attend to his own medical needs. "Once in custody, an arrestee is vulnerable, dependent, subject to the control of the officer and unable to attend to his or her own medical needs. Due to this special relationship, the officer owes a duty of reasonable care to the arrestee." *Frausto, supra*, at 993.

Where prior cases looked at the status of the prisoner to create a statutory duty of care, *Frausto* solidified that duty of reasonable care to include an arrestee, as a matter of law.

Book Review



Thinking, Fast and Slow by Daniel Kahneman

This is a fascinating book about how people think and process information. Kahneman describes two systems. The first system is fast, intuitive, and emotional. The second system is slower, more deliberative, and more logical. People use system one to process information and make decisions for most situations they encounter, and then use system two to back up the conclusions they make from system one.

Kahneman is the winner of the Nobel Memorial Prize in Economic Sciences and is a professor of psychology emeritus at Princeton University. He was involved in developing the concept of heuristics in the '70s. Examples using heuristics or mental shortcuts are trial and error, rule of thumb, or an educated guess.

If you really want to understand the irrational mind, this book is definitely for you. More pragmatically, this book provides great new insights into how your potential jurors process information and shape their judgments and decisions. This book is definitely worth the read.

Find the
Book



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